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ZONING - POLICE POWER - WILL CHANGE IN CONDITIONS MAKE ZONING RESTRICTIONS INVALID?

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ZONING — POLICE POWER — WILL CHANGE IN CONDITIONS MAKE ZONING RESTRICTIONS INVALID? — Desiring to operate a restaurant on his land, plaintiff petitioned the city trustees of Sunnyvale to rezone his property by taking it out of the residential district and adding it to the adjacent industrial district. After denial of his petitions, plaintiff brought this suit in which he sought a judgment declaring the zoning ordinance void as to his property. Reversing the lower court's judgment in favor of the city, the supreme court *held*, that because conditions had changed since the enactment of the ordinance, it was void as to plaintiff's property. *Skalko v. City of Sunnyvale*, (Cal. 1939) 93 P. (2d) 93.

Apparently the principal case is the first in which a zoning ordinance was held void because of a subsequent change in conditions. Moreover, it is one of the very few cases [1] in which such an argument has been made against the con-

[1] Austin v. Older, 283 Mich. 667, 287 N. W. 727 (1938); Evanston Best & Co. v. Goodman, 369 Ill. 207, 16 N. E. (2d) 131 (1938); and Young Women's Hebrew Assn. v. Board of Standards and Appeals, 266 N. Y. 270, 194 N. E. 751 (1935), are such cases. Two reasons may be suggested for the infrequency of occasions upon which such an issue has been raised: (1) Zoning ordinances are of recent origin and changes in the character of a neighborhood are comparatively slow. (2) Most zoning ordinances set up a board of zoning appeals with power to grant a variance upon a proper showing and thus prevent many cases from going to court. See METZENBAUM, LAW OF ZONING 248 ff. (1930).

tinued validity of zoning restrictions. In *Austin v. Older*,[2] the Michigan court denied that a change in the gasoline business which required plaintiff to build and operate a "lubritorium" in connection with his filling station was such a change as to make the zoning ordinance void as to him. But in *Evanston Best & Co. v. Goodman*,[3] as in the principal case, the plaintiff argued that the physical change in the character of the neighborhood made the zoning ordinance void. Without questioning the soundness of such an argument, the court pointed out that the change in the character of the neighborhood was not of a sufficient degree, and denied relief on the further ground that the plaintiff failed to show that the restrictions on his property were unnecessary to the public health, safety, morals, and welfare.[4] This latter part of the court's opinion explains why relief was denied in the Michigan case, and makes both these earlier cases consistent with the principal case. In other words, the "change in conditions" must be in the physical character of the neighborhood, or it must so affect all the property in the neighborhood that the restriction will not only be unreasonable and arbitrary as regards the complainant's land, but also unnecessary to the fullest enjoyment of the surrounding property, consistent with its present uses.[5] The treatment of these cases is sound. The validity of zoning restrictions cannot be determined by abstract considerations of complainant's land.[6] As in nuisance cases, the nature of the locality must also be considered.[7] If under present conditions the public interest requires the imposition of such restrictions upon complainant's land, the zoning ordinance may be sustained as a reasonable and hence valid exercise of police power.[8] But if conditions have changed since the enactment of the zoning ordinance and the restrictions are now clearly[9] unrelated to the public

[2] 283 Mich. 667, 278 N. W. 727 (1938).

[3] 369 Ill. 207, 16 N. E. (2d) 131 (1938).

[4] Usually a further showing must be made: That the restriction is unnecessary to the preservation of the general zoning plan or scheme. Nectow v. Cambridge, 277 U. S. 183, 48 S. Ct. 447 (1928).

[5] In Young Women's Hebrew Assn. v. Board of Standards and Appeals, 266 N. Y. 270, 194 N. E. 751 (1935), the plaintiff urged that it was entitled to a variance because of the deterioration of the neighborhood. The court did not deny that a variance would permit plaintiff to realize a greater income from its property than was otherwise possible, but denied relief on the ground that it would depreciate the surrounding property. See 4 LEGAL NOTES ON LOCAL GOVERNMENT 209 at 211 (1939); Norcross v. Board of Appeals, 255 Mass. 177, 150 N. E. 887 (1927).

[6] Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114 (1926); Kennedy v. Evanston, 348 Ill. 426, 181 N. E. 312 (1932); Gunderson v. Anderson, 190 Minn. 245, 251 N. W. 515 (1933).

[7] Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114 (1926), citing Sturges v. Bridgeman, 11 Ch. Div. 852 (1879).

[8] Gunderson v. Anderson, 190 Minn. 245, 251 N. W. 515 (1933); State ex rel. Skillman v. Miami, 101 Fla. 585, 134 So. 541 (1931); Kennedy v. Evanston, 348 Ill. 426, 181 N. E. 312 (1932).

[9] In doubtful cases the courts properly refuse to substitute their judgment for legislative discretion. Gunderson v. Anderson, 190 Minn. 245, 251 N. W. 515 (1933); Norcross v. Board of Appeals, 255 Mass. 177, 150 N. E. 887 (1927); Rehfeld v. City and County of San Francisco, 218 Cal. 83, 21 P. (2d) 419 (1933). See also 31 MICH. L. REV. 106 (1932); 4 LEGAL NOTES ON LOCAL GOVERNMENT 209 (1939).

interest and non-essential to the zoning scheme, the court ought not hesitate to grant relief.[10] It would seem better practice if the judgment were that complainant is entitled to a variance, rather than a pronouncement that the ordinance is void. If the judgment takes the latter form, it is apt to leave the other owners in doubt as to the constitutionality of the entire zoning plan [11] and encourage direct appeal to courts, instead of requiring aggrieved parties to exhaust the remedies of specially qualified administrative tribunals.[12] If, however, the judgment takes the alternative form, it would not only discourage collateral attacks upon rulings of boards of zoning appeals, but it would avoid the evils of "spot zoning" [13] and enable the board of appeals to grant the departure upon such conditions as would make the variance most harmonious with the surrounding uses.[14]

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[10] There is no want of authority for the proposition that a police regulation, valid at the time of enactment, may become invalid by reason of a subsequent change in conditions or events. Abie State Bank v. Bryan, 282 U. S. 765, 51 S. Ct. 252 (1931) (bank guaranty statute); First Trust Co. v. Smith, 134 Neb. 84, 277 N. W. 762 (1938) (mortgage moratorium statute); Newton v. Consolidated Gas Co., 258 U. S. 165, 42 S. Ct. 264 (1921) (statutory public utility rate).

[11] While the scope of an adjudication that the legislative rule cannot be constitutionally applied is limited to the case before the court [see ROTTSCHAEFER, CONSTITUTIONAL LAW 32 (1939)], the popular interpretation, and often the practical effect, of such a decision is not so restricted.

[12] The principal case may not be objectionable on this point, for although it seems that the board of trustees constituted an executive committee and was empowered to function similarily to a board of zoning appeals, it may have actually been only a legislative body.

[13] That is, amendment of the general zoning ordinance in order to take care of individual cases of hardship. BASSETT, ZONING 122 (1936).

[14] 4 LEGAL NOTES ON LOCAL GOVERNMENT 209 at 210 (1939)