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MUNICIPAL CORPORATIONS-ZONING-ABROGATION OF PRIVATE RESTRICTIVE COVENANTS BY ZONING REGULATIONS

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MUNICIPAL CORPORATIONS—ZONING—ABROGATION OF PRIVATE RESTRICTIVE COVENANTS BY ZONING REGULATIONS—A recent New Jersey decision[1] raises a question of current importance in view of the acute housing shortages in many metropolitan areas. Can a munici-

[1] Taylor v. Hackensack, 137 N.J.L. 139, 58 A. (2d) 788 (1948), affd. without opinion, 62 A. (2d) 686 (1948). Petitioners were the owners of single dwellings on the tract of land in question, their deeds containing restrictions limiting construction to single-family units. The city of Hackensack had sold land in this tract to one Ingannamort, placing a restriction in the contract limiting construction to single units. At that time the zoning ordinance also limited this land to single-family dwellings. Later the city amended its zoning ordinance changing the land in question from a single-family to a multiple-family zone, and a resolution was passed waiving the restrictions in the contract between the city and Ingannamort. Petitioners sought a writ of certiorari to review a judgment sustaining the validity of the city's action. The appellate court held that the validity of the resolution could not be disposed of on certiorari, and that petitioners' remedy, if any, was by injunction. However, it seems clear that a substantive question was decided, since the court said, at p. 142, "We hold that there is no such limitation on the right to zone, and that the amendment in this case is valid...."

pality, acting under its power to establish zoning regulations, authorize the construction of multiple-family dwellings in a particular area and simultaneously abrogate private covenants which restrict the area to single-family dwellings?

The power to zone, when expressly granted to a municipal corporation, is recognized as part of the police power of the municipality, and regulations imposed thereunder will be sustained if they are reasonable and are substantially related to the health, safety, morals and general welfare of the community.[2] However, the courts have generally found that the zoning ordinances under consideration did not or could not nullify private covenants that were more stringent.[3] The decision of the New Jersey court in reaching a contrary result represents a departure from the general view, and suggests that private covenants may not afford the protection long attributed to them.[4]

I

It is clear that a zoning regulation authorizing multiple dwellings in an area covered by private covenants restricting construction to single-family units would involve the destruction of property interests.[5] Should it follow that a city, in the exercise of its police power, is pre-

[2] Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114 (1926).

[3] For cases holding that zoning ordinances cannot override, annul or relieve land from building restrictions, or covenants placed thereon by deed, see Burgess v. Magarian, 214 Iowa 694, 243 N.W. 356 (1932); Vorenberg v. Bunnell, 257 Mass. 399, 153 N.E. 884 (1926); Dolan v. Brown, 338 Ill. 412, 170 N.E. 425 (1930); Magnolia Petroleum Co. v. Drauver, 183 Okla. 579, 83 P. (2d) 840 (1938); Szilvasy v. Saviers, 70 Ohio App. 34, 44 N.E. (2d) 732 (1942); Forstmann v. Joray Holding Co., 244 N.Y. 22, 154 N.E. 652 (1926); Marshall v. Salt Lake City, 105 Utah 111, 141 P. (2d) 704 (1943); Ludgate v. Somerville, 121 Ore. 643, 256 P. 1043 (1927). These courts have indicated that an ordinance would have no effect upon the deed restrictions where the covenant prescribes residences and the section is zoned for businesses and apartments. See 3 TIFFANY, REAL PROPERTY, §858 (1939); METZENBAUM, THE LAW OF ZONING 282 (1930).

[4] Although the New Jersey court observed in the latter part of its opinion that there was no evidence establishing a community scheme of covenants which would prevent erection of other than single-dwelling houses, a preceding part of the opinion states, "It does not seem to be disputed that the single-family dwellings restriction was applicable to the lands in question." Taylor v. City of Hackensack, 137 N.J.L. 139 at 140, 58 A. (2d) 788 (1948) affd. without opinion, 62 A. (2d) 686 (1948). Contact with one of the attorneys for the petitioners verifies the conclusion that the petitioners were claiming relief on the ground that the amendment was in violation of the restrictive covenants applicable to the tract in question.

[5] Ladd v. Boston, 151 Mass. 585, 24 N.E. 858 (1890); Frumveller v. Post, 167 Mich. 464, 133 N.W. 317 (1911); Riverbank Improvement Co. v. Chadwick, 228 Mass. 242, 117 N.E. 244 (1917); Flynn v. N.Y., Westchester & Boston Ry. Co., 218 N.Y. 140, 112 N.E. 913 (1916); Ludgate v. Somerville, 121 Ore. 643, 256 P. 1043 (1927).

vented from enacting such a regulation unless compensation is given to the beneficiaries of the covenants? The courts which have held that zoning regulations are invalid insofar as they contravene restrictive covenants[6] would presumably feel obligated to answer this question affirmatively. On the other hand, it seems that a court should be reluctant to impose such a limitation on the exercise of the police power.

Zoning regulations interfering with "rights" acquired under a prior ordinance have been invalidated, but these decisions are not compelling authority for denying the use of the zoning power to abrogate private covenants. A typical case holding that the zoning power could not be used to eliminate rights acquired under a prior ordinance was *Clifton Hills Realty Co. v. Cincinnati*,[7] where the plaintiff owned land which he had developed into a subdivision: streets had been laid, sidewalks built and lots platted under a general zoning plan restricting use to family residence. An amendment to a zoning regulation that would have permitted multiple units in this district was declared unconstitutional, it appearing that the value of the plaintiff's property would have been reduced by the introduction of multiple units. Nevertheless, the court carefully noted the absence of evidence to show that the amendment was designed to promote the public health, safety or general welfare.

In *Wilcox v. Pittsburgh*,[8] the city of Pittsburgh amended an ordinance to permit erection of apartment houses in a district that had been zoned for single dwellings. The court held that the amendment deprived the plaintiffs of property without due process of law. The record indicated, however, that (1) the amendment was made against the recommendations of the City Planning Commission, and (2) the amendment was made without findings as to a change in conditions. As to this last ground, the court said, "As conditions are the basis and justification for zoning, clearly a change in the former is essential to a change in the latter,"[9] thus implying that the amendment might have been upheld if the necessary change in conditions had been shown.

Many decisions in this particular field, although invalidating zoning regulations or amendments thereto, do not expressly hold that it is not within the power of a city to make the particular change. The

[6] See note 3, supra.
[7] 60 Ohio App. 443, 21 N.E. (2d) 993 (1938), noted in 38 MICH. L. REV. 431 (1940).
[8] (C.C.A. 3d, 1941) 121 F. (2d) 835.
[9] Id. at 837.

typical decision merely holds that, on the facts of the case, the regulation was unnecessary, unreasonable, or not in the public interest. Logically, improvements made in reliance upon an existing ordinance should be subject to removal by a later exercise of the police power if the public interest so requires, unless it is to be argued that the municipality divested itself of its police power by enacting the original ordinance.

Similarly, the courts which have declared that zoning regulations cannot abrogate private covenants have found that the ordinances were not intended to apply to such covenants, were arbitrary and unreasonable, or were against public policy. There is practically no direct authority holding that a municipality does not have the *power* to affect private covenants by enactment of a reasonable zoning regulation.

In the leading Supreme Court decision[10] holding an ordinance regulating future uses to be a valid exercise of the police power, it was recognized that enforcement of such ordinances might result in great monetary loss to property owners.[11] When danger or discomfort might result to the public from a particular use, its immediate elimination has been held constitutional. Thus, the owners of brick kilns[12] and livery stables,[13] who had carried on business for years in a particular locality, have been forced to remove such businesses from the locality, although no compensation was offered for the damage sustained. Certainly public health and welfare are equally supported by legislation for the purpose of providing adequate housing facilities.

II

It would seem that a city's attempt to authorize the violation of private covenants is analogous, in principle, to the attempt to eliminate existing non-conforming uses. In the former case, a property owner is

[10] Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114 (1926).

[11] The record indicated that the realty company's land was worth about $10,000 an acre for industrial purposes, while its value for the zoned residential use was about $2,500. See also West Bros. Brick Co., Inc. v. Alexandria, 169 Va. 271, 192 S.E. 881 (1937), where a brick company purchased land because of its valuable clay deposits only to discover the property zoned for residential buildings. There are many such cases, and it has been held that the loss must be borne without compensation where there is a reasonable relationship between the purpose of the zoning regulations and the public welfare.

[12] Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143 (1915), where the property was reduced in value from $800,000 to $60,000.

[13] Reinman v. Little Rock, 237 U.S. 171, 35 S.Ct. 511 (1915).

told that the present restrictions, in reliance on which investment has been made, are to be governed by the zoning regulation, and, if the regulation conflicts with the private covenants, the regulation is to prevail. In the case of the non-conforming use, the property owner is likewise told that the present use to which the land is being put is to be limited by the regulation. The Louisiana court[14] has held that a zoning ordinance may compel the discontinuance of a non-conforming use. This decision appears to stand alone;[15] yet it seems sound. The court apparently thought that if a village had authority under police power to zone, it was necessarily authorized to carry out the scheme by ordering removal of the non-conforming use. Other cases have simply assumed, without much discussion, that zoning is a power that can only be used to affect future uses, and that any attempt to eliminate existing uses would be an unconstitutional taking of property.[16] However, attention is being given to the possibility of eliminating non-conforming uses by amortization methods.[17]

It is recognized that most courts have shown no inclination to uphold any plan calling for elimination of existing uses, except insofar as the use may constitute a nuisance which would be subject to abatement. Yet, if the public health, safety, morals or general welfare requires the adoption of such a scheme, courts should be willing to uphold the plans. The difference between an ordinance restricting future uses, and an ordinance requiring the elimination of existing uses, is merely one of degree, and the constitutionality in either case should depend upon the relationship between public gain and private loss. Although the value of a restrictive covenant cannot be accurately compared with the value of the right to continue a non-conforming use, it would seem that in the typical case the damage caused by elimination of the beneficial interest under a restrictive covenant by a zoning regulation might be less than the damage suffered by one compelled to discontinue a non-conforming use.

[14] State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 S. 613, cert. den., 280 U.S. 556, 50 S.Ct. 16 (1929). An amortization period (the time allowed for meeting the requirements of the ordinance) of one year was permitted by the ordinance involved in that case.

[15] By the weight of authority, a zoning ordinance may not operate to suppress or remove from a residential district an otherwise lawful business already established therein. See 86 A.L.R. 688 (1933); Jones v. Los Angeles, 211 Cal. 304, 295 P. 14 (1930).

[16] See, e.g., Jones v. Los Angeles, 211 Cal. 304, 295 P. 14 (1930).

[17] 9 UNIV. CHI. L. REV. 477 (1942).

The cases suggesting that a non-conforming use cannot be removed are not recent decisions:[18] many of the assertions that elimination of an existing use would be unconstitutional were dicta which could gradually be repudiated.[19] Since the scope of police power is not merely negative, ordinances which constructively and affirmatively undertake to promote public interests should be upheld.[20]

III

The Wisconsin court[21] has observed that rights granted by *legislative* action under the police power can be taken away when, in the valid exercise of its discretion, the legislative body sees fit.[22] The Wisconsin case involved a zoning amendment by the city of Sheboygan converting a one-family area into an apartment zone. The evidence indicated that the re-zoned tract was unsuitable for building single-family residences because of the soil condition.[23] Although the plaintiffs claimed to have purchased or built in reliance on the single-family classification, the court held that they were not entitled to compensation.[24] If the police power can be used to authorize construction of apartments in an area not suited for building one-family units because of peculiar soil conditions, should it not also be available for eliminating private building restrictions in an area, when the public interest requires multiple dwellings? There is violation of a "property right" in both cases; the degree of the violation is not necessarily greater in the latter case.

IV

What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power.[25] A recent federal case[26]

[18] See note 14, supra.

[19] "... The inalienable rights of the individual are not what they used to be." West Bros. Brick Co., Inc. v. Alexandria, 169 Va. 271 at 283, 192 S.E. 881 (1937).

[20] Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925).

[21] Eggebeen v. Sonnenberg, 239 Wis. 213, 1 N.W. (2d) 84 (1941).

[22] Id. at 218. The court cited BASSETT, ZONING 32, 108, 178 (1936); Piper v. Ekern, 180 Wis. 586, 194 N.W. 159 (1923).

[23] There were unusual difficulties in establishing firm foundations; it was economically sound to build apartment houses, but not to erect one-family homes.

[24] Citing State ex rel. Carter v. Harper, 182 Wis. 148, 196 N.W. 451 (1923).

[25] Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925), citing Streich v. Board of Education, 34 S.D. 169, 147 N.W. 799 (1914); L.R.A. 1915A, 632; Ann. Cas. (1917A) 760. In the Streich case, it was also observed at 175-176: "There is nothing known to the law that keeps more in step with human progress than does the exercise of this power."

[26] Wolpe v. Poretsky, (App. D.C. 1946) 154 F. (2d) 330.

gave tacit recognition to this doctrine when the court stated that in view of the housing shortage the action of the zoning commission in refusing a permit to build an apartment house had a negative relation to the public welfare. The court observed that the defendant's proposed apartment building would accommodate many more people than the single dwellings which might be built on the lot.

If it appears clearly that the objective of a regulation authorizing apartments in an area subject to private covenants is to provide vital additional housing, a court should have valid grounds for holding that, because of changed conditions, this is a proper exercise of the police power, and that the "property interests" of the beneficiaries of the covenants could thus be taken without compensation.[27] If there was evidence upon which the city authorities could have found that the ordinance was necessary in consideration of the public health, safety, comfort or general welfare, it is beyond the province of the court to say that it is unreasonable, arbitrary or confiscatory, even though it may depreciate in value business property or restrict the liberty of citizens in regard to ownership and use of property.[28] The decision in the principal case may foreshadow a significant change in the thinking of the courts upon the question of the sanctity of private covenants that interfere with the satisfactory growth of cities.

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[27] "Regulations may result to some extent, practically in the taking of property, . . . and yet not be deemed confiscatory or unreasonable." State v. Hillman, 110 Conn. 92 at 105, 147 A. 294 (1929).

[28] Cassel Realty Co. v. Omaha, 144 Neb. 753, 14 N.W. (2d) 600 (1944), citing Pettis v. Alpha Alpha Chapter of Phi Beta Pi, 115 Neb. 525, 213 N.W. 835 (1927). A court will not ordinarily substitute its judgment for the decision of a municipal council or board of zoning appeals. Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925); BASSETT, ZONING 122 (1936).