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Article 24

Zoning - Authority of Municipality to Define Family

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In conclusion the court could have easily found that the dissent, as stated by Judge Kiley, exemplifies the current trend. But, whether or not the majority of American jurisdictions will adopt this view remains a matter of conjecture.

Philip Wolin

ZONING–AUTHORITY OF MUNICIPALITY TO DEFINE FAMILY

The owner of a house located in a single-family residence district leased the premises to four unrelated young men. Claiming that the dwelling was not being used as a single-family residence within the meaning of its zoning ordinance, the city of Des Plaines brought suit to enjoin occupancy by the lessees. The injunction was granted by the circuit court, holding that the lessees did not constitute a family within the meaning of the Des Plaines zoning ordinance. Upon appeal, the Supreme Court of Illinois reversed, finding that the enactment of a zoning ordinance which so defined family as to prohibit the occupancy of this dwelling by four unrelated men was beyond the authority delegated to the city by the Illinois General Assembly's enabling statute.[1] *City of Des Plaines v. Trottner,* 34 Ill. 2d 432, 216 N.E.2d 116 (1966).

The need for zoning has been recognized since early Roman Law,[2] and as it exists today, "It consists of a general plan to control and direct the use and development of property in a municipality or a large part of it by dividing it into districts according to the present and potential use of the properties."[3] While single-family residence zoning is a familiar, perhaps universal characteristic of zoning ordinances, questions relating to the precise definition of the word "family" have not been involved in Illinois zoning decisions.[4] Although various criteria have been employed by Illinois municipalities to define family in their zoning ordinances,[5] the *Trott-*

[1] ILL. REV. STAT. ch. 24, § 11-13-1 (1965).

[2] YOKLEY YOKLEY, ZONING LAW AND PRACTICE, § 1-3 (3rd ed. 1965).

[3] State v. Huntington, 145 Conn. 394, 399, 143 A.2d 444, 447 (1958). Reaffirming the definition in the text as it first appeared in Miller v. Town Planning Commission, 142 Conn. 265, 269, 113 A.2d 504, 505 (1956).

[4] City of Des Plaines v. Trottner, 34 Ill. 2d 432, 216 N.E.2d 116 (1966).

[5] Section 1 of the Rockford, Illinois zoning ordinance defines a family as follows: "Any number of individuals living and cooking together on the premises as a single housekeeping unit." Similar definitions appear in the zoning ordinances of Ottawa, Quincy, Wilmette and Skokie, Illinois. In contrast, the ordinances of Winnetka and Oak Park define a family as a group of individuals "related by blood or marriage." Maywood, Illinois Zoning Ordinance, Art. 11, § 2(15) (1952) permits a family to consist of unrelated persons, but in no event, in such a case, shall the group be more

ner case represents the initial test of the validity of these definitions. This note will attempt to analyze the court's rationale in invalidating the consanguinity and affinity requirements of the Des Plaines zoning ordinance.

By virtue of Illinois' enabling statute,[6] municipal corporations are authorized to enact zoning ordinances,

> [t]o the end that adequate light, pure air, and safety from fire and other dangers may be secured, that the taxable value of the land and buildings throughout the municipality may be conserved, that congestion in the public streets may be lessened or avoided, that the hazards to persons and damage to property resulting from the accumulation or runoff of storm or flood waters may be lessened or avoided, and that the public health, safety, comfort, morals and welfare may be otherwise promoted. . . .[7]

Since the basic legality for the exercise of zoning powers is found in the police powers of the state, and was so recognized by our High Court,[8] any zoning ordinance must be aimed at furthering one of the ends enumerated in the enabling statute, generally, public health, morals, or the general welfare.[9] Of the powers specifically granted, municipalities have authority to create districts whose use will further the general aims set forth in the enabling statute.[10]

For the purpose of establishing a single-family residence use district, the Des Plaines Zoning Ordinance defines family as follows:

> A "family" consists of one or more persons each related to the other by blood (or adoption or marriage), together with such relatives' respective spouses, who are living together in a single dwelling and maintaining a common household. A "family" includes any domestic servants and not more than one gratuitous guest residing with said "family."[11]

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than five in number. Chicago Heights Zoning Ordinance, Art. 11 (1953) defines family as "one or more persons occupying a dwelling and living as a single-non-profit, housekeeping unit, as distinguished from a group occupying a hotel, club, boarding house, fraternity, or sorority house." Also, note that the National Institute of Municipal Law Officers in § 11-204 (18) of their Model Zoning Ordinance (1966) defines family as, "a single individual, doing his own cooking and living upon the premises as a separate housekeeping unit, or a collective body of persons doing their own cooking and living together on the premises as a separate housekeeping unit in a domestic relationship based upon birth, marriage, or other domestic bond as distinguished from a group occupying a board house, lodging house, club, fraternity, or hotel."

[6] ILL. REV. STAT. ch 24, § 11-13-1 (1965).

[7] *Ibid.*

[8] Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926); Village of Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1925).

[9] It is commonly accepted that these are the ends to which the police power may be exercised. Since the state's power to zone is limited to an exercise of police power, the delegation of this power to municipalities must bear the same limitation.

[10] ILL. REV. STAT. ch. 24, § 11-13-1 (1965).

[11] *Supra* note 4, at 433, 216 N.E. 2d at 117.

In *Trottner*, the court held that the "General Assembly has not specifically authorized the adoption of zoning ordinances that penetrate so deeply as this one does into the internal composition of a single housekeeping unit."[12]

The court, however, does not state specifically why the Des Plaines definition of family is offensive. It merely indicates that "the General Assembly has not, in terms, authorized a classification based upon relationship by blood or marriage. . . ."[13] Yet, even the single-family restriction which the court accepts as valid, is not in terms, authorized by the General Assembly,[14] since nowhere in the enabling statute is there mention of single-family residence zoning.

By tracing the arguments advanced in support of their decision, the court's rationale is revealed. First, the court enumerates the types of living units which would be excluded by the definition. Secondly, it examines other single-family zoning ordinances to discover whether these living units would also be excluded. Finally, the court evaluates the ordinance to determine whether excluding these units tends to further the purposes listed in the enabling statute.[15] On the basis of this analysis the court concluded that the Des Plaines definition was not authorized by the enabling statute and that it bore no real or substantial relationship to public health, morals, safety, comfort or general walfare so as to constitute one of the ends for which a municipality is empowered to zone.[16]

However, in *City of Newark v. Johnson*,[17] the court sustained convictions of defendants who had violated such a zoning ordinance by taking foster children into their home. The New Jersey court held that such a zoning ordinance was reasonably related to public health, safety, morals, convenience or welfare, arguing that,

> [t]he family status, as defined and restricted by said ordinance, does have a bearing toward preventing overcrowding of a one-family building. Without its restriction it could open the door to increasing the occupants to the extent

[12] *Id.* at 438, 216 N.E.2d at 120.

[13] *Supra* note 4 at 435, 216 N.E.2d at 118.

[14] *Supra* note 10. The power to classify, regulate and restrict is authorized generally.

[15] *Supra* note 6.

[16] The overriding restriction upon the exercise of zoning power is that the action taken by the zoning authorities has a real and substantial relation to the public health, safety, morals, or general welfare. Trust Company of Chicago v. City of Chicago, 408 Ill. 91, 96 N.E.2d 499 (1951); Pioneer Savings Bank v. Village of Oak Park, 408 Ill. 458, 97 N.E.2d 302 (1951); Metropolitan Life Insurance v. City of Chicago, 402 Ill. 581, 84 N.E.2d 825 (1949); People v. City of Chicago, 402 Ill. 321, 83 N.E.2d 592 (1949); Quilici v. Village of Mount Prospect, 399 Ill. 418, 78 N.E.2d 240 (1948); Offner Electronics v. Gerhardt, 398 Ill. 265, 76 N.E.2d 27 (1947).

[17] 70 N.J. Super. 381, 175 A.2d 500 (1961).

of the increased number of the additional foster children taken in and increasing the number of additional children in the neighborhood.[18]

Similarly, it would seem that the consanguinity and affinity requirements of the Des Plaines ordinance would tend to limit the size of groups composing housekeeping units, thereby lessening congestion. Nevertheless, the *Trottner* decision did not regard the considerations thus advanced as particularly persuasive.[19]

In terms of permissible zoning objectives, a group bound together only by the desire to maintain a common housekeeping unit might be thought to have a transient quality that would adversely affect neighborhood stability and depreciate adjoining property values. A zoning ordinance based on consanguinity and affinity, as it tends to limit the size of, and render homogeneous, living units might tend to limit the intensity of land use and alleviate traffic and parking problems.[20] But, as stated in the *Trottner* case, "none of these observations reflects a universal truth. [T]he definition in the present ordinance [can] hardly be regarded as an effective control upon the size of 'family' units."[21] The court reaches this conclusion after noting that modern family units are mobile, not necessarily disciplined, and often possess several cars.[22]

In *Village of Aurora v. Burns*,[23] the Illinois Supreme Court noted that, the "question is not whether we approve of the ordinance under review, but whether we can pronounce it an unreasonable exercise of power, having no rational relation to public health, morals, safety or general welfare."[24] It would seem that the Des Plaines ordinance, which attempts to decrease the substantive evils enumerated in the statute, is related to public health, morals, safety or general welfare. Since rules for construction of zoning ordinances are the same as those applied in the construction of statutes,[25] and a presumption of validity surrounds zoning ordinances,[26]

[18] *Id.* at 387, 175 A.2d at 503. Also, the possible effect on local real estate values was considered.

[19] *Supra* note 4.

[20] *Ibid.*

[21] *Supra* note 4 at 433, 216 N.E.2d at 117.

[22] *Supra* note 4.

[23] 319 Ill. 84, 149 N.E. 784 (1925). See also Marquette National Bank v. County of Cook, 24 Ill. 2d 497, 182 N.E.2d 147 (1962).

[24] *Id.* at 98, 149 N.E. at 789.

[25] Markiewicz v. City of Des Plaines, 41 Ill. App. 2d 127, 190 N.E.2d 387 (1963).

[26] Standard State Bank v. Village of Oak Lawn, 29 Ill. 2d 465, 194 N.E.2d 201 (1965); No rule of zoning law seems more firmly established in Illinois. See Bowler v. Village of Skokie, 57 Ill. App. 2d 321, 207 N.E.2d 117 (1965); Reskin v. City of Northlake, 55 Ill. App. 2d 184, 204 N.E.2d 600 (1965); Kanefield v. Village of Skokie, 56 Ill. App. 2d 472, 206 N.E.2d 447 (1965); Wilson v. Village of Deerfield, 55 Ill. App. 2d 61, 204

the court should not have stricken the Des Plaines ordinance without clear and convincing proof that the ordinance was arbitrary, unreasonable and had no substantial relationship to the public welfare.[27]

There may, in fact, be a rational basis for limitations, even though the limitations are unwise, ineffective or more restrictive than the court feels necessary.[28] As stated in *Burkholder v. City of Sterling*,[29]

> It has been repeatedly stated [that the court] will not constitute itself a zoning commission and that all questions relative to the wisdom or desirability of particular restrictions in a zoning ordinance rest with the legislative bodies creating them, and that a finding will not be disturbed where there is ground for a legitimate difference of opinion concerning the reasonableness of a particular ordinance. . . . It is not the province of courts to interfere with the discretion of the legislative body in the absence of a clear showing of an abuse of a discretion vested in them. [Where] the advisability of restricting a particular area for a particular use is debatable, this court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.[30]

It is thus apparent that the presumption in favor of the validity of the legislative classification is strong. In *Hoffmann v. City of Waukegan*,[31] a large tract of vacant land on the outskirts of Waukegan was to be developed with a shopping center, homes and apartments. Though the entire area surrounding the tract was, hitherto, completely undeveloped, the court refused to allow the building of this modern community because of the municipality's decision to zone the area for single-family residences. Also in *Bright v. City of Evanston*,[32] the court refused to substitute its judgment for that of the legislative body where the construction of an eight-story apartment building was not allowed in a single-family residence district. The court was not swayed by the existence of apartments

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N.E.2d 167 (1965). This rule permeates all United States zoning law. See also, 1 YOKLE, *op. cit. supra* note 2, §2-23 at 104 n. 161 for citations from 29 different jurisdictions. No contrary authority has been discovered by this writer.

[27] Wolfe v. Village of Riverside, 60 Ill. App. 2d 164, 208 N.E. 2d 833 (1965); Exchange National Bank of Chicago v. City of Chicago, 28 Ill. 2d 341, 192 N.E.2d 343 (1963); Maywood Proviso State Bank v. Village of Berkley, Cook County, 55 Ill. App. 2d 84, 204 N.E.2d 144 (1965); Bright v. City of Evanston, 57 Ill. App. 2d 414, 206 N.E.2d 765 (1965). But see Village of Oak Park v. Gordon, 32 Ill. 2d 295, 205 N.E.2d 464 (1965) where the court also required proof of loss to the property owner. While the question was never presented, it may be that the loss to the property owner must always result by virtue of a restriction being placed upon the use of the property.

[28] See Klever Shampay Karpet Kleaners v. City of Chicago, 323 Ill. 368, 154 N.E. 131 (1926); Village of Western Springs v. Bernhagen, 326 Ill. 100, 156 N.E. 753 (1927).

[29] 381 Ill. 564, 46 N.E.2d 45 (1943). [30] *Id.* at 568, 46 N.E.2d at 47–48.

[31] 51 Ill. App. 2d 241, 201 N.E.2d 177 (1964).

[32] 57 Ill. App. 2d 414, 206 N.E.2d 765 (1965).

and hotels within one block of the proposed site in all directions. Even where railroad tracks transversed a tract consisting of thirty-two vacant lots, the court found some rational basis for the municipality's single-family residence-use zoning.[33]

Clearly the *Trottner* case raised debatable issues concerning intensity of land use, parking, traffic, community stability and property values.[34] As a minimum, there must exist room for a fair difference of opinion as to the effectiveness of the Des Plaines ordinance where the only authority considered by the court was diametrically opposed.[35] Where it appears from the evidence that room exists for a legitimate difference of opinion concerning the reasonableness of a zoning classification, the legislative and not judicial judgment must be presumed valid.[36] However, where no debatable issue is raised, the courts may strike down a zoning ordinance. Thus, in *Marquette National Bank v. Village of Oak Lawn*,[37] the court found that barring the erection of a drive-in restaurant upon a particular site zoned for restaurant and general business use had no rational basis as a zoning restriction. In this case it was shown that the area was well equipped to handle increased traffic and parking, a restaurant was already operating on the next lot, three drive-in restaurants were operating within two blocks, and the ordinance in question would have permitted a drive-in restaurant on the other side of the street. Oak Lawn, in defense of its own ordinance, presented no evidence tending to demonstrate any adverse affect upon public health, safety, morals, comfort or general welfare which allowing the drive-in at that particular site would tend to have. In the *Trottner* case, however, Des Plaines argued vigorously that its ordinance was designed to accomplish the very purposes set forth in the enabling statute.

The previous decisions discussed indicate that a court cannot strike down a statute or ordinance unless it is found to be unreasonable and unrelated to the original authority granted. There was no such finding in the *Trottner* case. The ordinance was held invalid because the court felt it was ineffectual and not because it was unreasonable. In this respect, it would appear that the court erred in usurping those zoning powers expressly granted to a municipal corporation by the enabling statute.

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[33] Urann v. Village of Hinsdale, 30 Ill. 2d 170, 195 N.E.2d 643 (1964).

[34] *Supra* note 4, at 437, 216 N.E. 2d at 119.

[35] *Ibid.*

[36] Sutter v. Village of Mundelein, 27 Ill. 2d 589, 190 N.E.2d 321 (1963); Kioutas v. City of Chicago, 59 Ill. App. 2d 441, 208 N.E.2d 587 (1965); Exchange National Bank v. Village of Niles, 24 Ill. 2d 144, 180 N.E.2d 462 (1962); Bowler v. Village of Skokie, 57 Ill. App. 2d 321, 207 N.E. 2d 117 (1965); *accord* Kanefield v. Village of Skokie, 56 Ill. App. 2d 472, 206 N.E.2d 447 (1965).

[37] 57 Ill. App. 2d 31, 206 N.E.2d 531 (1965).