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Municipal Corporations

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Upon the premises encumbered by the plaintiff's mortgage to the bank was located a building which contained two stores on the first floor and two suites of living quarters on the second floor, one of which was used by the plaintiff as his home.

The primary issue was whether this was "a dwelling or dwellings for not more than two families" and therefore within the purview of the statute hereinbefore referred to. In the court of common pleas, judgment was rendered against the bank and the court of appeals rendered substantially the same judgment. Reversing the lower courts, the Supreme Court held that the building was not within the scope and purpose of the statute, and stressed the fact that the whole first floor was designed for use and was used for business purposes; that only the second floor was used for dwelling purposes. It was held, therefore, that Revised Code section 2329.08 did not preclude the enforcement of the bank's deficiency judgment.[9] In reaching that conclusion, a majority of the court felt that the statute in issue, being a special restriction of the general right to enforce contracts in the usual way, should not be so liberally construed as to forbid an action not plainly prohibited by its terms; in other words, that the statute should not be extended by implication to deny that right.[10]

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Zoning — Abandonment of Non-conforming Use

Some zoning ordinances provide that a prior existing non-conforming use, once abandoned, may not thereafter be renewed.[1] Such provisions are usually upheld. The Court of Appeals of Cuyahoga County refused in an interesting case in 1956 to allow the City of Garfield Heights to prohibit the resumption of such a use which had lapsed for a period of about 15 years.[2]

The decision may very well turn upon the specific factual unreasonableness of the application of the prohibition of the ordinance to the circumstances of the case. It is safe to hazard a guess that the court would have decided the same way, even if no question of cessation of a prior

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[9] Strictly speaking, there is no such thing as a "deficiency judgment" in the sense that a formal judgment of that description is entered. There is only the original judgment for the full amount of the indebtedness, upon which a deficiency may exist after the application of the proceeds of the sale of the mortgaged premises.

[10] Three judges dissented. The reasoning of the majority is in line with an earlier construction of the statute. See Carr v. Home Owners Loan Corp., 148 Ohio St. 533, 76 N.E.2d 389 (1947).

non-conforming use had been involved, relying upon an unreasonableness of the ordinance as applied to plaintiff's property.

One of the bases for the court's decision was that the ordinance provided in part as follows:

> A non-conforming use shall be considered abandoned when the intent of the owner to discontinue the use is apparent, or when it has been replaced by a conforming use, or when the characteristic equipment and furnishings of the non-conforming use have been removed from the premises and have not been replaced by similar equipment within two years. [3]

The moral of the decision to this writer is this: as the draftsman of such ordinances, it is advisable to adopt an objective rather than a subjective test of abandonment, if a "tough" ordinance is desired. Many such provisions make no allowance for the intent of the owner of the non-conforming use. To the extent that his intent is permitted to be considered as a factor in abandonment by the owner, it may be more difficult to eliminate such uses.

The case also contains another statement, probably also dictum, but of noteworthy significance, which is to the effect that the population trend in the municipality, and its future needs for land for a given purpose may be admissible in evidence in support of the validity of its zoning ordinance and its allocation of the various land areas to various uses.

The general basis for the court's decision appears to be that the value of the land, if used for the industrial purpose of removal therefrom of high grade brick clay deposits, was so much greater than if it were used only for the residential purposes for which it had been zoned (the difference amounting to over $300,000.00), that it was an unreasonable deprivation of the owner's property rights to enforce the provisions of the ordinance as to the particular parcel.[4]

Utility Service Charges Enjoined

The problem of pollution of natural water courses and resources has become an increasingly serious one in recent years, brought about by growing urbanization of rural areas on the one hand and an increased awareness of public officials of the great danger to one of our most vital resources, on the other. The legislature has enacted comprehensive legislation upon the subject.[5]

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[1] See 6 WEST. RES. L. REV. 182, 183, n. 7 (1955)

[2] Cleveland Builders Supply Co. v. Garfield Heights, 136 N.E.2d 105 (Ohio App. 1956)

[3] *Id.* at 108.

[4] Cf. Hadachek v. Sebastian, 239 U.S. 394 (1915)

[5] OHIO REV. CODE §§ 6111.01 - 6111.99.

The Council of the City of Gallipolis enacted an ordinance fixing rates and charges for the use of a sanitary sewerage system and sewage disposal plant. The city did not at the time of the enactment of the ordinance, nor at the time of the institution of suit, have any such system or plant, had issued no revenue bonds to provide a fund to create such a system or plant and had made no plans for construction, management or control thereof. Apparently the council's purpose was to create a fund for the construction in the future of such a system and plant, by tacking a charge onto the bills of utility users who would benefit by the improvement when it should be constructed.

The city was enjoined from collecting such charges and from discontinuing the supply of water to such inhabitants thereof as refused to pay the charges.[6] The court refused to pass upon the question whether if the city had taken any affirmative steps towards the construction of such a system its right to make charges for the future use thereof could be justified, holding simply that its council could not so provide when it had done nothing at all towards providing the service.

Public Purpose — Exemption of Property From Taxation

The Ohio Constitution permits the legislature to exempt " public property used exclusively for any public purpose. " from taxation[7] and the legislature has done so.[8] The courts have generally been strict in their interpretation of the wording of the statute providing for such exemption, on the theory that such exemptions are not to be lightly granted and that, insofar as is possible, all property ought to bear its fair share of the cost of government.[9]

The line between what is and what is not a public purpose is not always easy to draw[10] and complete consistency does not always exist. Some difficult problems come up for adjudication, in which one does not envy the court's duty to interpret the law and the facts and to be fair to all parties.

The case of *Columbus v. County of Delaware*[11] involved such a conflict. The City of Columbus, in Franklin County, purchased with the proceeds of mortgage revenue bonds a plot of land in Delaware County. It proposed to use that land to hold a reservoir of water, which water

[6] Knotts v. City of Gallipolis, 100 Ohio App. 491, 137 N.E.2d 592 (1956).
[7] OHIO CONST. art. XII, § 2.
[8] OHIO REV. CODE §§ 5709.08, 5709.11.
[9] 51 AM. JUR., *Taxation* § 495 (1944).
[10] State *ex rel.* v. Toledo, 48 Ohio St. 112, 26 N.E. 1061 (1891)
[11] 164 Ohio St. 605, 132 N.E.2d 747 (1956)

would be sold and distributed by Columbus to its residents and the residents of its suburbs.

Several questions were raised by the case:

1) Whether a reservoir and the real estate thereunder were "works" within the meaning of the word in section 5709.11[12] of the Revised Code.
2) Whether the facts that the municipally owned property was used in a proprietary rather than a governmental function, and that revenue was incidentally to be obtained from its operation, precluded its exemption from taxation.
3) Whether the fact that the property lay outside the limits of the county in which the owner-municipality was situated precluded its exemption.

The Supreme Court held that the failure of the legislature specifically to mention land in section 5709.11 as exempt did not preclude its exemption as public property under section 5709.08; that a public purpose of a proprietary nature is a public purpose;[13] and that the fact that the taxpayers in the adjoining county would in effect be subsidizing the water users in metropolitan Franklin County did not preclude the exemption.

The last mentioned argument is in this writer's opinion the most telling one. While he agrees that the result is a correct one under the law, the problem is an increasingly severe one, and it cannot be solved by simply falling back on the statutes. With the growth of our metropolitan areas, there will be more such geographical "invasions." The extent to which the turnpikes take land off the tax duplicate with no corresponding financial return to the affected municipal corporations or other political subdivisions is a critical example. The writer suggests that perhaps an amendment to the exemption laws to provide for some "rental" payment to the "invaded" subdivision by the operator of a revenue-producing utility would help to correct the inequities of the situation.

Municipal Contracts — Liquidated Damages Provisions

The Council of the Village of McArthur by ordinance authorized a municipal improvement in the form of construction of sewers for the village. The legislation did not specify any time for completion of the work and did not indicate in any manner that time was of the essence.

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[12] "Works, machinery, pipelines and fixtures belonging to a municipal corporation and used exclusively for conveying water to it, or for heating and lighting it, shall be exempt from taxation."

[13] Here it was necessary to skirt carefully around several recent cases: Cleveland v. Board of Tax Appeals, 153 Ohio St. 97, 126, 91 N.E.2d 480, 494 (1950) and Zangerle v. Cleveland, 145 Ohio St. 347, 61 N.E.2d 720 (1945)

The Village Board of Public Affairs, however, stipulated in the contract entered into between it and the contractor for a 150-day completion date, and for "liquidated damages" in the sum of $25 per day for "each and every day the time employed on said work may exceed the time stipulated for its completion."

The contractor contended that since the provision in the contract for liquidated damages for delay in completion was not included in the ordinances, it could not be inserted in the contract and was therefore void. No question appears to have been raised, nor did the court in its opinion[14] refer to the statutory authorization for such provisions[15] and the requirement that they be stipulated by the legislative authority of the corporation.

The court held that since "the powers of the legislative authority of a city (sic) shall be legislative only" and since a council shall not perform any administrative duties, it became the duty of the Board of Public Affairs "to execute the contract and supervise the work to completion." The inference is that it was not the business of and apparently beyond the power of the council so to provide, and henceforth within the power of the Board of Public Affairs so to provide.

It is difficult to see how the result could have been reached in view of the statute referred to in the footnote, and particularly in view of the requirement that the legislative authority provide the bonus-penalty clause.

Regulation of Truck Traffic

The problem of reasonableness of municipal regulation, even within areas left by the legislature and the courts to control by councils, is a difficult one. A basic requirement is that a municipal ordinance, even within a permitted field, " must not be arbitrary, discriminatory, capricious or unreasonable and must bear a real and substantial relation to the health, safety, morals or general welfare of the public."[16]

The City of Bellevue lies on U.S. Route 20 and is temporary host to an exceedingly heavy volume of truck traffic. In an attempt to control such traffic, it provided by ordinance that trucks using the particular high-

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[14] Snyder v. Village of McArthur, 99 Ohio App. 324, 133 N.E.2d 399 (1955).

[15] OHIO REV. CODE § 731.15: " When a bonus is offered for completion of contract prior to a specified date, *the legislative authority* may exact a prorated penalty in like sum for each day of delay beyond the specified date. " (Emphasis supplied). The opinion is also silent whether the contract provided for a bonus of $25 per day for early completion. Is this an instance of inadequate legal research by the lawyers for the contractor?

[16] Cincinnati v. Correll, 141 Ohio St. 535, 49 N.E.2d 412 (1943). Of course, the courts are always the final arbiters on whether the test is met.

way within the corporate limits "must follow and stay in the extreme right lane of said street while travelling on said street " and forbade the passing or overtaking of another motor vehicle by heavy trucks at any time or place on said street.

The Supreme Court held the ordinance invalid.[17] It pointed out that the ordinance made no exception for the presence in the only lane permitted to heavy trucks of a parked or disabled vehicle or an excavation or obstruction. It refused properly to heed the contention of counsel for the city that the ordinance would not be invoked under such circumstances. In other words, the ordinance violated due process by its very terms, and not only in its enforcement. The implication is that had it provided for exceptions in the contingencies suggested it might have been upheld.[18]

Similarly, the Court of Appeals of Hamilton County declared unconstitutional an ordinance of the City of Reading,[19] which forbade traffic on the streets of that city of all vehicles having a gross weight in excess of 20,000 pounds, but which exempted from its prohibitions transportation having its beginning or ending, or both, within the city. In other words, the ordinance applied solely to through traffic.

The court conceded the city's proprietary interest in its streets, its police power to regulate traffic and its power of home rule, and conceded further the right of the council to classify the subjects of legislation. It found, however, that the effect, if not the purpose of this particular ordinance, was to shield one class or unduly to burden one class unlawfully in its administration. The ordinance was, therefore, violative of the equal protection of the laws requirements of the state constitution. The court cited *Myers v. City of Defiance*[20] and distinguished *Froelich v. Cleveland.*[21]

Municipal Home Rule — Civil Service

The state constitution grants to all municipal corporations a degree of "home rule."[22] The extent of this power is uncertain at best, being subject in fact, if not in theory, to inroads from the legislature and to broad or narrow interpretations by the courts of the qualifications in the Ohio Constitution — that the power is that of "local self government" and that

[17] City of Bellevue v. Hopps, 164 Ohio St. 523, 132 N.E.2d 204 (1956)

[18] See Cincinnati v. Luckey, 153 Ohio St. 247, 91 N.E.2d 477, 478 (1950)

[19] Richter Concrete Corp. v. City of Reading, 136 N.E.2d 422 (Ohio App. 1956)

[20] 67 Ohio App. 159, 36 N.E.2d 162 (1940)

[21] 99 Ohio St. 376, 124 N.E. 212 (1919)

[22] OHIO CONST. art. XVIII, §§ 3 and 7

"local police, sanitary and other similar regulations" must not be "in conflict with general laws."[23]

The Charter of the City of Cleveland provides that the appointment of a chief of police need not be made from a civil service eligible list. Section 143.34 of the Revised Code provides that such an office must be filled from such a list.

There is no question that the respective provisions cannot be reconciled, and in *State ex rel. Lynch v. Cleveland*[24] the Supreme Court unanimously resolved the problem by holding that the method of selecting a chief of an administrative department is not such a local police regulation as must conform to general laws. While it had perhaps inferentially made a similar ruling by overruling a motion to certify the record and dismissing an appeal as of right in *Lapolla v. Davis*,[25] the inference is now raised to a more effective position of authority. One may hope that the court will continue in this course of a reasonable enlargement of the constitutional authority of municipal corporations, rather than a diminution of it by narrow construction, as has sometimes unhappily been the case in the past.[26]

Home Rule — Qualifications of Councilmen

Similarly, in *State ex rel. Bindas v. Andrish*[27] the Supreme Court (the Chief Justice and one other judge dissenting this time) held that the statutory prohibition[28] against a councilman's holding any other public office or employment[29] did not control in the face of a Youngstown charter provision as to the qualifications of councilmen which omitted such prohibition. Said the court, " by specifying that its councilmen shall have certain specific qualifications, the people of Youngstown in their charter have inferentially expressed an intention that those are to be the only qualifications required of them. *"Expressio unius est exclusio alterius."*

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[23] Frecker v. Dayton, 88 Ohio App. 52, 85 N.E.2d 419 (1949), *aff'd*, 153 Ohio St. 14, 90 N.E.2d 851 (1950); and X-Cel Dairy, Inc. v. Akron, 63 Ohio App. 147, 25 N.E.2d 700 (1939), *appeal dismissed*, 136 Ohio St. 340, 25 N.E.2d 680 (1940).

[24] 164 Ohio St. 437, 132 N.E.2d 118 (1956).

[25] 89 N.E.2d 706 (Ohio C.P. 1948), *appeal dismissed*, 151 Ohio St. 550, 86 N.E.2d 615 (1949); see also Harsney v. Allen, Jr., 160 Ohio St. 36, 113 N.E.2d 86 (1953)

[26] See the cases cited in Judge Taft's concurring opinion, 164 Ohio St. 441, 132 N.E.2d 121 (1956)

[27] 165 Ohio St. 441, 136 N.E.2d 43 (1956).

[28] OHIO REV. CODE § 731.02.

[29] In this instance the respondent in the quo warranto action was a school teacher in the public school system of another political subdivision.

Zoning — Reasonableness of Use Classification

Numerous cases reach the appellate courts from the trial level on the question of the reasonableness of the classification by the municipal legislative body of particular parcels of land for one or another use. They are nearly always purely fact questions, and for that reason we have not dealt with them in past Surveys, since they rarely enunciate any new legal principles. Since the case of *Nectow v. City of Cambridge,*[30] it has been well established that as applied to a given parcel of land a zoning ordinance must not be arbitrary, capricious or unreasonable. And the test is usually, in the final analysis, the facts and circumstances of the particular case.

We note in this Survey the case of *Partain v. City of Brooklyn,*[31] for the reason that it is an example of absolutely contrary holdings by the courts within the period of approximately three years as to the same parcel of land. What is more, the holdings are probably justifiable, and are based upon an inexorable march of events, resulting in quickly changing circumstances.

In the City of Brooklyn there existed a certain 31 acre parcel of real estate. It was originally zoned for residential purposes. Litigation took place in 1952 on the question whether, under the facts and circumstances pertaining then, the classification was reasonable. The common pleas court held that it was not, but this was reversed by the court of appeals.[32] Motion to certify was overruled and appeal dismissed by the Supreme Court on October 29, 1952.[33]

But in the next three years the population of the city increased considerably and there was a substantial industrial development in the entire Brooklyn area and surrounding communities, although, of course, not on this particular parcel. The city council then rezoned the parcel for industrial purposes. Adjacent property owners and taxpayers sought to enjoin the issuance of an industrial building permit and to have the amending ordinance declared unconstitutional and void.

The trial court refused petitioners the relief sought and the court of appeals affirmed the trial court. Citing the same presumption of reasonableness which had led them to uphold the zoning when it was for residential purposes, the court of appeals held that the matter was one "for

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[30] 277 U.S. 183 (1928)

[31] 133 N.E.2d 616 (Ohio App. 1956). The case is also considered in the CONSTITUTIONAL LAW section, *supra.*

[32] Cleveland Trust Co. v. Brooklyn, 92 Ohio App. 351, 110 N.E.2d 440 (1952).

[33] 158 Ohio St. 258, 108, N.E.2d 679 (1952)

legislative action rather than for judicial decree."[34] It also rebuffed petitioners' contention that "spot zoning" had taken place, and, relying on *Youngstown v. Aiello*,[35] held that a zoning ordinance is susceptible of passage as an emergency measure, thereby preventing a referendum thereon.[36]

Liability of Municipalities for Conditions In Public Highways

The Revised Code has long required municipal corporations to keep their public highways, streets, avenues, alleys, sidewalks and public grounds open, in repair and free from nuisance.[37] This requirement has been construed to impose liability upon municipalities for injury arising as a result of failure to comply, so often and in so many different situations as to require no citation of authority. The extent to which courts have sometimes gone in declaring comparatively insignificant defects to constitute "nuisance" has almost made municipalities insurers of the condition of their streets.

Occasionally, however, the municipality gets a break, as in *Standard Fire Ins. Co. v. City of Fremont*.[38] The application of the statute is limited generally to conditions affecting the actual physical structure of the streets or highways and to the physical obstructions or hindrances to travel thereon.[39] In the case at issue the City of Fremont had undertaken a street widening improvement. Its independent contractor cut off the roots of a tree in front of plaintiff's property in preparation for removal of the tree to permit the installation of curbing for the improvement. Before it could be removed it fell on plaintiff's house.

There could be no liability on the part of the city, inasmuch as the work had been done by an independent contractor, unless it was to be a liability under the statute. The Supreme Court properly gave a strict construction to the statute, limiting its application to conditions in the street affecting travel thereon, and its benefits to persons injured to those using the street as a means of travel.

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[34] Partian v. Brooklyn, 133 N.E.2d 616, 619 (Ohio App. 1956).

[35] 156 Ohio St. 32, 100 N.E.2d 62 (1952).

[36] OHIO REV. CODE § 731.30.

[37] OHIO REV. CODE § 723.01.

[38] 164 Ohio St. 344, 131 N.E.2d 221 (1955).

[39] Typical is Wooster v. Arbenz, 116 Ohio St. 281, 156 N.E. 210 (1927).