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INTRODUCTION

Advances in the fields of transportation and communication have made necessary a vast amount of law which was foreign to the statute books of a century ago. So, also, in the field of local government, changes in conditions have required alterations in, and additions to, the old law of municipal corporations. Comprehensive municipal zoning, as it exists today, is such an addition to our laws. The subject of zoning is not new, but it was not until 1926 that it became a fixed and important part of our laws. In that year the United States Supreme Court, in the leading case of *Village of Euclid v. Ambler Realty Company*[1] upheld the validity of comprehensive municipal zoning.

In the *Village of Euclid* case the Realty Company brought suit in the federal district court to enjoin the enforcement of a zoning ordinance, on the grounds that the ordinance and its application violated both the due process and equal protection clauses of the Constitution. The suit did not allege a denial of a specific right or a particular injury, but attacked the law generally. The Court held that in its general scope and dominant features the ordinance was a valid exercise of authority, and that a comprehensive zoning ordinance does not per se violate the Constitution.

A body of law does not suddenly spring up. A period of development is required during which there is a gradual evolution of a comprehensive and coherent body of law. So, the law of zoning did not go immediately from the one extreme of completely unregulated city development to the other extreme of closely restricted city planning and zoning. Throughout the years tremendous changes in living conditions were taking place; sign board regulation was developing;[2] and cities were prohibiting noxious uses of property for the benefit of the whole community.[3] These things paved the way for the holding in *Village of Euclid v. Ambler.* That decision did not, of course, provide a full-grown body of law. Our law of zoning has taken a number of years to develop, and is still being developed by the flow of judicial decisions.

That development has now occurred to the point where it seems worthwhile to examine some of its phases. This paper will treat only one phase of the topic—the extraterritorial exercise of the

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1. 272 U.S. 365 (1926).
2. SMITH, THE LAW AND PRACTICE OF ZONING 14 (1937).
3. See, *e.g.*, Green v. Mayor of Savannah, 6 Ga. 1 (1849); Harrison v. Mayor of Baltimore, 1 Gill 264 (Md. 1843).

zoning power; that is, the exercise of the zoning power of a municipality outside the corporate boundaries. Since this area has not been widely explored by the courts, a portion of the argument is necessarily presented by way of analogy.

NEED FOR EXTRATERRITORIAL ZONING

The shift of population from the rural areas to urban centers has been characteristic in recent years. Practically all cities have been growing in area and population. That municipal growth is seldom orderly, however, and does not always go in the direction predicted. "The city grows like a forest, not like the rings of a tree."[4]

A distinction must be made between the city and the metropolitan area. The city is usually the center of the metropolitan area which, as a whole, constitutes an economic unity. A large segment of the population, working and trading within the city, may live in the area beyond the corporate limits. Industries which are vital to the welfare of the community may be located outside the city. Thus the city and the metropolitan area surrounding it are mutually interdependent.

Logic would seem to suggest that a single economic unit such as the city and its surrounding metropolitan area should be a single political unit; extension of the city boundaries to include the area would be an effective means of achieving this end. But the solution is easier to state than to accomplish. Although the area may constitute a physical and economic unit, it may not be a social unit.[5] For reasons which may be historical, financial, political, or otherwise, the residents in that area adjacent to the corporate boundaries may vigorously oppose any move to place them within the municipality. Then, too, municipal boundaries and the annexation of territory adjacent to cities are subjects over which the state has plenary power, and there is no constitutional requirement that the legislature enact what seems logical.

In the suburban area there may be present buildings and property uses which are not conducive to the health, safety and general welfare of the community as a whole. Fire hazards may exist; certain types of enterprises may be there conducted which are obnoxious and, as generally recognized, should not be present in the immediate vicinity of a concentration of population; and the suburban area may constitute a wholly non-aesthetic pattern. Under such conditions it would seem quite obvious that proper regulations and controls over buildings and property uses would be for the good of the community. A proper zoning law would provide such regulations and controls.

4. From a speech by Thomas Reed before the National Municipal League, St. Louis, Mo., Nov. 9, 1926.
5. BAKER, THE LEGAL ASPECTS OF ZONING 164 (1927).

The term "zoning" is frequently confused with "planning." They are not synonymous; there is a distinction and it should be observed, even though the two are related and do overlap. Perhaps the best definition of those terms and, at the same time, the best differentiation, has been made by the Court of Appeals of Kentucky when it said:

> "Broadly speaking, 'planning' connotes systematic development of an area with particular reference to location, character, and extent of streets, squares, and parks and to kindred mapping and charting, and 'zoning' relates to regulation of use of property, to structural and architectural designs of buildings, and the character of uses to which the property or the buildings within classified or designed districts may be put."[6]

It may be suggested that such a stringent law as zoning is unnecessary because the property owners already have a solution available in the form of deed or contract restriction upon building and the use of property. The results of private restriction, imposed by deed or agreement, and zoning ordinances are similar. However, zoning has certain advantages over private restrictions. A zoning law sets up requirements which are uniform and will protect each property owner from his neighbor, providing for their mutual benefit. A zoning ordinance is enforceable by the municipal authorities and it is also enforceable by the individual property owner who may bring suit for an injunction restraining a violation of the ordinance.[7] That system of enforcement is far superior to enforcement of private restrictions. With the passage of time and changing conditions, private restrictions may cease to be a benefit and become a burden. It would be most difficult to establish changed circumstances as an excuse for failing to comply with a private restriction. The zoning ordinance depends upon the surrounding circumstances as the basis for its reasonableness and validity.[8]

Another possible alternative to extraterritorial zoning by the municipal authorities would be to establish a district or an authority for the purpose of performing two services—planning and zoning of the metropolitan area. Such a district would resemble the sanitary district, park district, or school district which is common throughout the United States. An example is the Division of Metropolitan Planning, a subdivision of the Metropolitan District Commission which operates in the Boston area. That unit deals with planning, but not with zoning, of the area. Such a district, with authority both to plan and to zone, would solve the problem of zoning the area just beyond the corporate boundaries and would eliminate one argument against

6. Seligman v. Belknap, 288 Ky. 133, 155 S.W.2d 735 (1941).
7. Snow v. Johnston, 197 Ga. 146, 28 S.E.2d 270 (1943).
8. Wulfson v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925).

extraterritorial municipal zoning—namely, it is usually unjust and unsuccessful to give one governmental unit control over the territory and people of another, and it confuses both units.[9] However, even such a district or "authority" would cause some confusion because of overlapping political boundaries.

Still another solution to the general problem is to have the county zone the area beyond the city limits. This is of course a perfectly valid and proper remedy. Its effectiveness may be open to question. A mutual recognition of the common problem, and a willingness to cooperate is necessary between the county and city governments. Too, counties vary considerably, and in many cases the county government organization is inadequate to administer a zoning law properly. The municipal corporation is much more likely to have the organization necessary to write and effectively administer a zoning ordinance.

EXTRATERRITORIAL APPLICATION OF MUNICIPAL ZONING ORDINANCES

Each of the solutions previously suggested hereinabove has been subject to significant objections. We will now consider the validity of an ordinance passed by the municipal government and designed to apply to the metropolitan area outside the city limits, as well as to the city itself. Though at first blush such a solution seems far-fetched, it appears more logical when one considers that the city may be the only government properly equipped to administer a zoning law. The legality of such a solution—the application of a city's comprehensive zoning ordinance beyond its corporate limits—has not been passed upon by the courts.

Municipalities are not vested with inherent powers; a city government exercises various types of powers because it has been authorized to do so by the state. A municipality may possess and exercise "first, all powers granted in express terms consistent with the United States Constitution, treaties and laws, and the state constitution and general laws of the state, second, certain implied or incidental powers, in like manner consistent (1) necessarily arising from those expressly granted or (2) those essential to give effect to powers expressly granted, or (3) those recognized as pertaining or indispensible to local civil government, to enable it to fulfill the objects and purposes for which it was organized and brought into existence."[10]

Thus, municipal laws or ordinances are subordinate to all laws of the state and Federal Government. In considering the relationship between the city and the state, the state has properly been termed "the parent sovereign."[11] If all laws are placed in an "hierarch of

9. BAKER, THE LEGAL ASPECTS OF ZONING 124 (1927).

10. MCQUILLIN, MUNICIPAL CORPORATIONS § 367 (2d ed. 1940).

11. STASON AND TRACY, CASES ON THE LAW OF MUNICIPAL CORPORATIONS 4 (1946).

laws," the municipal ordinances appear at the bottom and are subject to all of the superior types of laws.[12]

The legal basis for a municipal zoning ordinance is, then, a constitutional authorization or—far more commonly—an enabling statute. The enabling statute may be either a general or a special law of the state legislature, in either case granting to the city the authority to zone. A comprehensive zoning ordinance must then be passed pursuant to the enabling statute. When the authority for a zoning ordinance is found in an enabling statute, the ordinance must follow the statute, for there is no other justification for the existence of the municipal power. The ordinance must not be more inclusive nor more restrictive than the legislative authorization. But a zoning ordinance, properly passed pursuant to an enabling act, is safe from successful attack. The ordinance may be declared invalid in some respect because of its applicability to a particular use or location, but the right of the city to pass a comprehensive zoning law will be upheld by the courts.[13] A valid zoning ordinance has the "force of a statute;" it is as though the law were passed by the legislature itself.[14]

The power to zone is a part of the police power which is inherent in the state, and it can be exercised by a municipality to the extent that it has been delegated by the state to the city. If the grant has been a broad one, then the municipality may exercise the power broadly.

The term "police power" can be described by general words but cannot be definitely and exactly defined.[15] It includes regulations for the promotion of the public convenience or the general prosperity. The word "comfort" has also been used to describe the regulations which can be adopted under the police power.[16] The police power is not static, but is flexible and adaptive. It is elastic to meet changing and shifting conditions. It must be adaptive to provide proper regulations required by a changing world;[17] to meet the problems arising from the increased population, the increased interdependence of people, and the complex commercial and social relations of the citizens. "It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise."[18] Mr. Justice Holmes pointed out that the "police power extends to all great public needs" and it is indefinite so that its lines (the boundaries of that power) are "pricked out by the gradual ap-

12. WALKER, FEDERAL LIMITATIONS UPON MUNICIPAL ORDINANCE MAKING POWER 2, 3 (1929).
13. 1 YOKLEY, ZONING LAW AND PRACTICE § 20 (2d ed. 1953).
14. Stubbe v. Adamson, 220 N.Y. 459, 116 N.E. 372 (1917).
15. Eubank v. City of Richmond, 226 U.S. 137 (1912).
16. *Ibid.*
17. 1 YOKLEY, ZONING LAW AND PRACTICE § 16 (2d ed. 1953).
18. Chief Justice Shaw in Commonwealth v. Alger, 7 Cush. 53, 85 (Mass. 1862).

proach and contact of decisions on the opposing sides."[19] Said Judge Pound in a decision concerning the police power: "The struggle to meet changing conditions through new legislation constantly goes on. The fundamental question is whether society is prepared for the change. The law of each age is ultimately what that age thinks should be to law."[20] Such, then, is the nature of the power which a state may delegate to a municipality to meet its zoning problems. Where the community welfare requires it, the state being willing to make the grant, the power can be exercised broadly, both as to subject matter and area.

A grant of power to a municipality is strictly construed. Thus, if there is a fair and reasonable doubt concerning the existence of the power, it is resolved against the city.[21] On the other hand, if the existence of the power be conceded, ordinances passed pursuant to the power are presumed to be valid. The court assumes that the ordinance has been adopted by those who are familiar with the conditions in the locality affected.[22] The judgment of the local legislative body will not be interfered with unless that body has over-stepped the constitutional limitations and exceeded its powers.[23] When the validity of a zoning ordinance is thus brought into question, and the issue is fairly debatable, the ordinance stands as constitutional.[24]

Generally, municipal ordinances are effective only up to, and not beyond, the corporate boundaries. That is a statement of the general rule, but, as is frequently the case, there is an exception to the rule. Perhaps the general rule could better be stated in this manner: A municipality cannot exercise its power beyond its own corporate limits without legal authority. The right to exercise police power beyond the city's boundaries must be derived from a state grant which expressly or impliedly permits it. If that power be only impliedly granted, the power must be essential to the performance of something which is expressly authorized.[25] In support of these general statements it may be well to summarize a few court holdings:

A city may operate beyond its limits without restrictions if the legislature grants such authority.[26]

Generally, city powers cease at its limits and cannot without plain manifestation of legislative intention be exercised beyond its limits.[27]

19. Noble State Bank v. Haskell, 219 U.S. 104 (1911).
20. People *ex rel.* Durham R. Corp. v. La Fetra, 230 N.Y. 429, 130 N.E. 601 (1922).
21. Irvin v. Torbert, 204 Ga. 111, 49 S.E.2d 70 (1948).
22. West Bros. Brick Co. v. Alexandria, 169 Va. 271, 192 S.E. 881 (1937).
23. 1 DILLON, MUNICIPAL CORPORATIONS 358-59 (2d ed. 1911).
24. West Bros. Brick Co. v. Alexandria, 169 Va. 271, 192 S.E. 881 (1937); Wulfson v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925).
25. MCQUILLIN, MUNICIPAL CORPORATIONS § 229 (2d ed. 1940).
26. Central Lincoln Peoples' Utility Dist. v. Smith, 170 Ore. 356, 133 P.2d 702 (1943).
27. *Ex parte* Ernest, 138 Tex. Crim. R. 441, 136 S.W.2d 295 (1939).

As a rule, city power ceases at the boundaries and cannot without plain delegation of the necessary power from a proper authority be exercised outside of its geographical limits.[28]

Usually the police power of a city is exercised only within its own area and cannot be exerted elsewhere, even though the corporation may have acquired property outside of its geographical area, but the legislature may grant the city right to exercise police power outside its corporate limits.[29]

A municipal corporation has no extraterritorial powers and cannot without specific legislative authority exercise powers beyond its governmental limits.[30]

The foregoing decisions sufficiently point out that if the state has granted authority to the city the latter may exercise its police power beyond the municipal limits. Municipalities have exercised extraterritorial power in such a manner that property rights have been vitally affected, much the same as property rights would be affected by a zoning law. For example:

It has been held valid for a city to exercise police jurisdiction within three miles of a city, and under that power the city could levy a privilege tax on business.[31]

A city was permitted to prohibit and abate offensive and unwholesome businesses or establishments within one mile of its boundaries.[32]

It is permissible for a city, under state authority, to exercise power for sanitary and police purposes beyond its municipal boundaries.[33]

As long as a century ago a type of extraterritorial zoning law was upheld. In 1849, the City of Savannah, Georgia, could validly prohibit rice farms within one mile of the city.[34]

The City of Baltimore could regulate or prohibit slaughter houses, hog farms and nuisances dangerous to health and safety of the people of the city, within an area extending three miles from its boundaries.[35]

These are a few of the examples that illustrate the extraterritorial exercise of police power. The use of the individual's property is restricted; the owner of land within three miles of Baltimore was not permitted to establish a slaughterhouse. Such a regulation may be a detriment and hindrance to the particular property owner, but it is definitely for the benefit of the community generally.

Ordinances such as those just illustrated amount to an extra-

28. St. Louis v. Lee, 235 Mo. App. 309, 132 S.W.2d 1055 (1939).
29. Shreveport v. Case, 198 La. 702, 4 So.2d 801 (1941).
30. City of Sedalia v. Shell Petroleum Corp., 81 F.2d 193 (8th Cir. 1936); Gainesville v. Dunlap, 147 Ga. 344, 94 S.E. 247 (1917).
31. City of Homewood v. Wofford Oil Co., 232 Ala. 634, 169 So. 288 (1936).
32. St. Bernard Poultry Farm v. City of Aurora, 98 Colo. 158, 54 P.2d 684 (1936).
33. Light v. Danville, 168 Va. 181, 190 S.E. 276 (1937).
34. Green v. Mayor of Savannah, 6 Ga. 1 (1849).
35. Harrison v. Mayor of Baltimore, 1 Gill 264 (Md. 1843).

territorial extension of municipal laws for a single purpose. The city is a subdivision of, and subordinate to, the state, and the legislature may alter the municipal boundaries in the absence of constitutional restriction.[36] Thus, a legislature can, if it sees fit, make a general extension of the boundaries, or it can extend the boundaries for a single purpose. A common example is for the city to be enabled to attach adjacent areas for school purposes. That, in effect, extends the limits solely for public educational purposes. The examples previously given can also be looked upon as an extension of the municipal boundaries for one or more purposes—health, sanitation, public order, etc. It would seem to follow that an extension of the city limits for zoning purposes would also be valid, if authorized by the state, as in furtherance of the health, safety and general welfare of the public.

There are limitations upon the exercise of the police power. Perhaps the most important limitation is that of reasonableness. To be a valid exercise of the police power, a law must be reasonable and must be administered reasonably. Reasonableness is tested largely by what is ordinary usage and knowledge gained by common experience.[37] The law and its application must be reasonable under the circumstances of the particular case.[38] If the ordinance is discriminatory or assumes the character of an arbitrary fiat, the courts will interfere and declare the law invalid. The classifications in the law must be reasonable and there must be a reasonable relationship between the regulations and the purpose, which must be within the scope of the police power. Thus, if the legislative grant of extraterritorial zoning authority covers an area broader than that reasonably required to protect the city and its metropolitan area, or if the authority is used unreasonably, the courts will strike down such grant or action. A Tennessee case has held that a legislative grant of power to a city, giving the city authority to prohibit dairies and stables in an area ten miles beyond the city limits, was invalid as too sweeping and unreasonable.[39] On the other hand, the Georgia Supreme Court upheld the right of the City of Atlanta to condemn land, outside its own corporate limits, and within the boundaries of another municipal corporation, for airport purposes.[40] Atlanta was found to have acted in a reasonable manner, in good faith, without abuse of its authority, and the land involved was reasonably necessary for a proper municipal purpose.

Assuming the extension of the city limits for zoning purposes to be reasonable, another important problem arises. If there is a general extension of the corporate boundaries, the residents of the annexed area become voters of the city, if qualified; but if the limits of the city

36. Geweke v. Village of Niles, 368 Ill. 463, 14 N.E.2d 482 (1938).
37. 1 YOKLEY, ZONING LAW AND PRACTICE § 28, p. 40 (2d ed. 1953).
38. Ballard v. Roth, 141 Misc. 319, 253 N.Y.S. 6 (Sup. Ct. 1931).
39. Malone v. Williams, 118 Tenn. 390, 103 S.W. 798 (1907).
40. Howard v. Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940).

are extended for a single purpose the qualified voters in the adjacent area do not become members of the municipal electorate. Thus the question is raised: Is all government by consent of the governed? That it must be so was alleged in an Indiana case, but the court decided the case without commenting or ruling upon that point.[41]

Closely allied to that problem (all government shall be by consent of those governed) is the doctrine of local self-government.[42] This doctrine was clearly enunciated by Judge Cooley of the Michigan Supreme Court.[43] The courts of Michigan, Kentucky,[44] Indiana,[45] Iowa,[46] and Texas[47] have approved the doctrine. The majority of the states have held contrary to that view.[48] Adhering to the inherent right of local self-government would indicate that consent of the governed is a prerequisite to a valid law.

However, granting that consent of the governed is essential and a prerequisite to a valid law in the United States, an extraterritorial zoning statute could still be upheld. The governed have given their consent through their representatives in the legislature. If the people affected oppose the law, they have their remedy, not at the municipal polls, but in the elections which select the state legislature. The wisdom of the legislature in passing a law does not affect the constitutionality of the law; action at the polls is the remedy provided by our form of government.[49]

CONCLUSION

In conclusion and summary, it may be said that, though extraterritorial municipal zoning may be a drastic step, there are circumstances where it may be the only practicable satisfactory solution. There are, of course, some cases where it is not necessary, and where it would be impolitic to suggest such a measure. Where zoning can be accomplished by the county, and where close cooperation between county and city governments is possible, the necessary results can be achieved under present patterns.[50]

41. Robb. v. Indianapolis, 38 Ind. 49 (1871).
42. McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COL. L. REV. 190, 299 (1916).
43. People *ex rel.* LeRoy v. Hurlburt, 24 Mich. 44 (1871).
44. City of Lexington v. Thompson, 113 Ky. 540, 68 S.W. 477 (1902).
45. State *ex rel.* Jameson v. Denny, 118 Ind. 382, 21 N.E. 252 (1889).
46. State *ex rel.* White v. Barker, 116 Iowa 96, 89 N.W. 204 (1902).
47. *Ex parte* Lewis, 45 Tex. Crim. R. 1, 73 S.W. 811 (1903).
48. McBain, *supra* note 42, at 216.
49. Anderson, *Extraterritorial Power of Cities*, 10 MINN. L. REV. 581 (1926).
50. For example, The City Planning Commission of the City of Atlanta has legislative authority to investigate and make suggestions and recommendations to the general council, commissioners of roads and revenues of Fulton County, and to the General Assembly of Georgia, with reference to an area covering six miles adjacent to the corporate boundaries. Georgia Laws of 1929, p. 825. The officers of the City of Atlanta and Fulton County maintain close co-operation, and the city performs the planning for that area. The city notifies the county as to zoning of the areas at the corporate boundary, and the county then zones the adjacent areas conformably.

Where no other satisfactory solution appears, it seems that extraterritorial municipal zoning may be validly accomplished. A zoning law is an exercise of the police power. The city receives its authority from the state, usually by an enabling stature. An exercise of the police power by a municipality, extraterritorially, under an ordinance passed pursuant to an enabling act, is not new, and has been generally upheld as valid. An argument against the validity of such an ordinance is that all government is by consent of the governed, and that the people in the affected area beyond the corporate limits are not qualified voters of the city and therefore have not given their consent to the zoning ordinances. An answer to this argument is that the qualified voters in the area have consented to the law through their representatives in the state legislature, and they have their remedy at the polls.

A municipal zoning ordinance with an extraterritorial effect is subject to certain limitations and restrictions. The city officials must not abuse their discretion and they must act in a reasonable manner. The entire pattern of the law must be reasonable, not arbitrary or discriminatory, and the law and its administration must be aimed at a proper public purpose.