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Municipal Corporations - Zoning - Exclusion of Churches from Residential Area

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MUNICIPAL CORPORATIONS—ZONING—EXCLUSION OF CHURCHES FROM RESIDENTIAL AREAS—In two recent New York cases churches sought permits to use residential property for church purposes, including worship, social gatherings, construction of an adjacent parking lot, and, in one case, establishment of a school and playground. In each case the zoning board denied the permit on grounds that a church would change the residential character of the neighborhood, decrease the enjoyment of neighboring property, depreciate property values, and that the contemplated use of the property for other than worship was prohibited by the ordinance. The lower court upheld the decisions of both zoning boards. On appeal to the New York Court of Appeals, *held*, reversed. The zoning board decisions are arbitrary and unreasonable in that they bear no substantial relation to the public health, safety, morals or general welfare of the community. *Community Synagogue v. Bates*, 1 N.Y. (2d) 445, 136 N.E. (2d) 488 (1956); *Diocese of Rochester v. Planning Board of Brighton*, 1 N.Y. (2d) 508, 136 N.E. (2d) 827 (1956).

The establishment of exclusively residential areas by municipal zoning is undoubtedly valid as a proper exercise of the police power when the conflicting interest is a business enterprise.¹ When the conflicting interest is a church, the validity of such an ordinance is not so clear.² The clearest case of invalidity is the zoning ordinance provision which totally excludes churches from residential areas.³ A church may attack the constitutionality of such a provision either as a deprivation of property without due process⁴

¹ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). See generally Johnson, "Constitutional Law and Community Planning," 20 LAW & CONTEMP. PROB. 199 (1955).

² The validity of a zoning ordinance provision excluding churches from residential zones is not determined in a decision which upholds the validity of the ordinance generally, nor by a decision which upholds the provision as it applies to conflicting business uses. For example, the zoning ordinance in the *Euclid* case, note 1 *supra*, excluded churches from two residential zones. See generally 58 AM. JUR., Zoning §124 (1948); PFEFFER, CHURCH STATE AND FREEDOM 563 (1953).

³ *Ellsworth v. Gercke*, 62 Ariz. 198, 156 P. (2d) 242 (1945); *North Shore Unitarian Society v. Village of Plandome*, 200 Misc. 524, 109 N.Y.S. (2d) 803 (1951); *City of Sherman v. Simms*, 143 Tex. 115, 183 S.W. (2d) 415 (1944). *Accord*, *Archbishop v. Village of Orchard Lake*, 333 Mich. 389, 53 N.W. (2d) 308 (1952). *Contra*, *Corporation of the Presiding Bishop v. City of Porterville*, 90 Cal. App. (2d) 656, 202 P. (2d) 823 (1949), app. dismissed 338 U.S. 805 (1949), reh. den. 338 U.S. 939 (1949). See generally RATHKOPF, THE LAW OF ZONING AND PLANNING, 3d ed., c. 19 (1956); 2 YOKLEY, ZONING LAW AND PRACTICE, 2d ed., §222 (1953).

⁴ *State of Ohio ex rel. Synod of Ohio v. Joseph*, 139 Ohio St. 229, 39 N.E. (2d) 515 (1942); *State ex rel. Roman Catholic Bishop of Reno v. Hill*, 59 Nev. 231, 90 P. (2d) 217 (1939).

or as an abridgement of the right to freedom of worship.⁵ More difficult is the situation where the ordinance permits churches in residential areas, but only on special permit from the zoning board. It is doubtful whether a church can, in the same proceeding in which it seeks a permit, challenge the constitutionality of the ordinance itself, since it has appealed to the discretion of the zoning board, and thereby assumed the constitutionality of the ordinance.⁶ But, as in the principal cases, the church may attack the decision of the zoning board as arbitrary and unreasonable in that the decision bore no substantial relation to the health, safety, morals or general welfare of the community. Such cases present the question, Was the denial of a permit, for the reasons given by the board, a reasonable exercise of the police power? Under this test, the following reasons have generally been held not sufficient to deny a permit to a church to establish in a residential area: the presence of a church would change the residential character of the neighborhood;⁷ the enjoyment of neighboring property would be decreased;⁸ a church would create a traffic hazard in the area;⁹ the value of adjoining property would be depreciated;¹⁰ the church would use the property for activities other than worship;¹¹ other property, non-residential, was available;¹² the municipality would lose future tax revenue from the prop-

⁵ *City of Sherman v. Simms*, note 3 *supra*; *Board of Zoning Appeals v. Jehovah's Witnesses*, 233 Ind. 83, 117 N.E. (2d) 115 (1954).

⁶ *State of Ohio ex rel. Synod of Ohio v. Joseph*, note 4 *supra*. The court in each of the principal cases assumed the validity of the zoning ordinance and confined its inquiry to the action of the zoning board. One judge dissented in the Rochester case, on grounds that the court's decision in effect held the ordinance unconstitutional, an issue which the church could not raise.

⁷ *Roman Catholic Archbishop v. Baker*, 140 Ore. 600, 15 P. (2d) 391 (1932); *Young Israel Organization v. Dworkin*, (Ohio 1956) 133 N.E. (2d) 174; *State of Ohio ex rel. Synod of Ohio v. Joseph*, note 4 *supra*. See generally ANTIEAU, *MUNICIPAL CORPORATION LAW* §7.05 (1955); Rodda, "The Accomplishment of Aesthetic Purposes under the Police Power," 27 So. CAL. L. REV. 149 (1953); 11 AM. JUR., *Constitutional Law* §280 (1937).

⁸ See BASSETT, *ZONING* 200 (1940). See also *Christ's Methodist Church v. Macklanburg*, 198 Okla. 297, 177 P. (2d) 1008 (1947).

⁹ *State ex rel. Anshe Chesed Congregation v. Bruggemeier*, 97 Ohio App. 67, 115 N.E. (2d) 65 (1953); *Village of University Heights v. Cleveland Jewish Orphan's Home*, (6th Cir. 1927) 20 F. (2d) 743; 54 A.L.R. 1008 (1928). But see *Miami Beach United Lutheran Church v. City of Miami Beach*, (Fla. 1955) 82 S. (2d) 880. A zoning ordinance may require the church to provide off-street parking facilities. *Congregation of Jehovah's Witnesses v. City Council*, (Tex. 1956) 287 S.W. (2d) 700; *State ex rel. Tampa Company of Jehovah's Witnesses*, (Fla. 1950) 48 S. (2d) 78. *Accord*, *Titus St. Paul Property Owners Assn. v. Board of Zoning Appeals*, 205 Misc. 1083, 132 N.Y.S. (2d) 148 (1954).

¹⁰ *State of Ohio ex rel. Synod of Ohio v. Joseph*, note 4 *supra*; *Anshe Chesed Congregation v. Bruggemeier*, note 9 *supra*. *Contra*: *West Hartford Methodist Church v. Zoning Board*, 143 Conn. 263, 121 A. (2d) 640 (1956); *Miami Beach United Lutheran Church v. City of Miami Beach*, note 9 *supra*.

¹¹ *Keeling et al. v. Board of Zoning Appeals*, 117 Ind. App. 314, 69 N.E. (2d) 613 (1946); *Board of Zoning Appeals v. Wheaton*, 118 Ind. App. 38, 76 N.E. (2d) 597 (1947). The municipality, however, may enjoin uses which amount to a nuisance. *Portage Township v. Full Salvation Union*, 318 Mich. 693, 29 N.W. (2d) 297 (1947).

¹² Compare *State of Ohio ex rel. Synod of Ohio v. Joseph*, note 4 *supra*, with *Corporation of the Presiding Bishop v. City of Porterville*, note 3 *supra*.

erty;¹³ the church had not obtained the consent of a required percentage of surrounding property owners.¹⁴ The board may require the church to conform to health, fire and sanitation regulations¹⁵ and possibly to provide off-street parking facilities.¹⁶ Beyond these requirements, however, the zoning board will be in an area of doubtful legality, and will have to justify its refusal of a permit on the ground that it promotes the health, safety, morals or general welfare of the community. A municipality will find it exceedingly difficult, therefore, to exclude a church from a residential area, either by zoning ordinance or decision of the zoning board.

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¹³ *Anshe Chesed Congregation v. Bruggemeier*, note 9 *supra*, at 75. But cf. *State ex rel. Lutheran High School Conference v. Sinar*, 267 Wis. 91, 65 N.W. (2d) 43 (1954) (private high school excluded).

¹⁴ *Roman Catholic Archbishop v. Baker*, 140 Ore. 600, 15 P. (2d) 391 (1932); *Pentecostal Holiness Church v. Dunn*, 248 Ala. 314, 27 S. (2d) 561 (1946). *Accord*, *State ex rel. Westminster Presbyterian Church v. Edgecomb*, 108 Neb. 859, 189 N.W. 617 (1922).

¹⁵ *City of Sherman v. Simms*, note 3 *supra*. *Accord*, *Kurman v. Philadelphia Zoning Board*, 351 Pa. 247, 40 A. (2d) 381 (1945); *O'Brien v. Chicago*, 347 Ill. App. 45, 105 N.E. (2d) 917 (1952).

¹⁶ See note 9 *supra*.