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Municipal Corporations

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an interpretation or application of the collective bargaining contract to arbitration."[7]

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State Power to Regulate Labor Regulations. Plaintiff, who was wrongfully expelled from a labor union, brought an action in the state court for reinstatement and for damages measured by loss of wages. A judgment for the plaintiff was rendered in *Mahoney v. S.U.P.*, 43 Wn.2d 874, 264 P.2d 1095 (1953). On rehearing [145 Wash. Dec. 422, 275 P.2d 440 (1954)], the court held that the Taft-Hartley Act [61 Stat. 136 *et seq.*, 29 U.S.C. ed., § 141 *et seq.*] has precluded the state from granting such compensatory and injunctive relief based on unfair labor activities. The court further held, however, that the state does have jurisdiction to order reinstatement as a means of protecting the employee's property and contract rights as a member of the union. The case is more fully discussed in Wollett, *Taft-Hartley and State Power to Regulate Labor Relations*, 30 WASH. L. REV. 1, 9-14 (1955).

MUNICIPAL CORPORATIONS

Zoning. During the past year, two decisions were handed down by the Washington court, both of which reversed the trial court findings of fact and resulting conclusions of law on problems involving local zoning ordinances. In *Coleman v. Walla Walla*,[1] the plaintiff owned a large house near the Whitman College campus in a zone designated as "Residential Single Family District" by city ordinances. The ordinance contained the usual and necessary constitutional provision that pre-existing nonconforming uses could be continued.[2] Plaintiff proposed to sell the building, which she had previously used as a rooming house, for use as a fraternity house.[3] On her suit for declaratory relief, the trial court sitting without a jury found the proposed use of the building was merely a permissible continuation of a pre-existing nonconforming use. This conclusion was primarily substantiated by two of the findings of fact: "V. no major alterations were proposed or are needed to utilize the building as a fraternity house."[4] "VI. no change in the use of said premises is contemplated except a change in the denomination. . . ."[5]

On appeal by the city, the Supreme Court extensively reviewed these and other findings of fact along with the conclusions of law which were predicated upon them, and the majority of the court concluded the

[7] 44 Wn.2d 808, 821, 271 P.2d 689, 696.
[1] 44 Wn.2d 296, 266 P.2d 1034 (1954).
[2] U. S. CONST. AMEND. XIV, § 1; WASH. CONST. ART. I, § 3.
[3] At the time of the suit, plaintiff rented rooms to thirteen students all of whom were members of the same fraternity.
[4] 44 Wn.2d at 298, 266 P.2d at 1035.
[5] *Ibid.*

preponderance of the evidence was contrary to the findings of the trial judge. As the basis of its decision denying declaratory relief, the court strictly applied the rule that one type of nonconforming use cannot be converted into another kind of nonconforming use, nor can the pre-existing use be substantially altered without violating the purpose and intent of the zoning ordinance. Of the various cases cited as authority in the majority opinion, none is very closely in point, although most of them do set forth general propositions and rules for applying zoning ordinances to certain fact patterns. *State* ex rel. *Miller v. Cain*[6] indicates that the policy of the law, as conceived by the Washington court, favors strict confinement of nonconforming uses. The majority opinion quotes at some length from McQuillen[7] and cites from this source the general rule that a prior nonconforming use "cannot be changed into some other kind of nonconforming use."[8] In citing this statement the court apparently did not choose to include as a part of the rule the sentence which immediately follows and elucidates it: "Leastwise, it cannot rightfully be changed into a nonconforming use that is substantially or entirely different."[9] (Quaere whether this is an intentional selection which commits Washington to a stricter rule as to changes in nonconforming uses than does the general rule as posited by McQuillen?)

The trial court concluded that the intended purchasers planned no major alterations, nor would any be necessary for them to utilize the building as a fraternity house. On extensive review of the record, the majority of the appellate court found that alterations would of necessity be required in order to provide adequate facilities for the proposed fraternity house. It is significant to note that the majority did not expressly state that *major or substantial alterations* would be necessary, yet, according to McQuillen, as a general rule the only alterations of nonconforming uses that are prohibited by zoning laws are those which involve substantial or structural changes.[10] It is also generally accepted that the owner of a pre-existing nonconforming use can engage in other uses normally incidental, auxillary and collateral to the nonconforming use.[11] The court did not discuss this problem although it seems clearly possible to hold that a fraternity house and

[6] 40 Wn.2d 216, 242 P.2d 505 (1952).
[7] 8 McQUILLEN, MUNICIPAL CORPORATIONS (3d ed. 1950).
[8] 8 *Id.* § 25.202.
[9] *Ibid.*
[10] 8 *Id.* §§ 25.205, 25.206 and 25.259.
[11] 8 *Id.* § 25.209 and cases cited.

a rooming house are not such auxiliary and collateral uses as come within the exception to the rule.

The dissenter felt extremely reluctant to overrule the trial judge in his findings of fact and resulting conclusions. His opinion advocates a far less strict rule be applied to zoning problems of this sort: ". . . an owner of nonconforming property may not be interfered with if he desires to use it in a somewhat different way than it was used when the ordinance was enacted if such use is not substantially and essentially a departure from the character of the nonconforming use excepted from the operation of such ordinance."[12] While the position of the dissenter has some appeal, it must be conceded that Washington authority supporting this argument is extremely scant, whereas the *Miller* case[13] supports the majority conclusion that nonconforming uses should be strictly confined.

In the case of *Hauser v. Arness,*[14] 38 plaintiffs brought suit to enjoin defendants from using their own tideland lots in Kitsap County for log dumping and booming operations. The plaintiffs contended (1) that the land in question was zoned as residential property, and (2) that the log dump was a general nuisance. By way of reply, the defendants contended, and it was an undisputed fact as shown in the appellate record, that the actual dumping and booming operation took place entirely on the defendants' tidelands, which were unclassified by the county zoning ordinances. Thus, the defendants were at most guilty of driving their trucks across their own zoned property in order to reach and dump on their own unzoned property. The trial court concluded that the operation was not a general nuisance, but that it was in violation of the county zoning ordinance in that the classified upland lots and the unclassified abutting tideland lots were being used *as a single unit* for the purpose of operating a log dump. The defendants alone brought the appeal.

In reaching a decision on this novel and extremely complex factual problem, the Supreme Court noted the fact that neither party cited any case from any jurisdiction which was of assistance in arriving at a solution. However, the court itself did unearth one authority, the *Rolling Green Golf Club Case,*[15] which dealt with somewhat similar

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[12] Note 1 *supra,* at 304, 266 P.2d at 1038.
[13] Note 6 *supra.*
[14] 44 Wn.2d 358, 267 P.2d 691 (1954).
[15] 374 Pa.2d 450, 97 A.2nd 523 (1953). This decision, having been rendered subsequent to the trial of the instant case, was, of course, not available to counsel or the trial court in deciding it.

facts and prbolems. In the *Golf Club Case,* the Pennsylvania Supreme Court permitted the club to construct a private road across its own tract, even though the tract was residentially zoned. This was done in spite of the fact that the club already had access to another public road, the court holding that: "The right of a property owner to have (or build) a road over his own land to connect with a public road has been recognized for centuries as one of his fundamental inalienable rights."[16]

In neither the *Golf Club Case* nor the instant case does the zoning ordinance *expressly forbid* the use of the classified land as a driveway to reach the unclassified land. But the Washington court, not content to rest its decision solely on this point, went on to consider whether or not the ordinance *"by clear and necessary implication"*[17] forbids the use as a driveway. [Italics supplied.] As a byproduct of its examination of the ordinance in question, the court reiterated several of the applicable rules of statutory construction and constitutional interpretation. With two constructions available, the court chose the one avoiding the question of constitutionality of the ordinance.[18] The decision then announced for the first time in Washington what was denominated "the correct rule of interpretation of zoning ordinances,"[19] a rule set forth in the Maryland case of *Landay v. McWilliams* as follows: "Such ordinances are in derogation of the common law right to so use private property as to realize its highest utility, and while they should be liberally construed to accomplish their plain purpose and intent, they should not be extended by implication to cases not clearly within the scope of the purpose and intent manifest in their language."[20] Roughly this same rule was declared in the *Golf Club Case,*[21] and it is apparently the modern weight of authority although there is considerable conflict among the cases.[22]

It is worthy of note that in the *Hauser* case the court took cognizance of the fact that logging is a lawful and extremely valuable industry in this state, one that is not generally held to constitute a nuisance unless the use clearly interferes with the reasonable and comfortable enjoyment of adjoining landowners. The court concluded from the evidence

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[16] *Id.* at 526. The court cited in support of this proposition: 2 BLACKSTONE'S COMMENTARIES 35; 3 KENT COMMENTARIES 420; and two Pennsylvania decisions.
[17] Note 14 *supra,* at 366, 267 P.2d at 696.
[18] Soundview Pulp Co. v. Taylor, 21 Wn.2d 261, 150 P.2d 839 (1944).
[19] Note 14 *supra,* at 370, 267 P.2d at 698.
[20] 173 Md. 460, 196 A. 293, 296 (1938).
[21] Note 15 *supra.*
[22] 8 MCQUILLEN, *op. cit. supra,* §§ 25.72, 25.73.

that "to conduct their business profitably independent loggers must have some means of access to tide water in order to compete with others. . . ."[23] This approach to a nuisance problem involving a *paramount industry* is in line with the policy of this court as announced in various other decisions.[24]

In comparing and contrasting these two recent zoning cases, it might appear at first blush that they are inconsistent. A closer examination reveals, however, that, while they are factually quite different, both cases can be decided by application of the rule laid down in the *Hauser* case, a rule which is called the correct rule for construing and interpreting zoning ordinances. Thus, in the *Coleman* case, the court liberally construed the ordinance in order to accomplish its plain purpose and intent. The logical corollary of this rule of liberal construction is the rule of strict application of the terms of the ordinance, to the end that one type of nonconforming use shall not be converted into another type. This approach to zoning problems clearly indicates the Washington policy of strict confinement of nonconforming uses. The *Hauser* case presented quite a different problem, for there the challenged use was not a nonconforming one and was in fact not clearly within the prohibition of the ordinance. In order to prohibit this use, the court would have had to extend the zoning statute by implication to a case which was not clearly within the scope and intent of the ordinance. This the court was unwilling to do in view of the constitutional question that such a construction would raise.

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Term of Officer Appointed to Fill Vacancy. In *State* ex rel. *Welsh v. Langenbach,* 44 Wn.2d 371, 267 P.2d 715 (1954), respondent was appointed by the mayor to fill an unexpired four-year term as city attorney, the vacancy having been created when the elected officer was called to active military duty. With two years of the term remaining, the successor to the mayor ousted respondent and appointed relator to the position. Following RCW 73.16.040, the court ruled the person first appointed was entitled to hold office during the absence of the elected officer, or until the expiration of the four year term, which ever occurred first.

Municipal Departments and Officers. In *Augustine v. Board of Police Pension Fund,* 44 Wn.2d 732, 270 P.2d 475 (1954), defendant had contracted with a local hospital to furnish hospital care to policemen. Plaintiff was injured and chose to receive care from another hospital. Pursuant to RCW 41.20.120, he applied for payment of hospital

[23] Note 14 *supra,* at 369, 267 P.2d at 698.

[24] *Cf.* Bartel v. Ridgefield Lumber Co., 131 Wash. 183, 229 Pac. 306 (1924), Mattson v. Defiance Lumber Co., 154 Wash. 503, 282 Pac. 848 (1929), Powell v. Superior Portland Cement, Inc., 15 Wn.2d 14, 129 P.2d 536 (1942).

and doctor bills from the fund, and defendant denied the application. The statute provides: "Whenever any member of the police department . . . is confined *to any hospital* or to his home . . . the board shall pay the necessary hospital, care and nursing expenses. . . ." *Held:* the defendant acted illegally in ruling that the benefits to which plaintiff was entitled were limited as a matter of law to those provided under the contract between the defendant and the local hospital.

Municipal Departments and Officers—Examination and Promotion. *Stoor v. City of Seattle,* 44 Wn.2d 405, 267 P.2d 902 (1954), was an action to annul an oral examination given to plaintiffs by the civil service commission. The city charter required written competitive examination except where tests of manual or professional skill are necessary. Defendant contended the oral examination was necessary to and did test the professional skill of plaintiffs. The majority of the court ruled a captaincy in the fire department is a profession and thus the city charter permits oral testing. As a problem of first instance, the majority decided competitive tests need not be strictly objective as long as all candidates take the same tests and are in competition with one another. Following the prevailing practice in problems of this sort, the court allowed the civil service commission wide discretion in the examination and promotion of candidates.

Schools and School Districts—Teachers' Reappointment. In *State* ex rel. *Welch v. Seattle School District No. 1,* 145 Wash. Dec. 6, 272 P.2d 617 (1954), the school district sent relator a registered letter advising her that her existing contract to teach would not be renewed. The letter was never delivered. Relator demanded issuance of her contract under RCW 28.67.070. Upon refusal, she appealed to the State Superintendent of Public Instruction who ruled she was entitled to the contract. Relator in this action secured a writ of mandate to compel reinstatement. *Held:* the contract was conclusively presumed to have been renewed pursuant to RCW 28.67.070. The school district could have appealed the State Superintendent's decision, but since no appeal was taken, "the decision became final under the purview of RCW 28.88.040."

Zoning. *State* ex rel *Ogden v. City of Bellevue,* 145 Wash. Dec. 460, 275 P.2d 899 (1954). Relator made a formal application to the city for a permit to construct business buildings on a part of his land zoned for business. Defendant denied the application, asserting relator had made no provision for off street parking as provided by city ordinance. Relator leased a tract of land which complied with all the standards of the ordinance applicable to parking facilities, and made reapplication for a building permit. Defendant asserted the leased tract was not being put to its best use and denied the permit in the exercise of its administrative discretion, whereupon relator sought a writ of mandate to compel issuance of the permit. *Held:* a building permit must issue as a matter of right upon full compliance with the applicable ordinance. The court said the only discretion which is permissible in zoning matters is that exercised in adopting the zoning classifications which must be of general applicability. The administration of a zoning ordinance can only be concerned with questions of compliance with the standards of the ordinance and not with the wisdom of the policy set forth in the ordinance.

PRACTICE AND PROCEDURE

Judgment N.O.V.—Inconsistent Testimony by the Same Witness May Be Considered. In *Halder v. Department of Labor and Industries,*[1] the court qualified the rule that a judgment notwithstanding

[1] 44 Wn.2d 537, 268 P.2d 1020 (1954).