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MUNICIPAL CORPORATIONS-VALIDITY OF "PIECEMEAL" ZONING AS APPLIED TO BUILDING UNDER CONSTRUCTION

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MUNICIPAL CORPORATIONS—VALIDITY OF "PIECEMEAL" ZONING AS APPLIED TO BUILDING UNDER CONSTRUCTION—Shortly after plaintiff obtained a building permit and commenced work on the excavation for a laundry and dry-cleaning plant in an unzoned section of the City of Huntsville, the city adopted a new zoning ordinance which limited to residential uses an area of approximately two blocks in which plaintiff's property was situated. On appeal from a decree dismissing a bill to enjoin enforcement of the new zoning ordinance, *held*, reversed. Since the enabling statute required that zoning regulations

should be adopted in accordance with a comprehensive plan,[1] an ordinance which did not zone the whole municipality was void. *Johnson v. City of Huntsville*, (Ala. 1947) 29 S. (2d) 342.

It is well established that the police power of a state is vested in the state legislature and cannot be exercised by a municipality without a delegation of the power by the state.[2] Since zoning is an exercise of the police zoning power,[3] the authority to zone must usually be traced to a state enabling statute.[4] Therefore, the power cannot be exercised otherwise than as prescribed in the statute, and the provisions of the statute must be strictly followed.[5] In addition to the requirements of the enabling statute, zoning ordinances must be reasonable and designed to accomplish some purpose within the scope of the police power.[6] In this connection, it has been held that property similarly situated must be zoned alike.[7] Either as a matter of statutory interpretation, then, or as a requirement that zoning ordinances meet certain standards of reasonableness, ordinances which do not take into consideration the whole area of the municipality are generally held bad.[8] In the principal case the ordinance fails to meet the test of reasonableness on other grounds. The plaintiff had obtained a permit and had begun work on his building prior to the enactment of the ordinance placing his property in a residential section. Although there is some conflict of authority on the question of whether a municipality may force the abolition of a non-conforming use in existence at the time the ordinance is adopted,[9] the tendency,

[1] Ala. Code (1940) tit. 37, § 777 provides, "Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets, to secure safety from fire, panic, and other dangers. . . ." The Alabama act is substantially the same as the Standard State Zoning Enabling Act prepared by the Department of Commerce.

[2] Clements v. McCabe, 210 Mich. 207, 177 N.W. 722 (1920); Friend v. City of Chicago, 261 Ill. 16, 103 N.E. 609 (1913); City of St. Louis v. Dorr, 145 Mo. 466, 41 S.W. 1094 (1897).

[3] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114 (1926); Knickerbocker Ice Co. v. Sprague, (D.C. N. Y. 1933) 4 F. Supp. 499; People ex rel. Kirby v. Rockford, 363 Ill. 531, 2 N.E. (2d) 842 (1936).

[4] If the state constitution grants broad powers to the municipalities, it may not be necessary to resort to an enabling statute. Cf. Ekern v. City of Milwaukee, 190 Wis. 633, 209 N.W. 860 (1926).

[5] Fierst v. William Penn Memorial Corp., 311 Pa. 263, 166 A. 761 (1933); Benton v. Phillips, 191 Ark. 961, 88 S.W. (2d) 828 (1935); Ford v. Hutchinson, 140 Kan. 307, 37 P. (2d) 39 (1934).

[6] Nectow v. Cambridge, 277 U.S. 183, 48 S. Ct. 447 (1929); State of Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 49 S. Ct. 50 (1928); Forbes v. Hubbard, 348 Ill. 166, 180 N.E. 767 (1932).

[7] Hedgcock v. Reed, 91 Colo. 155, 13 P. (2d) 264 (1932); Holden Co. v. Connor, 257 Mich. 580, 241 N.W. 915 (1932).

[8] Olean v. Conkling, 156 Misc. 63, 283 N.Y.S. 66 (1935); Youngstown v. Kahn Bros. Building Co., 112 Ohio St. 654, 148 N.E. 842 (1925); City of Utica v. Hanna, 202 App. Div. 610, 195 N.Y.S. 225 (1922); Harris v. Village of Dobbs Ferry, 208 App. Div. 853, 204 N.Y.S. 325 (1924).

[9] Some cases allow the prohibition of a use which has the characteristics of a common law nuisance: Ex parte Quong Wo, 161 Cal. 220, 118 P. 714 (1911); Hadacheck v. Sebastian, 239 U.S. 394, 36 S. Ct. 143 (1915); State ex rel. Dema Realty

where work has started, is to refuse to interpret the ordinance as having a retroactive effect unless there is explicit language to that effect,[10] or to assume that vested rights cannot be affected except where they constitute nuisances.[11] The commencement of work on the land, under the better view, is held to constitute sufficient change of position to protect the land owner under this doctrine.[12] As a result, the ordinance in the principal case would probably be unreasonable as applied to the plaintiff even in the absence of a statutory requirement that zoning be accomplished in accordance with a comprehensive plan. Even though one of the chief reasons for requiring a comprehensive plan is to secure orderly rather than haphazard development of the community, under some circumstances it may be desirable to leave certain undeveloped area open to unrestricted use.[13] In such cases, if the ordinance is adopted after full consideration and as part of a plan for orderly development, it should make no difference to the validity of the particular zoning ordinance whether it is formally zoned as an unrestricted area or is left unzoned subject to later classification.

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Co. v. Jacoby, 168 La. 752, 123 S. 314 (1929). One case, New Orleans v. Liberty Shop, 157 La. 26, 101 S. 798 (1924), holds that zoning for residential use makes a business a nuisance which can be prohibited; contra, Jones v. Los Angeles, 211 Cal. 304, 295 P. 14 (1930); City of Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1925).

[10] Rosenberg v. Whitefish Bay, 199 Wis. 214, 225 N.W. 838 (1929); Adams v. Kalamazoo Ice & Fuel Co., 245 Mich. 261, 222 N.W. 86 (1928).

[11] Sandenburgh v. Michigamme Oil Co., 249 Mich. 372, 228 N.W. 707 (1930); City of Lansing v. Dawley, 247 Mich. 394, 225 N.W. 500 (1929); Rice v. Van Vranken, 132 Misc. 82, 229 N.Y.S. 32 (1928), affd., 225 App. Div. 179, 232 N.Y.S. 506 (1929) and 255 N.Y. 541, 175 N.E. 304 (1930).

[12] Rice v. Van Vranken, 132 Misc. 82, 229 N.Y.S. 32 (1928), affd., 225 App. Div. 179, 232 N.Y.S. 506 (1929) and 255 N.Y. 541, 175 N.E. 304 (1930); Rosenberg v. Whitefish Bay, 199 Wis. 214, 225 N.W. 838 (1929). A mere application for, or receipt of a license is not enough, Ware v. Wichita, 113 Kan. 153, 214 P. 99 (1923). In Western Theological Seminary v. City of Evanston, 325 Ill. 511, 156 N.E. 778 (1927), purchase of land in reliance on existing zoning is held enough. In Brett v. Building Commissioner of Brookline, 250 Mass. 73, 145 N.E. 269 (1924), the court held that there must be substantial completion of the building.

[13] Cf. Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E. (2d) 587 (1938), which holds extension of zoning to previously unzoned area is unreasonable because the property could not be used profitably at the time for residential purposes. See also BASSET, ZONING 90 (1940).