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CONSTITUTIONAL LAW - ZONING ORDINANCES PROHIBITING REPAIR OF EXISTING STRUCTURES

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CONSTITUTIONAL LAW — ZONING ORDINANCES PROHIBITING REPAIR OF EXISTING STRUCTURES — The rapid development and expansion of the zoning movement during the last ten years has been directed mainly toward guiding new construction in accordance with modern ideals of city planning. There has been, however, a concomitant attempt to restrict the use and repair of existing structures which, if built after its passage, would not conform to the provisions of the zoning ordinance. This at first glance may seem only an insignificant part of the whole zoning problem. But when it is considered, from the point of view of city planners, that it is nearly impossible to make a high grade residence district out of one which contains an existing commercial use, and from the attitude of the owners of existing structures which do not conform to the plan, that curtailment of existing uses may mean the confiscation of large amounts of capital invested in good faith in legitimate enterprises, the attempt assumes importance which amply justifies an examination of its form and its treatment by the courts which have considered it.

The zoning ordinance is a direct descendant of the "fire limit" ordinance of the nineteenth century which restricted populous districts in our larger municipalities to fireproof buildings. The fire limit ordinance commonly prohibited the repair of non-fireproof buildings erected prior to its passage after they had been more or less totally destroyed by fire or other calamity. In order fully to understand the few decisions which have been rendered on zoning ordinances containing similar provisions and to forecast the trend of decisions to come, it is advisable to examine the American judicial attitude toward both fire limit and zoning ordinances in general. The reader will appreciate, of course, that the objections to the validity of both types of ordinance are on the grounds of violation of "due process" and "equal protection" clauses of federal and state constitutions and of the generally recognized rule of law that municipal ordinances must be reasonable.

I.

The Supreme Court of the United States has held, in the leading case of *Village of Euclid v. Ambler Realty Co.*,[1] that state statutes and municipal ordinances providing for the division of cities into business and residence districts do not contravene the Constitution of the United States unless clearly arbitrary and unreasonable and without substantial relation to public health, safety, morals or general welfare. Some states have held that municipalities may pass zoning ordinances under their general police power, while others have decided that spe-

[1] 272 U. S. 365, 47 S. Ct. 114 (1926).

cial statutory or constitutional authorization is necessary.[2] No American court now holds an ordinance void merely because it is a zoning ordinance.

Zoning ordinances must be reasonable, however, and one which restricts to residence use property obviously unsuited therefor violates both the due process clause of the Fourteenth Amendment and similar state constitutional provisions. A zoning ordinance placing a wide, noisy, congested thoroughfare partly in a residence district is void. In *Nectow v. City of Cambridge*,[3] where a zoning ordinance restricted the plaintiff's property to residence uses and the property was on a wide street with a very few old mansions, a soap factory, an automobile factory, and a railroad in the vicinity and widening of the street had made the lot too shallow for residence use, it was held that, as applied to the plaintiff, the ordinance deprived him of his property without due process of law. Likewise, in *City of Pleasant Ridge v. Cooper*,[4] it was decided that restriction of a corner on a wide, congested thoroughfare to residence use was unreasonable when the other three corners were being used for business and there was a municipal zoo a block away. Moreover, so zoning property that it cannot be put to any use is held unreasonable by all courts, whether the impossibility of use arises from the nature of the soil or locality or from drawing zone boundaries through the middle of lots.[5]

2.

By the overwhelming weight of authority, a provision in a zoning ordinance exempting existing non-conforming structures and uses from

[2] For an example of legislation granting zoning power, see Mich. Pub. Acts (1921), No. 207, Comp. Laws §§ 2633-2641, as amended by Pub. Acts (1931), No. 285, (Mason Supp. 1935), §§ 2655-1 to 2655-16. As to its validity and effectiveness without amendment of municipal charters, see Dawley v. Ingham Circuit Judge, 242 Mich. 247, 218 N. W. 766 (1928).

[3] 277 U. S. 183, 48 S. Ct. 447 (1927).

[4] 267 Mich. 603, 255 N. W. 371 (1934). The property involved was the southwest corner of Woodward and Ten Mile Road. See also, Forbes v. Hubbard, 348 Ill. 166, 180 N. E. 767 (1932); Taylor v. Haverford, 299 Pa. 402, 149 A. 639 (1930); Isenbarth v. Bartnett, 237 N. Y. 617, 143 N. E. 765 (1924); Dowsey v. Village of Kensington, 257 N. Y. 221, 177 N. E. 427 (1931); Plymouth Co. v. Bigelow, (N. J. S. Ct. 1924) 129 A. 203. See, however, Zahn v. Board of Public Works of City of Los Angeles, 195 Cal. 497, 234 P. 388 (1925), affirmed 274 U. S. 325, 47 S. Ct. 594 (1927), which indicates a broader zoning power than the Noctaw case, 277 U. S. 183, 48 S. Ct. 447 (1927).

[5] See, for example, City of North Muskegon v. Miller, 249 Mich. 52, 227 N. W. 743 (1929), where restriction of a swamp lot, suitable only for an oil well and surrounded by the city dump and old docks, to residence uses was held unreasonable.

its prohibitions does not invalidate it by denying the equal protection of the laws.[6]

It has been held in Louisiana that a zoning ordinance may require the removal of existing structures and the cessation of existing uses without compensation even though they do not constitute nuisances in any common-law sense of that term.[7] In *State ex rel. Dema Realty Co. v. McDonald*[8] the application of such an ordinance, requiring existing business uses to be discontinued within a year, to a grocery store situated, with an adjoining drug store, in a newly created residence district, was considered and the ordinance held valid as so applied. The Louisiana decisions in this field, however, sound more like Cossack interpretations of Muscovite ukases than utterances of a court operating under the benignant provisions of *Magna Carta*.[9] Every other court which has decided the point, whether under the old fire limit ordinances, which involved more nearly a genuine public safety element than modern zoning ordinances, or under zoning ordinances, has held that a city may not by ordinance compel the demolition or abandonment of an existing structure or the cessation of its existing use unless the structure or its use amounts to a nuisance or the power of eminent domain is properly exercised and just compensation paid.[10]

[6] City of Aurora v. Burns, 319 Ill. 84, 149 N. E. 784 (1926); Spencer-Sturla Co. v. City of Memphis, 155 Tenn. 70, 290 S. W. 608 (1927); City of Norton v. Hutson, 142 Kan. 305, 46 P. (2d) 630 (1935). However, Weadock v. Judge of the Recorder's Court of Detroit, 156 Mich. 376, 120 N. W. 991 (1909), decided before the era of zoning ordinances, indicates a contrary view.

[7] City of New Orleans v. Murat, 119 La. 1093; 44 So. 898 (1907); State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929), certiorari denied, 280 U. S. 556, 50 S. Ct. 16 (1929); State ex rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929).

[8] 168 La. 172, 121 So. 613 (1929), certiorari denied, 280 U. S. 556, 50 S. Ct. 16 (1929).

[9] For example, in Van Horn v. City of New Orleans, 161 La. 767, 109 So. 484 (1926), it was decided that commercial buildings which happened to be vacant on the day of passage of a zoning ordinance permitting continuance of existing uses could thereafter be used only for residence purposes.

[10] Cases under fire limit ordinances: Incorporated Town of Paris v. Hall, 131 Ark. 104, 198 S. W. 705 (1917); Inhabitants of Town of Skowhegan v. Heselton, 117 Me. 17, 102 A. 772 (1917); Bettey v. City of Sidney, 79 Mont. 314, 257 P. 1007 (1927); City of Mayville v. Rosing, 19 N. D. 98, 123 N. W. 393, 26 L. R. A. (N. S.) 120 (1909); Hill Military Academy v. City of Portland, 152 Ore. 272, 53 P. (2d) 55 (1936); Crossman v. City of Galveston, 112 Tex. 303, 247 S. W. 810, 26 A. L. R. 1210 (1923); Harvey v. City of Elkins, 65 W. Va. 305, 64 S. E. 247 (1909). Cases under zoning ordinances: Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1931); Provident Institution for Savings v. Castles, 11 N. J. Misc. 773, 168 A. 169 (1933); State ex rel. v. MacDuff, 161 Wash. 600, 297 P. 733 (1931).

While the cases thus seem in substantial agreement that existing uses of property not amounting to nuisances may not be entirely prohibited, a certain amount of regulation is permissible. There is no doubt, for example, that the installation of fire escapes may be compelled where it is reasonably necessary. Under the fire limit ordinances it was generally held that the right to make minor repairs was an incident of the right to continue an existing use and could not be infringed.[11] Adding to existing structures could be prohibited by fire ordinance[12] and this rule seems uniformly to have been applied to zoning ordinances.[13] Provisions in a zoning ordinance permitting continuance of an existing non-conforming use have been construed not to permit change to another non-conforming use.[14] Abandonment of a non-conforming use has been held to abrogate the right to return to it,[15] and some cases hold even minor changes in method of operation violations of zoning ordinances.[16]

3.

The "fire limit" cases approach our problem more closely. Every case but one which the writer could find on the point holds that a

[11] See cases cited in preceding note, especially Bettey v. City of Sydney, collecting cases. But in State v. Lawing, 164 N. C. 492, 80 S. E. 69, 51 L. R. A. (N. S.) 62 (1913), a conviction of placing a metal roof on a wooden building within fire limits prescribed by an ordinance prohibiting repair was affirmed.

[12] City of Earle v. Shackleford, 177 Ark. 291, 6 S. W. (2d) 294 (1928); Brigham v. City of Dublin, 152 Ga. 167, 108 S. E. 532 (1921); Commercial Club of St. James v. Chicago, St. P. M. & O. R. R., 142 Minn. 169, 171 N. W. 312 (1919); State ex rel. v. Cunningham, 97 Ohio St. 130, 119 N. E. 361 (1918).

[13] Rehfeld v. City & County of San Francisco, 218 Cal. 83, 21 P. (2d) 419 (1933); Piccolo v. Town of West Haven, 120 Conn. 449, 181 A. 615 (1935); State ex rel. v. City of New Orleans, 171 La. 1053, 132 So. 786 (1931); Conaway v. Atlantic City, 107 N. J. L. 404, 154 A. 6 (1931); De Vito v. Pearsall, 115 N. J. L. 323, 180 A. 202 (1935); State v. Rosenstein, 148 Minn. 127, 181 N. W. 107 (1921); Weisberg v. Boatmen's Bank, (Mo. App. 1923) 245 S. W. 1053, 251 S. W. 393; People ex rel. v. Walsh, 121 Misc. 494, 201 N. Y. S. 226 (1923); State of Ohio ex rel. v. Stegner, 120 Ohio St. 418, 166 N. E. 226, 64 A. L. R. 916 (1929); White v. Perkins, (Tex. Civ. App. 1933) 65 S. W. (2d) 423; State ex rel. v. Harper, 182 Wis. 148, 196 N. W. 451 (1923); cases collected in annotation, 64 A. L. R. 920 (1929). But see A. L. Carrithers & Son v. City of Louisville, 250 Ky. 462, 63 S. W. (2d) 492 (1933), and Cochran v. Roemer, 287 Mass. 500, 192 N. E. 58 (1934), the latter decided under the unusual Massachusetts zoning statute which permits limited expansion of existing uses.

[14] Wilson v. Edgar, 64 Cal. App. 654, 222 P. 623 (1923); Collins v. Moore, 125 Misc. 777, 211 N. Y. S. 437 (1925).

[15] Town of Darien v. Webb, 115 Conn. 581, 162 A. 690 (1932).

[16] Appeal of Consolidated Cleaning Shops, 103 Pa. Super. 66, 157 A. 811 (1932), where a cleaning shop was not permitted to shift from using gas as a fuel to using coal.

provision in a fire limit ordinance that an existing wooden structure shall not be rebuilt if largely destroyed by fire is valid.[17] The cases referred to involved ordinances setting a definite percentage of destruction, varying from 25 per cent to 50 per cent but usually 50 per cent, after which repair was prohibited, and the courts intimated that ordinary minor repairs could not be prohibited. One court indicated that the percentage of destruction should be arrived at by cumulating all loss from disasters occurring after the passage of the ordinance.[18] The Supreme Court of Michigan has gone farther than any other in sustaining the validity of such an ordinance, having held valid one forbidding the repair of any wooden building within fire limits "partially destroyed by fire" in *Brady v. Northwestern Insurance Company*.[19] The sole decision holding unreasonable an ordinance prohibiting repair of buildings within fire limits after a moiety has been destroyed by calamity is in a Maine case, *Inhabitants of Town of Skowhegan v. Heselton*.[20]

In view of the fact that fire limit ordinances appear to have a more direct bearing on public safety than ordinary zoning ordinances, it would seem that the courts would not go as far in sustaining provisions prohibiting repair in the latter as in the former. However, such does not seem to be the case. *Provident Institution for Savings v. Castles*[21] holds that a zoning ordinance may not prevent repair of old stores, but this seems to have been a case of ordinary repairs and, moreover, the courts of New Jersey are unique in their bias against zoning ordinances, being inclined to find them invalid on any possible pretext.

In *Haase v. City of Memphis*[22] the court upheld a statute authorizing zoning ordinances to create residence districts in which preexisting business buildings might not be re-erected or repaired to the extent of more than 75 per cent of their value. In *State v. Hillman*[23] the Connecticut court considered a zoning ordinance which provided that "No building or premises shall be erected, altered, or used . . .

[17] Citizens Ins. Co. v. Barnes, 98 Fla. 933, 124 So. 722 (1929); Poledor v. Mayerfield, (Ind. App. 1930) 173 N. E. 292, 176 N. E. 32; Zalk & Josephs Realty Co. v. Stuyvesant Ins. Co., 191 Minn. 60, 253 N. W. 8 (1934); State v. Shannonhouse, 166 N. C. 241, 80 S. E. 881 (1914); Russell v. City of Fargo, 28 N. D. 300, 148 N. W. 610 (1914); Bennett v. City of Seminole, 132 Okla, 80, 269 P. 273 (1928); De Von v. Town of Oroville, 120 Wash. 317, 207 P. 231 (1922); Behrend v. Town of Pe Ell, 136 Wash. 364, 240 P. 12 (1925).

[18] Zalk & Josephs Realty Co. v. Stuyvesant Ins. Co., 191 Minn. 60, 253 N. W. 8 (1934).

[19] 11 Mich. 425 (1863).

[20] 117 Me. 17, 102 A. 772 (1917).

[21] 11 N. J. Misc. 773, 168 A. 169 (1933).

[22] 149 Tenn. 235, 259 S. W. 545 (1924).

[23] 110 Conn. 92 at 95-96, 147 A. 294 (1929).

except in conformity with the regulations herein prescribed," exempted existing uses from its prohibitions, and continued:

> "Nothing in these regulations shall prevent the restoration of a building destroyed by fire, explosion, act of God, or act of the public enemy, to the extent of not more than fifty per cent (50%) of its assessed value. . . ."

The defendant in the case was convicted of rebuilding a barrel factory in a residence district after it had been more than half destroyed by fire and the conviction was affirmed.

One case has been decided the other way. In *State ex rel. v. MacDuff*[24] the plaintiff's lumber store, located in a recently established district from which such a business appeared to be excluded, was totally destroyed by fire and he petitioned for a writ of mandamus to compel the issuance of a permit to rebuild. The Supreme Court of Washington held void for retroactivity a provision of the zoning ordinance prohibiting reconstruction of existing non-conforming structures destroyed by fire and issued the writ, relying for authority on the Michigan decision in *Adams v. Kalamazoo Ice & Fuel Co.*,[25] a case with scarcely any bearing on the point. The *MacDuff* case is not entitled to as much weight as it might otherwise be because, after the burning of the lumber store, the city council, in order to clear up an ambiguity in the zoning ordinance, added an amendment making it plain that lumber stores were excluded from the district.

It probably would have horrified the jurists of a generation ago to contemplate a piece of legislation preventing the continuance of a useful and legitimate business merely because calamitous partial destruction of its building necessitated repair. Nevertheless, in view of the current favorable attitude of all the American courts except those of New Jersey toward zoning ordinances and the earlier fire limit ordinances it may be predicted rather confidently that the law will become clear in this country that provisions in zoning ordinances prohibiting reconstruction of existing nonconforming structures after their more or less complete destruction by calamity are valid. On the other hand, it would seem that except in Louisana such ordinances will not be upheld in so far as they attempt to prevent ordinary routine repair and maintenance.

[24] 161 Wash. 600, 297 P. 733 (1931).

[25] 245 Mich. 261, 222 N. W. 86 (1928). This case held that one who had erected an icehouse in a residential district a few days before and in anticipation of the passage of a zoning ordinance, but had not used it until months after the passage, could not be compelled to remove it.

The wisdom of this turn of the judicial mind is gravely doubtful. Granting that the ideal of city planning is excellent and has much justification in its tendency to promote public health and aesthetic enjoyment, it must be recognized that one of the most important, if not *the* most important, object of the zoner is the protection of property values. Should Smith be forced, without compensation, to lose his business, properly located at the time of its inception, merely to enhance the value of Jones' residence lot nearby? Would it not be far fairer to take his property by eminent domain, perhaps spreading the cost by special assessment over the benefited owners of property who seek the regulation? [26]

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[26] In construing ordinances prohibiting "structural alterations," most courts have been rather liberal in allowing minor changes. See, for example, Irby v. Panama Ice Co., 184 La. 1082, 168 So. 306 (1936); Perrine Terrace Land Co. v. Brennan, 101 N. J. L. 487, 128 A. 786 (1925); City of Mayville v. Rosing, 19 N. D. 98, 123 N. W. 393, 26 L. R. A. (N. S.) 120 (1909); People ex rel. Wohl v. Leo, 109 Misc. 448, 178 N. Y. S. 851 (1919); Contas v. Bradford, 206 Pa. 291, 55 A. 989 (1903); Town of Seneca v. Cochran, 84 S. C. 279, 66 S. E. 288, 26 L. R. A. (N. S.) 124 (1909). Changes involving the addition of a story and the like are, however, prohibited. City of Earle v. Shackleford, 177 Ark. 291, 6 S. W. (2d) 294 (1928); Piccolo v. Town of West Haven, 120 Conn. 449, 181 A. 615 (1935); Commercial Club of St. James v. Chicago, St. P. M. & O. R. R., 142 Minn. 169, 171 N. W. 312 (1919); State ex rel v. Cunningham, 97 Ohio St. 130, 119 N. E. 361 (1918). Insolvency of a tenant resulting in temporary discontinuance of a nonconforming use is not an abandonment of it. State ex rel. v. Manders, 206 Wis. 121, 238 N. W. 835 (1931).

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