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CONSTITUTIONAL LAW - ZONING - AMENDMENT OF ZONING ORDINANCE AS IMPAIRING VESTED RIGHTS

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CONSTITUTIONAL LAW — ZONING — AMENDMENT OF ZONING ORDINANCE AS IMPAIRING VESTED RIGHTS — The town plan commission amended the municipal zoning ordinance to permit the erection of an incinerator in a class *C* residence district. The particular tract upon which the incinerator was to be located had been a municipal garbage dump, and as such, a non-conforming use under the zoning ordinance. The board of health by ordinance declared the garbage dump to be a nuisance. The facts revealed there was an immediate need to dispose of the garbage, etc.; that the erection of an incinerator was the best means of so doing; that the proposed site was a suitable location; that the commission acted fairly following a careful investigation of the problem; that the particular site would have been undesirable for residential purposes because of the previous user; and that the proposed structure and cleaning up of the dump would enhance property values in the district. The plaintiffs, residents of the district, contended that they obtained a vested interest in the zoning

ordinance as determined by the standard of a class *C* residence zone apart from actual conditions, and that the change in the ordinance constituted a taking of their property without due process of law. *Held*, the action of the commission was a reasonable exercise of police power, even assuming the premise asserted by the plaintiffs. *De Palma v. Town Plan Commission of Greenwich*, (Conn. 1937) 193 A. 868.

The police power of the state is the source of its power to enact zoning regulations.[1] A variance in a zoning ordinance may be granted to a property owner when the circumstances are such that a change thereof is consistent with the general objectives of the ordinance.[2] It is a different situation when, as in the instant case, the law-making body itself deems an amendment necessary. In the one case a property owner is attempting to assert his rights against the state; in the other, the state believes its own regulation too stringent and that a modification thereof would better suit its needs. Whether or not a property owner obtains such a vested right in the ordinance by the inclusion of his property in a restricted use district that he may object to the variance in the latter situation appears to be a novel question so far as the authorities are concerned. The answer to the question depends upon the nature of the police power. The police power is exercised to promote the general welfare of the people at large, and not for the proprietary interests of any private group.[3] If the legislature deems it beneficial to bestow the gift of exclusiveness on a particular residential district, the grant should be considered as one to the community, not to the incidental beneficiaries thereof. It does not seem reasonable to argue that one who receives such a gratuity should be compensated upon a theory of a taking of his property when the exigencies of the situation require the removal of those advantages. To adopt the plaintiff's argument one would have to assume, contrary to a well-settled principle in the law,[4] that the state may divest itself of its police power. Although the court did not actually pass on the question whether the adjacent property owners did receive any additional rights by the enactment of the ordinance, it is submitted that had it done so the answer would have been in the negative. The decision in the instant case, therefore, may be supported by either of two concurrent theories. If it is assumed that no new legal interests were created by the zoning ordinance, the plaintiff would not have had any just grounds for complaint since the substitution of the incinerator for the dump did not invade any legal right. On the other hand, if it is assumed, as did the court for the purposes of this case, that the ordinance did create new rights in the property, then whatever injury

[1] Village of Euclid, Ohio v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 54 A. L. R. 1016 at 1030 (1926). See generally on this subject, STASON, CASES ON MUNICIPAL CORPORATIONS 145 (1935); 3 MCQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., 313 (1928); METZENBAUM, ZONING (1930).

[2] Thayer v. Board of Appeals of City of Hartford, 114 Conn. 15, 157 A. 273 (1931), discussed in 31 MICH. L. REV. 106 at 107 (1932); Freund, "Power of Zoning Boards of Appeal to Grant Variations," 20 NAT. MUN. REV. 537 (1931).

[3] See 3 MCQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., 56 (1928), for nature and limitations of this power; BAKER, THE LEGAL ASPECTS OF ZONING (1927).

[4] 3 MCQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., 57 (1928).

might have resulted from the modification of the ordinance was within the proper exercise of the police power of the state in the regulation of private property for the purposes of public health.[5]

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[5] On the general question of due process as a limitation on the specific application of zoning ordinances, see Ribble, "The Due Process Clause as a Limitation on Municipal Discretion in Zoning Legislation," 16 VA. L. REV. 689 (1930); also 39 YALE L. J. 735 at 740 (1930), for a discussion of zoning power with regard to eminent domain and police power; O'Reilly, "The Non-Conforming Use and Due Process of Law," 23 GEORGETOWN L. J. 218 (1935); 11 WIS. L. REV. 543 (1936).