

Municipal Corporations--Police Powers--Zoning Regulations (*Village of Euclid v. Ambler Realty Co.*, 47 S.Ct. 114 (1926))

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portion of the consideration as the value of the land which he lost bears to the whole consideration.

But in Connecticut and Massachusetts, *Cecconi v. Rodden*, 147 Mass. 164, 16 N. E. 749 (1888); *Butler v. Barnes*, 61 Conn. 399, 24 Atl. 328 (1892), the plaintiff is permitted to recover the value of the improvements he put on the land; but it is submitted that this rule is illogical for, at the time of the conveyance of the land the records were open to both parties and a search thereof would have disclosed the true owner and in such case, of two innocent persons, neither should be made to suffer for the misfortune of the other.

MUNICIPAL CORPORATIONS—POLICE POWERS—ZONING REGULATIONS.

—The village of Euclid, a suburb of Cleveland, Ohio, passed the zoning laws in question which provided for use, height and area districts. Plaintiff attacks the constitutionality of the measure on the ground that it is in derogation of the 14th amendment of the United States Constitution in that the plaintiff is deprived of liberty and property without due process of law and is denied the equal protection of the law. *Held*, in the lower court judgment was rendered for the plaintiff, reversed on appeal to the Supreme Court, with three justices dissenting, on the ground that zoning regulations are within the police powers of the state and as such are valid when not arbitrary or unreasonable. *Village of Euclid v. Ambler Realty Co.*, 47 Sup. Ct. Rep. (U. S.) 114 (1926).

Zoning regulations are an outgrowth of modern civilization, called forth by the complexities of present day life. They may be divided into two classes, namely, those regulatory in their nature and those passed for aesthetic purposes. *Cochran v. Preston*, 180 Md. 220, 70 Atl. 113 (1908); 23 L. R. A. (N. S.) 1163; *Welch v. Swasey*, 193 Mass. 364, 79 N. E. 745, 214 U. S. 91 (1908). In the first class are included the provisions restricting the height, use and location of commercial and dwelling houses, in the second, regulations in reference to bill-boards, sky-signs, etc.

These ordinances, which twenty-five years ago, would have been rejected as unconstitutional as an arbitrary abuse of power, are now being generally sustained in most jurisdictions. In *re* Opinion of the Justices, 235 Mass. 597, 127 N. E. 525 (1920); *State v. City of New Orleans, et al.*, 154 La. 271, 97 So. 440 (1923); *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N. Y. 313, 128 N. E. 209 (1920); *City of Aurora v. Burns, et al.*, 319 Ill. 84, 149 N. E. 784 (1925); *State v. Houghton*, 164 Minn. 146, 204 N. W. 569 (1925); *Miller v. Board of Public Works*, 195 Cal. 477, 234 Pac. 381 (1925); under the so-called "police powers" of the state. For what once was a lonely cow-path now is a broad highway, teeming with motor vehicles and other conveyances, all inherently dangerous instruments. What once was a small rural community now is a large city, pulsating with life and all its problems, requiring more and better fire, police and other protection. This rule is, therefore, not inconsistent with the former one, for, while it is true that the meaning of the constitution cannot be stretched, we must impart a certain sense of elasticity to its application, *Village of Euclid v. Ambler Realty Co.*, 47 U. S. Sup. Ct. 114 (1926). If the rule were otherwise, the original purpose

and spirit of the constitution would be defeated by its rigid construction. But the line which separates those regulations that are legal from those that are illegal, the beneficial from the detrimental, is a shadowy one and varies with conditions and circumstances. In settling doubts, we may have recourse to the maxim "Sic utere tuo ut laienum non laedas," and other common law principles underlying the law of nuisances.

There has been no great disparity in the rulings sustaining the validity of measures regulating the height, use, and location of buildings and thus, comprehensive zoning plans have been upheld in most states. In *re* opinion of Justices, 235 Mass. 597, 127 N. E. 525 (1920); *State v. City of New Orleans, et al.*, 154 La. 271, 97 So. 440 (1923); *Wulfson v. Burden*, 241 N. Y. 228, 150 N. E. 120 (1925); *City of Aurora v. Burns, et al.*, 319 Ill. 84, 149 N. E. 784 (1925); *State v. Harper*, 182 Wis. 148, 196 N. W. 451 (1923); *Ware v. City of Wichita*, 113 Kan. 153, 214 Pac. 99 (1923); with the exception of New Jersey and Texas. *Spann v. City of Dallas, et al.*, 111 Tex. 350, 235 S. W. 513, 19 A.L.R. 1387 (1921). See also *City of Dallas v. Mitchell*, 245 S. W. 944 (1922); *Ignacumas v. Rielly*, 98 N. J. Law 712, 121 Atl. 783 (1923); where the court said: (In *Span v. City of Dallas*) "The police power is founded in public necessity, and only public necessity can justify its existence." But in the case of *Lincoln Trust Co. v. Williams Building Corp.*, 229 N. Y. 313, 128 N. E. 209 (1920) the New York Court of Appeals expressly held that public necessity required the existence of zoning regulations and upheld an ordinance providing for a strictly residential district. This case was followed by the case of *Matter of Wulfsohn v. Burden*, 241 N. Y. 228, 150 N. E. 120 (1925), in which the court said: "The power (police) is not limited to regulations designed to promote public health, public morals or public safety, or to the suppression of what is offensive, disorderly or unsanitary, but extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity." Thus it would appear that zoning laws relating to height, use and location of buildings are accepted by the great weight of authority in this country. (See preceding citations.)

The great difficulty now being encountered is in the support of the "aesthetic" zoning ordinances. Although few courts recognize the validity of such ordinances, *Piper, et al., v. Ekern*, 180 Wis. 586, 194 N. W. 159 (1923); *Ryan v. City of Chester, et al.*, 212 Pa. 259, 61 Atl. 284 (1905); *Billposting Sign Co. v. Atlantic City*, 71 N. J. Law 72, 58 Atl. 342 (1904); *City of Passaic v. Paterson Billposting Co.*, 72 N. J. Law 285, 62 Atl. 267 (1905); they are upheld by some, *Welch v. Swasey*, 193 Mass., 364, 79 N. E. 745 affirmed 214 U. S. 91, 29 Supreme Court 67 (1908). Thus, in the Massachusetts case of *Welsh v. Swasey, supra*; it was held that if the primary purpose was to promote public safety and health, the fact that there were aesthetic considerations would not invalidate the regulation if those considerations were secondary. But in the Maryland case of *Cochran v. Preston*, 108 Md. 220, 70 Atl. 113, 23 L.R.A. N.S. 1163, (1908), the court went a step further and it held that even though the primary purpose of an act be aesthetic, it may be upheld if

there can be found some secondary purpose to promote public health and safety.

However, it was held in New York, *People v. Murphy*, 195 N. Y. 126 affirming 129 A. D. 260 (1909), that an ordinance which limited the height of a sky sign to nine feet was unconstitutional, but the same court, in a later case, *People v. Ludwig*, 172 A. D. 71 affirmed 218 N. Y. 540, 113 N. E. 532 (1916), held that an ordinance restricting the height of a sky sign to thirty-one feet in the case of solid signs and seventy-five feet in the case of open signs was valid. This was followed by the case of *People v. Wolf*, 216 N. Y. S. 741, 127 Misc. 382 (1926), which held unconstitutional a village ordinance prohibiting the erection of any advertising signs except those used for the purpose of advertising real estate, on the ground that it was not calculated to remedy an existing evil; that it does not tend to promote public health, public safety, public morals or general welfare; and that it is discriminatory, in that it permits one kind of advertising and prohibits all other kinds. The case of *People v. Wolf*, supra, although it has not yet gone up on appeal seems to be the last word of the New York Courts. It would, therefore, seem that there is a serious conflict of authority as to those ordinances aesthetic in their nature. It is submitted that the rule followed by Massachusetts, *Welch v. Swasey*, supra, and Maryland; *Cochran v. Preston, et al.*, supra, is the sounder one for, in time to come, courts will be compelled to take judicial notice of the fact that a beautiful city, whose buildings present a picture of symmetry in art and design, is as much a property right of the city and its inhabitants as any other property right and as such should be protected. These views were voiced by Crownhart, J., in a dissenting opinion in the Wisconsin case of *Piper, et al., v. Ekern*, supra, in which he said: "I do not believe that the constitutionality of the statute need rest upon the narrow ground of safety and health, though I think them ample to sustain the present statute as an exercise of the police power. If 'public welfare' has not done so already, it is high time it took on a meaning for the courts which it has already done for the rest of the world. . . ."

INSURANCE—KNOWLEDGE OF AGENT IMPUTABLE TO PRINCIPAL.—The defendant insurance company employed one Bowler as a soliciting agent. Bowler took the written application of Otto Rose for insurance on a threshing machine. The policy was issued upon the application which contained a clause voiding the policy should the subject of the insurance be or become incumbered by chattel mortgage. The plaintiff at the time of the destruction of the machine had a chattel mortgage covering it though it was in the possession of Rose. After the destruction Rose assigned his entire interest in the policy to the plaintiff. When the application was filed by Rose he informed Bowler of the mortgage. Bowler, after receiving this information, proceeded to fill out application and caused policy to be issued on same. Policy issued had no mortgage clause, or indorsement, or rider attached referring to the incumbrance. In an action by the plaintiff on the policy the defense is voiding of same because of the incumbrance. *Held*, in reversing the decision of the lower court, which nonsuited the plaintiff, that when an agent of an insurance company procures the issuance of a policy after being informed of an incumbrance