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# Property Owners' Consent Provisions in Zoning Ordinances

Harold C. Havighurst
*West Virginia University College of Law*

# PROPERTY OWNERS' CONSENT PROVISIONS IN ZONING ORDINANCES

HAROLD C. HAVIGHURST*

The courts are concerned with zoning from several angles. They must construe the language of the ordinances and determine the remedies that may be invoked in the situations presented to them. They must decide finally upon the reasonableness of particular applications of zoning regulations.[1] They also have the power to pass upon the machinery established for dealing with zoning problems.

Obviously the establishment of effective machinery is of the utmost importance. The Supreme Court cannot pass upon the merits of every dispute that arises. As far as possible objections by property owners should be disposed of before they reach the lower courts.[2] A significant part of the judicial function in connection with the solution of zoning problems arises from the power to declare invalid certain administrative devices which seem objectionable.[3]

Among the devices which legislative bodies have sometimes attempted to establish is that of permitting property owners to have a part in determining whether particular restrictions should be effective. The latest pronouncement of the Supreme Court is adverse to such a practice. In *State of Washington* v. *Roberge*[4] the court had before it an ordinance providing that a home for the aged might be erected in a residential district if the written consent of two-thirds of the property owners within a distance of four-hundred feet was obtained. The court held that this clause in the ordinance providing for the consent of property owners made it invalid because in conflict with the due process clause. The court did not overrule, but expressly dis-

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* Associate Professor of Law, West Virginia University.

1 Nectow *v.* Cambridge, 277 U. S. 188 (1928).

2 The most important device for sifting cases is probably the zoning board of appeals. See BAKER, LEGAL ASPECTS OF ZONING, 76-112 (1927).

3 A court may invoke the due process clause, or in the case of a state court, the principle of the non-delegability of legislative power, to prevent the determination of restrictions in a way that does not provide adequate protection for individual rights.

4 278 U. S. 116 (1928).

tinguished, the case of *Cusack Company* v. *Chicago*,[5] which had upheld an ordinance containing a provision as to the consent of property owners. The reasoning of the court in the Roberge Case also suggests certain situations where it would not be unconstitutional to give adjoining property owners a voice in the determination of what restrictions should be effective. It may therefore be useful to consider the extent to which ordinances may incorporate provisions for property owners' consent.

A number of state courts[6] have held in accord with the Roberge Case. None of the opinions spells out the considerations of social policy which must lie in the back of the minds of the judges. A casual view of such a provision reveals nothing harmful in the scheme established. There can be little doubt that the demand for restricting the use of property through zoning ordinances arose primarily as a result of the need for the protection of property owners against the injurious use of individual pieces of property in the vicinity. The law of nuisance was inadequate to give such protection. Restrictions in deeds enforceable against purchasers with notice were uncertain and could not always be obtained even with the exercise of foresight. The zoning ordinance has proved far more effective in preserving property values against the activities of individual non-conformists. If this is the paramount purpose, the making of exceptions in restricted districts upon the consent of property owners affected would appear to be an admirable plan. If a majority or two-thirds of the property owners, acting on consideration of their own interests, consented, no property would be likely to suffer. The non-consenting minority would rarely be seriously affected.

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[5] 242 U. S. 525 (1917).

[6] Austin *v.* Thomas, 96 W. Va. 628, 123 S. E. 590 (1924); Levy *v.* Mvralag, 96 N. J. L. 367, 115 Atl. 350 (1921); St. Louis *v.* Russell, 116 Mo. 248, 22 S. W. 470 (1893); Tilford *v.* Belknap, 126 Ky. 244, 103 S. W. 289 (1907); Wasilewski *v.* Biedrzycki, 180 Wis. 633, 192 N. W. 989 (1923); Utica *v.* Hanna, 202 App. Div. 610, 195 N. Y. S. 225 (1922); Glens Falls *v.* Standard Oil Co., 127 Misc. 104, 215 N. Y. S. 354 (1926). In several cases the particular regulation was held unconstitutional because not within the police power. The court discussed the question whether the consent provision had the effect of making valid an otherwise invalid regulation. It was held that it did not save the ordinance. Willison *v.* Cooke, 54 Colo. 320, 130 Pac. 828 (1913); State *v.* Withnell, 78 Neb. 33, 110 N. W. 680 (1907).

The individual owner desiring to break the restriction would enjoy greater freedom. Some courts doubtless with such ideas in mind have upheld ordinances containing the provisions under discussion.[7]

But there may be other considerations that will destroy this picture. It may be suggested that the interests involved in zoning are broader than those outlined. The immediate property owners are not the sole beneficiaries of such regulations. The community in general is concerned with orderly urban development. The possibility of planning for the future in regard to fire protection, sewage disposal and similar matters has frequently been stressed as an advantage of zoning legislation. A device which places in the hands of a few property owners the power to regulate building in a district would leave such interests unrepresented.[8] An answer to this question might be that the legislative body framing the ordinance is the representative of the community interest. A provision for an exception if the consent of property owners is obtained, is tantamount to a declaration that as far as the general interst is concerned, the restriction is a matter of indifference. It is imposed for the benefit of property owners in a particular area and may be withdrawn by their action. The property covered by such consent provision would presumably be made sufficiently narrow to prevent any possible weakening of the effectiveness of the general zoning plan. If it should appear that in a particular instance the legislative body has placed matters of general public interest in the hands of property owners, the ordinance might be held invalid. That is perhaps the explanation of *Eubank* v. *Richmond*,[9] the first Supreme Court case to hold determinations by property owners invalid. The ordinance there involved purported to give to the owners of two-thirds of the property on one side of a square the power to determine that a

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[7] Meyers *v.* Fortunato, 12 Del. Ch. 374, 110 Atl. 847 (1920); People *v.* Ericsson, 263 Ill. 368, 105 N. E. 315 (1914); U. S. *v.* Richards, 35 App. D. C. 540 (1910); Spokane *v.* Camp, 50 Wash. 554, 97 Pac. 770 (1908); State *v.* Harris, 158 La. 974, 105 So. 33 (1925).

[8] This is pointed out in Utica *v.* Hanna, *supra* N. 6.

[9] 226 U. S. 137 (1912).

building line for that side of the square should be established. The court emphasized the fact that the public interest would not be served by such a provision.[10]

The next difficulty that presents itself is the danger of discriminatory action by property owners. If this power conferred on property owners is broad enough to enable them to permit building by some individuals and deny such permission to others, an undesirable situation results. The way would be open for a scramble by various interests. Property owners might be led for personal or other more corrupt reasons to show favoritism without regard to the effect upon interests of the district or the community.[11] It must be conceded, however, that this can not be a controlling reason in the minds of the justices of the United States Supreme Court, for in the Roberge Case,[12] the question presented to the property owners by the ordinance was confined to whether or not one particular described building might be erected. That would leave no room for discrimination.

The most vital objection seems to arise from the possibility that consents might be purchased.[13] Such action may be as morally reprehensible as vote-buying. But it will no doubt be difficult for the property owner to see it in that light. Criminal statutes do not forbid it. Purchased consents have, however, been held invalid.[14] The evils of such a practice are apparent. The purpose of regulations as to the use of property with consent provisions is not to enable adjacent owners to profit financially.

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[10] Eubank *v.* Richmond, *supra* n. 9, at 144, "There may be one taste or judgment of comfort or convenience on one side of a street and a different one on the other. There may be diversity in other blocks; and viewing them in succession, their building lines may be continuous or staggering (to adopt a word of the mechanical arts) as the interests of certain of the propery owners may prompt against the interests of others. * * * * 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."

[11] This objection was stated in a number of cases including Levy *v.* Mvralag, *supra* n. 6, and St. Louis *v.* Russell, *supra* n. 6:

[12] *Supra* n. 4.

[13] See Ernst Freund, "Some Problems in the Law of Zoning," 24 Ill L. Rev. 135 at 143 (1929).

[14] Greer *v.* Severson, 119 Iowa 84, 93 N. W. 72 (1903); Doane *v.* Chicago City R. R. Co., 160 Ill. 22, 45 N. E. 507 (1895).

Non-consenting owners would be subjected to the injurious use without any compensation.[15] Criminal legislation forbidding purchased consents might give adequate assurance, although difficulties of proof are great. To be sure the possibility of bribery and graft in connection with the action of administrative boards has not reduced them to ineffectiveness. It may be that a clear understanding as to the impropriety of purchased consents would reduce this possibility to a point where the resulting evils would be negligible.

There is little in the opinions to indicate that the courts have rested their decisions upon the social factors outlined above. Occasionally some of them are mentioned. But the chief ground for declaring ordinances containing consent provisions unconstitutional has been that they leave the decision to the arbitrary and capricious action of property owners. Cases like *Yick Wo* v. *Hopkins* [16] are cited, in which statutes placing arbitrary power in administrative boards were held invalid. But to compare the action of property owners to that of administrative boards is to overlook the whole purpose of such ordinances. The property owners are in no sense fulfilling a public duty. The statutory scheme contemplates that they should give or withhold their consent in accordance with their view of the effect of the particular use of property upon their own interests. Collectively they are waiving rights given to them by the ordinance. Property owners desiring to contest restrictions where property owners refuse consent are fully protected. It must be remembered that the legislative body in the first instance indicates the particular restriction which is to be the subject of the consent. The restriction must, of course, be reasonable in its particular application to conform to the due process clause. There would be no objection to placing the power of making exceptions in a zoning board of appeals in addition to the consent provision. Thus there may be adequate sage-guards against

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[15] This objection would not be present if the ordinance required the consent of all adjoining property owners as did the ordinance involved in Myers *v.* Fortunato, *supra* n. 7.

[16] 118 U. S. 356 (1886.)

action that would be unreasonable in the constitutional sense.

Most of the distinctions that have been pointed out by the courts in cases involving the constitutionality of consent provisions have no relation to the social policies involved. In the Roberge Case a distinction was made with respect to the character of the use forbidden. The Cusack Case[17] involving the regulation of billboards was differentiated on the ground that such a structure was more like a nuisance than was a home for the aged. None of the state cases turns upon that point.[18] The Supreme Court may have sensed an analogy in the cases involving ordinances conferring arbitrary discretion on administrative boards. These cases have sometimes distinguished between harmful businesses and those harmless in themselves.[19] The soundness of that distinction is open to question. If it can be justified, it must be on the ground that the regulation of harmful businesses can never be wholly unreasonable. Even assuming that the action of property-owners could be compared to that of a board, that would not serve to distinguish the Cusack Case. Billboards do not have an evil character that is independent of the situation and circumstances. There can be no doubt that an ordinance prohibiting them might be unreasonable in some of its applications. The analogy therefore fails. Moreover the considerations of social policy advanced above apply as well to slightly tainted structures as to those entirely harmless. There is equal danger of discrimination. There is the same opportunity for purchased consents. The only explanation of the attitude of the Court in the Roberge Case is that its view as to the desirability of consent provisions had changed since the earlier decision. The fact that the Cusack Case was not overruled, however, leaves the way open for extending the classification of harmful

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17 *Supra* n. 5.

18 These cases frequently make distinctions based upon whether or not the structure forbidden is like a nuisance, but it is always mentioned in connection with the issue of reasonableness, not that of the validity of the consent provision. See Austin *v.* Thomas *supra* n. 6; People *v.* Village of Oak Park, 268 Ill. 256, 109 N. E. 11 (1915).

19 See Crowley *v.* Christensen, 137 U. S. 86, at 94 (1890).

structures if the Court should again experience a change of heart.

The distinction advanced in the Cusack Case whereby it disposed of *Eubank* v. *Richmond*[20] was tacitly repudiated in the Roberge Case. This was to the effect that whereas legislative bodies could not invest property owners with power to take affirmative action, they might make regulations with power in the property owners to make exceptions as to their operation. Essentially this would make the cases turn upon whether the restriction in question would be effective on the action or on the inaction of property owners. In both cases they have the same powers. The method of indicating their position seems immaterial. It is true, however, that the way of expressing the statutory provision may throw light on its purpose. And that of course may enter into the constitutional question. In the Eubank Case there seems to have been more of an attempt to invest property owners with powers similar to those of an administrative board. In the cases where the question is strictly one of consent of property owners expressed by action, it is clearer that they are merely permitted to waive a statutory right passed chiefly for their protection.

The courts have generally given little attention to the possibility of declaring the consent provisions alone invalid, permitting the restrictions to stand whether or not consents were obtained. The Supreme Court had an opportunity to do that in the Roberge Case, for there the consent provision had been added by a later amendment. It has been held that the principle that the unconstitutionality of a part of a statute invalidates the whole will be applied with reluctance if the invalid section was added to an otherwise valid statute by amendment.[21] It is difficult to see why that should not apply to an ordinance. In the usual case, however, there can be little question that the consent provision is such an integral part of the scheme of the ordinance that the whole ordinance must fall with it.

Finally, it may be pointed out that legislative bodies de-

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[20] *Supra* n. 9.

[21] Frost *v.* Corporation Commission, 278 U. S. 515, at 526 (1929), and cases there cited.

siring to give property owners a voice may resort to other devices that differ only slightly. Ordinances making property owners' consents merely advisory, leaving final action to administrative or legislative bodies are undoubtedly constitutional. One type of ordinance that has occasionally been enacted provides that a governmental body may make an exception provided the consents are first obtained. If the power is lodged with a legislative body, the action of property owners is only advisory, since the ordinance might be changed without the consents. If permission for building may be granted by an administrative agency conditional upon first obtaining consents, property owners by withholding them may prevent withdrawal of the restrictions, although the fact that consents are given is not conclusive. This accomplishes the same end as ordinances making the action of property owners final, with a slightly more cumbersome procedure. The first objection considered above would be eliminated since the governmental body may refuse to issue permits if some general community interest would suffer from the erection of the structure proposed. Opportunities for discrimination and purchased consents would still exist, although there may possibly be additional supervision under such an arrangement. The courts will no doubt be more inclined to sustain ordinances of this type.[22]

There seems to be no insuperable objection to property owners' consent provisions with the possible exception of the evils arising from purchased consents. If some assurance can be given that consents will not be purchased the ordinances should be upheld with certain qualifications. They should be sufficiently narrow in their application to prevent the possibility of discrimination. They should not

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22 Such ordinances were upheld in Building Inspector *v.* Stoklosa, 250 Mass. 52, 145 N. E. 262 (1924) and Stockton *v.* Frisbie, 270 Pac. 270 (Cal. App. 1928). See also Des Moines *v.* Manhattan Oil Co., 193 Iowa 1096, 184 N. W. 823 (1921). In Spann *v.* Dallas, Ill Tex. 250, 235 S. W. 513 (1921), however, one of the reasons given for declaring the ordinance unconstitutional was that it conferred arbitrary power on a building inspector after property owner consents were given.

The writer has been assisted in the collection of cases by Louis D. Meisel.

commit matters of general community interest to the decision of property owners within a limited area. Ordinances providing for final action by a governmental body after consents are given are more suitable where such broader interests are involved.

The Supreme Court has left the way open for upholding ordinances with consent provisions in cases arising in the future. It is to be hoped that it will abandon some of the distinctions made in the past. A frank consideration of the desirability of such legislation will lead it to a sounder basis for differentiation between the cases.