The Catholic Lawyer

Volume 2
Number 3 *Volume 2, July 1956, Number 3*

Article 8

April 2016

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ON OCTOBER 27, 1955, the Supreme Court of California decided what may well be the most important case on private education to come before the courts in recent years—*Roman Catholic Welfare Corp. v. City of Piedmont.*[1] By the narrow margin of 4 to 3, the court held a city zoning ordinance which prohibited private schools while permitting the erection of public schools to be "unconstitutional and void because of its arbitrary and unreasonable discrimination against private schools."[2]

Two earlier cases, one distinguished and one contradicted by the instant opinion, had demonstrated an undue extension of the restrictive power of zoning ordinances. In *Corporation of Presiding Bishop v. City of Porterville,*[3] decided in 1949, Mormons sought a court order to compel the issuance of a building permit for a church. A local zoning ordinance excluded all churches from the single family residential district in which the plaintiff owned land. At the time the property was acquired, it was located partly without the city limits. It was later included within the city limits in an area limited in its use to single family dwelling units. The District Court of Appeals of California held that:

> . . . [S]ince the city had power to zone the property herein affected, strictly for single family dwellings, there was no abuse of the power in prohibiting the erection and construction of church buildings therein. It is a matter of common knowledge that people in considerable numbers assemble in churches and that parking and traffic problems exist where crowds gather. . . . There necessarily is an appreciable amount of noise

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[1] —Cal. 2d —, 289 P. 2d 438 (1955). See also 1 CATHOLIC LAWYER 64 (Jan. 1955); 1 *id.* at 153 (April 1955); 1 *id.* at 254 (July 1955); 1 *id.* at 340 (Oct. 1955); 2 *id.* at 83 (Jan. 1956).

[2] Roman Catholic Welfare Corp. v. City of Piedmont, *supra* note 1 at 443.

[3] 90 Cal. App. 2d 656, 203 P. 2d 823 (1949), *appeal dismissed,* 338 U. S. 805 (1949) (per curiam).

> connected with the conduct of church and "youth activities." These and many other factors may well enter into the determination of the legislative body.in drawing the lines between districts, a determination primarily the province of the city.[4]

The court reasoned that the plaintiff was not a congregation; that it merely held property as a corporation sole; that having such right from the state and being dependent upon the state for its existence, the enjoyment of the property was subject to "reasonable regulations." In concluding that the complaint was legally insufficient, the court further found:

> Plaintiff's contention in the trial court was as stated in his reply brief—"That the prohibition of churches in virtually all residential zones is on its face not a proper exercise of the police power, and that it violates the constitutional immunity of freedom of religious worship."
>
> Where, as here, plaintiff elected to stand on the allegations of the petition, and declined to amend it, informing the court that amendment would be "futile," it cannot be held that there was an abuse of discretion in the ruling of the trial court [dismissing the plaintiff's petition].[5]

It is interesting to note that after the California Supreme Court denied the petitioner a hearing, the Supreme Court of the United States also denied a hearing "for want of a substantial federal question."[6]

Prior to the *Porterville* decision the cases were in accord that churches could not be excluded from residential zones, with little attention being given to possible congestion or traffic hazards.[7] The effect of the decision is illustrated by the fact that the *Porterville* case, despite its faulty reasoning, was found to be a "complete answer" to the contentions of a Baptist church in a similar case decided two years later.[8]

The second adverse zoning decision to be noted is *State ex rel. Wisconsin Lutheran High School Conference v. Sinar.*[9] There, a building permit for a high school was sought by Lutherans in Wauwatosa, Wisconsin. A zoning ordinance permitted public high schools in a residential district but private high schools were banned. The plaintiff brought mandamus to compel the issuance of a permit, alleging that the ordinance deprived it of property without due process of law and denied it equal protection of the laws. The Circuit Court granted the writ. In a 5 to 2 decision, the Supreme Court of Wisconsin reversed the lower court, holding that the distinction drawn between private and public high schools was not arbitrary and unreasonable. The court reasoned that:

> The public school has the same features objectionable to the surrounding area as a private one, but it has, also, a virtue which the other lacks, namely that it is located to serve and does serve the area without discrimination. Whether the private school is sectarian or commercial, though it now complains of discrimination, in its services it discriminates and the public school does not. Anyone in the district of fit age and educational qualifications may attend the public high school. It is his right. He has no

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4 Corporation of the Presiding Bishop v. City of Porterville, 203 P. 2d 823, 825 (1949).

5 *Id.* at 826.

6 Corporation of the Presiding Bishop v. City of Porterville, 338 U. S. 805 (1949) (per curiam).

7 See Annot., 138 A.L.R. 1287 (1942).

8 City of Chico v. First Avenue Baptist Church, 108 Cal. App. 2d 297, 238 P. 2d 587 (1951).

9 267 Wis. 91, 65 N.W. 2d 43 (1954), *appeal dismissed,* 349 U. S. 913 (1955) (per curiam).

> comparable right to attend a private school. To go there he must meet additional standards over which the public neither has nor should have control. The private school imposes on the community all the disadvantages of the public school but does not compensate the community in the same manner or to the same extent.[10]

This decision was similar to the *Porterville* case in several respects. In both cases the courts went against the weight of authority,[11] in both the validity of the court's reasoning was open to serious question, and on each occasion the United States Supreme Court refused to review the decision on the ground that no substantial federal question was involved.[12]

It was against this background that the California Supreme Court entertained a mandamus proceeding to compel the issuance of a building permit for an elementary parochial school in Piedmont, a San Francisco suburb. Piedmont's zoning laws excluded private schools from Zone A, which embraces 98.7 percent of the city's 1152 acres. The Church and the adjoining school site in question were in Zone A. In the remaining 1.3 percent of Piedmont's area there was no vacant land of sufficient size to accommodate a school. In the Archdiocese of San Francisco, school property is held separately by the Roman Catholic Welfare Corporation of San Francisco. Accordingly, it was this corporation which sought and was refused a building permit. The District Court of Appeals, in a unanimous decision, ordered the city to issue the permit.[13]

In affirming the District Court's decision,[14] the California Supreme Court reasserted the principle laid down in *Pierce* v. *Society of Sisters*[15] that:

> The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[16]

However, the court went further and declared that "parents have the right to send their children to private schools, rather than public ones, which are located in their immediate locality or general neighborhood."[17] In reaching its conclusion, the court discounted arguments based on the fact that the city has no power to regulate or exclude public schools. It also rejected the distinction drawn between private and public schools in the *Wisconsin Lutheran High School* case, holding that it was "difficult to make an argument that private schools are inimical to the public welfare while public schools are not."[18]

The only disconcerting factor in the majority opinion was the apparent recognition of the principle laid down in the *Porterville* case. The majority held the *Porterville* decision to be inapplicable to the present facts, since the former involved total exclusion whereas the instant case turned on

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10 State *ex rel.* Wisconsin Lutheran High School Conference v. Sinar, 65 N.W. 2d 43, 47 (1954).

11 See 1 YOKELY, ZONING LAW AND PRACTICE, §57, at 89 (2d ed. 1953); Annot., 138 A.L.R. 1287 (1942).

12 See notes 6 and 9, *supra*.

13 Roman Catholic Welfare Corp. v. City of Piedmont, 278 P. 2d 943 (1955).

14 —Cal. 2d —, 289 P. 2d 438 (1955).

15 268 U. S. 510 (1925).

16 *Id.* at 535.

17 Roman Catholic Welfare Corp. v. City of Piedmont, 289 P. 2d 438, 441 (1955).

18 *Id.* at 442.

the question of discrimination. This may have been a tacit approval of the *Porterville* doctrine that churches may be totally excluded from a residential zone.

The importance of the foregoing decisions can best be appreciated in the light of current suburban growth. Scores of suburbs have sprung up as a result of the housing boom after World War II. Each year more and more of the new suburbs are being incorporated as villages, towns and cities. As this transition takes place, zoning regulations are formulated. To prevent a recurrence of the events which took place in Porterville, Piedmont and Wauwatosa, an active interest should be taken by laymen in the formulation of local zoning ordinances. In addition, strong public opinion should be aroused and brought to bear when such cases are litigated in the courts.

The favorable decision in the *Piedmont* case illustrates what can be achieved through the united action of all denominations. There, eleven members of the California Bar and two members of the New York Bar appeared as amici curiae, representing such organizations as the Jewish Welfare League and the Protestant Episcopal Bishop of California.

AS THE CATHOLIC LAWYER went to press, the New York Court of Appeals announced its decision in two significant zoning cases; *Diocese of Rochester* v. *Planning Board of Town of Brighton* and *Matter of Community Synagogue* v. *Bates.*

In the *Rochester* case the Court held that a zoning board's refusal to issue petitioners a permit for the construction of a church and school was arbitrary and unreasonable. In so doing the Court discounted the board's objections that the construction would change the character of the residential use and enjoyment of the area, that property values would suffer, and that there would be a loss of tax revenue. The majority opinion expressly refrained from deciding any question as to the constitutionality of the ordinance itself but limited the holding to the arbitrary nature of the town board's determination.

In *Matter of Community Synagogue* v. *Bates,* a zoning board had refused a permit for the erection of buildings for religious and educational purposes as well as the concomitant recreational and social uses. In remanding the case, the Court of Appeals reversed the board's finding that the enumerated uses were not "strictly religious." In deciding several other questions raised on appeal, the Court rejected the contention that a distinction can be drawn between the power to prohibit and the authority to deny a church the right to build at a specfiic location, reasoning that the latter would amount to the power of declaring what is the precise location for a church.

Both these cases will be treated more extensively in a subsequent edition of THE CATHOLIC LAWYER.—*Ed.*