# CONSTITUTIONAL LAW

## Constitutionality of Zoning Ordinance

The Mayor of the Village of Ottawa rejected the defendant's application for a permit to build a grain loading elevator on property adjacent to a railroad crossing. On the same day the village council passed an emergency zoning ordinance prohibiting certain types of business structures, among them grain elevators, in a prescribed area of the village comprising one-tenth to one-fifteenth of the total area and including the defendant's property. In an action by the Village of Ottawa to enjoin the erection of the elevator, the Common Pleas Court of Putnam County entered a decree for the plaintiff, subject to the securing of a permit by the defendant. The Court of Appeals of Putnam County held the ordinance unreasonable and discriminatory, resulting in a deprivation of property without due process of law and a denial of the equal protection of the laws. Following compliance with certain procedural omissions, the defendant was held entitled to an injunction to secure the permit as prayed for in its cross-petition. *Village of Ottawa* v. *The Odenweller Milling Co.*, 57 Ohio App. 170, 20 Ohio L. Abs. 664, 5 Ohio O. 154 (1936).

From the viewpoint of extensive efforts to control and eliminate traffic hazards the case presents an interesting problem.

A zoning ordinance is in derogation of the common law right to use of private property, enacted in the exercise of municipal police power. The courts in the beginning were reluctant to concede the existence of the power but, since recognition by the Supreme Court of the United States in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A.L.R. 1016 (1926), the scope of the power has been greatly extended. Ohio municipalities have two alternatives, deriving their power from Art. 18, Sec. 3 of the Ohio Constitution and Ohio G.C. sec. 4366-1 to 4366-19. Regulation of bulk, area, and use of buildings is upheld under the former, while the latter prescribes statutory methods for the creation of planning commissions. Apparently the statutory method is not exclusive, and the exercise of local police power is not in conflict with general state laws. In the principal case there was no effort to comply with the provisions of the statute, and the court felt the ordinance was not justified as a valid exercise of the police power under the Constitution.

It is a fundamental rule that rights of private property cannot be

taken away or interfered with without due process of law. The right to use private property is, however, subservient to the general welfare, and before a court will declare a zoning ordinance invalid, it must clearly appear that it bears no substantial relation to public health, safety, morals, or general welfare. Thus the power to zone must not be exercised in an arbitrary, unreasonable, or unjustifiable manner, and the ordinance must have a reasonable and substantial relation to its purpose. *Euclid* v. *Ambler Realty Co., supra; Nectow* v. *Cambridge,* 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842 (1928).

Municipalities have a broad field in the application of these powers, including regulation of the height of buildings, percentage of lot occupancy, set back or building lines, and nuisances, in addition to the plans relative to manufacturing, business, and residential districts. Typical Ohio cases are *Harris* v. *State ex rel.,* 23 Ohio App. 33, 155 N.E. 166 (1926); *State ex rel.* v. *Rendigs,* 98 Ohio St. 251, 120 N.E. 836 (1918); and *State ex rel.* v. *Cunningham,* 97 Ohio St. 130, 119 N.E. 361 (1917). In the principal case, the regulation extended to prohibition and the prohibited buildings were not nuisances *per se.* A legislative declaration cannot make an ordinary business a nuisance, although it may by regulation prevent its becoming such, and the business may become one by its location in a certain zoned district. *Smith* v. *Collison,* 119 Cal. App. 180, 6 Pac. (2d) 277 (1931); *Spann* v. *Dallas,* 111 Tex. 350, 235 S.W. 513, 19 A.L.R. 1387 (1921); *Wolarz* v. *Cuyahoga Heights,* 5 Ohio App. 161, 4 N.E. (2d) 400, 21 Ohio L. Abs. 497, 5 Ohio O. 422 (1936).

Advancing from building regulations into the broader field of zoning, the first requirement seems to be a reasonable classification of zoning districts. Ohio is in accord with a majority of jurisdictions in requiring a general, comprehensive plan, and in looking with disfavor on so-called "block ordinances" relating to only a small district of a municipality. *Pritz* v. *Messer,* 112 Ohio St. 628, 149 N.E. 30 (1925); *Youngstown* v. *Kahn Bros. Bldg. Co.,* 112 Ohio St. 654, 148 N.E. 842, 43 A.L.R. 662 (1925). Some jurisdictions apparently find no objection to ordinances segregating a lot, single block, or small area. *State ex rel.* v. *Miami,* 117 Fla. 594, 158 So. 82 (1934); *Harris* v. *Piedmont,* 5 Cal. App. (2d) 146, 42 Pac. (2d) 356 (1935). But throughout the cases we find a requirement of reasonable classification and restrictions within the zoned district, allowing the same rights of using property similarly situated. *Koch* v. *Toledo,* 37 Fed. (2d) 336 (1930); *Reynolds* v. *Barrett,* —Cal.—, 68 Pac. (2d) 266 (1937); *People ex rel.* v. *Rockford,* 363 Ill. 531, 2 N.E. (2d) 842 (1936);

*Gabrielson* v. *Glen Ridge*, 13 N. J. Misc. R. 142, 176 Atl. 676 (1935); *White's Appeal*, 287 Pa. 259, 134 Atl. 409, 53 A.L.R. 1215 (1926); *State of Washington ex rel.* v. *Roberge*, 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210, 86 A.L.R. 659 (1928); *Strain* v. *Mims*, 123 Conn. 275, 193 Atl. 754 (1937); *Bay* v. *Borchers*, 15 Ohio L. Abs. 226 (1933); *Mahoning Express Company* v. *Youngstown*, 15 Ohio L. Abs. 745 (1933); *Smith* v. *Troy*, 18 Ohio L. Abs. 476 (1934); *Cincinnati* v. *Struble*, 30 Ohio N.P. (N.S.) 380 (1933).

In the principal case, the court concluded there was neither a general plan nor a reasonable classification. The zoned district is almost entirely devoted to business and commercial purposes. Other elevators located therein are as proximate to residential areas as that the defendant proposed to erect. Since all whose property is in substantially the same position were not treated alike, the ordinance was held unreasonable and confiscatory. See: *Tews* v. *Woolhiser*, 352 Ill. 212, 185 N.E. 827 (1933); *State ex rel.* v. *Jacksonville*, 101 Fla. 1241, 133 So. 114 (1931). Although a proper exercise of the police power can materially restrict or destroy property rights, the court indicated that the proper way to reach the desired result was by condemnation and compensation under Art. 1, Sec. 19 of the Ohio Constitution. Ohio courts have previously held that the prohibition of a business not a nuisance *per se* from a commercial district cannot be accomplished under the guise of the police power, but that provision must be made for appropriation or payment of damages sustained. *Lucas* v. *State ex rel.*, 21 Ohio L. R. 363 (1923); *Wolarz* v. *Cuyahoga Heights*, *supra*.

The principal contention of the Village of Ottawa rested upon an anticipated obstruction of view at a railroad crossing adjacent to the proposed elevator site. It may seem surprising that such a commendable purpose cannot be justified in view of the extent to which regulation has gone in restricting and partially depriving owners of the use of their property. Regulation of areaways, set backs, residential districts, and billboards effectively deprives an owner of at least part of his property right. Although purportedly based on health, safety, morals, and general welfare, even aesthetic values have in many cases furnished a primary basis. Despite expressions of the courts to the contrary, the presence of a serious public need or justification often seems questionable, however desirable the result. *Thomas Cusack Co.* v. *Chicago*, 242 U.S. 526, 37 S. Ct. 190, 61 L. Ed. 472 (1917); *Gen. Outdoor Adv. Co.* v. *Dept. of Public Works*, 289 Mass. 149, 193 N.E. 799 (1935); *Thille* v. *Bd. of Public Works of Los Angeles*, 82 Cal. App. 187, 255 Pac. 294 (1927); *Weiss* v. *Guion*, 17 Fed. (2d) 202 (1926); *Ayer*

v. *Cram*, 242 Mass. 30, 136 N.E. 338 (1923); *West Bros. Brick Co.* v. *Alexandria*, —Va.—, 192 S.E. 881 (1937).

The defendant might be limited to a less profitable use of his property if the ordinance here were upheld. A considerable decrease in the value of property has seemingly not troubled the courts, although it is indicated as a factor to be considered. *Geneva Inv. Co. v. St. Louis*, 87 Fed. (2d) 83 (1937); *Gabrielson* v. *Glen Ridge*, *supra*; *Smith* v. *Collison*, *supra*. There are limitations, however. *Isenbarth* v. *Bartnett*, 201 N. Y. Supp. 383, 206 App. Div. 546 (1923). Zoning regulations have been carried to the point of preventing the exploitation of natural resources on the owner's land. *West Bros. Brick Co.* v. *Alexandria*, *supra*. However, the courts generally show a tendency to protect property of such peculiar value. *Terrace Park* v. *Erret*, 12 Fed. (2d) 240 (1926).

The safety basis was insufficient to convince the court in the principal case. It becomes less forceful when we notice that only grain elevators, grain storage houses, flour mills, public automobile garages, coal sheds, and stone sheds were prohibited, thus allowing other types of buildings which would obstruct the view of motorists, although possibly not as completely as a grain elevator. And if carried to its logical conclusion, the safety argument would preclude or seriously restrict almost any profitable use of the land in question. There is authority supporting the view that an attempt to save the lives of motorists at railroad crossings and intersections will not justify zoning regulations for corner lots and land contiguous to a railroad crossing. *Henderson* v. *Greenwood*, 172 S. C. 16, 172 S.E. 689 (1934); *Eaton* v. *South Orange*, 3 N. J. Misc. R. 956, 130 Atl. 362 (1925); *Tenez Const. Corp.* v. *Garner*, 4 N. J. Misc. R. 488, 133 Atl. 396 (1926). The courts observe that a motorist has the duty of using due care when he approaches a crossing or intersection.

If the problem is really acute, the municipality has other approaches by compelling elimination of the crossing or the maintenance of adequate signals, warnings, watchmen, or gates. The use of eminent domain will be a solution if the public need is sufficient to warrant its exercise, and the stumbling block of confiscation under the police power thereby averted. It seems we could reasonably argue, however, that the zoning ordinance is non-discriminatory and general enough, if it could be shown only one such dangerous obstruction exists, or if it applied uniformly to all crossings in the municipality. Or, not going so far, it seems plausible that some regulation, in the nature of set backs, for example, rather than prohibition, could be justified for the purpose of lessening the danger.

The court further pointed out, consistently with earlier Ohio decisions, that the ordinance was invalid as a stop-gap ordinance to preserve the *status quo* pending the adoption of a comprehensive zoning ordinance. *State ex rel.* v. *Guion*, 117 Ohio St. 327, 158 N.E. 748 (1927); *State ex rel.* v. *Kruezweiser*, 120 Ohio St. 352, 166 N.E. 228 (1929). A number of jurisdictions look more favorably upon such emergency measures. *Downham* v. *City Council of Alexandria*, 58 Fed. (2d) 784 (1932); *Lima* v. *Woodruff*, 107 Cal. App. 285, 290 Pac. 480 (1930).

The crux of the whole problem is the extent to which regulation under the police power can be carried before it ceases to be regulation and reaches the point of confiscation without compensation. It is essentially a question of degree and a balancing of public and private interests. While it may at first seem startling that such a hazard to life cannot be removed in the manner attempted, the case is sound from the viewpoint of precedent.

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# CRIMINAL LAW

## EXTRADITION — INSANITY AS A BAR TO

The Ohio Legislature, during its last session, adopted the Uniform Criminal Extradition Act (Ohio G.C. sec. 109-1 to 109-31) which became effective August 20, 1937. The first case decided under the new Act involved a request by the State of Georgia for the return of an alleged fugitive who had committed arson in that state and fled from justice, seeking asylum in Ohio. At the hearing before the Governor, the request for extradition was honored, and a warrant issued for the rendition of the alleged fugitive. A writ of *habeas corpus* on behalf of the accused issued out of the court of common pleas, and at the hearing of the cause it was shown that a lunacy inquest concerning his mental capacity was then pending. The court found that it was improper to proceed with the extradition so long as the lunacy proceedings existed. A writ of procedendo on the relation of the Governor then issued in the Supreme Court compelling the court of common pleas to proceed to judgment in the *habeas corpus* proceedings notwithstanding the pendency of the lunacy inquest. *The State, ex rel., Davey, Governor, et al.* v. *Owen, Judge, et al.*, 133 Ohio St. 96, 10 Ohio O. 102, 12 N.E. (2d) 144 (1937). This raises the interesting question, "Suppose the alleged fugitive were so insane as to be unable to understand the