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ZONING - MUNICIPAL CORPORATIONS - DUE PROCESS - RESTRICTIONS ON POWER TO CHANGE ZONING PLAN PREVIOUSLY ADOPTED

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ZONING — MUNICIPAL CORPORATIONS — DUE PROCESS — RESTRICTIONS ON POWER TO CHANGE ZONING PLAN PREVIOUSLY ADOPTED — The plaintiff owned several lots in a subdivision which the defendant city changed from a class "B" residence district to a class "C" residence district. In an action for a declaratory judgment the plaintiff asked the court to pronounce the amendment making the change void. The declaration contained the following allegations: that there was already sufficient undeveloped class "C" property to satisfy present and future building needs; that the change was made at the instance of private persons, for their benefit, and not in the public interest; that the new classification would decrease the value and enjoyment of the plaintiff's property. *Held*, on demurrer, the amendment is of no force and effect. Judgment for plaintiff. *Clifton Hills Realty Co. v. Cincinnati*, 60 Ohio App. 443, 21 N. E. (2d) 993 (1938).

Changes in a zoning plan previously adopted may be made by amending [1] the

[1] Jardine v. City of Pasadena, 199 Cal. 64, 248 P. 225 (1926); Marblehead Land Co. v. Los Angeles, (C. C. A. 9th, 1931) 47 F. (2d) 528; Michigan-Lake Bldg. Corp. v. Hamilton, 340 Ill. 284, 172 N. E. 710 (1930).

zoning ordinance, or by granting variances in its application.[2] Because changes in the plan, like the enactment of the original ordinance, are an exercise of police power,[3] a court will not ordinarily substitute its judgment for the decision of a municipal council or board of zoning appeals.[4] Nevertheless, a variance may not be granted if the contemplated use of the property is out of harmony with the general plan designed to secure and promote the public interest,[5] or if it would do substantial injustice to other owners in the district.[6] When there is no board of zoning appeals, and amendment is used to remedy uncontemplated hardship and inconvenience resulting from the application of the general ordinance,[7] the power to give relief is subject to similar limitations.[8] Amendments imposing greater restrictions upon a single property, or a small number of properties, are suspiciously viewed by the courts,[9] and must be clearly justified as having a substantial relation to the public interest.[10] If the restricting amendment

[2] People ex rel. Sheldon v. Board of Appeals, 234 N. Y. 484, 138 N. E. 416 (1923); METZENBAUM, LAW OF ZONING 248 et seq. (1930).

[3] Dobbins v. Los Angeles, 195 U. S. 223, 25 S. Ct. 18 (1904); Jardine v. City of Pasadena, 199 Cal. 64, 248 P. 225 (1926); De Palma v. Town Plan Commission, 123 Conn. 257, 193 A. 868 (1937). To the effect that zoning ordinances are not contracts between property owners and the zoning authorities, see Reichelderfer v. Quinn, 287 U. S. 315, 53 S. Ct. 177 (1932).

[4] Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925). BASSETT, ZONING, 122 (1936). If the zoning statute specifies grounds upon which variances may be granted, the board may not change boundaries of the zoning ordinance except upon such grounds: Bradley v. Board of Zoning Adjustment, 255 Mass. 160, 150 N. E. 892 (1926); Michigan-Lake Bldg. Corp. v. Hamilton, 340 Ill. 284, 172 N. E. 710 (1930). On this point in relation to amendments, see Strain v. Mims, 123 Conn. 275, 193 A. 754 (1937). Statutory requirements as to notice and hearing must be observed. BASSETT, ZONING 36 (1936).

[5] Evanston Best & Co. v. Goodman, 369 Ill. 207, 16 N. E. (2d) 131 (1938).

[6] For a further discussion of the power of a board of zoning appeals to grant variances, see 31 MICH. L. REV. 106 (1932); 38 MICH. L. REV. 434 (1939). See also: Young Women's Hebrew Assn. v. Board of Standards and Appeals, 266 N. Y. 270, 194 N. E. 751 (1935).

[7] BASSETT, ZONING, 122 (1936); Jardine v. City of Pasadena, 199 Cal. 64, 248 P. 225 (1926); De Palma v. Town Plan Commission, 123 Conn. 257, 193 A. 868 (1937); Reichelderfer v. Quinn, 287 U. S. 315, 53 S. Ct. 177 (1932).

[8] In Michigan-Lake Bldg. Corp. v. Hamilton, 340 Ill. 284, 172 N. E. 710 (1930), an amendment permitting four proprietors to erect 440 foot buildings, while other owners in the district were limited by the original ordinance to 264-foot buildings, was held invalid on the ground that it had no substantial relation to the public interest and depreciated the values of the surrounding properties. For a similar result see: Kennedy v. Evanston, 348 Ill. 426, 181 N. E. 312 (1932). To the effect that an amendment improperly "varying" the application of a general zoning ordinance may be remedied by repeal, see Marblehead Land Co. v. Los Angeles, (C. C. A. 9th, 1931) 47 F. (2d) 528.

[9] Phipps v. City of Chicago, 339 Ill. 315, 171 N. E. 289 (1930); St. Patrick's Church Corp. v. Daniels, 113 Conn. 132, 154 A. 343 (1931). Zoning ordinances should apply equally to all properties of the same class: Michigan-Lake Bldg. Corp. v. Hamilton, 340 Ill. 284, 172 N. E. 710 (1930).

[10] The amending power cannot be used to give a public utility a monopoly by

embraces an entire district, or a substantial portion thereof, it is less likely to be impeached by the courts.[11] But an apparent breadth of scope will not save an amendment if its concealed objective is to prohibit an intended use of specific property, lawful under the original ordinance, and not inconsistent with the public interest.[12] The scope of police power is not merely negative, and therefore zoning ordinances, or amendments to such ordinances, which constructively and affirmatively undertake to promote public interests are valid.[13] But amendments whose only objectives were to increase property values in the district have been held invalid.[14] Theoretically improvements made in reliance upon an existing classification, like any originally existing noncomforming uses, are subject to ouster under the police power,[15] but there is no reason to suppose that a retroactive amendment will be sustained any more than a retroactive original ordinance.[16] The mere purchase of property under classification seems to increase

zoning a competitor's property into residential district. Dobbins v. Los Angeles, 195 U. S. 223, 25 S. Ct. 18 (1904). In Marblehead Land Co. v. Los Angeles, (C. C. A. 9th, 1931) 47 F. (2d) 528, an amendment repealing a previous amendment which gave an owner a right to drill for oil was upheld. See also: People v. Hawley, 207 Cal. 395, 279 P. 136 (1929); Rosenberg v. Village of Whitefish Bay, 199 Wis. 214, 225 N. W. 838 (1929); Strain v. Mims, 123 Conn. 275, 193 A. 754 (1937).

[11] Compare BASSETT, ZONING 50 (1936). Courts will not pronounce a zoning ordinance invalid merely because they think a better arrangement or classification could have been made. See, for example, Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925). It is not sufficient that the majority of the people in the district want the classification of the district changed, but the change must be in the public interest. Kennedy v. Evanston, 348 Ill. 426, 181 N. E. 312 (1932).

[12] Western Theological Seminary v. Evanston, 325 Ill. 511, 156 N. E. 778 (1927); Phipps v. City of Chicago, 339 Ill. 315, 171 N. E. 289 (1930); People ex rel. Ortenberg v. Bales, 224 App. Div. 87, 229 N. Y. S. 550 (1928); Sandenburgh v. Michigamme Oil Co., 249 Mich. 372, 228 N. W. 707 (1930); Rosenberg v. Village of Whitefish Bay, 199 Wis. 214, 225 N. W. 838 (1929).

[13] Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925).

[14] The case of Brown v. Board of Appeals, 327 Ill. 644, 159 N. E. 225 (1927), involved a minimum building bulk and height restriction. If such restrictions are reasonable it would seem that they ought to be sustained. Despite the camouflage of "public health, safety, morals, comfort, and general welfare," a very real purpose of zoning ordinances is to increase property values in the community. See annotation in 56 A. L. R. 242 at 247 (1928). Compare Kennedy v. Evanston, 348 Ill. 426, 181 N. E. 312 (1932) and Strain v. Mims, 123 Conn. 275, 193 A. 754 (1937). Courts refuse to sustain zoning restrictions based purely on esthetic considerations. BASSETT, ZONING 97 (1936).

[15] BASSETT, ZONING 112 (1936). See also decision note in 36 MICH. L. REV. 487 (1938).

[16] BASSETT, ZONING, 112 et seq. (1936); METZENBAUM, LAW OF ZONING 287, 288 (1930); Adams v. Kalamazoo Ice & Fuel Co., 245 Mich. 261, 222 N. W. 86 (1928) (dictum that zoning ordinance can not be retroactive); London v. Robinson, 94 Cal. App. 774, 271 P. 921 (1928) (amendment to zoning ordinance construed as not being retroactive). In Sandenburgh v. Michigamme Oil Co., 249 Mich. 372, 228 N. W. 707 (1930), a retroactive amendment was held invalid. See People ex rel. Ortenberg v. Bales, 224 App. Div. 87, 229 N. Y. S. 550 (1928). Compare Marblehead Land Co. v. Los Angeles, (C. C. A. 9th, 1931) 47 F. (2d) 528. When making

the requirement of the substantiality of the relationship between the proposed change and the public interest.[17] In view of these principles the instant case was correctly decided. The value of plaintiff's property, and his enjoyment of it, should not be decreased without a sufficient reason.[18] If there was no substantial public interest involved, it was not enough that the adjoining owners wanted the classification of the district changed.[19] The availability of sufficient other class "C" property for present and future building needs, and the absence of special circumstances, indicate that the change in the instant case was not to public advantage.

Edmund R. Blaske

changes, zoning authorities should give due consideration to the trends in property development, to the present state of development, and to the protection of the investment in present improvements. Cooper Lumber Co. v. Dammers, 2 N. J. Misc. 289, 125 A. 325 (1924), noted in 11 VA. L. REV. 142 (1924); Michigan-Lake Bldg. Corp. v. Hamilton, 340 Ill. 284, 172 N. E. 710 (1930); METZENBAUM, LAW OF ZONING 287, 288 (1930).

[17] Although the courts do not say it in so many words, such an attitude is apparent from the decisions. See for example: Phipps v. City of Chicago, 339 Ill. 315, 171 N. E. 289 (1930); Kennedy v. Evanston, 348 Ill. 426, 181 N. E. 312 (1932).

[18] Michigan-Lake Bldg. Corp. v. Hamilton, 340 Ill. 284, 172 N. E. 710 (1930); Kennedy v. Evanston, 348 Ill. 426, 181 N. E. 312 (1932).

[19] Phipps v. City of Chicago, 339 Ill. 315, 171 N. E. 289 (1930); Dobbins v. Los Angeles, 195 U. S. 223, 25 S. Ct. 18 (1904); Kennedy v. Evanston, 348 Ill. 426, 181 N. E. 312 (1932).