Michigan Law Review

Volume 34 | Issue 4

1936

MUNICIPAL CORPORATIONS-STANDARDS REQUIRED IN LICENSING ORDINANCES

MUNICIPAL CORPORATIONS—STANDARDS REQUIRED IN LICENSING ORDINANCES—Defendant appealed from conviction for operating a used auto business without obtaining a license for such business under a city ordinance requiring same to be granted by the city commission if in its opinion applicant was a proper and suitable person, the place to be used was proper, having in mind the nature and character of the business and possibility of commission of crime, and the sanitary facilities thereon were proper. There was no specific legislative grant for passage of such ordinance. Defendant's application was rejected by the commission mainly because of lack of proper sanitary facilities. *Held*, standards to guide and control the licensing body are required, especially as to the type of business involved in the instant case, which was not inherently dangerous or inimical to public welfare, and the ordinance was invalid because it conferred too broad a discretion and did not set up reasonable standards to guide the commission in

granting the license.[1] *People v. Sturgeon*, 272 Mich. 319, 262 N. W. 58 (1935).

Cases involving the validity of ordinances vesting discretionary authority in the licensing body are hopelessly in conflict and seem irreconcilable unless resort is had to the particular facts of each case.[2] No standard whatsoever is required to be set up in some licensing cases,[3] such as those involving occupations not regarded as vested rights but as mere privileges,[4] as well as those involving lawful occupations tending to have a detrimental effect on the moral calibre of the community if carried on by unfit persons.[5] Very specific standards must be set up in cases involving so-called fundamental common law rights.[6] Falling between the two preceding categories is the licensing of businesses themselves lawful, but susceptible of being abused if not controlled, and here the conflict is the most violent. The instant case falls into this category. In determining the standards required in this last category, only two generalizations can be made: (1) the definiteness of the standards required varies inversely with the danger involved to public

[1] The court did not indicate the legal basis for holding the ordinance invalid, that is, whether it was unconstitutional as a delegation of legislative powers or an unreasonable exercise of the police power; it did indicate that it did not hold it invalid as *ultra vires* because it was the exercise of a power not impliedly granted by the legislature to the municipality.

[2] See, 17 VA. L. REV. 168 (1930); 2 DILLON, MUNICIPAL CORPORATIONS, 5th ed., § 598, p. 934 (1911).

[3] 17 VA. L. REV. 168 (1930).

[4] E.g., licensing of right to move buildings on public streets, licensing of right to mine phosphate rock in navigable streams of the state, licensing of right to dispense liquor, etc. These cases and others on this point are collected in 12 A. L. R. 1453 (1921). *Contra* as to dispensing liquor: Ensley v. State, 172 Ind. 198, 88 N. E. 62 (1909), holding void an ordinance providing for issuing of liquor-dispensing license "upon said council's being satisfied with the fitness of the applicant."

[5] E.g., sale of cigarettes, Gundling v. City of Chicago, 177 U. S. 183, 20 S. Ct. 633 (1900); horse racing, cases collected in 17 VA. L. REV. 168 (1930); pool parlors, cases collected in 17 VA. L. REV. 168 (1930). *Contra* as to pool parlors, Devereaux v. Township Board, 211 Mich. 38, 177 N. W. 967 (1920), holding invalid an ordinance giving arbitrary power to license pool rooms, dance halls, etc. Generally, see, Melconian v. City of Grand Rapids, 218 Mich. 397, 188 N. W. 521 (1922), upholding an ordinance setting as standard, "if person making application is a proper person both by experience and character," as to taxicab drivers; People v. Harley, 230 Mich. 676, 203 N. W. 531 (1925), upholding an ordinance setting standard that "applicant be fit" as to rooming houses; City of Grand Rapids v. Braudy, 105 Mich. 670, 64 N. W. 29 (1895), upholding an ordinance regulating junk dealers, which conferred discretionary power to council to grant or refuse a license; Hyma v. Seeger, 233 Mich. 659, 207 N. W. 834 (1926), upholding an ordinance as to gasoline stations setting standard of "where by reason of traffic conditions . . . a filling station would imperil the public safety."

[6] E.g., public gatherings, use of public highways and constructing buildings—cases cited in 17 VA. L. REV. 168 (1930); licensing of physicians by the state, Hewitt v. State Medical Examiners, 148 Cal. 590, 84 P. 39 (1906), noted 3 L. R. A. (N. S.) 896 (1906); parades, In re Frazee, 63 Mich. 396, 30 N. W. 72 (1886), and cases cited in opinion of court in Wilson v. Eureka City, 173 U. S. 32, 19 S. Ct. 317 (1898); but *contra* as to parades, see In re Flaherty, 105 Cal. 558, 38 P. 981 (1895), and cases cited therein.

health, safety and welfare in the business licensed; [7] and (2) if the subject matter is such that it is impossible or difficult to lay down a specific rule by which uniformity can be obtained, less specific standards are required.[8] Beyond those generalizations no definite rules can be formulated from an investigation of the cases. In determining how dangerous a certain business may be to the public health, safety or welfare, an examination of the conditions in the particular city in respect to that business is proper.[9] Some cases justify lodging discretion in the licensing body on the theory that it is assumed that such body will act with a sound discretion,[10] but this theory is rejected in Michigan.[11] Arrest and appeal, or habeas corpus proceedings, are not necessary to raise the constitutionality of such an ordinance, but it may be raised by mandamus proceedings to compel issuance of such license.[12] The constitutional violation, if any, is a denial of equal protection of the laws or due process.[13] The used-car business is certainly susceptible of abuse,[14] and so it would seem that less comprehensive standards would be required in licensing such a business than in others less inimical to public welfare.[15] How-

[7] Village of St. Johnsbury v. Aron, 103 Vt. 22, 151 A. 650 (1930), noted in 15 MINN. L. REV. 586 (1930) and 4 So. CAL. L. REV. 410 (1931). Also, see 17 VA. L. REV. 168 (1930); Melconian v. City of Grand Rapids, 218 Mich. 397, 188 N. W. 521 (1922), recognized in the instant case where the court said (272 Mich. 319 at 323): "The rule [requiring adequate standards] gathers momentum as it leaves occupations inherently dangerous or bad."

[8] Fischer v. St. Louis, 194 U. S. 361, 24 S. Ct. 673 (1903); 12 A. L. R. 1447 (1921); Gorieb v. Fox, 145 Va. 554, 134 S. E. 914 (1926); *contra*, City of St. Louis v. Polar Wave Ice & Fuel Co., 317 Mo. 907, 296 S. W. 993 (1927), holding unconstitutional an ordinance requiring securing of license for stable for more than ten horses, for reason that no standards were set up.

[9] People v. Harley, 230 Mich. 676, 203 N. W. 531 (1925).

[10] Ex parte Holmes, 187 Cal. 640, 203 P. 398 (1922), holding valid an ordinance giving police commissioners discretionary power to grant or refuse permits to trade in second hand goods. See also, 15 MINN. L. REV. 586 (1930).

[11] Hoyt Bros., Inc. v. City of Grand Rapids, 260 Mich. 447, 245 N. W. 509 (1932), holding invalid an ordinance with standard "whenever it appears that the charity is a worthy one and the person making the application is fit and responsible" as to charity subscriptions. Contrary result reached on practically identical facts in Ex parte White, (Okla. 1935) 41 P. (2d) 488, and State v. Hundley, 195 N. C. 377, 142 S. E. 330 (1928).

[12] Keavey v. Randall, (N. J. 1923) 122 A. 379.

[13] Hoyt Bros., Inc. v. City of Grand Rapids, 260 Mich. 447, 245 N. W. 509 (1932).

[14] The instant case recognizes this possibility.

[15] Village of Durand v. Love, 254 Mich. 538, 236 N. W. 855 (1931), held invalid an ordinance giving chairman of building committee unlimited discretion in permitting removal of wooden buildings within fire limits; City Council of Montgomery v. West, 149 Ala. 311, 42 So. 1000 (1907), held invalid an ordinance providing no person shall operate a steam engine, planing mill, planing machine, foundry, blacksmith shop or bakery without consent of council; Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064 (1885), held invalid an ordinance granting an arbitrary discretion in licensing laundries; Commonwealth v. Maletsky, 203 Mass. 241, 89 N. E. 245 (1909), held invalid an ordinance requiring a permit from the chief of the fire department to use a building for sorting or storing rags; Postal v. Village of Grosse Pointe, 239 Mich. 286,

ever, the ordinance in the instant licensing case was for the protection of the public health, rather than to guard against traffic in stolen cars,[16] and manifestly the public health is not seriously jeopardized by the operation of such a business. Had the purpose of the licensing been to guard against traffic in stolen cars, it would more likely have been upheld with the standards set out here. Accepting the view of the ordinance argued by the municipality, the result reached is in consonance with the accepted law on this subject.

R. E. H.

214 N. W. 148 (1927), held invalid an ordinance requiring permit for eating establishments, standard being "for good and satisfactory reasons"; Samuels v. Couzens, 222 Mich. 604, 193 N. W. 212 (1923), held invalid an ordinance leaving licensing of jewelry stores in discretion of mayor.

[16] The city in the instant case relied wholly on its contention that the ordinance represented a lawful exercise of the police power to preserve the *public health*, and does not appear to have relied on a purpose of guarding against traffic in stolen cars.