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Zoning Laws and the Church

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ZONING LAWS AND THE CHURCH

Introduction

Legislation, the practical effect of which is to restrict the use of private property without pecuniary compensation to the owner, has assumed many forms, and has been sustained as a valid exercise of police power.[1] The compensation to the restrained owner is found in the share he enjoys in the common benefit received by all.[2] The scope of state police power has been extended in recent decades to include zoning legislation. These laws have effected substantially the growth and development of cities, towns and villages by dividing them into residential, business and industrial districts, for the purpose of preserving property values,[3] and enabling their inhabitants to live in a truly residential environment, free from the discomforts of an industrial atmosphere.

Recently, some communities have endeavored to pervert the purpose of zoning, by enacting ordinances excluding churches from their residential districts, and even from the community entirely.[4] Although this type of zoning law has not as yet been extensively employed, it would be well at this stage to examine its soundness, to evaluate its merit, and to determine the probability of its acceptance or rejection in the future.

In the analysis of such restrictive legislation, cases involving the exclusion of other charitable institutions will be alluded to because of the similar judicial treatment afforded them and the paucity of law solely involving the church.

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[1] See BASSET, ZONING c. II, p. 26 (1936). This differs essentially from the state's power of eminent domain which involves the power to *appropriate* private property for a public use by compensating the owner of the seized property, as provided by the United States Constitution.

[2] *See* Collins v. Margate City, 3 N. J. 200, 69 A. 2d 708, 710 (1949).

[3] The purpose is to *preserve* property values, not to *increase* them by zoning legislation. See BASSET, ZONING c. IV, p. 52 (1936).

[4] The ordinances listed below will serve as examples of this new type legislation.

(a) Village of Orchard Lake, Michigan—the ordinance allowed churches, under special permit only, in three zones comprising ten per cent of the village area, while prohibiting them in the fourth zone containing the balance of the village.

(b) City of Chico, California, Municipal Code of Chico § 1790(3)—the ordinance established an R-1 district as a single family residence district, and prohibited churches from being erected in the R-1 area.

(c) City of Mesa, Arizona—the ordinance set up a Class A residence district in which schools, public libraries, and public museums were permitted, while excluding churches from the district.

Judicial Acceptance of Zoning Laws

When community zoning laws were first enacted, parties adversely affected attacked their constitutionality, alleging a violation of the due process clause of the federal and respective state constitutions.[5] The views of the state courts judging this new method of property restriction were divided. Those jurisdictions which have traditionally taken a liberal view of the scope of their police powers had little difficulty in sustaining these zoning laws;[6] while others, which permitted invasions of property rights only in cases of clear necessity, held them invalid.[7] It was apparent that this new type legislation needed clarification. The first indication by the Supreme Court of the United States of its future attitude toward zoning laws is found in *Welch v. Swasey*.[8] Here the Court upheld a regulation requiring buildings in a residential area to be of a different height than buildings in a commercial area. In a later case, a law prohibiting an existing brick-yard from continuing its operation in the residential area, was declared valid by the Court although it did not constitute a nuisance *per se*.[9] In effect, this regulation was a limited form of use zoning.[10] This apparently favorable attitude toward zoning generally was somewhat curtailed in a decision declaring an ordinance grounded in class discrimination unconstitutional.[11] The Court reasoned that since the true purpose of zoning is to divorce

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[5] Roman Realty Co. v. Board of Commissioners of Borough of Haddonfield, 96 N. J. L. 117, 114 Atl. 248 (1921); People v. Kaul, 302 Ill. 317, 134 N. E. 740 (1922); Brett v. Building Commissioner of Brookline, 250 Mass. 73, 145 N. E. 269 (1924); City of Aurora v. Burns, 319 Ill. 84, 149 N. E. 784 (1925); Karke Realty Associates v. Mayor of Jersey City, 104 N. J. L. 173, 139 Atl. 55 (1927); Western Theological Seminary v. City of Evanston, 325 Ill. 511, 156 N. E. 778 (1927); Applestein v. Osborne, 156 Md. 40, 143 Atl. 666 (1928).

[6] Brett v. Building Commissioner of Brookline, 250 Mass. 73, 145 N. E. 269 (1924); City of Aurora v. Burns, 319 Ill. 84, 149 N. E. 784 (1925).

[7] Roman Realty Co. v. Board of Commissioners of Borough of Haddonfield, 96 N. J. L. 117, 114 Atl. 248 (1921); Karke Realty Association v. Mayor of Jersey City, 104 N. J. L. 173, 139 Atl. 55 (1927); City of Atlanta v. Smith, 165 Ga. 146, 140 S. E. 369 (1927).

[8] 214 U. S. 91 (1909).

[9] Hadacheck v. Los Angeles, 239 U. S. 394 (1915); City of Atlanta v. Smith, 165 Ga. 146, 140 S. E. 369 (1927).

[10] Use zoning refers to the use to which the ordinance will allow the land to be put. The use districts are usually divided into residential, business and industrial. In the instant case, the land on which the brick-yard was located was deemed a residential use area, therefore the brick-yard was a nonconforming use.

[11] Buchanan v. Warley, 245 U. S. 60 (1917); *accord*, Harmon v. Tyler, 273 U. S. 668 (1926); City of Richmond v. Dean, 281 U. S. 704 (1926); City of Birmingham v. Monk, 185 F. 2d 859 (5th Cir. 1951). The zoning law in the *Buchanan* case by its first section, made it unlawful for any colored person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly any house upon any block upon which a greater number of houses are occupied as residences, places of abode, or places

home life from business activity, it cannot be utilized to further the bigotry of a group.[12] However, it was not until 1926 in the case of the *Village of Euclid v. Ambler Realty Co.*,[13] that the Supreme Court expressed its plenary approval of zoning laws. This was the first case presented to this tribunal which put in issue the validity of a comprehensive use zoning plan encompassing an entire community. The Court held that zoning legislation is a proper subject of police power,[14] and that the ordinance in its *general scope* and *dominant features* was valid. While giving this blanket approval to zoning laws generally, the Court pointed out that the validity of a specific regulation must be determined by the facts in each case. The test laid down for determining the validity of each regulation is its substantial relation to the public health, safety, morals and general welfare of the community.[15] It is significant to note that the Court in the *Ambler* case specifically omitted from its consideration the portion of the zoning ordinance relating to churches.[16] The holding relates solely to provisions restricting industrial and profit-making enterprises. On the strength of this decision zoning law enactments greatly increased, and the previously dissentious state courts eventually accepted this progressive legislation.[17]

The criterion for validity set forth in the *Ambler* decision has been relied on by the Supreme Court in later cases.[18] And while there is a presumption of constitutionality of zoning legislation en-

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of public assembly by white people than are occupied as residences, places of abode, or places of public assembly by colored people. Section two contained a similar prohibition against white people, where the greater number of houses are occupied by colored people.

[12] See Buchanan v. Warley, 245 U. S. 60, 80 (1917). The advocates of this law said it tended to promote public peace by preventing racial conflicts; that it tended to maintain racial purity, and that it prevented the deterioration of property owned and occupied by white people. The court found these reasons insufficient to support the legislation.

[13] 272 U. S. 365 (1926).

[14] *Id.* at 387. "Regulations [zoning ordinances] . . . half a century ago, probably would have been rejected as arbitrary and oppressive. . . . While the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation."

[15] *Id.* at 395.

[16] *Id.* at 385. "For present purposes the provision of the ordinance in respect of [sic] these uses [churches and schools] may, therefore, be put aside as unnecessary to be considered." While considering the remainder of the ordinance, the court thought it prudent not to pass upon this delicate aspect, since it was not absolutely necessary to the decision in the instant case.

[17] See Howden v. Mayor and Aldermen of Savannah, 172 Ga. 833, 159 S. E. 401 (1931); Duffcon Concrete Products, Inc. v. Borough of Cresskill, 1 N. J. 509, 64 A. 2d 347 (1949); Guaclides v. Borough of Englewood Cliffs, 11 N. J. Super. 405, 78 A. 2d 435 (1951).

[18] Gorieb v. Fox, 274 U. S. 603 (1927); Nectow v. City of Cambridge, 277 U. S. 183 (1928).

acted pursuant to the police power,[19] such legislation must *in fact* comply with the constitutional test set forth in the *Ambler* opinion. This test acts as a safeguard against the unwarranted use of zoning laws for illegitimate ends.

Federal Cases

Seattle Trust Co. v. Roberge,[20] which involved a zoning ordinance imposing a restriction on the admission of a charitable institution into a residential area, is the only case in which this type of legislation has reached the Supreme Court for analysis. One section of the ordinance considered there provided that such an institution could be established therein only by the written consent of two-thirds of the surrounding property owners. The Court held this section of the zoning law unconstitutional, since it failed to provide a standard by which to govern the decision of these owners, thus relegating any decision to their whim or caprice. The Supreme Court, therefore, did not pass on the constitutionality of the *purpose* of this type zoning ordinance, but declared the *means* used to be violative of the due process clause of the Fourteenth Amendment. However, when this same type of ordinance was previously considered by a lower federal court, it unhesitatingly declared the purpose of the law invalid as being unreasonable and bearing no substantial relation to the public health, safety, morals and general welfare,[21] rejecting the plaintiff's argument that an institution attended by children of a particular race or creed is harmful to a community. In a later case, Judge Kenyon reiterating the true purpose of zoning ordinances declared that they are "made necessary by the tremendous *industrial* and *business* development of the country. The people of cities are entitled to some protection for their homes . . . and from the conglomeration of nerve-destroying . . . development; hence residential districts are established where people may have a reasonably quiet home life." [22] That no other objective would be given judicial sanction was made evident in the *Women's Kansas City St. Andrew Society v. Kansas City, Mo.* case.[23] The zoning ordinance there prohibited a home, in a residential area, to be utilized for sheltering aged ladies. Holding this law invalid the court asserted that it was predicated on the *feelings* of the people in a particular section against an eleemosynary institution being located in their area. The regulation was denounced as a vehicle of *exclusiveness,* which is not a valid objective of zoning.

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[19] Gorieb v. Fox, *supra* note 18 at 608.

[20] 278 U. S. 116 (1928).

[21] Village of University Heights v. Cleveland Jewish Orphans' Home, 20 F. 2d 743 (6th Cir.), *cert. denied,* 275 U. S. 569 (1927).

[22] American Wood Products Co. v. City of Minneapolis, 35 F. 2d 657, 660 (1929) (emphasis added).

[23] 58 F. 2d 593 (8th Cir. 1932).

A case involving an ordinance excluding a church from a residential area has not as yet been presented to a federal tribunal. Yet every ordinance attempting to exclude a charitable institution from a residential zone has been held to be invalid. The federal tribunals have kept clearly in mind the true purpose of zoning, *i.e.,* the separation of residential areas from a detrimental business atmosphere, and have not permitted alien factors to cloud the issue.

State Courts

The state tribunals have generally permitted charitable institutions to establish themselves in residential areas in contravention of existing zoning laws, while at the same time avoiding the issue of their constitutionality. This was accomplished by granting a variance,[24] by invoking an estoppel against the enforcement of the law,[25] by setting aside the ordinance as an unlawful delegation of authority,[26] by construing the law as not prohibiting churches,[27] and by dismissing the suit for want of jurisdiction by the court.[28] The means employed by other tribunals for avoiding this delicate constitutional problem are open to reproach. In one instance a zoning law actively enforced over a two-year period was held invalid when its provisions were employed to prevent the erection of a church;[29] while in another case a seemingly valid law was rejected when questioned by a church, for vesting arbitrary discretion in the landowners.[30] It is noteworthy that this attitude of forbearance adopted

[24] See Thomson v. Tafel, 309 Ky. 753, 218 S. W. 2d 977 (1949); Board of Zoning Appeals of City of Indianapolis v. Wheaton, 118 Ind. App. 38, 76 N. E. 2d 597 (1948); Keeling v. Board of Zoning Appeals of City of Indianapolis, 117 Ind. App. 314, 69 N. E. 2d 613 (1946).

[25] See Phipps v. City of Chicago, 339 Ill. 315, 171 N. E. 289 (1930); Western Theological Seminary v. City of Evanston, 325 Ill. 511, 156 N. E. 778 (1927).

[26] See Pentecostal Holiness Church of Montgomery v. Dunn, 248 Ala. 314, 27 So. 2d 561 (1946); R. C. Archbishop for Diocese of Oregon v. Baker, 140 Ore. 600, 15 P. 2d 391 (1932); City Council of City of Denver v. United Negroes Protective Association, 76 Colo. 86, 230 Pac. 598 (1924). The issue of constitutionality being treated in this article is the validity of the purpose of the law, and not the means used to enforce it.

[27] See State v. Meador, 154 W. Va. 368, 154 S. E. 876 (1930).

[28] See Phelps v. Board of Appeals of City of Chicago, 325 Ill. 625, 156 N. E. 826 (1927).

[29] State v. Edgcomb, 108 Neb. 859, 189 N. W. 617 (1922).

[30] Pentecostal Holiness Church of Montgomery v. Dunn, 248 Ala. 314, 27 So. 2d 561, 564 (1946). The zoning law subjected the decision of the property owner to the following review: "Provided, that in cases where the property owner or owners whose unanimous consent is required, fails [sic] to state his or their objection, or should his or their objection seem to be trivial . . . then the city commission reserves the right to notify . . . the parties in interest of the place and time of such hearing before the city commission, and if at such hearing the objections of the property owner or owners shall seem trivial or not well taken, the city commission reserves the right to overrule

by these courts, although evasive on the constitutional issue, did, nevertheless, extricate the church from the prohibition of the zoning regulation.[31] Some courts, however, have passed upon their constitutionality, and these decisions will now be considered.

A. Partially Restrictive Ordinances

A zoning ordinance, the practical effect of which is to exclude churches from the residential district though permitting them in other parts of the community, is the type most commonly presented to the courts. The majority of those jurisdictions which have passed directly on the constitutionality of such ordinances have held them to be unconstitutional, for the reason that the exclusion of a church bears no substantial relation to the public health, safety, morals or general welfare.[32] The policy of excluding churches from residential areas though allowing them in business areas was rejected by an Ohio court as being violative of the due process clause of the state and federal constitutions.[33] Describing the future effect of the ordinance, if enforced, the court recognized that ". . . what respondents are seeking to accomplish is the creation, by an administrative act, of exclusive residential subdivisions for private individuals. It is true that many people prefer not to reside next door to a church . . . . We must not 'employ the new device of zoning to make exclusive districts much more exclusive.' " [34]

The rationale of the minority view, holding such zoning legislation constitutional,[35] is set forth in the *City of Porterville* decision.[36] The plaintiff was denied permission by the zoning authorities to erect a church in an area zoned exclusively for single-family dwellings.[37]

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such objections, and to instruct the city engineer to issue a permit for the proposed improvement."

[31] *But see* Galfas v. Ailor, 206 Ga. 76, 55 S. E. 2d 582 (1949).

[32] City of Sherman v. Simms, 183 S. W. 2d 415 (Tex. 1944); State v. Joseph, 139 Ohio St. 229, 39 N. E. 2d 515 (1942); State v. Hill, 59 Nev. 231, 90 P. 2d 217 (1939); *see* O'Brien v. City of Chicago, 347 Ill. App. 45, 105 N. E. 2d 917, 920 (1952); Ellsworth v. Gerke, 62 Ariz. 198, 156 P. 2d 242, 244 (1945).

[33] State v. Joseph, 139 Ohio St. 229, 39 N. E. 2d 515 (1942).

[34] *Id.* at 524.

[35] City of Chico v. First Avenue Baptist Church of Chico, 238 P. 2d 587 (Cal. 1951); Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 P. 2d 823, *appeal dismissed*, 338 U. S. 805 (1949); *see* Mooney v. Village of Orchard Lake, 53 N. W. 2d 308, 309 (Mich. 1952).

[36] The court in the *Chico* case merely repeated the reasoning of the Porterville bench. Therefore, an analysis of the reasoning employed in the *Porterville* case will be sufficient.

[37] The City of Porterville ordinance, as far as it is germane, is as follows: R-1, single family residences; R-2, duplex or two-family residences; R-3, multiple residences; R-4, unlimited residences. Churches were relegated to the R-4 district only.

On appeal, the District Court, with two of the five judges dissenting, held that "[s]uch a zoning regulation bears a substantial relation to the public health, safety, morals and general welfare because *it tends to promote and perpetuate the American home and protect its civic and social values.*" [38] In support of this statement, the court relied on the prior decision in *Miller v. Board of Public Works,*[39] which held that a community could establish a one-family residential district and exclude therefrom general business enterprises, apartments, tenements, and *like* structures. Apparently, the majority of the court in the *Porterville* case considered the church a "like" structure. But, although the court in the *Miller* case reasoned that a purely residential district would perpetuate the American home, it went on to explain that ". . . the very existence of a nation depends upon the character and calibre of its citizenry . . . . With ownership comes increased interest in the promotion of public agencies, such as *church* and school, which have for their purpose a desired development of the moral and mental makeup of the citizenry of the country." [40] Thus, one of the reasons set forth by the court for sustaining this type of zoning regulation was that it would thereby encourage the support of institutions like a church. Yet, the majority of the court in the *Porterville* opinion, ostensibly adopting the conclusion of the *Miller* case, completely frustrates the motivating force behind the latter decision. It is submitted, that since the court in the *Porterville* case cited no other authority for its holding, it remains an unsupported opinion, which probably does not represent the existing law in that jurisdiction. The view that exclusion of churches from residential neighborhoods will promote the American home is a philosophy alien to the United States, since our constitution is based upon fundamental principles of natural law.[41] Moreover, it is a generally accepted concept that the church and family supplement each other, and should be accessible to each other.

B. Totally Restrictive Ordinances

The second type ordinance, less frequently considered judicially, prohibits the erection of churches anywhere in the entire community. The courts have been unanimous in declaring this type ordinance invalid.[42] A Michigan court held the enactment unreasonable on

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[38] Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 P. 2d 823, 825, *appeal dismissed,* 338 U. S. 805 (1949) (emphasis added).

[39] 195 Cal. App. 477, 234 Pac. 381 (1925).

[40] *Id.* at 387 (emphasis added).

[41] See Corwin, *Debt of American Constitution Law to Natural Law Concepts,* 25 NOTRE DAME LAW. 258 (1950); Manion, *The Founding Fathers and the Natural Law: A Study of the Source of Our Legal Institutes,* 35 A. B. A. J. 461 (1949).

[42] Mooney v. Village of Orchard Lake, 53 N. W. 2d 308 (Mich. 1952); *see*

its face, thereby rebutting the presumption of constitutionality attaching to state regulations.[43] In view of the judicial attitude toward those laws excluding churches only from a residential area,[44] regulations excluding them from the entire community are clearly unconstitutional.

Even where churches have successfully extricated themselves from the restrictive ordinances and were permitted to establish themselves in residential districts, a problem was raised as to whether or not foreseeable appurtenances, such as the parish house, school and convent, would likewise escape the bar of the regulation. Judicial expressions have indicated that these structures accompany a church as a matter of *right*.[45] It has been held that a convent *must* be considered an integral part of a church project—*viz.*, a church, parish house and school.[46] The position taken in these opinions is reasonable and will undoubtedly serve as a guide to courts confronted with this issue in the future.

Rebutting the Presumption of Constitutionality

These zoning laws have been enacted to obtain an "exclusive" district in every community.[47] Relying on the presumption of constitutionality accompanying such legislation,[48] the laws were shaped to attain the personal desires of a group. However, zoning laws will only be upheld if *in fact* they bear a substantial relation to the public health, safety, morals and general welfare. Do these laws meet this test?

It has been indicated that the *general welfare* of the community as a whole will not be promoted by relegating churches solely to the business districts,[49] characteristically crowded and noisy, and removed

North Shore Unitarian Society, Inc. v. Village of Plandome, 200 Misc. 524, 525, 109 N. Y. S. 2d 803, 804 (Sup. Ct. 1951).

[43] Mooney v. Village of Orchard Lake, 53 N. W. 2d 308 (Mich. 1952).

[44] See note 31 *supra*.

[45] See Board of Zoning Appeals of City of Indianapolis v. Wheaton, 118 Ind. App. 38, 76 N. E. 2d 597 (1948); *cf.* Keeling v. Board of Zoning Appeals of City of Indianapolis, 117 Ind. App. 314, 69 N. E. 2d 613, 618 (1946); Scott Co. v. R. C. Archbishop for Diocese of Oregon, 83 Ore. 97, 163 Pac. 88 (1917); Western Theological Seminary v. City of Evanston, 325 Ill. 511, 156 N. E. 778 (1927). See also BASSET, ZONING c. IV, p. 100 (1936).

[46] See Board of Zoning Appeals of City of Indianapolis v. Wheaton, 118 Ind. App. 38, 76 N. E. 2d 597 (1948).

[47] See State v. Joseph, 139 Ohio St. 229, 39 N. E. 2d 515, 524 (1942); Women's Kansas City St. Andrew Society v. Kansas City, Missouri, 58 F. 2d 593, 603 (8th Cir. 1932); *cf.* Trust Company of Chicago v. City of Chicago, 408 Ill. 91, 96 N. E. 2d 499, 506 (1951). See also BASSET, ZONING c. IV, p. 72 (1936).

[48] See note 18 *supra*.

[49] *See* State v. City of Tampa, 48 So. 2d 78, 80 (Fla. 1950); State v. Joseph, 139 Ohio St. 229, 39 N. E. 2d 515, 524 (1942); City of Sherman v. Simms, 183 S. W. 2d 415, 417 (Tex. 1944). See also note 61 *infra*.

from the home life with which the church is so intimately connected. Admittedly, such legislation may promote the *particular* welfare of the group desiring its enactment, but as indicated previously, a zoning ordinance to be valid must be comprehensive and designed to benefit the entire community.[50] That the church will generally further public *morality* rather than have a detrimental effect thereon, is a generally accepted principle.[51]

The proponents of these restrictive laws assert that noise, confusion and increases in traffic resulting from church activities will adversely affect the health and safety of the inhabitants in the community. These superficial claims have been rejected by many tribunals,[52] and a Florida court summarily dismissed the argument as being *de minimis* in nature.[53] Perhaps the only sound arguments in support of this legislation are that the exclusion of churches will preserve an attractive community, and prevent depreciation of adjacent property values. The theory that aesthetic considerations are alone sufficient to justify the enactment of a zoning law, has gained support in recent years.[54] However, the weight of authority considers aesthetic concepts merely a factor to be considered in framing a zoning ordinance, and are insufficient by themselves to justify such legislation.[55] Regarding the second argument, while it is true that one of the objectives of zoning is the *overall* preservation of property

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[50] Guaclides v. Borough of Englewood Cliffs, 11 N. J. Super. 405, 78 A. 2d 435 (1951); Trust Company of Chicago v. City of Chicago, 408 Ill. 91, 96 N. E. 2d 499 (1951); *see* Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 390 (1926); City of Aurora v. Burns, 319 Ill. 84, 149 N. E. 784, 788 (1925).

[51] *See* State v. City of Tampa, 48 So. 2d 78, 79 (Fla. 1950); State v. Joseph, 139 Ohio St. 229, 39 N. E. 2d 515, 523 (1942).

[52] See State v. Joseph, 139 Ohio St. 229, 39 N. E. 2d 515 (1942); Mooney v. Village of Orchard Lake, 53 N. W. 2d 308 (Mich. 1952); State v. Hill, 59 Nev. 231, 90 P. 2d 217 (1939); City of Sherman v. Simms, 183 S. W. 2d 415 (Tex. 1944).

[53] "The contention that people congregating for religious purposes cause such congestion as to create a traffic hazard has very little in substance to support it. Religious services are normally for brief periods two or three days in the week and this at hours when traffic is lightest—early in the morning, early in the evening and at 10:00 and 11:00 on Sundays." State v. City of Tampa, 48 So. 2d 78, 79 (Fla. 1950).

[54] Town of Lexington v. Governor, 295 Mass. 31, 3 N. E. 2d 19 (1936); Thompson v. City of Carrolton, 211 S. W. 2d 970 (Tex. Civ. App. 1948); Connor v. City of University Park, 142 S. W. 2d 706 (Tex. 1940). See Sayre, *Aesthetics and Property Values: Does Zoning Promote the Public Welfare?* 35 A. B. A. J. 471 (1949). The author has opined that aesthetics are an aspect of morals, and should be a standard for determining the validity of a zoning ordinance.

[55] See Women's Kansas City St. Andrew Society v. Kansas City, Missouri, 58 F. 2d 593 (1932); Trust Company of Chicago v. City of Chicago, 408 Ill. 91, 96 N. E. 2d 499 (1951); Guaclides v. Borough of Englewood Cliffs, 11 N. J. Super. 405, 78 A. 2d 435 (1951); Frischkorn Construction Co. v. Lambert, 315 Mich. 556, 24 N. W. 2d 209 (1946); Baker v. Somerville, 138 Neb. 466, 293 N. W. 236 (1940).

values, nevertheless, if the effect of an ordinance is to depreciate the value of *particular* properties, this will not render the law invalid.[56] The zoning laws themselves adversely affect *some* realty, and even if the existence of a church will have a similar effect, it logically follows that the depreciation caused by a church is not fatally inconsistent with zoning, and exclusion is not necessary to effectuate a comprehensive zoning plan. So the fact of depreciation is not a conclusive test of the validity of these regulations. Therefore, these laws fail *in fact* to comply with the test of constitutionality, and it is submitted have rightfully been rejected.

While all the reported cases have been resolved solely on the issue of due process, in some of them, the defense of freedom of worship was raised.[57] There is strong dicta in one case, that to exclude a church from a residential area would violate freedom of worship.[58] This aspect has been virtually untested, and if more fully exploited could prove to be an additional sword in the hands of the denouncers of such legislation.

Conclusion

It is submitted that if this legislation were presented to the Supreme Court, the Court would declare it to be inconsistent with American philosophical and social values, to contravene the purpose of zoning, and strike it down as being violative of due process. It would seem that this opinion is not unwarranted in view of the treatment afforded charitable institutions in the Supreme and Federal Courts,[59] the weight of authority by state judicial decision,[60] and the position taken by the leading text writers.[61] Nor should the impli-

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[56] Village of Euclid v. Ambler Realty Co., 272 U. S. 365 (1926).

[57] See City of Chico v. First Avenue Baptist Church of Chico, 238 P. 2d 587 (Cal. 1951); Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 P. 2d 823, *appeal dismissed,* 338 U. S. 805 (1949); Galfas v. Ailor, 206 Ga. 76, 55 S. E. 2d 582 (1949); State v. Joseph, 139 Ohio St. 229, 39 N. E. 2d 515 (1942); Sexton v. Bates, 17 N. J. Super. 246, 85 A. 2d 833 (1951); City of Sherman v. Simms, 183 S. W. 2d 415 (Tex. 1944).

[58] City of Sherman v. Simms, 183 S. W. 2d 415, 417 (Tex. 1944). *But see* Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 P. 2d 823, 825, *appeal dismissed,* 338 U. S. 805 (1949); City of Chico v. First Avenue Baptist Church of Chico, 238 P. 2d 587, 589 (Cal. 1951).

[59] See notes 20, 21 and 23 *supra.*

[60] See note 32 *supra.*

[61] See YOKELY, ZONING LAW AND PRACTICE § 183 (1948); BASSET, ZONING c. IV, p. 70 (1936). ". . . [I]t did not occur to them [framers of New York Zoning Law] that there was the remotest possibility that churches, schools, and hospitals could properly be excluded from *any* districts. It was also recognized that churches should be in quiet localities, and as they are so intimately connected with home life, they should be in home communities." See also Note, 138 A. L. R. 1288 (1942).

cations latent in these restrictive type zoning ordinances be overlooked. The people living in small communities need not concern themselves with the possibility of churches overrunning their village. The percentage of people of a particular denomination residing in that community, plus the cost of building a church, will keep their number at a minimum. Conversely, if this legislation were upheld, it would theoretically be possible to legislate this country into atheism. But rather than await a judicial determination by the Supreme Court, a more speedy and efficient remedy has been resorted to by the State of Massachusetts. This jurisdiction has enacted a state-wide statute which declares invalid any ordinance prohibiting the use of land for church purposes.[62] Such a declaration of public policy should be promulgated in all the states, and this will prevent the enactment of this bigoted legislation.

SOME ASPECTS OF PUBLIC BIDDING LAW IN NEW YORK

Introduction

Public bidding contracts are those entered into after submitting advertisements to the public and executed between a successful bidder and the state, its political subdivisions or agencies. They are governed, in general, by the principles applicable to all contracts and, whenever such instruments come before the courts, the rights and obligations of the contracting parties will usually be adjusted on the same principles as if both were private persons.[1] A statute requiring competitive bidding is based upon motives of public economy and of the mistrust of the officers to whom the duty of making contracts for the public service was committed. Such a statute or charter is designed to preclude favoritism and jobbing,[2] and to protect the constituent body from corruption and improvidence.[3] While public contracts are, in general, governed by the same rules as private contracts, they differ greatly in many respects. Thus, where the defense of *ultra vires* will not be sustained in an action on an executed contract

[62] "No by-law or ordinance which prohibits or limits the use of land for any church or other religious purpose or which prohibits or limits the use of land for any religious, sectarian or denominational educational purpose shall be valid." MASS. ANN. STAT. c. 325, § 1 (1950).

[1] *See* People *ex rel.* Graves v. Sohmer, 207 N. Y. 450, 457, 101 N. E. 164, 166 (1913); People v. Stephens, 71 N. Y. 527, 537 (1878).

[2] *See* Brady v. Mayor of New York, 20 N. Y. 312, 316 (1859).

[3] *See* Donovan v. City of New York, 33 N. Y. *291, *292 (1865).