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CONSTITUTIONALITY OF ZONING ORDINANCES

The division of the territory of a city into certain zones is the natural consequence of a city's growth. All cities, by the nature of their growth and the natural use of the property within their corporate limits, are divided into three distinct zones. The manufacturing industries naturally collect into a convenient location where transportation for the products produced in the factories are accessible, the retail business men build their business houses in the central part of the city so that they may have a convenient location which is easy of access by the entire inhabitants of the city, and those who desire to establish homes, schools and churches select locations away from the noise of factories and the clang and confusion of traffic. The creation of these zones is the inevitable consequence of the desires of the various inhabitants of the city, but after these zones have been established many problems may arise concerning the property rights of those who own property in these districts and those who desire to maintain the districts for the original purpose for which they were established. The legislative bodies in various jurisdictions, after taking notice of the fact that certain uses of property are not conducive to the peace, happiness and general welfare of those who have established homes in certain localities, have granted the municipal legislative bodies authority to enact legislation prohibiting the establishment of uses which would interfere with the natural enjoyment of residential property. It is the purpose of this article to consider the constitutionality of ordinances enacted by municipal legislative bodies under the authority delegated to them by state legislation.

A municipal corporation is a creature of the state; it exists by virtue of the authority of the state government, and its powers are defined and controlled by its creator. Kent has defined a municipal corporation as being "a public corporation created by the government for political purposes, and having subordinate and local powers of legislation."[1] This creature of the state has its local self governing body; that is, it is composed of executive, judicial and legislative departments. In the enforcement of police regulations it becomes an agent of the state

[1] 2 Kent's Com. 275.

and it is delegated the power by the state to enact ordinances for the general welfare of its inhabitants and due to its inherent powers resulting from the nature of its organization, the nature of its powers and duties there are numerous human activities which are subject to municipal police regulation. The municipal corporation by virtue of its organization has delegated to it by the state a certain residuum of police power and further authorization is unnecessary when this power concerns purely local and municipal matters, for by the organization of a city the state grants to it the powers necessary for the performance of its functions, and to the protection of its citizens in their person and property and the police power is one of these functions. The legislative body of the state may declare certain uses of property when the use interferes with the safety, health, morals or the general welfare of the citizenry of the state as being a nuisance,[2] or it may delegate authority to its agent, the municipal corporation, to enact ordinances against any unwarranted interference with the property rights of the citizens living within the corporate limits of the municipal corporation,[3] and such authority has been so granted by numerous state legislative bodies. The extent to which a municipal corporation may restrict the use of property within its corporate limits is an interesting and complicated question which affects the lives and property rights of citizens living under its municipal authority.

The lawmaking body of a state may delegate to the municipal corporations within its boundaries all powers incidental to municipal government, whether legislative or otherwise, without violating the rule against the delegation of the legislative powers of the legislative body of a state. In the case of the *City of Jackson* v. *Bowden* the court held that, "In conferring upon municipalities appropriate quasi-legislative powers for local governmental purposes, the legislature does not violate the implied principle of organic law that the legislature shall not delegate its general lawmaking power."[4] Under the authority granted to municipal corporations by the lawmaking power of the state various ordinances

[2] *City of Des Moines* v. *Manhattan Oil Co.*, 193 Iowa 1096.
[3] *Des Moines* v. *Manhattan Oil Co.; Welch* v. *Swasey*, 166 Mass. 83.
[4] 67 Fla. 181, 65 So. 769, L. R. A. 1916D 913; also see *Commonwealth* v. *Union Pass R. Co.*, 163 Pa. 22, 29 A. 711; *Commonwealth* v. *Kingsbury*, 199 Mass. 542, 85 N. E. 848, L. R. A. 1915E, 264; and *Embee* v. *Kansas City*, 257 Mo. 593, 116 S. W. 282.

have been enacted controlling and limiting the use of property located within the corporate limits of the municipalites. These ordinances generally establish building lines in residential zones, prohibit the building of business houses in residential districts and divide the city into fire zones, and prescribe the type and character of buildings which may be erected in certain defined territories.

The 1908 Acts, page 623, of the state of Virginia, authorized the councils of cities and towns "to make regulations concerning the building of houses in the city or town, and in their discretion in particular districts or along particular streets, to prescribe and establish building lines, or to require property owners in certain localities or districts to leave a certain percentage of lots free from buildings and to regulate the height of buildings." By virtue of the authority vested in the legislative bodies of the cities and towns in the state of Virginia the city of Richmond enacted the following ordinance:

"That whenever the owners of two-thirds of property abutting on any street shall, in writing, request the committee on streets to establish a building line on the side of the square on which their property fronts, the said committee shall establish such line so that the same shall not be less than 5 feet nor more than 30 feet from the street line. And no permit for the erection of any building upon such front of the square upon which such building line is so established shall be issued except for the construction of houses within the limits of such line."

In the case of *Eubank* v. *City of Richmond*[5] the court held that to limit the use of property as prescribed by the ordinance cannot be upheld as an exercise of the police power. In this decision the court stated that "The only discretion, we have seen, which exists in the street committee or in the committee of public safety, is in the location of the line, between 5 and 30 feet. It is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed.

"We are testing the ordinance by its extreme possibilities

[5] 226 U. S. 137, 42 L. R. A. (N. S.) 1123; also see *Williamson* v. *Cooke*, 54 Col. 320, 44 L. R. A. (N. S.) 1030; *St. Louis* v. *Hill*, 116 Mo. 527, 21 L. R. A. 226, and *People, ex rel Dilzer* v. *Calder*, 85 N. Y. Supp. 1015.

to show how in its tendency and in instances it enables the convenience or purpose of one set of property owners to control the property rights of others, and property determined, as the case may be, for business or residence—even, it may be, the kind of business or character of residence. One person having a two-thirds ownership of a block may have the power against a number having a less collective ownership. This we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power."

In the case of *Windsor* v. *Whitney*[6] a special act providing for the creation of a town planning commission whose duty was defined as being that of making surveys and maps of Windsor, section by section, showing locations for any public building, highway, street or parkway layouts, including street, building and veranda lines. The defendants in this case were engaged in the development of a tract of land in Windsor and opened streets, established building and curb lines not in accordance with the plans of the town commission. The court held that "a legislative requirement, such as the act before us, that private highways laid out in land development schemes shall be of a reasonable width and that reasonable building lines shall be established upon these streets before the erection of buildings fronting upon these streets shall be permitted, is well within the police power, and does not offend against the fourteenth amendment."

It is to be noted that in the Eubank case the line established was in a settled residential section and that it was so established because the citizens of this section owning two-thirds of the property desired the establishment of the building line, while in the Windsor case the section of the city under consideration was one free from buildings of any kind. The Eubank decision states that, "We need not consider the power of a city to establish building line or regulate the structure or height of buildings." This case holds nothing more than that to allow property owners who own two-thirds of the property along a street to compel the remaining owners to place buildings along a certain line does not come within the police power. The Windsor case holds that a city may be established

[6] 95 Conn. 357, 111 A. 354, 12 A. L. R. 669; also see *Halsell* v. *Ferguson*, 202 S. W. 317.

according to a general plan determined by a city planning commission, that the establishment of a city according to a plan having for its purpose the regulation of the use of the property for the general benefit and welfare of the inhabitants is within the police power and does not take property without compensation. These two cases do not represent conflicting opinions, for when the particular facts of each case are considered it must be admitted that these facts control each decision. The courts have generally held, that statutes providing for a building line are unconstitutional, that such acts cannot be sustained under the police power, and that they take property without due compensation, but if it may be shown that in the establishment of new municipal districts, the general public health, public morals and the general public welfare have been served by the enactment of such legislation these acts will be construed as coming within the police power of the state and as being constitutional.

The city of Minneapolis, under proper legislative authority, passed an ordinance establishing a residential district providing that, "no person shall hereafter erect within said district any building except double houses, flats, tenement and apartment houses, and there are hereby prohibited within said district the erection and maintenance of hotels, stores, factories, warehouses, dry cleaning plants, public garages or stables, or any industrial establishment or any business whatsoever."

In *State ex rel. Lachtman* v. *Haughton*[7] this ordinance is held to be unconstitutional in so far as it applies to retail store buildings. In this opinion the court said that, "The police power of the state is very broad, but not without limits. Under it the legislative power may impose any reasonable restrictions and may make any reasonable regulations in respect to the use which the owner may make of his property, which tends to promote the general well-being or to secure to others that use and enjoyment of their own property to which they are lawfully entitled; but when the legislative power attempts to forbid the owner from making a use of his property which is not harmful to the public, and does not interfere with the rightful use and enjoyment of their own property by others, it invades

[7] 134 Minn. 226, L. R. A. (1917F) 1050.

property rights secured to the owner by both state and federal Constitutions. Only such use of property as may produce injurious consequences, or infringe the lawful rights of others, can be prohibited without violating the constitutional provisions that the owner shall not be deprived of his property without due process of law nor without compensation therefor first paid or secured. That the right of a property owner to erect a store building upon his land is within the protection of these constitutional provisions, and cannot be taken away under the guise of a police regulation, is so universally recognized that an extended search has failed to disclose any decision holding otherwise either in fact or in principle. We are forced to the conclusion that the ordinance in question cannot be sustained in so far as it prohibits the erection of an ordinary store building. This does not mean, however, that it is not valid in so far as it applies to structures or occupations which are in the regular domain of the police power."

In *People ex rel. Friend* v. *Chicago*[8] the court considered an ordinance similar to the ordinance in the Lachtman case[9] and though the legislative authority in Illinois had not granted municipalities the authority to enact such ordinances the court stated that "even if the municipality is clothed with the whole police power of the state, it would still not have the power to deprive citizens of valuable property rights under the guise of prohibiting or regulating some business or corporation that has no tendency whatever to injure the public health or public morals, or interfere with the general welfare. An act of the legislature which deprives the citizen of his liberty or property rights cannot be sustained under the police power unless the public health, comfort, safety, or welfare demands such enactment. . . . There is nothing inherently dangerous to the health or safety of the public in conducting a retail store."

[8] 261 Ill. 16, 49 L. R. A. (N. S.) 438.

[9] The Chicago ordinance provided that, "It shall be unlawful for any person, firm, or corporation to locate, build or construct any store for the sale, at retail, of goods, wares, and merchandise on any street, in any block in which all buildings are used exclusively for residence purposes, without first securing and filing with the commissioner of buildings the written consent of a majority of the property owners according to frontage, on both sides of the street in the block in which the building to be thus used is located.

In *Spann* v. *City of Dallas*[10] the court, in considering an ordinance prohibiting the building of a business house in a residence section, stated that "It is a doctrine not to be tolerated in this country that either state or municipal authorities can, by their mere declaration, make a particular use of property a nuisance which is not so, and subject it to the ban of absolute prohibition."

An Iowa statute authorizes cities of that state, upon a petition of sixty per cent of the owners of real estate residing in any district of the corporate limits of a city, to enact an ordinance declaring this district as being a restricted residence district. Under the authority of this statute the city of Des Moines, after it had been petitioned by the citizens of a certain district, enacted an ordinance declaring this district as being a restricted residence district, and among other things this ordinance provided that "no buildings or other structures, except residences, schoolhouses, churches and other similar structures, shall be hereafter erected, reconstructed, altered, repaired, or occupied within said district without first securing from the city council a permit therefor; nor shall any such permit be granted when sixty per cent of the owners of real estate in said district residing in said city object thereto.

"Any building or structure erected, altered, repaired, or used in violation of any of the provisions of this ordinance, is hereby declared to be a nuisance. . . . "

In *City of Des Moines* v. *Manhattan Oil Company*[11] this statute came before the court for judicial construction upon the presentation to the court of the following facts: While the action concerning the enactment of the above ordinance requested by the property holders was pending, the defendants, with knowledge of the pendency of the application to establish the restricted district, applied for a building permit to build an automobile filling station at the intersection of two streets within the zone outlined in the property holders' petition, and

[10] 235 S. W. (Tex.) 513, 19 A. L. R. 1387; also see *S. Louis* v. *Dorr*, 145 Mo. 466, 42 L. R. A. 686; *Willison* v. *Cooke*, 54 Colo. 320, 44 L. R. A. (N. S.) 1030; *Calvo* v. *New Orleans*, 136 La. 480, 67 So. 338; *Stubbs* v. *Scott*, 127 Md. 86, 95 Atl. 1060; *Quintini* v. *Bay St. Louis*, 64 Miss. 483, 62 So. 625; *People, ex rel. Corn Hill Realty Co.* v. *Stroebel*, 209 N. Y. 434, 103 N. E. 735; and *Levy* v. *Marvlag*, 115 Atl. (N. J.) 350.

[11] 193 Iowa 1096, 23 L. R. A. 1322.

the council, without having acted upon the petition of the property owners, passed a resolution granting the permit, but within a few days adopted another resolution rescinding it. Shortly following the granting and rescinding of the building permit, the council passed the ordinance creating the residential district requested by the petitioners. This is a suit in equity by the city of Des Moines to enjoin the defendants from the erection and maintaining of the proposed gasoline and oil filling station.

The court held that a statute permitting the establishment of residential districts in municipalities does not unconstitutionally take private property located within the district for the private use of others, that a police regulation is not invalid because it may operate to restrict the individual citizen in the use of his own property, or even in his liberty, that the police power extends to the promotion of public convenience and general prosperity, that giving residents of a district in a municipality power to initiate by petition a project to restrict the use of the property therein to residential purposes does not unconstitutionally delegate to them legislative power, that the state may enforce reasonable regulations concerning the use and occupation of real estate in cities and towns, and that the legislature may authorize municipalities to establish districts within which no building shall be erected for commercial purposes without a license.

The language used by the court is significant and illustrative of the trend of present day authorities on this subject. This opinion states that, "With the changing conditions necessarily attendant upon the growth and density of population, and the ceaseless changes taking place in method and manner of carrying on the multiplying lines of human industry, the greater becomes the demand upon that reserve element of sovereignty which we call the police power, for such reasonable supervision and regulation as the state may impose, to insure observance by the individual citizen of the duty to use his property and exercise his rights and privileges with due regard to the personal and property rights and privileges of others.

"To justify the exercise of such authority it is not necessary that the subject thereof shall be inherently wrong; nor is the fact that such regulation may operate to restrict the

individual citizen in the use of his own property, or even in his liberty, of itself sufficient to render the regulation or restriction void.

"The interest of the individual or subordinate to the public good, and the constitutional guaranties of the security of private property were not designated and do not operate to prohibit the reasonable restriction of its use by legislation enacted within the sphere of the police power for the promotion of the public welfare."

In *People ex rel. Busching* v. *Ericsson, City Building Commissioner,*[12] the court held that the police power extends to the forbidding of the construction of a public garage within a city block without the consent of a majority of the owners of property in such block, without depriving the one seeking to do so of any right of liberty or property.

In *Newton* v. *Joyce*[13] an ordinance prohibiting the erection of a blacksmith shop in a residence district without the written consent of a majority of the property owners was upheld as being a valid exercise of police power. In *Barbier* v. *Connelly*[14] an ordinance prohibiting the operation of laundries during the night in a certain city district was considered as not being open to constitutional objections. In *Little Rock* v. *Reinman-Wolfort Auto Livery Co.*[15] an ordinance prohibiting the maintenance of a livery stable in a certain district of the city was held to be constitutional. In *Welch* v. *Swasey*[16] the court held that the state may, in the exercise of the police power, limit the height of buildings to be erected in cities when, in its judgment, the public health or public safety so require such regulations, and that the legislature may delegate to a commission the power to determine the boundaries of the section of the city in which the buildings of different heights as determined by the legislature shall be erected. In this case the

[12] L. R. A. (1915D) 607, 263 Ill. 368, 105 N. E. 315; also see *Hadacheck* v. *Sebastian,* 239 U. S. 394; *Standard Oil Co.* v. *Danville,* 199 Ill. 50, 64 N. E. 1110; *People, ex rel. Keller* v. *Oak Park,* 266 Ill. 365, 107 N. 636; and *Storer* v. *Downey,* 215 Mass. 273, 102 N. E. 321.

[13] 166 Mass. 83, 44 N. E. 116.

[14] 113 U. S. 27.

[15] 237 U. S. 171.

[16] 193 Mass. 364, 79 N. E. 745, 23 L. R. A. (N. S.) 1160; also see *Kemp* v. *D'Oench,* 111 N. Y. 359, 18 N. E. 862; *Knowlton* v. *Williams,* 174 Mass. 476, affirmed by U. S. Supreme Court in 188 U. S. 491.

court stated that, "It is for the legislature to determine whether the public health or public safety requires such a limitation of the rights of landowners in a given case. Upon a determination in the affirmative they may legislate accordingly." This case was brought before the United States Supreme Court, and the views expressed in it were affirmed.[17]

Cochron v. *Preston*[18] sustained the following ordinance: "That from and after the date of the passage of this act, no building, except churches, shall be erected in the city of Baltimore on territory bounded by the south side of Madison street, the west side of S. Paul street, and the east side of Cathedral street, to exceed in height a point 70 feet above the surface of the street at the base line of Washington Monument." This opinion states that, "Among the police powers of the state the right to regulate the height of buildings is one that cannot be questioned.

"The very existence of government presupposes the right of the sovereign power to prescribe regulations, demanded by the general welfare, for the common protection of all. This principle inheres in the very nature of the social compact. The protection of private property is one of the main purposes of government, but no one holds his property by such an absolute tenure as to be freed from the power of the legislature to impose restraints and burdens required by the public good, or proper and necessary to secure the equal rights of all."

In the consideration of the constitutionality of building zone ordinances there appear to be many conflicting decisions, but when the particular facts and circumstances surrounding each case are taken into consideration, the authorities may be harmonized. The police power of the state represents the reserve power which may be called upon to control the varied conditions which arise due to the growing complexity of our civilization. During the early history of the development and growth of municipal governments, the state, due to the natural simplicity of the development of these governmental agencies, was not called upon to exert its reserve power as often as it is under growth of modern municipalities. Numerous new vocations, brought into being within the last quarter of a cen-

[17] 53 L. Ed. 923.
[18] 108 Md. 220, 70 Atl. 113, 23 L. R. A. (N. S.) 1163.

tury, and congestion not provided for during the period of the development of early municipal territory, present problems which demand the careful consideration of the legislative bodies of the state governments, and in the making of adjustments, due to these growing complexities of the present day civilization, the legislative authority will by necessity be compelled to regulate to a greater extent than heretofore the use of property owned by individuals.

The Spann case in unmistakable terms rejected a city ordinance prohibiting the building of business houses in a residence district, but it is to be remembered that the type of business under consideration was an ordinary retail store and that when the decision spoke of such ordinances as representing conditions not to be tolerated in this country, such declarations in this decision by the court stand for nothing more than that an ordinance cannot be held constitutional which declares a business, not harmful to the general public, which does not interfere with the citizen's enjoyment of his property, or injure the morals or general welfare, as being a nuisance and prohibits the establishment of that business in a certain section of the city, is not a valid exercise of the police power and is unconstitutional. The great weight of authority has established the principle, that an ordinary retail business house does not represent such use of property which may be restricted, from any particular zone established within the corporate limits of a municipality, under the police power of the state or municipal government, that ordinances prohibiting the establishment of ordinary business houses within a residence district is an unconstitutional infringement upon the rights of the property owners within that district, who may desire to use their property for the establishment of retail business houses.

The Des Moines case declared constitutional an ordinance which created a restricted residence district. This case prohibited the use of property in conducting a type of business, which in its nature becomes a constant annoyance to any residence district, that of establishing and maintaining a gasoline filling station. There is ample authority to support the principle, that the state or municipal authority may restrict the use of property in a residence district when that use becomes a constant annoyance to the property owners of the district, and is

detrimental to the general welfare, health and happiness of the citizens within that district, that so restricting the use of property is within the police power of the state, and does not violate the constitutional guarantees to the citizenry of the state. Garages and gasoline filling stations unquestionably come within this principle and are subject to any reasonable regulation and restriction prescribed by the legislative authority of a state, after taking under consideration the general welfare of the inhabitants of the community in which they are established.

The state may regulate the use of property to the point of forbidding thereon certain businesses within themselves lawful, as in the case of slaughter-houses, cemeteries, garages, gasoline supply stations, livery stables, blacksmith shops, laundries and numerous other types of businesses. It may regulate building in the interest of health and fire safety, this being one of the controlling influences in the Welch and the Cochron cases digested above. It may limit the height of buildings in certain districts, or the character of buildings in these districts. It may, to certain extent, prevent the erection of billboards, or limit their height. Briefly stated, it may regulate any business or the use of any property in the interest of the public health, public morals, or welfare, provided this be done reasonably. To this extent the public interest is superior to private interest and private use of property, and when private interest is compelled to subordinate itself because of the serving of the general welfare of the public, as outlined above, there is no violation of the constitutional guarantees.

Zoning ordinances which restrict the use of property upon the grounds of purely esthetic consideration are not constitutional.[19] The state cannot control the use of property so as to meet the particular esthetic taste of any group of property owners, but, if the primary and substantial purpose of the legislation is such as justifies the ordinance, considerations of taste and beauty may enter in as auxiliaries.[20] The court in the Cochron case said, after holding that the legislative conception of artistic beauty and symmetry will not be sustained, "It may be that in the development of a higher civilization, the culture and refinement of the people reached the point where the

[19] *Cochran* v. *Preston, supra.*
[20] *Welch* v. *Swasey, supra.*

educational effect of the fine arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction under some circumstances, to the exercise of this power, even for such purposes."

The law on this subject, in that it deals with rights which may be limited by the exercise of the police power, is not clearly defined. Each case is, by necessity, determined according to its particular facts and circumstances surrounding the use of the property which is being controlled by legislative enactment. Before a statute or ordinance, controlling the use of property, may be declared constitutional it must be established that the use the state or municipal corporation is endeavoring to control comes within their jurisdiction under the police power, and that the statute or ordinance preserves public health, safety, comfort, or welfare of the inhabitants of the state. A law which assumes to be a police regulation, but deprives the citizen of the use of his property under the pretense of preserving the public health, safety, comfort, or welfare, when it is manifested that such is not the real object and purpose of the regulation will be set aside as a clear and direct invasion of the right of property without compensation.

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