Michigan Law Review

Volume 34 | Issue 3

1936

MUNICIPAL CORPORATIONS-REGULATION OF GAS STATIONS-DELEGATION TO PROPERTY OWNERS OF POWER TO MODIFY ZONING RESTRICTIONS

MUNICIPAL CORPORATIONS—REGULATION OF GAS STATIONS—DELEGATION TO PROPERTY OWNERS OF POWER TO MODIFY ZONING RESTRICTIONS—A city ordinance prohibited the installation of gasoline filling stations within the city except after obtaining the written consent of 51 per cent of the property owners within a radius of six hundred feet from the site. Relator, without obtaining the required consent, asked for a writ of mandamus, which was refused. The court *held* the regulation not arbitrary but substantially relating to the public safety and welfare, and not a delegation of legislative powers. *State ex rel. Standard Oil Co. v. Combs*, 129 Ohio St. 251, 194 N. E. 875 (1935).

The instant case recognizes that gasoline filling stations are not nuisances *per se*,[1] but that since they have the potentiality of becoming such they are subject to reasonable regulation by the city,[2] and their erection in certain sections may be entirely forbidden.[3] But while the police power of the state may be delegated to

[1] *Accord*: Lombardo v. City of Dallas, (Tex. 1934) 73 S. W. (2d) 475; Slaughter v. Post, 214 Ky. 175, 282 S. W. 1091 (1926). See Powell v. Craig, 113 Ohio St. 245, 148 N. E. 607 (1925). Annotations are to be found in 96 A. L. R. 1337 (1935); 79 A. L. R. 918 (1932); 55 A. L. R. 256 (1928); 51 A. L. R. 1224 (1927); 35 A. L. R. 95 (1925).

[2] State Bank & Trust Co. v. Village of Wilmette, 358 Ill. 311, 193 N. E. 131 (1934); City of Muskogee v. Morton, 128 Okla. 17, 261 P. 183 (1927); Martin v. City of Danville, 148 Va. 247, 138 S. E. 629 (1927); Pritz v. Messer, 112 Ohio St. 628, 149 N. E. 30 (1925); City of Des Moines v. Manhattan Oil Co., 193 Iowa 1096, 184 N. W. 823 (1922). The same is true of funeral establishments: Brown v. City of Los Angeles, 183 Cal. 783, 192 P. 716 (1920); Beisel v. Crosby, 104 Neb. 643, 178 N. W. 272 (1920). See Ohio Hair Products Co. v. Rendigs, 98 Ohio St. 251, 120 N. E. 836 (1918).

In determining whether the city possesses the power to make the regulation involved, it is important to distinguish between municipal regulation of nuisances and city planning. The general welfare clause of city charters does not include authority to make comprehensive zoning schemes, but this may be expressly provided for. See Downey v. City of Sioux City, 208 Iowa 1273, 227 N. W. 125 (1929); People ex rel. v. Busse, 240 Ill. 338, 88 N. E. 831 (1909), where restrictions were void for want of express power. 19 MICH. L. REV. 191 (1920); 3 MCQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., § 1028 (1928).

[3] The ordinance in the principal case was also attacked because it applied to the entire city, including outlying, unzoned districts. The court expressed uncertainty as to its constitutionality as it affected such sections, but refused to entertain the objection since relator was not injuriously affected. See cases in n. 20, infra.

municipalities,[4] neither the state nor the municipality can entrust it to private persons.[5] On the question whether the power given property owners to lift the restriction constitutes an improper delegation counsel, as the court put it, "train their heavier guns." Prior to 1917 the decisions were conflicting,[6] but the Supreme Court cases of *Eubank v. City of Richmond*[7] and *Cusack Co. v. City of Chicago*[8] have not ended the confusion in the case law on this subject. The exception to the *Eubank* rule announced in the *Cusack* case, namely, that while the municipality cannot delegate power to individuals to make a regulation such as a building line, it is proper to allow an existing absolute restriction to be lifted by the consent of a proportion of the property owners directly concerned, has indeed been followed by many courts.[9] Perhaps this line of authority will increase. Delaware, Louisiana, and the instant Ohio case have followed it to the extent of

[4] 1 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 235 (1927).

[5] Owensboro & Nat. R. R. Co. v. Todd, 91 Ky. 175, 15 S. W. 56 (1891). 1 MCQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., §§ 393 ff. (1928).

[6] *Early cases holding lifting of restrictions void as delegation of legislative powers:* Ex Parte Sing Lee, 96 Cal. 354, 31 P. 245 (1892) (laundries); City of St. Louis v. Russell, 116 Mo. 248, 22 S. W. 470 (1893) (livery stables); City of St. Louis v. Howard, 119 Mo. 41, 24 S. W. 770 (1893) (slaughter houses); Hays v. City of Poplar Bluff, 263 Mo. 516, 173 S. W. 676 (1915) (frame buildings); Tilford v. Belknap, 126 Ky. 244, 103 S. W. 289 (1907) (frame buildings); State ex rel. Oklahoma Gas Co. v. Withnell, 78 Neb. 33, 110 N. W. 680 (1907) (gas tanks); Nehrbass v. Harper, 162 Wis. 589, 156 N. W. 941 (1916) (public garages); Dangel & Witsil v. Williams, 11 Del. Ch. 213 (1916) (public garages), reversed later, see n. 10, infra.

Permitting lifting of restrictions: City of Chicago v. Stratton, 162 Ill. 494, 44 N. E. 853 (1896) (livery stables), with which compare City of Chicago v. Gunning System, 214 Ill. 628, 73 N. E. 1035 (1905), holding billboard ordinance void for unreasonableness, not delegation of power, and compare also People ex rel. v. Busse, 240 Ill. 338, 88 N. E. 831 (1909) (junk stores); People ex rel. v. Ericsson, 263 Ill. 368, 105 N. E. 315 (1914) (public garages); People ex rel. v. Village of Oak Park, 266 Ill. 365, 107 N. E. 636 (1915) (public garages); United States v. Richards, 35 App. D. C. 540 (1910) (public garages). Cases analogous if not strictly in point are: State of Connecticut v. New Haven & Northhampton Co., 43 Conn. 351 (1876); Meyers v. Baker, 120 Ill. 567, 12 N. E. 79 (1887); State v. Barringer, 110 N. C. 525, 14 S. E. 781 (1892).

[7] 226 U. S. 137, 33 S. Ct. 76 (1912), reversing 110 Va. 749, 67 S. E. 376 (1910). The Court held that an ordinance requiring the committee on streets, upon the request of owners of two-thirds of the abutting property, to establish a building line took plaintiff's property without due process of law.

[8] 242 U. S. 526, 37 S. Ct. 190 (1917). An ordinance forbidding erection of billboards was held a justifiable exercise of the police power, and to permit the restriction to be lifted by the majority of the property owners in the block was not a delegation of legislative power. See Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 49 S. Ct. 50 (1928).

[9] Appeal of Perrin, 305 Pa. 42, 156 A. 305 (1931) (gas stations); Martin v. City of Danville, 148 Va. 247, 138 S. E. 629 (1927) (gas stations); City of Muskogee v. Morton, 128 Okla. 17, 261 P. 183 (1927) (gas stations); General Outdoor Adv. Co. v. Dept. of Public Works, (Mass. 1935) 193 N. E. 799 (advertising). Cf. Downey v. City of Sioux City, 208 Iowa 1273, 227 N. W. 125 (1929), dictum. Included in this group are the cases in the note following and in the latter part of note 6, supra.

reversing prior decisions.[10] Other courts have criticized the *Cusack* rule in no uncertain terms,[11] while still others have ingeniously sought to distinguish it or confine it to billboard ordinances and parallel situations.[12] It is true that in *Washington ex rel. Seattle Title Trust Co. v. Roberge*[13] the Supreme Court held that consent provisions could not be applied unless the legislative body of the city had the power to impose a prohibition, but no more restrictive application of consent provisions is necessarily called for by that decision. It can hardly be said to mark a departure from *Cusack v. Chicago*.[14] One class of cases upholds consent provisions where final discretion is left to the city officials.[15] Professor Ernst Freund has called the *Cusack* distinction one without a difference;[16] and it has been

[10] In Myers v. Fortunato, 12 Del. Ch. 374 (1920), the Delaware Supreme Court, upholding an ordinance prohibiting public garages in residential districts without consent of adjoining property owners, approved the Cusack case. In Dangel & Witsil v. Williams, 11 Del. Ch. 213 (1916), the Chancellor had disposed of identical arguments as "sophistical." Dickason v. Harris, 158 La. 974, 105 So. 33 (1925), overruled State v. Garibaldi, 44 La. Ann. 809, 11 So. 36 (1892). The principal case overruled the per curiam decision in City of Canton v. Mid-Continent Producers' & Refiners' Corp., 115 Ohio St. 705, 155 N. E. 865 (1926).

[11] McCown v. Gose, 244 Ky. 402, 51 S. W. (2d) 251 (1932) (gas stations); Wertheimer v. Schwab, 124 Misc. 822, 210 N. Y. S. 312 (1925) (theaters); Wasilewski v. Biedrzycki, 180 Wis. 633, 192 N. W. 989 (1923) (public garages); Levy v. Mravlag, 96 N. J. Law 367, 115 A. 350 (1921) (business buildings). See Smith v. Barrett, 81 Utah 522, 20 P. (2d) 864 (1933); Koos v. Saunders, 349 Ill. 442, 182 N. E. 415 (1932).

[12] Austin v. Thomas, 96 W. Va. 628, 123 S. E. 590 (1924), citing numerous cases to the effect that ordinances which forbid *business buildings* in residential districts without majority consent of property owners are an unreasonable exercise of the police power, to which Cusack v. Chicago was never meant to apply.

[13] 278 U. S. 116, 49 S. Ct. 50 (1928), which held the majority consent provision as applied to a prohibition of philanthropic homes for the aged to be a denial of due process. The Court seemed to think, however, that independent of the consent provision the prohibition would be an improper exercise of the police power. See 13 MINN. L. REV. 507 (1929).

[14] But McCown v. Gose, 244 Ky. 402, 51 S. W. (2d) 251 (1932), and other cases profess to find in the Roberge case a change from Cusack v. Chicago. It may well be that the courts, vaguely realizing that people incline to be more than usually arbitrary and capricious regarding certain establishments, as homes for the aged, hesitate to allow the majority consent ordinances which too frequently will result in absolute prohibition. See People ex rel. v. Village of Oak Park, 268 Ill. 256, 109 N. E. 11 (1915), refusing to apply the Illinois rule to every business obnoxious to a residence district, as a milk distributing depot.

[15] City of Stockton v. Frisbie & Latta, 93 Cal. App. 277, 270 P. 270 (1928); Building Inspector of Lowell v. Stoklosa, 250 Mass. 52, 145 N. E. 262 (1924); Spann v. City of Dallas, (Tex. Civ. App. 1916) 189 S. W. 999; 27 MICH. L. REV. 472 (1929). Cf. Carpenter v. City of Cincinnati, 92 Ohio St. 473, 111 N. E. 153 (1915). It is conceivable that some courts might not even allow this type of ordinance, for the objection that property owners may discriminate by refusing assent remains. Since final discretion rests with the council, however, it is at least not open to the objection that zoning policies may be weakened by thoughtless individuals.

[16] "Some Inadequately Discussed Problems of the Law of City Planning and Zoning," 24 ILL. L. REV. 135 at 143 (1929).

termed fallacious to say that if the property owners do not consent then this is an indirect exercise of the municipal prohibitory power, for such prohibition takes effect, not in obedience to the will of the responsible governing body, but through the inaction of individuals, perhaps influenced by malice, caprice, favoritism or ignorance.[17] Much is made of the point that ordinances must operate uniformly on all similarly situated.[18] On the other hand, the cases sustaining majority consent ordinances contend that there is no improper delegation of legislative powers, since the city council has itself prohibited the structures involved. It is sometimes said that the difference between the *Eubank* and *Cusack* cases is merely one of ordinance drafting,[19] but it is at least arguable that the distinction goes much deeper, and that when the city council passes the *Cusack* type of ordinance it is really formulating a policy and exercising its legislative power. Then it is urged that it is highly reasonable to permit the relaxation or waiver of the restriction where those directly concerned agree; that the plaintiff has not been harmed, but rather benefited by this provision, and persons not injured by the operation of a law are not deprived by it of either constitutional rights or property.[20] The conception that the greater power, to make an absolute restriction, includes the lesser, which does not necessarily follow in law, has also been thought to require this result.[21] The consent feature has been likened to a condition subsequent.[22] Manifestly the cases cannot be reconciled, but they may be said to represent the possibilities for good and evil inherent in the majority consent, as a method of overcoming volatile and unrepresentative opposition and as an instrument for freezing out legitimate minority interests.[23]

W. J. W.

[17] State ex rel. Omaha Gas Co. v. Withnell, 78 Neb. 33, 110 N. W. 680 (1907). A vigorous dissent in a Virginia case questions the reasonableness of ordinances which provide that it shall be unlawful for a citizen to erect a potential death-trap at a given point, without the consent of a majority of the property owners, but that one or a dozen similar potential death-traps may be erected in the same locality, should there be a change in ownership. Martin v. City of Danville, 148 Va. 247 at 250 ff., 138 S. E. 629 (1927). See also the opinion of Rosenberry, J., in Nehrbass v. Harper, 162 Wis. 589, 156 N. W. 941 (1916). The unreasonable discrimination between property owners and residents is stressed in City of St. Louis v. Russell, 116 Mo. 248, 22 S. W. 470 (1893).

[18] McCown v. Gose, 244 Ky. 402, 51 S. W. (2d) 251 (1932).

[19] The ordinance sustained in the principal case was couched in prohibitory terms, while that held void in Nehrbass v. Harper, 162 Wis. 589, 156 N. W. 941 (1916), although to the same effect, allowed the absence of majority consent to determine the rule. The writer does not mean to suggest that this minor detail provides the true criterion.

[20] On the last point see Heald v. District of Columbia, 259 U. S. 114, 42 S. Ct. 434 (1922); Arkadelphia Milling Co. v. St. Louis Southwestern R. Co., 249 U. S. 134, 39 S. Ct. 237 (1919); Windsor, Town of, v. Whitney, 95 Conn. 357, 111 A. 354 (1920).

[21] Martin v. City of Danville, 148 Va. 247 at 249, 138 S. E. 629 (1927).

[22] City of Chicago v. Stratton, 162 Ill. 494 at 502, 44 N. E. 853 (1896).

[23] Freund (n. 16, supra), 24 ILL. L. REV. 135 (1929).