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Municipal Corporations

Samuel Sonenfield

that the covenant did not run with the land,[11] hence, the present owners were not liable.

In last year's survey the importance of property relationships to the right of an injured person to recover in tort was noted.[12] A recent court of appeals decision denied a wrongful death claim because the relationship of decedent to the defendant was that of landlord and tenant rather than lodginghouse keeper and lodger.[13] The decedent died from monoxide poisoning due to an unvented gas heater. The decedent had paid his rent for one week, made a key deposit, and entered into possession. The landlord retained the right to make weekly inspections. Because the defect was patent, the landlord was not liable.[14]

MARSHALL I. NURENBERG

MUNICIPAL CORPORATIONS

Zoning Ordinance Forbidding Removal of Valuable Minerals — Constitutionality

Although the case did not involve zoning by a municipal corporation, *East Fairfield Coal Co. v. Booth*,[1] may well have an important bearing upon the constitutionality of such ordinances when enacted by municipal legislative bodies. The legislation in question was a zoning resolution[2] of a township, as distinguished from that of a municipal corporation.[3] It prohibited the removal of coal by the strip mining method. Rather than turning upon the permission of the statutes to "regulate" rather than to "prohibit," the case appears to turn on the fact that the land in question was underlain with minerals (coal) having a present fair market value in excess of $1,000,000, while the land itself after such removal, or if removal were forbidden had a value of approximately $17,000.

The court seemed impressed by the following factors: the coal could be removed only through strip mining or the open pit method; that such

[11] As to the distinction between real and personal covenants see: 15 OHIO JUR. 2d, Covenants §§ 14-22 (1955).

[12] Di Renzo v. Cavalier, 165 Ohio St. 386, 135 N.E.2d 394 (1956).

[13] Branham, Admrx. v. Fordyce, 103 App. 379, 145 N.E.2d 471 (1957). The tenant is put into the exclusive possession of his rooms, while the boarder or lodger has merely the use of them without the actual or exclusive possession, which is in the lessor subject to such use. 24 OHIO JUR. Landlord and tenant § 7 (1932). It would appear, therefore, that the duty owed a boarder or lodger is that owed to a business invitee, i.e. ordinary care, whereas the tenant is bound by caveat emptor except as to latent defects.

[14] 24 OHIO JUR. Landlord and tenant § 185 (1932).

operation would constitute only a temporary use of the land, following which in approximately six years the land would be restored to agricultural uses; that the land in question was rural and open, with only a few houses and other structures located in the general vicinity thereof; that the plaintiff had been granted a license to strip mine the land by the Division of Reclamation of the Department of Agriculture of the State of Ohio[4] under which plaintiff would be required to "reclaim" the lands; and that the legislation, to the extent that it applied to the property of the plaintiffs, was unreasonable and arbitrary in that it deprived plaintiffs of their property without due process of law in violation of the fourteenth amendment of the Constitution of the United States and of Sections 1, 16, and 19, Article I of the State Constitution.

To the extent that the opinion might later be used as an analogy in striking down the power of a municipal corporation to prohibit similar invasions of what are essentially residential areas by unsightly, noisome, and hazardous uses, the decision appears to this writer a highly dangerous invasion of constitutional home rule and an utter disregard of many items dear to the individual in favor of purely economic factors. All zoning (unless completely unrestricted) hurts someone, and if the people of suburban residential areas have no more protection than such a decision gives to them from the ravages of industrial horrors, then we might as well give the country back to the Indians.[5]

Right of Signer to Withdraw Signature From Referendum Petition

The right of a person who signs a petition directed to a body having power to perform or refrain from performing the act which is the subject matter of the petition is well established. The general rule is that in the absence of statutory provisions to the contrary an elector signing a petition authorized by law has a right to withdraw his signature therefrom at any time before official action has been taken on it.[6]

The problem arises when the time for action is uncertain. In *Lynn*

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[1] 166 Ohio St. 379, 143 N.E.2d 309 (1957).

[2] So called in the court's opinion. The statutes permitting township zoning use the word "resolution." OHIO REV. CODE c. 519.

[3] OHIO REV. CODE §§ 713.07-.13.

[4] OHIO REV. CODE § 1513.01.

[5] In the 1956 Annual Survey, there was reported the case of Cleveland Builders Supply Company v. City of Garfield Heights, 102 Ohio App. 69, 136 N.E.2d 105, (1956), in which similar reasoning *was* applied to the zoning ordinance of a municipal corporation. Apparently, then, no distinction will be made between the zoning powers of a township and of a municipal corporation.

[6] State *ex rel.* Kahle v. Rupert, 99 Ohio St. 17, 122 N.E. 39 (1918).

v. Supple,[7] there were involved the passage of an ordinance amending the zoning ordinance of the City of Mayfield Heights, a petition of 1,008 electors calling for a referendum thereon, a counterpetition containing the names of 517 electors asking that their names be withdrawn from the referendum petition, and a counter-counter-petition signed by 25 of the electors who had signed each of the previous two petitions.[8]

The question therefore became one of how many valid signatures remained. The municipal charter provision provided for the presentation of a properly executed referendum petition to the clerk of council within 40 days after final passage by council of the disputed legislation, the examination thereof by the clerk and its presentation to council within 30 days after its filing with the clerk, the reconsideration of the ordinance by council and, in the event of council's failure to repeal it, its submission to the electorate. The charter provisions were silent as to the length of time given for reconsideration of the measure by council.[9] The clerk had not taken any action at all on the referendum petitions until after the filing of the last one.

The Supreme Court held, adhering to the rule enunciated in the *Rupert* case,[10] that the right to withdraw one's name existed up to the time the petition has been acted upon and that no particular formality is required to effectuate the withdrawal, provided that it is sufficiently established that the identity of the signer is that of the party indicating his withdrawal, (presumably the withdrawal must be in writing)[11] and that "final action" had not yet taken place, since the petition had not yet been presented to council.[12]

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[7] 166 Ohio St. 154, 140 N.E.2d 555 (1957).

[8] This may appear confusing, but it is typical of uninformed and ill-considered public reaction to proceedings of municipal legislative bodies. The author of this portion of this survey has a total of 20 years' experience representing three municipal councils, and while he has never had this exact experience, he was not at all astonished to read of it.

[9] The reader's attention is also directed to State, *ex rel.* Endress v. Wellington, 166 at all for reconsideration by the council of legislation at which the referendum is directed. OHIO REV. CODE § 731.29. The idea of giving the legislative body a chance to reconsider is a laudable one, but unless a limitation is put upon it in charter referendum provisions the result will frequently be just what happened in the case under discussion.

[10] *Supra* note 6.

[11] The opinion cites authorities from other jurisdictions *contra.*

[12] The reader's attention is also directed to State, *ex. rel.* Endress v. Wellington, 166 Ohio St. 166, 140 N.E.2d 563 (1957) decided the same day, in which it was held that when a petition containing the requisite number of signatures was filed within the time provided by the state statute, but of which a number sufficient to bring the total *below* the requirement were withdrawn, so that the petition became inadequate, a supplemental petition containing new names could not be filed after the statutory date for filing petitions. The result appears logical, but the opportunities for fraud

Right of Councilman to Hold Other Public Office

Until September 30, 1955, the Revised Code forbade municipal councilmen to hold any other public office or employment.[13] The prohibition was applied with a broad brush so as to extend to *all* public positions and employment, such as a member of the state board of health, military service of the United States, state university professor, and public school teacher.[14]

As of September 30, 1955, the Legislature amended the section[15] to forbid only the holding of other public office, or "employment with said village." The first reported decision under the new statute appears to be *State ex rel. Scarl v. Small*[16] in which the Court of Appeals for Portage County held a village councilman who was a public school teacher in a nearby city to be eligible to act as councilman.

The court was faced only with deciding whether the position of school teacher was a "public office" as a result of the amendment of the statute. The court applied the definition given to *State ex rel. Attorney General v. Jennings*,[17] that:

> To constitute a public office, . . . it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by Law, to be exercised by the incumbent in virtue of his election or appointment to the office thus created and defined, and not as a mere employee, subject to the direction and control of someone else.

The court held that the school teacher was not holding public office, but was engaged under contract to perform public employment, and therefore eligible to hold office as councilman.

Exclusion of Through Trucks From Municipal Highways

In the 1956 Annual Survey,[18] we commented upon the case of *Richter Concrete Corp. v. City of Reading*[19] in which the Court of Appeals of Hamilton County had declared unconstitutional an ordinance which prohibited the operation of trucks weighing over 20,000 pounds gross

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are obvious. See also State *ex rel.* Wilson v. Bd. of Education, 102 Ohio App. 541, 144 N.E.2d 323 (1956), *Aff'd* 166 Ohio St. 260, 141 N.E.2d 289 (1957), another interesting case on the right of signatories to withdraw from a petition.

[13] OHIO REV. CODE, § 731.12.

[14] See cases noted in footnotes to the above section and its equivalent, Ellis' OHIO MUNICIPAL CODE § 731. 02 (10th ed. 1955).

[15] 126 OHIO LAWS 287.

[16] 145 N.E.2d 200 (Ohio Ct. App. 1956).

[17] 57 Ohio St. 415, 49 N.E. 404 (1898).

[18] 7 WEST. RES. L. REV. 301 (1957).

[19] 103 Ohio App. 67, 136 N.E.2d 422 (1956).

weight on streets of the city of Reading (except state highways) but which excepted from the prohibition operations of loading or unloading in the city or traveling to or from the city. The court reasoned that the effect was to discriminate against non-residents, particularly those driving *through* the city.

The Supreme Court sustained the court of appeals in 1957, approving both the reasoning in and result of its opinion.[20]

Injunction Against Zoning Violation

Most zoning ordinances have traditionally contained provisions making their violation a misdemeanor and establishing fines and penalties for violation thereof. A few years ago the General Assembly amended[21] what was then Section 4366-12 of the General Code[22] to permit the municipal corporation or the owner of any contiguous or neighboring property who would be especially damaged by such violation to institute a suit for injunction to prevent or terminate such violation, in addition to any other remedies provided by law.

The interpretation and, inferentially, the validity of the provision with respect to injunctive remedies came before the Supreme Court in *Johnson v. United Enterprises, Inc.*[23] The contention was that since the persons seeking the injunction had a right of appeal[24] to the common pleas court from the order of the municipal board of zoning appeals which had granted the allegedly illegal permit, they could not have recourse to injunctive proceedings.

The Court properly distinguished *Eggers v. Morr*,[25] which involved no problem of erecting, constructing, altering, repairing or maintaining of any building or structure or the use of any land in violation of any zoning ordinance or regulation, but rather a resolution of the county commissioners which had actually amended a county zoning resolution.

Section 713.13 is a special statute, and comes within the ". . . unless otherwise provided by law . . ." clause of Section 2505.03.

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[20] 166 Ohio St. 279, 142 N.E.2d 525 (1957).

[21] 124 OHIO LAWS 555, 556 (effective 10-1-53).

[22] Now OHIO REV. CODE § 713.13.

[23] 166 Ohio St. 149, 140 N.E.2d 407 (1957).

[24] OHIO REV. CODE § 2505.03:

> Every final order, judgment or decree of a court and, when provided by law, the final order of any administrative officer, tribunal or commission may be reviewed as provided in Sections 2505.03 to 2505.45, inclusive, of the Revised Code, unless otherwise provided by law. . . .

[25] 162 Ohio St. 521, 124 N.E.2d 115 (1955).

Observance By Council of Its Own Rules Not Required

Nearly all legislative bodies adopt and from time to time amend their own rules of procedure. Municipal councils are specifically authorized by statute to do so[26] although, it is submitted, the power is inherent and needs no statutory grant of authority. In practice, this is done in two ways, either by motion of council or by an ordinance enacted as are other items of permanent legislation.

The power of a municipal council to pass legislation in a manner contrary to the method therefor, which had previously been established by an existing ordinance of its predecessor, was in issue in *Humphrey v. City of Youngstown.*[27] The city council passed an ordinance amending its zoning ordinance. While the zoning amendment conformed, in the steps taken in the passage thereof, with the applicable state statutes,[28] the council appears definitely to have violated the rules of parliamentary procedure theretofore adopted by councilmanic ordinance. No effort was made to amend the parliamentary rules ordinance.

The right of a legislative body to depart freely from its own rules was upheld by the court of appeals. Ample authority therefor, exists in the decisions of courts in other states and in an earlier opinion of the Ohio Supreme Court dealing with the right of the General Assembly to do likewise.[29] Such departures will not be the subject of judicial inquiry, so long as they do not violate vested rights or fundamental law such as a charter provision.[30]

Fire and Police Relief and Pension Funds

In order to insure that members of municipal police and fire departments may be cared for in case of disability in line of duty and in their old age, and that their dependents may not become public charges, the Legislature has enacted comprehensive relief and pension legislation for both departments in all municipal corporations having "full time" departments.[31] The establishment of such funds is mandatory; the funds are

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[26] OHIO REV. CODE § 731.45.

[27] 143 N.E.2d 321 (Ohio Ct. App. 1955).

[28] OHIO REV. CODE §§ 713.07-.13.

[29] State *ex rel.* City Loan and Savings Co. of Wapakoneta v. Moore, 124 Ohio St. 256, 177 N.E. 910 (1931).

[30] As to the rule in changing a basic document such as a state constitution or a municipal charter, however, see Leach v. Brown, 167 Ohio St. 1, 145 N.E.2d 525 (1957).

[31] OHIO REV. CODE, c. 741.