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Municipal Corporations

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bers of the bar who have occasion to draft instruments intended as perpetual leases should heed the court's advice.

The question of what a lessee is legally bound to preserve was the principal issue in *Powell v. Socony Mobil Oil Co.*[3] Defendant leased certain premises from plaintiff and operated a gasoline station upon them. This was a nonconforming use, which fact was known to both plaintiff and defendant. For a time defendant operated the station, then abandoned all operations but continued to pay the rent for several years. The city where the premises were located, Washington Court House, had a zoning ordinance in effect, which in substance provided that if a nonconforming use was not utilized for more than one year, the use was thereby terminated and could not be revived.

Plaintiff in his second cause of action sought damages for defendant's alleged failure to operate the station, thereby causing him to lose the use of the property for commercial purposes under the zoning ordinance. The court held that, under the terms of the lease, the defendant was not bound to operate the gasoline station. Because it was not bound to preserve this nonconforming use, it could not be held liable for damages. The court did mention that although the lease provided that the tenant would comply with, *inter alia,* all ordinances relating to health, and that the ordinance discussed above was "for the promotion of public health," the failure to operate the station did not constitute noncompliance with the city ordinance. This would certainly be a logical conclusion, for to require a party to maintain a nonconforming use to comply with an ordinance whose obvious purpose was to reduce such uses would be contradictory to reason and the intent of the ordinance.

JOHN H. WILHARM, JR.

MUNICIPAL CORPORATIONS

HOME RULE

Licensing by Municipalities

Nature of a License

The City of Akron owned in fee the land underlying two artificial reservoirs outside the city limits. These reservoirs were built by damming non-navigable streams and were used to supply the city water works. The city undertook to devote these reservoirs to recreational purposes and

3. 113 Ohio App. 507, 179 N.E.2d 82 (1960).

to permit boating and fishing on their waters. In order to raise revenues to this end,[1] the city required that a "permission of license" be obtained for the privilege of operating water craft on the reservoir waters. The Ohio Attorney General sought to enjoin the City of Akron from requiring a separate boat license for this privilege.

In *State ex rel. McElroy v. City of Akron*[2] the Ohio Supreme Court reversed the lower court decisions, which had sustained the city's power to license, and granted the injunction. The court held that the license was a tax because its purpose was the production of revenue and that the state had pre-empted the power to tax watercraft on waters of the state by the enactment of Ohio Revised Code sections 1547.54 and 1547.61.[3] The opinion of the court sought to delineate what the city could and could not do as the owner of these reservoirs: The city could preclude anyone, including those who held watercraft licenses issued by the state, from using its waters; the city could charge admission fees for access to the reservoir waters or for the use of the city ramps and docks; however, the city could not license the privilege of operating watercraft upon its waters.[4]

The court did not make a distinction in this case between a license granted by a municipality to a third party for the privilege of using and enjoying the municipality's property, and a license granted by a municipality to a third party as a condition precedent to the full use and enjoyment of the third party's property. Under prior Ohio case law, a municipality which has an interest in property retains the same rights and duties in relation to that property as does any private owner.[5] Further, under Ohio case law, the owner of the fee underlying a body of water created by the damming of a non-navigable stream has the exclusive right to use the waters above the land for boating and fishing.[6] This exclusive right

1. The city claimed that it was precluded by its charter and by state statute from devoting either water department funds or general tax revenues for the maintenance and supervision of the recreational area. See State *ex rel.* McElroy v. City of Akron, 168 N.E.2d 500, 502 (Ohio C.P. 1960).

2. 173 Ohio St. 189, 181 N.E.2d 26 (1962), *appeal dismissed,* 371 U.S. 35 (1962).

3. OHIO REV. CODE § 1547.54 requires owners of watercraft operated on waters of the state to apply for a state license. OHIO REV. CODE § 1547.61 provides in part: "No political subdivision of this state or conservancy district shall charge any license fee or other charge against the owner of any watercraft for the right or privilege of operating said watercraft upon the waters of any such political subdivision or conservancy district and no license or number in addition to those provided for hereunder shall be required by any state department, conservancy district, or political subdivision of this state." In the *City of Akron* case the court construed this prohibition not only as applying to waters located in political subdivisions but also as applying to non-navigable waters in which the political subdivision held an important property interest.

4. State *ex rel.* McElroy v. City of Akron, 173 Ohio St. 189, 195-96, 181 N.E.2d 26, 31 (1962).

5. State *ex rel.* White v. City of Cleveland, 125 Ohio St. 230, 181 N.E. 24 (1932).

6. Lembeck v. Nye, 47 Ohio St. 336, 24 N.E. 686 (1890); Akron, Canal & Hydraulic Co. v. Fontaine, 72 Ohio App. 93, 50 N.E.2d 897 (1943).

necessarily entails the right to grant someone else a license for some special use and enjoyment of the property.[7]

Licensing as a Police Regulation

Prior to 1962, municipalities had little success in regulating liquor establishments.[8] However, the power of municipalities to license business establishments operating under state licenses was upheld in *Stary v. City of Brooklyn*,[9] decided in 1954.

In *Auxter v. City of Toledo*[10] the owner of a beer and wine carry-out store brought an action to enjoin the City of Toledo from collecting its fifteen dollar license fee under the Toledo liquor licensing ordinance. In reversing the lower court decision which had sustained the ordinance as valid, the supreme court determined the ordinance to be a police regulation because it prohibited "the doing of something without a municipal license to do it,"[11] and held that under the *Sokol*[12] test, the regulation was in conflict with state law:

> In the instant case, the *ordinance forbids and prohibits what the statute permits and licenses.* Even though plaintiff has a state license authorizing him to carry on the business of selling beer in Toledo, the ordinance prohibits him from doing so if he does not pay for and secure a municipal license to do so.[13]

By limiting and distinguishing the holding in *Stary*, the court in *Auxter* placed in serious doubt all types of municipal regulatory licensing where there exists a state regulatory license for the same business operation.[14]

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7. The court's decision is not one which will encourage municipalities to dedicate their water supply and flood control reservoirs to recreational uses, despite a lengthy discussion in the court's opinion of the rapidly increasing number of boat owners in the state and the need for more boating and fishing areas.

8. See, *e.g.*, Neil House v. City of Columbus, 144 Ohio St. 248, 58 N.E.2d 655 (1944) (invalidating a midnight closing ordinance); Spisak v. Village of Solon, 68 Ohio App. 290, 39 N.E.2d 531 (1941) (invalidating liquor licensing ordinance).

9. 162 Ohio St. 120, 121 N.E.2d 11 (1954). The ordinance which was upheld required trailer camp operators to obtain a municipal license and provided for revocation of the license if any trailer were permitted to remain in the camp more than ninety consecutive days. Licensing by the State Board of Health was provided for in OHIO GEN. CODE § 1235-3, now OHIO REV. CODE § 3733.04. Syllabus 3 of the opinion in *Stary* states: "A provision in a municipal ordinance requiring the operator of such camp or park to pay to the municipality a license fee which is reasonably related to the expense of supervision of the camp or park and the enforcement of the ordinance is not in conflict with § 1235-3, General Code . . . ."

10. 173 Ohio St. 444, 183 N.E.2d 920 (1962).

11. *Id.* at 446, 183 N.E.2d at 922.

12. Village of Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923).

13. Auxter v. City of Toledo, 173 Ohio St. 444, 447, 183 N.E.2d 920, 923 (1962) (All italicized in original.).

14. The court suggested that Stary v. City of Brooklyn, 162 Ohio St. 120, 121 N.E.2d 11 (1954), could be distinguished on the basis that a housing regulation rather than a liquor regulation was under consideration. Another possible distinction between *Auxter* and *Stary* which was not suggested by the court is that in *Auxter* the statute provided that "each permit issued . . . shall authorize the person named to carry on the business specified" whereas in

In *City of Wooster v. Gentile*[15] defendants appealed from a conviction for failure to obtain a peddler's and solicitor's license as required by municipal ordinance. The Wayne County Court of Appeals reversed the conviction and held that while municipalities are authorized by state statute to adopt ordinances licensing peddlers, such ordinances, if they are not to be deemed in conflict with state law, must contain the same exemptions and exceptions as provided under state law.[16]

Since the state statute does not itself regulate peddlers and solicitors but purports only to authorize and limit municipal regulation in this area, the case raises the question whether a municipal regulation which extends beyond the limits imposed by the state statute is in conflict with the statute.[17] The *Gentile* case also suggests, but does not raise, another "conflict" problem: Whether the "conflict" issue may be invoked by a person who does not come within the particular provisions of a municipal ordinance which on their face are at variance with the state statute.[18]

Penalties under Ordinances

In *City of Cleveland v. Betts*[19] the supreme court held that a municipal ordinance which defined a certain offense as a misdemeanor is in conflict with a state statute which defines the same offense as a felony, and the ordinance is, therefore, invalid.[20]

Stary the statute contained no such provision. Thus an argument could be made that the statute expressly permitted the holder of a state liquor permit to operate his business without a municipal license.

15. 116 Ohio App. 386, 188 N.E.2d 172 (1962).

16. OHIO REV. CODE §§ 715.63 & 715.64 purport to authorize municipalities to adopt ordinances licensing peddlers and transient dealers. OHIO REV. CODE § 715.63 provides in part: "No municipal corporation may require of the owner of any product of his own raising, or the manufacturer of any article manufactured by him, a license to vend or sell, by himself or his agent, any such article or product." OHIO REV. CODE § 715.64 provides in part: "This section does not apply to persons selling by sample only, nor to any agricultural articles or products offered or exposed for sale by a producer."

17. See City of Fremont v. Keating, 96 Ohio St. 468, 118 N.E. 114 (1917) (statute prohibiting municipal speeding regulations unconstitutional); *but cf.* Schneiderman v. Sesantein, 121 Ohio St. 80, 167 N.E. 158 (1929).

18. The facts of the opinion do not reveal whether defendants had manufactured or raised the products they were selling and/or whether they were merely selling samples so that they might come within the statutory exceptions.

19. 168 Ohio St. 386, 154 N.E.2d 917 (1958). For a criticism of the *Betts* rule, see FARRELL-ELLIS, OHIO MUNICIPAL CODE § 1.33 (11th ed. 1962).

20. Two cases reported in 1962 and decided under the *Betts* rule involved municipal ordinances deemed to be in conflict with OHIO REV. CODE § 2905.34, which declares a sale, or the like, of obscene materials or contraceptives to be a felony. In City of Cincinnati v. Coy, 115 Ohio App. 478, 172 N.E.2d 268 (1962), the city unsuccessfully contended that the requirement of *scienter* in the ordinance was not the same as the requirement in the statute as construed and that, therefore, the ordinance did not fall within the *Betts* rule. In Hicks v. City of Akron, 181 N.E.2d 279 (Ohio Ct. App. 1961), a declaratory judgment action, the operator of vending machines which dispensed prophylactics, successfully attacked a municipal penal ordinance prohibiting distribution of contraceptives except by physicians and druggists as in conflict with OHIO REV. CODE § 2905.34.

In *City of Toledo v. Best*[21] the supreme court held that an ordinance which prescribed a certain penalty for a misdemeanor is not in conflict with a state statute which prescribed a greater penalty for the same offense so long as the penalty prescribed in the state statute does not classify the offense as a felony.

In 1962 the Cuyahoga County Court of Appeals added a further refinement to these rules. Under the court's holding in *City of Cleveland v. Jones,*[22] an ordinance which provides a misdemeanor punishment for a certain offense is not in conflict with a state statute which provides for the same offense a misdemeanor punishment upon the first conviction and for a felony punishment upon subsequent convictions. Apparently, the prosecution under the ordinance was for a first offense. Would a prosecution under the ordinance for a second offense render the ordinance in conflict with the state statute?

Adoption of Municipal Ordinances

In *Davis v. City of Willoughby*[23] the charter drafters included a provision that

> any ordinance or resolution may be passed or adopted . . . by the affirmative votes of four members of the council unless a larger number be required by the provisions of this charter or *by the laws of Ohio.*[24]

Five members of a seven man council voted to adopt a resolution of necessity for a sewer improvement to be paid for by special assessments. In a taxpayer's action to enjoin the levy of a special assessment, the Ohio Supreme Court declared the assessment invalid because the resolution of necessity for the improvement was not adopted with three-fourths of the council "members elected thereof concurring" as required by Ohio Revised Code section 727.09.[25]

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21. 172 Ohio St. 371, 176 N.E.2d 520 (1961); *contra,* City of Toledo v. Ransom, 169 N.E.2d 657 (Ohio C.P. 1960).

22. 184 N.E.2d 494 (Ohio Ct. App. 1962).

23. 173 Ohio St. 338, 182 N.E.2d 552 (1962).

24. WILLOUGHBY CITY CHARTER, art. III, § 6 (Emphasis added.).

25. A main argument raised by the city was that the failure of the president of council, acting as mayor at the council meeting, to vote was an expression of his acquiescence and concurrence, and that in this way the requisite three-fourths majority was attained. See Babyak v. Alten, 106 Ohio App. 191, 154 N.E.2d 14 (1958). The supreme court, looking to the word, "concurring," in the language of the statute, rejected this argument: "The theory that inaction by members of a city council should be considered as an acquiescence and approval of the action taken by the majority of the members voting is not applicable in a proceeding to levy and collect assessments for a public improvement." Davis v. City of Willoughby, 173 Ohio St. 338, 343-44, 182 N.E.2d 552, 556 (1962).

For another case involving the procedure for adopting an ordinance by a charter municipality, see City of Dayton v. Woodgeard, 116 Ohio App. 248, 187 N.E.2d 921 (1962). In this case an ordinance enacted by a charter municipality was declared valid even though the ordinance was not enacted in compliance with the rules of the legislative body.

In *State ex rel. Tester v. Board of Elections*[26] the legislative body of a non-charter municipality, upon the filing of a referendum petition, repealed the ordinance subject to the referendum and enacted a second ordinance substantially the same as the first ordinance except that it contained an emergency recital. This procedural maneuver to avoid a referendum on the merits of the ordinance was held to be valid:

> However, our law recognizes the right of a municipal council to defeat the right to a referendum on legislation by enacting such legislation as an emergency measure; and we have held that the question of whether there was an emergency is not subject to review in the courts if council has, by the required vote, determined that there was an emergency.[27]

CHARTER MUNICIPALITIES

Compelling a Municipal Legislative Body to Act under Its Charter

Ohio courts have frequently invalidated acts of municipalities because these acts were not carried out in the manner required by the municipal charter.[28] In *State ex rel. Scott v. Masterson*[29] the supreme court went a step further and granted a writ of mandamus compelling a municipal legislative body to act under its charter when the manner of acting was left wholly to the discretion of the legislative body.

Section 25 of the Charter of the City of Cleveland places the duty on city council to redivide the city after each federal census into thirty-three wards "as nearly equal in population as may be, composed of contiguous and compact territory, and bounded by natural boundaries or street lines." The Cleveland City Council had failed to redivide the wards according to changes in population density reported in the 1950 and the 1960 federal census. In issuing a writ of mandamus ordering council to redistrict, the court looked with approval to the recent Tennessee reapportionment ruling by the United States Supreme Court.[30]

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26. 174 Ohio St. 15, 185 N.E.2d 726 (1962).

27. *Id.* at 17, 185 N.E.2d at 763.

28. In two Ohio cases reported in 1962, municipal contracts were invalidated because the contracts were entered into without following the charter provisions for competitive bidding. Young v. City of Dayton, 116 Ohio App. 271, 188 N.E.2d 166 (1962) (Dayton charter); Revco v. City of Cleveland, 183 N.E.2d 646 (Ohio C.P. 1961) (Cleveland charter). In both these cases, since the municipal obligation under its contract was a debt, the competitive bidding provisions of OHIO REV. CODE § 735.05 applied. See Phillips v. Hume, 122 Ohio St. 11, 170 N.E. 438 (1930).

29. 173 Ohio St. 402, 183 N.E.2d 376 (1962).

30. Baker v. Carr, 369 U.S. 186 (1962).
On January 14, 1963, the Cleveland City Council adopted a redistricting ordinance which recited the mandate of the Supreme Court. Cleveland, Ohio, Ordinance 118-63, Jan. 14, 1963.

Distribution of Power by Municipal Charters

Generally, Ohio courts have sustained charter provisions which redistributed the function and offices of the municipal executive or which have provided different procedures for the appointment of an executive official from those provided in the state statutes. Further, the Ohio courts have held that in the realm of the organization of a municipality the charter is supreme and is not affected by state constitutional limitations.[31] From this, some municipal lawyers have concluded that the doctrine of separation of powers does not apply to charter municipalities.[32]

In *City of Avon Lake v. Burke*[33] the municipality attempted to prosecute defendant for violation of a regulation of the Board of Municipal Utilities which provided that the tampering with any water valve was a misdemeanor punishable by a one-hundred dollar fine. The municipal charter delegated to the board the power to make regulations relating to the "safe, economical and efficient management, operation and protection" of the public utility and provided that such regulations shall have "the same validity as municipal ordinances."[34] The Avon Lake Municipal Court, on its own motion, dismissed the prosecution and held that insofar as the regulation attempted "to determine certain acts as misdemeanors it is repugnant to the constitution of the State of Ohio."[35] The court of appeals reversed and remanded holding that the doctrine of the separation of powers did not apply because the delegation of power came from the charter itself and not from another legislative body which did not have the power to delegate.[36]

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31. State *ex rel.* Hackley v. Edmonds, 150 Ohio St. 203, 80 N.E. 769 (1948) (charter provision for recall of councilmen alleged in conflict with OHIO CONST. art. II, § 38); State *ex rel.* Taylor v. French, 96 Ohio St. 172, 117 N.E. 173 (1917) (charter provision permitting women to hold municipal office alleged in conflict with OHIO CONST. art. V, § 1); Fitzgerald v. City of Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913) (charter provision abolishing nomination of municipal officer by partisan primary alleged in conflict with OHIO CONST. art. V, § 7).

32. FARRELL-ELLIS, OHIO MUNICIPAL CODE, § 1.13 (11th ed. 1962); Duffey, *Non-Charter Municipalities: Local Self-Government,* 21 OHIO ST. L.J. 304, 310 (1960).

33. 115 Ohio App. 541, 186 N.E.2d 94 (1962), *reversing* 180 N.E.2d 645 (Ohio Munic. Ct. 1962).

34. AVON LAKE CITY CHARTER, § 51.

35. City of Avon Lake v. Burke, 180 N.E.2d 645, 646 (Ohio Munic. Ct. 1962). The holding by the municipal court that the regulation was invalid was based both on the doctrine of separation of powers and the due process requirement that certain formalities be observed in enacting penal regulations.

36. The court of appeals stated regarding its jurisdiction to entertain an appeal by the state from a judgment by the municipal court dismissing a complaint: "We entertain this appeal of the City of Avon Lake by virtue of the jurisdiction given this court under the Constitution of Ohio, as well as on authority of cases cited in 2 OHIO JURISPRUDENCE (2D), *Appellate Review* § 179." City of Avon Lake v. Burke, 115 Ohio App. 541, 543, 186 N.E.2d 94, 95 (1962).

At least one other home rule case in 1962 was decided in favor of the city on an appeal

RELATIONS BETWEEN MUNICIPALITIES

Eminent Domain

In *Village of Blue Ash v. City of Cincinnati*[37] the general home rule power granted to municipalities under article XVIII, section 3 of the Ohio Constitution collided with the home rule public utility power granted to municipalities under article XVIII, section 4.

The City of Cincinnati had drawn up plans to construct a feeder-type airport outside the city limits and had spent millions of dollars in acquiring property for this purpose. The city filed an action to condemn one of the public streets of the Village of Blue Ash, which action the village sought to enjoin. The trial court entered a decree enjoining Cincinnati from condemning the street after the court had sustained a demurrer to the answer of the city, and Cincinnati declined to amend its answer.[38]

Cincinnati's view of the facts of the case as summarized by its law director was as follows:

> Because of the high landing and takeoff speeds of modern aircraft, modern airports must be large enough to provide runways in excess of 8,000 feet in length. Because of the fact that most cities that require the services of airports are densely populated, it is necessary, from an economic point of view, to locate such airports in the areas outside the city which are sparsely populated. In the sparsely populated areas it is impossible, because of the length of the runways required, to construct an airport without acquiring in some manner, either by appropriation or vacation, parts of existing street systems. If the streets cannot be vacated then they must be appropriated or there can be no airport. It might be said, with respect to such a case, that the city should locate its airport in an unincorporated area. The facts of the Cincinnati case are, and this would probably be true of many other cases, that the area in which the airport is located was unincorporated at the time the city

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by the city from a judgment in the municipal court dismissing the prosecution. City of Cleveland v. Jones, 184 N.E.2d 494 (Ohio Ct. App. 1962), discussed at 454, *supra.*

These holdings have been discredited by City of Toledo v. Crews, 174 Ohio St. 253, 188 N.E.2d 592 (1963). The *Crews* case involved an appeal by the city from the municipal court to the court of appeals following the municipal court's sustaining defendant's demurrer on the grounds that the municipal ordinance under which defendant was charged was in conflict with a state statute and therefore unconstitutional. The supreme court held that under the existing statutes "there is no right of appeal in a criminal case involving a charge of violation of a municipal ordinance except from a judgment of conviction." *Id.* at 256, 188 N.E.2d at 594.

37. 173 Ohio St. 345, 182 N.E.2d 557 (1962).

38. Village of Blue Ash v. City of Cincinnati, 166 N.E.2d 788 (Ohio C.P. 1960).

Behind the immediate issue before the courts in this case, the power of one municipality to condemn another municipality's street, was perhaps even a more basic issue, the power of one municipality to condemn and exercise exclusive and unrestricted control over property within the limits of another municipality. This issue was initially raised at the trial level by the city's allegation in its answer that the village sought by a zoning ordinance to prohibit construction of airport runways in excess of 3,000 feet. For a full discussion of this problem in another state, see Howard v. City of Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940).

began the airport project and that the incorporation was effected primarily for the purpose of blocking the airport.[39]

Cincinnati sought to show that the facts in this case brought it within an exception to the general rule which prohibits the appropriation of property already devoted to a public purpose. The general rule does not apply, the city maintained, where there is either express or implied authority to condemn property of another public body. The authority to condemn was necessarily implied from the constitutional grant under article XVIII, section 4, because of the paramount necessity for acquiring additional property in order to complete the airport project.

The Ohio Supreme Court, in effect, held the city's argument to be correct as a proposition of law.[40] However, the court also held that the facts of this case did not warrant a finding of necessarily implied authority to condemn public property. The court, therefore, reversed the judgment of the court of appeals, and affirmed the judgment of the trial court which had granted the injunction.[41]

The court held as a matter of law that the power to condemn in this case did not arise by necessary implication. The majority opinion stated that a municipality acting in its proprietary capacity cannot condemn property used by other municipalities in the performance of a governmental function.[42] Further, the opinion stated that in order to find power implied by necessity, the "necessity must arise from the nature of things over which the corporation desiring to take has no control, and not from a necessity created by such corporation for its convenience or economy."[43] Finally, the court added that an injunction against an unau-

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39. Farrell, *Municipal Public Utility Powers*, 21 OHIO ST. L.J. 390, 397-98 (1960). For the competing policy argument, see Village of Blue Ash v. City of Cincinnati, 173 Ohio St. 345, 352, 182 N.E.2d 557, 562 (1962): "This case must be controlled by legal principles and not by considering the practical effect of an airport for the city of Cincinnati at the expense of a public street in the village of Blue Ash. Each are municipal corporations, and if property of one, devoted to governmental uses, can be taken by the other for an airport, while acting in its proprietary capacity, it would make possible the destruction of a municipal corporation, or at least a part thereof, by another municipal corporation for its convenience and economy."

40. Village of Blue Ash v. City of Cincinnati, 173 Ohio St. 345, 182 N.E.2d 557 (1962).

41. *Ibid.* (5-2 decision).

42. *Id.* at 351, 182 N.E.2d at 562. The distinction made by the majority opinion between condemnation for proprietary purposes and condemnation for governmental purposes was sharply criticized by the dissent: "Such a criterion [the criterion of paramount need], in my opinion, is eminently more desirable than further perpetuating the already over-extended differentiation between governmental and proprietary functions of a municipality." *Id.* at 354, 182 N.E.2d at 563 (dissenting opinion).

43. *Id.* at 352, 182 N.E.2d at 562, citing 2 MCQUILLIN, MUNICIPAL CORPORATIONS § 32.67 (3d ed. 1950). It is not clear when the necessity may arise "from the nature of things over which the corporation has no control." Would this test be met if the city had built an airport on the land already condemned and then at some later date, desiring to extend the runway across a village street to accommodate jet planes, could show that it would not be economically feasible to build a new jet airport in a better location?

thorized appropriation proceeding "is a matter of strict right, not of equitable discretion."[44]

Zoning

Shaker Coventry Corp. v. Shaker Heights Bd. of Zoning Appeals[45] presented, as an underlying issue, the problem of whether the exercise by one municipality of its zoning regulation power may affect the power of another municipality to zone land within its boundaries.

Shaker Boulevard is a main artery which runs westerly through Shaker Heights and Cleveland and in the center of which is located a rapid transit line. On the west side of the Shaker Heights-Cleveland boundary line along Shaker Boulevard the land is zoned by the City of Cleveland for high-rise apartments. On the east side of the boundary the land is zoned by the City of Shaker Heights for single family and duplex residences. A rapid transit station with a concession stand and a small service station adjacent to it is located on the boundary.

In 1947 Shaker Coventry Corporation purchased a parcel of land comprising several sublots which were bisected by the boundary line. On the sublot west of the boundary, in Cleveland, the owner constructed a high rise apartment. Then the owner applied for a building permit to construct a high-rise apartment on the sublots to the east in Shaker Heights. The permit was refused and the owner appealed to the Shaker Heights Board of Zoning Appeals. The board rejected the appeal asserting that it had no jurisdiction because, under the city zoning code, it had no authority to grant a variance in this case.

On further appeal, the Common Pleas Court of Cuyahoga County held that the restrictive zoning ordinance, as applied to the property proposed for a high-rise apartment was arbitrary and unreasonable.[46] Three considerations apparently determined the court's decision: (1) the nature of the property, now a vacant lot and likely to remain so in the court's view as long as its use was restricted to single family and duplex resi-

44. *But cf.* Village of Richmond Heights v. Board of County Comm'rs, 112 Ohio App. 272, 166 N.E.2d 143 (1960), *appeal dismissed,* 171 Ohio St. 449, 172 N.E.2d 133 (1961).

However, the dissent in *Village of Richmond Heights* was in accord with the majority view of the supreme court in *Blue Ash. Id.* at 288-90, 166 N.E.2d at 154-56. The *Village of Richmond Heights* case involved an action to enjoin the county from condemning land to build an airport which land was purchased by the municipality for the purpose of using it as a site for municipal buildings and a village recreational park. The Cuyahoga County Court of Appeals refused to grant the injunction. In this case the county sought to condemn land which at the time was still vacant under a statute authorizing counties to construct airports. OHIO REV. CODE §§ 307.20, 719.01(O).

45. 115 Ohio App. 472, 180 N.E.2d 27, *appeal dismissed,* 173 Ohio St. 572, 184 N.E.2d 212 (1962).

46. Shaker Coventry Corp. v. Shaker Heights Planning Comm'n, Civil No. 735,845, C.P. Ohio, March 24, 1961.

dences;[47] (2) the nature of the property adjoining to the west and the ready access of public transportation; and (3) the fact that the Board of Zoning Appeals had refused Shaker Coventry a hearing on its application for a variance.[48] The decision by the common pleas court was affirmed by the court of appeals.[49]

The assertion by Shaker Heights in its brief in support of a motion to certify to the supreme court,[50] recalls the language of the *Village of Euclid v. Ambler Realty Co.*:[51]

> But the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public if left alone, to another course where such injury will be obviated.[52]

If the phrase "industrial establishments" were replaced by the phrase "apartment houses," the language of the United States Supreme Court would aptly apply to the problem raised in the instant case.[53]

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47. At the trial there was testimony to the contrary. One builder testified that if the property were for sale, he would be willing to purchase it and construct a duplex residence on it. Brief for Appellees-appellants, p. 7, Shaker Coventry Corporation v. Shaker Heights Board of Zoning Appeals, 115 Ohio App. 472, 180 N.E.2d 27, *appeal dismissed,* 173 Ohio St. 572, 184 N.E.2d 212 (1962).

48. One of the arguments made by Shaker Heights to the court was that since the zoning board of appeals had no authority to hear the case and since this was not an independent action but rather an appeal from an administrative agency under OHIO REV. CODE §§ 2506-.01-.04, the reviewing court had no authority or jurisdiction to hear the case either. See Broad-Miami Co. v. Board of Zoning Adjustment, 185 N.E.2d 76 (Ohio C.P. 1959), wherein it was stated in dictum: "Turning now to the merits, the first question involved is whether the Board had the authority to grant the variance requested; for if of course the Board had no such authority, it would mean that this Court, on appeal, would have no such authority." *Id.* at 81.

49. Shaker Coventry Corp. v. Shaker Heights Bd. of Zoning Appeals, 115 Ohio App. 472, 180 N.E.2d 27, *appeal dismissed,* 173 Ohio St. 572, 184 N.E.2d 212 (1962).

50. Shaker Heights asserted in its brief: "In the present case the district boundary line is the boundary line of the city itself. The City of Shaker Heights has no voice in the zoning within the City of Cleveland. Yet the result of the decision below is that the City of Cleveland by its zoning and the Appellee by constructing an apartment building in Cleveland have had a great deal to say about the zoning in Shaker Heights." Brief for Appellees-appellants, p. 19, *ibid.*

51. 272 U.S. 365 (1926).

52. *Id.* at 389-90.

53. For a further discussion of this aspect of the *Shaker Coventry Corp.* case, see Crawford, *Home Rule and Land Use Control,* 13 W. RES. L. REV. 702, 720 (1962).