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VALIDITY OF LEGISLATION CREATING RESIDENTIAL DISTRICTS

The law-making bodies of our country for the past several years have been confronted with a concerted agitation for legislation restricting the purposes for which real estate in different parts of municipalities may be used. This plan aimed principally at forbidding shops, offices, hotels, factories and other industrial establishments in strictly residential districts, developed from the belief that such a plan will better utilize all the real property in any given municipality and promote better living conditions.

The average observer undoubtedly does not realize what legal difficulties these civic promoters encounter, nor within what narrow limits of legislative action they are confined, because of the existence of several well-settled principles of law which cannot be swept aside for the accommodation of the advancement of these new plans and ideas.

In touching upon the general powers of a legislature to pass laws to restrict the uses to which real property may be put or laws authorizing municipalities to so act, we are at once thrown into the field of constitutional law.

We are advised by the Fourteenth Amendment of the federal constitution that no state shall deprive any person of his property without due process of law and our state constitution provides in Article 1, Section 13, that the property of no person shall be taken for public use without just compensation therefor.

It must be conceded that a law forbidding a property owner to build on his property in any manner he desires is an interference with his property rights and can only be sustained either (1) under the police power of the state, or (2) as a taking of private property for public use.

The subject matter, therefore, is divided into two parts and each will be briefly discussed.

POLICE POWER OF THE STATE.

There, perhaps, is no better explanation of what is meant by the police power of the state than is found in *Redmon vs. State*, 134 Wis. 89, to-wit:

“It would be better to always say that the police power extends to and permits legislation regulating reasonably matters appertaining to the public welfare, since anything beyond that must necessarily fall at the threshold of some

constitutional defense. The doctrine that the police power is really a law of necessity forms the key, it would seem, with which to unlock the mysteries, so far as practicable, of what is within and what is without the limits of such power. Not that a police regulation, in form or pretense to be one, in fact must supply some absolute essential to the public welfare, but that the exigency to be met must so concern such welfare, be sufficiently vital thereto as to suggest some reasonable necessity for a remedy affordable only by a legislative enactment as to efficiently invite public attention thereto."

We must remember that while it is primarily a legislative function to pass upon a matter, it nevertheless is a judicial function to define the proper steps for the exercise of police power and words in a legislative enactment, no matter how industriously used to give that act the character of a public regulation, are not conclusive, for a law is not necessarily one to promote the welfare of the public merely because such is the declared purpose of its framers.

State vs. Redmon, supra.

Mugler vs. Kansas, 123 U. S. 623.

The important question, therefore, is—Is it necessary for the interests of the public generally, as distinguished from those of a particular class, to prevent industrial establishments of every kind in specified sections which have been set aside as exclusively residence districts? Is it necessary to enact that sort of legislation to prevent the infliction of a public injury?

The writer is of the opinion that courts generally will judicially know that a business establishment, such as a grocery or haberdashery for instance, or any business which is not of a noxious or offensive character, in any particular block of a city, is not detrimental to the safety, comfort and health of the citizens.

The police power is confined to the imposition of those burdens which are necessary to promote the general welfare. In the exercise of the police power the state is authorized to subject all occupations to a reasonable regulation, but it is not an arbitrary power enabling the legislature to prohibit a business, the transaction of which inflicts no injury or damage to others.

The question of creating exclusive business and residence districts is rather modern, but wherever it has been attempted that sort of legislation has been condemned as not being within the police power of the state.

LEGISLATION GREATING RESIDENTIAL DISTRICTS

The city of Chicago passed an ordinance forbidding retail stores to be conducted, constructed or located in any block used exclusively for residence purposes and in deciding the legality of that act the Supreme Court of Illinois, in *Friend vs. Chicago*, 261 Ill. 16, 49 L. R. A. (N. S.) 438, said:

“There is nothing inherently dangerous to the health or safety of the public in conducting a retail store. It may be that in certain exclusively residential districts the owners of residence property would prefer not to have any retail stores in such blocks, but, if such be the case, it manifestly arises solely from esthetic considerations disconnected entirely from any relation to the public health, morals, comfort or general welfare. Legislation, either by the state or by municipal corporations, which interferes with private property rights or personal liberty cannot be sustained for purely esthetic purposes.”

An ordinance was enacted in Minneapolis prohibiting the erection of any building, except for residence purposes, within a certain district. The city has received proper legislative authority from the state. The Supreme Court of Minnesota, 158 N. W., page 1017, decided on July 28th, 1916, that the ordinance was invalid and that the police power did not extend to the prohibition of innocent and legitimate business.

It has been uniformly held that ordinances or statutes requiring the closing of business places where merchandise is bought or sold after a certain hour in the day are invalid.

Saville vs. Corless, L. R. A. 1916 A.

If no such interference with the rights of ownership and domination over one's property can be exercised, is it not natural to infer that entire prohibition to engage in such business cannot be upheld?

From these citations it can be seen that the primary motive for this legislation is the desire to satisfy the esthetic taste, which is a matter beyond the control of the police power of the state.

TAKING OF PROPERTY FOR PUBLIC USE.

It would appear, therefore, that if laws enacted restricting the use to which property is put in certain localities are to be upheld, it must be done under the right of eminent domain.

Eminent domain of course implies compensation and unless the statute provides a method of compensation to the owner of property the statute must fall.

It must also be borne in mind that the state or municipal corporation can only take property for public use. Public use is not "use by the public" for if it were, eminent domain might be applied to selecting sites for theaters to which the public has the right of access without discrimination. Nor is public use synonymous with "public advantage" or what the legislature might deem to be the public advantage. Public use is a taking to enable the government to carry on its public function and to conserve the safety and health of the public and for the purpose of enabling the municipal corporation to provide the public with some necessity or convenience which is required by the public as such.

It is somewhat difficult to satisfy one's self to the belief that the prohibition to a property owner to build on his property in a certain district gives the municipality a "public use" of that property right.

It has been uniformly held that a taking for esthetic purposes is not one for a public use.

Freund on Police Power, Par. 181.

To constitute a taking of property it is not necessary that the real estate itself be taken. Restricting the use or enjoyment of property is a taking.

City of Janesville vs. Carpenter, 77 Wis. 288.

Our own state has grappled with this agitation and has enacted several laws along this line. One of them is Section 670-1, Revised Statutes of Wisconsin, which authorizes counties having a population of one hundred fifty thousand or more (Milwaukee County), to restrict certain portions of their territory to be used exclusively for business, factory or residential purposes. It is interesting to note the following unique phraseology in the act:

"The enactment of such ordinances shall be deemed a finding and declaration to the effect that such districting will protect, promote and conserve the public health, convenience and morals." That sentence undoubtedly was inserted to try to show that the act is a regulation under the police power. Undoubtedly not feeling satisfied that the statute is valid under the police power, the legislature also provided a method of compensation to the owners whose property is affected. From the general discussion above and because of the method of compensation it is questionable whether that act can stand the test of constitutionality.

LEGISLATION CREATING RESIDENTIAL DISTRICTS

The Session Laws of 1917 reveal an enactment amending Section 959-17e whereby every city is authorized to regulate and restrict the location of trades and industries and the location of buildings designed for specified uses and to establish districts of such number, shape and area as such city may deem best suited to carry out the purposes of that section. It further provides that such regulation and act shall not prohibit the continuance of the use of any building for any trade or industry for which such building or premises are used at the time such ordinances take effect. No compensation for damages is provided.

Under this law it would seem that it was intended that the cities are to restrict the location of trades under the police power inasmuch as no compensation is provided for, and because of the following words in said act: "Such districts and regulations shall be prescribed by ordinances which shall be designed to promote the public health, safety and general welfare." If then we assume that it is necessary to prohibit industrial occupations to preserve the health, morals and convenience of the community and if such business places are dangerous, how then can it be said that existing businesses can be conducted? It would seem that the very fact that the law sanctions the continuance of existing business places nullifies and declares absurd any contention that a business place is dangerous to the community and for that reason ought to be prohibited.

From the foregoing it seems clear that the statute cannot be sustained under the police power and it is also evident that, inasmuch as no compensation is made to the owners of the property affected, the law cannot be upheld under the power to acquire private property for public use under the law of eminent domain.

It will be seen that this entire question, which at first appears to contain few difficulties, is in fact a very big and important question. In view of the fact that there is a national agitation for the separation of business places from residence districts and that people generally recognize that a business district is not the best place for a family home, it is problematical whether or not the courts hereafter will adopt the view that the consideration that prompts this class of legislation is only partly esthetic, and in a far greater measure purely practical so as to justify a broader conception of the police power.

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