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Article 9

Restriction of Church Construction in Residential Districts

Patrick T. McMahon

out, the fact that the plaintiff had credible evidence showing how it arrived at both the rentals and the option prices indicated that the parties intended to enter into lease-option agreements and not conditional sales. The case leaves open the question as to whether rental payments must be related to use where the latter can be determined. Jerry L. Haushalter

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Zoning: Restriction of Church Construction in Residential Districts—A Village of Bayside, Milwaukee County, ordinance of 1954 failed to provide any district wherein a church could be constructed. The Lake Drive Baptist Church obtained its property, partly by gift and partly by option, from a parishioner, in 1955, after it had been given an encouraging reception from the Bayside village board concerning the building of a church on the property. A plat plan and plans for construction and off street parking were submitted to the board upon request.

In 1956 the board engaged a consultant to aid in determining areas suitable for institutional purposes. After this the zoning ordinance was amended to provide for several class "E" districts in which land could be used for institutional purposes including churches. However, relator's property was not included in a class "E" district, despite the recommendation of the planning commission. In 1957 the church presented plans and specifications drawn by its architects along with its application for a building permit. The planning commission recommended rezoning the property into a class "E" district. The village board denied the request, apparently basing its action on 1). a petition signed by three hundred residents of the village which requested that the board preserve the residential character of the area; 2). the traffic problems involved; 3). the decrease in property values in the area resulting from the construction of a church.

Relator sought a writ of mandamus to force the issuance of a building permit on the grounds that the action of the village board was arbitrary and capricious. The trial court held that the board was within its authority under the zoning provisions as found in the Constitution of the United States, and that the equities were in favor of the board. The trial court apparently relied upon the factors considered by the village board in reaching its decision and considered that these outweighed any claim that could be made by the church. The Supreme Court *held,* that the action of the board was arbitrary and capricious. It remanded the cause with directions to enjoin enforcement of the zoning ordinance against construction of the church on relator's site,

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rentals do not equal the above, the lessee can apply the rentals to the purchase price. Truman Bowen v. Commissioner, *supra* note 5.

and to compel the building inspector to issue a building permit. *State ex rel Lake Drive Baptist Church v. Village of Bayside,* 12 Wis. 2d 585, 108 N.W. 2d 288 (1961).

Since the land mark case of *Village of Euclid, Ohio v. Ambler Realty Company,* it has been established that "zoning and kindred regulations must find their justification in some aspect of the police power."[1] The application of this principle to zoning ordinances which seek to regulate the building of churches in a community has caused the courts considerable difficulty. In the principal case Justice Fairchild, speaking for the court, and referring to an Oregon case,[2] classified ordinances involving the problem into three categories: 1). those permitting churches in all districts; 2). those permitting churches in certain districts only by special permit after a hearing; and 3). those excluding churches often, if not usually, from districts where residential use in itself is restricted to certain types of dwellings. The validity of a zoning ordinance which falls within any one of these categories depends upon the interpretation of the "general welfare" provision of the police power.[3] A complete analysis of the development of the "general welfare" provision is beyond the scope of this article.

Although there is a decided split of authority as to interpretation, a general statement of the attitude of the courts toward the "general welfare" provision can be found in an opinion of the New Jersey court:

> While some of the earlier cases seemingly confine the [zoning] authority to such regulations as are needful for the public health, the public safety, and the public morals, such measures as are fairly requisite for the 'public convenience' and the 'general prosperity' are now considered as within the category. This reserve element of sovereignty embraces action conducive to social well being.[4]

Through interpretation of this general statement as applied to zoning, courts fall within two categories: those taking a negative view, allowing restriction or elimination for the health-safety, economic reasons as deletorious to the "general welfare", and those which, while recognizing these negative aspects as important, add the more positive element of the inherent value of locating certain institutions in an area easily accessible for those they serve.

The first named, which from the viewpoint of a more comprehensive use of the zoning power can be called the broad view, is well expressed by the Massachusetts court: "The primary purpose of zoning is the

[1] 272 U.S. 365 (1926).
[2] Milwaukie Co. of Jehovah's Witnesses v. Mullen, 214 Or. 821, 330 P.2d 5, 74 A.L.R.2d 347 (1958).
[3] U.S. CONST. amend. XIV.
[4] Schmidt v. Board of Adjustment of the City of Newark, 9 N.J. 405, 88 A.2d 607, 611 (1952).

preservation in the public interest of certain neighborhoods against uses which are believed to be deleterious to such neighborhoods."[5] This broad viewpoint holds that there is an economic devaluation of property which occurs with the presence of a church in a residential district sufficient to invoke the police power to zone out churches to avoid the deleterious effect, e.g., traffic congestion resulting from such presence of a church in a built up residential area is dangerous to the safety of persons, especially children, living there. An Oregon court reiterated this viewpoint by saying that churches should no longer be placed in a special category of judicial favoritism which exempts them from the zoning laws, and which allows them to have such deleterious effect on a neighborhood.[6] In short, these courts hold that a zoning regulation which forbids the building of churches in certain districts ". . . 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 civil and social values."[7]

The stricter interpretation of the general statement proceeds along an entirely different path of reasoning. Representative of this viewpoint, which would deny the zoning out of churches from residential districts, is a statement of the Ohio supreme court: "Truly to accomplish its great religious and social function, the church should be integrated into the home life of the community which it serves."[8] Integration of the church into the homelife of the community while allowing zoning out of churches from residential districts would be obvious incompatibles.

This strict view considers the possible effect of a church upon property values; but, for the most part, it places the high purposes served by the church and the necessary integration of the church with the people it serves above the economic considerations. The New York court of appeals has said that ". . . in view of the high purposes, and the moral values of these institutions, mere pecuniary loss to a few persons should not bar their erection and use."[9]

But even this strict interpretation, which usually would not allow the zoning out of churches from residential districts, is subject to qualification. For example, if substantial loss would result, the second type of ordinance could be utilized, i.e., that which would allow churches to be

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[5] Kaplan v. City of Boston, 330 Mass. 381, 113 N.E.2d 856, 858 (1953).

[6] Milwaukie Co. of Jehovah's Witnesses v. Mullen, *supra* note 2.

[7] Corp. of Presiding Bishop of Church of the Latter-Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 P.2d 823, 825 (1949).

[8] State *ex rel* Synod of Ohio of United Lutheran Church in America v. Joseph, 139 Ohio St. 239, 39 N.E.2d 515, 524 (1942).

[9] Diocese of Rochester v. Planning Board of Town of Brighton, 1 N.Y. 2d 508, 136 N.E.2d 827, 154 N.Y.S.2d 849, 858 (1956).

constructed in certain residential districts by special permit.[10] This, in effect, would be possible by balancing the factors of the desirability of having the institution accessible to those it serves and the desirability of retaining the peace and quiet, the higher property values, and the absence of congested traffic in the particular neighborhood. Here the norm for deciding would be whether or not the action denying a special permit would be arbitrary and capricous.[11]

In the *Bayside* case[12] the Wisconsin court did not commit itself to either the broad or the strict view of the "general welfare" clause.

However, from another recent decision of the Wisconsin court we can draw an inference as to which interpretation the court would adopt. In *State ex rel Wisconsin Lutheran High School v. Sinar,*[13] it was held that private and parochial high schools could be excluded from a residential district in which all grade and public high schools would be allowed. The basis of this decision was that while all high schools would present detrimental effects, public high schools present certain advantages which the zoning authority could have considered compensating.

From this alone it cannot be concluded that Wisconsin would adopt the broad view, which allows the zoning out of churches from certain residential areas. But, in the *Bayside* case, while choosing not to decide this more basic question, it was stated: "This court has upheld the exclusion of private and parochial high schools from a district where public high schools are permitted. . . ."[14] The inference can be drawn that, if the court were to have the question squarely before it, churches would be placed in the same category as private and parochial high schools; the zoning authority could find certain advantages in zoning out churches compensating for the loss of accessibility to those they serve. In any event, Justice Fairchild, speaking for three members of the court, did decide that the action of the village of Bayside was arbitrary and capricous.[15]

In a concurring opinion Justice Hallows, also speaking for three members of the court, seems to adopt the more strict interpretation of the general principle that would not usually allow the zoning out of churches from residential districts:

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[10] ". . . exclusion in individual instances must be justified on such factors as congested traffic, noise, loss of tax revenue, etc." Annot., 74 A.L.R.2d 377, 381 (1960).

[11] "The terms 'arbitrary and capricious' when used in a matter like the instant one must mean wilfull and unreasoning action without consideration and in disregard of the facts and circumstances of the case." Milwaukie Co. of Jehovah's Witnesses v. Mullen, *supra* note 2, at 12.

[12] State *ex rel* Lake Drive Baptist Church v. Village of Bayside, 12 Wis. 2d 585, 108 N.W. 2d 288 (1961).

[13] 267 Wis. 91, 65 N.W.2d 43 (1954).

[14] *Supra* note 12, at 601.

[15] *Ibid.*

> The church in our society has long been identified with family and residential life. Churches traditionally have been and should be located in that part of the community where people live. They should be easily and conveniently located to the home. Churches are not super markets, manufacturing plants or commercial establishments and should not be restricted to such areas. How can the exclusion of churches from a residential area promote public morals or the general welfare? To so hold is a failure to understand the purpose and the influence of churches.[16]

The solution to the problems presented by the presence of a church—traffic congestion, noise, and inconvenience—is in reasonable regulation, not in absolute prohibition.

This concurring opinion explicitly rejects the broad interpretation of the general principle, allowing the zoning out of churches from residential areas, as a step toward relegating churches to commercial and industrial districts. To say that municipalities would not do this is not enough—they could do this. And there are limits beyond which government cannot go in exercising its zoning power. Since the church is considered desirable in a residential district by many, it cannot be said that the "general welfare" allows a municipality to completely zone out churches from residential districts.

Referring to the *Sinar* case[17] Justice Hallows accords with the reasoning of the dissent in which Justice Steinle said: "Private high schools as well as public high schools promote the general welfare and there is no substantial distinction in the purpose in which they serve. . . ."[18] For that reason, permitting the one and excluding the other in the same land use district is invalid. In the principal case, Justice Hallows discards the distinction between school and church since the same reasons for exclusion would apply to both, viz., traffic congestion, noise, inconvenience, resulting in decrease in property values. Exclusion of either private schools, or churches, or both, override the objections.

Justice Currie, dissenting in the *Bayside* case, adopted the broad interpretation of the general principle, which interpretation would allow the zoning out of churches from residential areas. Decline in property values, noise, and traffic congestion are mentioned as reasons which allow for the invocation of the police power of the state based on general welfare. The situation where schools would be allowed in certain districts in which churches would not be allowed is not offensive from this viewpoint because of "the desirability of having schools within walking distance of the homes of the majority of the children who

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[16] *Id.* at 608, 609.
[17] State *ex rel* Wisconsin Lutheran High School v. Sinar, *supra* note 13.
[18] *Id.* at 102.

attend,"[19] whereas, according to the dissenting opinion, this is not necessary for a church, and in fact is often not the case.

Justice Currie did not agree that the action of the village board of Bayside was arbitrary and capricous since the Lake Drive Baptist Church had no vested rights at the time the ordinance was passed. According to the broad viewpoint of the general principle, this conclusion of Justice Currie would be correct; for if the legislative power can be used, its use cannot be questioned by the courts. This view holds that the factors considered by the village board would be sufficient to use the authority to zone, and to zone out the "deleterious effect" created by the presence of the church.

The writer agrees with the result in the *Bayside* case, but believes that the strict interpretation of the present day statement of the meaning of the "general welfare" provision as adopted by the three concurring justices, would have been the more sound basis of decision. The opinion of the court leaves in doubt which of the two interpretations of the present day statement of the "general welfare" provision Wisconsin would adopt. The dissent in this case adopts a view which is far too broad in its application of municipal zoning power. It allows purely economic considerations to override those ideas which, historically, have placed the church in a position within the community from which it can easily be reached by those it seeks to serve. This viewpoint is very definitely a furtherance of the general welfare.

PATRICK T. MCMAHON

[19] *Supra* note 12, at 611.