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MUNICIPAL CORPORATIONS-ZONING-LIMITATIONS ON THE POWER TO LIFT ZONING RESTRICTIONS

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MUNICIPAL CORPORATIONS—ZONING—LIMITATIONS ON THE POWER TO LIFT[1] ZONING RESTRICTIONS—A declaratory judgment proceeding was brought by persons owning property within a small-unit residential zone to determine the validity of a rezoning amendment relaxing the restrictions upon one block located within the zone. The change was designed to allow the construction of large apartment houses, containing some inside commercial establishments, in an area formerly restricted to family units of less than seven apartments. The entire area, with the exception of the island created by the rezoned block, was restricted to the smaller types of residential units, and was predominantly made up of single family residences. On appeal from a judgment setting aside the amendment, *held* affirmed. Rezoning amendments which violate the basic purposes supposed to be served by the zoning power are void as unreasonable exercises of such power. *Davis v. City of Omaha,* 153 Neb. 460, 45 N.W. (2d) 172 (1950).

Municipal zoning ordinances are recognized to be a valid exercise of the state police powers,[2] provided that they are within the statutory or charter authority of the municipality[3] and meet the constitutional due process requirement of reasonableness.[4] Since a state cannot dispose of any of its police powers, either by contracting them away[5] or by irrevocably exercising them in a particular manner,[6] zoning ordinances may be amended at any time,[7] subject to the same limitations as apply to any other exercise of the zoning power.[8] It is evident that any plan designed to regulate the future growth and development of the community must be sufficiently flexible to meet changing conditions and needs as they arise or become apparent. However, while it is not desirable to place any undue bur-

[1] As used in this article, the "lifting of zoning restrictions" is meant to describe the rezoning of property so as to place it in a less restricted classification than formerly.

[2] Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114 (1926); cases collected in 8 MCQUILLEN, MUNICIPAL CORPORATIONS, 3d ed., §§25.05 and 25.34 (1950).

[3] 8 MCQUILLEN, MUNICIPAL CORPORATIONS, 3d ed., §25.38 (1950); 40 A.L.R. 351 (1926); Cassel v. Mayor & City Council of Baltimore, (Md. App. 1950) 73 A. (2d) 486.

[4] 8 MCQUILLEN, MUNICIPAL CORPORATIONS, 3d ed., §25.38 (1950); cases collected in 86 A. L. R. 662 (1933) and 117 A.L.R. 1123 (1938).

[5] Stone v. Mississippi, 101 U.S. 814 (1879); Boston Beer Co. v. Massachusetts, 97 U.S. 25 (1877).

[6] Sanitary District of Chicago v. United States, 266 U.S. 405 at 427, 45 S.Ct. 176 (1925).

[7] See cases collected in 138 A.L.R. 500 (1942) and 149 A.L.R. 292 (1944).

[8] See 8 MCQUILLEN, MUNICIPAL CORPORATIONS, 3d ed., §§25.42 and 25.67; also cases listed on pp. 79 and 117 of McQuillen.

dens or restraints upon needed alterations of zoning restrictions, some checks must be imposed in order to protect property owners from amendments which are not readily warranted by a proper consideration of community interests. Many of the zoning enabling statutes seek to guard against inconsiderate amendments by prescribing special procedural requirements for the changing of zone classifications.[9] An additional, and more adequate, safeguard is provided by judicial surveillance of contested enactments. In general, an amendment must fulfill four major requirements in order to be upheld by the courts. (1) The amendment must be within the permissive bounds of power marked out by the enabling statute. Since such statutes commonly require uniform application of regulations made in pursuance of a comprehensive plan of city development, the arbitrary lifting of restrictions on small areas within a zone can often be condemned as a violation of these statutory mandates.[10] (2)The amendment must also be likely to accomplish the policies and purposes which the statute designates as the aims of zoning regulations.[11] The courts generally refuse to be bound by a legislative recital of supposed purposes, but instead determine from all the available evidence what the probable results of the change will be, and then decide whether or not such results violate the statutory theme.[12] Thus, where the removal of prior restrictions will adversely affect the surrounding area,[13] without meeting any real need of either the immediate neighborhood or the municipality,[14] the amendment can usually be successfully attacked as ex-

[9] Published notice of proposed amendments, an opportunity for affected property owners to file a written protest, and the requirement of a 2/3 to unanimous vote of the city council to pass the amendment if a specified proportion of the affected property owners protest, are commonly called for by the enabling statute.

[10] For good examples of this approach, outside of the principal case, see Kuehne v. Town of East Hartford, 136 Conn. 452, 72 A. (2d) 474 (1950); Cassinari v. Union City, 1 N.J. Super. 219, 63 A. (2d) 891 (1949); Davis v. Nolte, (Tex. Civ. App. 1950) 231 S.W. (2d) 471.

[11] Outstanding examples of an application of this test are the principal case and Cassinari v. Union City, supra note 10. It should be noted that an amendment which serves only one of the specified purposes will probably not be upheld. Ohio requires the fulfillment of at least two purposes, Ohio Gen. Code (Page, 1938) §4366-11, while most states require compliance with substantially all of the prescribed purposes. See Neb. Rev. Stat. (1943) §14-403 discussed in the principal case.

[12] See cases listed in 8 MCQUILLEN, MUNICIPAL CORPORATIONS, 3d ed., 46 (1950). Of course, pursuant to traditional doctrines, all doubts are resolved in favor of the legislation.

[13] If the change will lower property values in the neighborhood, unduly interfere with existing uses of adjoining property, increase the health and safety hazards in the community, or tax the municipal facilities beyond their capacity, the amendment will be overthrown unless otherwise justified. Appley v. Township Committee of Bernards Township, 128 N.J.L. 195, 24 A. (2d) 805 (1942); Luse v. City of Dallas, (Tex. Civ. App. 1939) 131 S.W. (2d) 1079; Davis v. City of Omaha, 153 Neb. 460, 45 N.W. (2d) 172 (1950).

[14] Factors to be taken into consideration include the civic, commercial, and housing needs of both the community and the city, City of McAllen v. Morris, (Tex. Civ. App. 1948) 217 S.W. (2d) 875; Lamarre v. Commissioner of Public Works of Fall River, 324 Mass. 542, 87 N.E. (2d) 211 (1949); Bartram v. Zoning Comm. of City of Bridgeport, 136 Conn. 89, 68 A. (2d) 308 (1949); and the availability of suitable alternative locations which would satisfy such needs, Kuehne v. Town of East Hartford, supra note 10; Davis v. City of Omaha, supra note 13.

ceeding the statutory grant of power. (3) In addition, the change must bear a substantial relation to the public welfare.[15] This constitutional requirement, while broader in scope than the statutory purpose test, is likewise satisfied only if the operative effect of the amendment is reasonably calculated to achieve a permissible result.[16] Some courts have used this requirement to bar changes which would adversely affect a property owner who has changed his position in reliance on the prior classification.[17] While no vested or contractual right can be said to accrue to any individual as a result of an exercise of the zoning power,[18] a person is justified in believing that the existing classification will not be changed except in the public interest. This principle, however, runs the danger of being carelessly extended into a judicial straitjacket precluding even desirable changes while adding nothing to the protection already accorded the property owner by the public welfare requirement. (4) Finally, the amendment must not be unreasonable or discriminatory in its operation.[19] Relief from hardship[20] and from discriminatory treatment[21] are clearly grounds for the lifting of restrictions on the property so affected. On the other hand, amendments allowing uses out of line with the surrounding area, and operating merely to the economic advantage of property otherwise adaptable to the permitted uses, are invalid.[22] In conclusion, while many courts have used short cut phrases, such as "spot zoning," to condemn the lifting of zoning restrictions,[23] it is submitted that the realistic approach adopted by the Nebraska court in the principal case of treating an amendment as a new zoning ordinance would lead to greater legislative understanding of the restrictions on its power, and consequently a reduction in abuses of the amendment process.[24]

Allan Neef, S.Ed.

[15] 117 A.L.R. 1123 (1938); 8 McQUILLEN, MUNICIPAL CORPORATIONS, 3d ed., §25.19 (1950). For the meaning of "public welfare" see 8 McQUILLEN §25.20.

[16] Ibid.

[17] See cases listed in 138 A.L.R. 500 (1942). While this doctrine was originally developed to protect an individual property owner from the arbitrary imposition of additional restrictions, it has been extended to protect property owners generally against changes arbitrarily lifting restrictions on neighboring property.

[18] This necessarily follows from the power reserved by the legislature, implied if not expressed, to amend or alter the zoning regulations at any time it sees fit. See Eggebeen v. Sonnenburg, 239 Wis. 213, 1 N.W. (2d) 84 (1941) and 36 MICH. L. REV. 487 (1938).

[19] Brady v. Keene, 90 N.H. 99, 4 A. (2d) 658 (1939); cases listed in 117 A.L.R. 1123 (1938).

[20] People ex rel. Miller v. Gill, 389 Ill. 394, 59 N.E. (2d) 671 (1945); Forde v. City of Miami Beach, 146 Fla. 676, 1 S. (2d) 642 (1941).

[21] Bartram v. Zoning Comm. of City of Bridgeport, supra note 14; Bianchi v. Morey et al., 124 N.J.L. 258, 11 A. (2d) 405 (1940).

[22] Cassinari v. Union City et al., supra note 10; Leahy et al. v. Inspector of Buildings of New Bedford, 308 Mass. 128, 31 N.E. (2d) 436 (1941).

[23] See cases listed in 149 A.L.R. 292 (1944).

[24] On considerations that should be given to amendments, see Chandler, "The Amending of Zoning Ordinances," 4 LEGAL NOTES ON LOCAL GOVERNMENT 10 (1938).