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# Comments

## THE MISSOURI MUNICIPALITY'S POWER TO ZONE PUBLIC AND QUASI-PUBLIC USES

Section 89.020, Revised Statutes of Missouri (1949), is the enabling act by which the General Assembly has delegated to Missouri municipalities the power to zone uses of property. It provides, in part:

For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of all incorporated towns and villages is hereby empowered to regulate and restrict . . . the location and use of buildings, structures and land for *trade, industry, residence, or other purposes*. (Emphasis added.)

Recently, there have been two Missouri cases interpreting this enabling act in such a manner as to exclude particular uses from the municipality's zoning power. They were concerned with the erection of a public school and a synagogue.

In *State ex rel. St. Louis Union Trust Co. v. Ferriss*,<sup>1</sup> the City of Ladue had enacted a comprehensive zoning plan under the enabling act set out above. As part of this plan, the ordinances contained certain provisions restricting the location and erection of school buildings to certain areas within the city. Nevertheless, the school district filed a condemnation suit in the St. Louis County circuit court to locate a school in an area from which the zoning regulations excluded school facilities. An original prohibition proceeding was filed in the Missouri Supreme Court to prohibit the judge of the circuit court from hearing the condemnation suit. The plaintiff claimed that the ordinance passed in pursuance of the enabling act deprived the school district of its condemnation power in the areas of the city which were not zoned for schools. The school district showed, however, that it was charged by statute with the exclusive duty of locating school facilities<sup>2</sup> and on this basis claimed that the zoning regulation was ineffective in its attempted application. *Held*, provisional rule in prohibition discharged. Chapter 89, Revised Statutes of Missouri (1949), did not give the municipality the power to immunize private property from the express power vested in the school district by the General Assembly to select, locate, take by eminent domain and use property for a public school upon payment of just compensation. The court found that Chapter 165, Revised Statutes of Missouri (1949), relied upon by the school district, implemented a

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1. 304 S.W.2d 896 (Mo. 1957) (en banc).

2. §§ 165.100, .370, RSMo 1949.

constitutional mandate<sup>3</sup> that the General Assembly shall establish and maintain a state-wide system of schools. It was then noted that the enabling act gave no express power to cities appertaining to the regulation or restriction of schools and other public buildings. The rule of *ejusdem generis* was applied to negative any construction of the enabling act that could apply in the public school situation.<sup>4</sup> That is, the specific terms "trade," "industry" and "residence" all relate to private property; the general words following them, "or other purposes," were then interpreted to be within the same general meaning and application as those specifically mentioned, as appertaining to private property only and not embracing schools and other public buildings.<sup>5</sup> The court would not invest the municipality with the power to restrict the exercise of the school district's delegated power of eminent domain. The court noted, however, that the school district would be subject to police regulations in the use of its facilities, such as, for example, safety regulations.<sup>6</sup> It also noted that the location of public institutions could most likely be controlled if their nature was proprietary rather than governmental.<sup>7</sup>

In the second case, *Congregation Temple Israel v. City of Creve Coeur*,<sup>8</sup> the municipality had enacted ordinances under which the plaintiff was denied a permit to build a synagogue on its property. After the plaintiff had contracted to purchase the land in question, the ordinances were amended to provide that no church, school, park, hospital, etc., could be built in the city unless a special permit was issued by the Board of Aldermen. There were no standards set out for granting such a permit. The plaintiff was denied a permit and then brought this suit for a declaratory judgment that the ordinances were invalid and for an injunction against the defendants' enforcing the ordinances. *Held*, judgment for the plaintiff affirmed. The court followed the *Ferriss* case in its interpretation of the enabling act, joining schools and churches in the same classification, apart from trade, industry, residence or other similar purposes. The concept of religious freedom under the first amendment of the United States Constitution (as applied to the several states by the fourteenth amendment)<sup>9</sup>

3. 304 S.W.2d at 902-903. The constitutional mandate referred to is MO. CONST. art IX, § 1(a), which provides: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools. . . ."

4. 304 S.W.2d at 900; *accord*, Hall v. City of Taft, 47 Cal. 2d 177, 302 P.2d 574 (1956).

5. 304 S.W.2d at 900; 28 C.J.S. *Ejusdem* (1941).

6. 304 S.W.2d at 899; *accord*, Smith v. Board of Educ., 359 Mo. 264, 221 S.W.2d 203 (1949) (en banc) (concerning sanitation regulations); Kansas City v. School Dist., 356 Mo. 364, 201 S.W.2d 930 (1947) (concerning smokestack, boiler, etc.).

7. 304 S.W.2d at 902; *accord*, Baltis v. Village of Westchester, 3 Ill. 2d 388, 121 N.E.2d 495 (1954) (water system); Taber v. City of Benton Harbor, 280 Mich. 522, 274 N.W. 324 (1937) (water system); O'Brien v. Town of Greenburgh, 239 App. Div. 555, 268 N.Y. Supp. 173 (1933) (garbage and refuse disposal).

8. 320 S.W.2d 451 (Mo. 1959).

9. Cantwell v. Connecticut, 310 U.S. 296 (1940); Murdock v. Pennsylvania, 319 U.S. 105 (1943).

was also brought to bear on the problem to show that the intent of the legislature did not include placing power in the state's municipalities to restrict the location and use of buildings and land for churches.<sup>10</sup> The court noted that churches would be subject to police regulations just as schools were said to be in the *Ferriss* case. A motion for rehearing or to transfer to the court en banc was overruled.<sup>11</sup> The court reiterated the basis for the decision in the *Ferriss* case and pointed to the added ground of religious freedom in this case. The court then allayed any fears of over-expansion of zoning immunity by saying:

This ruling does not mean, as defendants suggest, that it permits in all residential districts, cemeteries, hospitals, museums, lodge halls, club houses, libraries, private schools and many other types of institutional structures. Since a charge or other consideration is required for the services or facilities of such institutions, we do not think it would be unreasonable to say that they are similar purposes to 'trade, industry, residence' and that this clause of the statute may be reasonably construed to include them. . . .<sup>12</sup>

In Missouri, as the principal cases illustrate, the legislature has invested the cities with the state's police power to zone when it is necessary in the interests of public health, safety, morals, and general welfare. It should be noted that a municipal corporation has no inherent authority to zone in absence of an express delegation from the state by constitutional provision, statute or charter.<sup>13</sup> However, zoning in some cases can be supported under the power of eminent domain with compensation being paid owners damaged by result of such restrictions.<sup>14</sup>

As indicated in the principal cases, the municipalities' power to zone is by no means plenary, for the enabling act is construed as excluding schools and other public buildings from zoning restrictions under the rule of *ejusdem generis*.<sup>15</sup> Also, zoning enactments must conform with both the state and federal constitutions<sup>16</sup> and must not exceed the allowable limits of the police power.<sup>17</sup> Therefore, the Missouri approach in these two cases is not the only lane open to one seeking to have a particular zoning ordinance declared invalid. In some cases the courts are able to deal with the church or school situations by finding that the zoning ordinance is an arbitrary, discriminatory and improper use of the police power in a manner not relating to the health, safety, morals or

10. 320 S.W.2d at 454. See generally, Comment, *Zoning the Church*, 3 St. Louis U.L.J. 265 (1955).

11. 320 S.W.2d at 456.

12. 320 S.W.2d at 457.

13. *Rose v. City of Andalusia*, 249 Ala. 333, 31 So.2d 66 (1947); *Trust Co. of Chicago v. City of Chicago*, 408 Ill. 91, 96 N.E.2d 499 (1951); *Piper v. Moore*, 163 Kan. 565, 183 P.2d 965 (1947); *Wertheimer v. Schwab*, 124 Misc. 822, 210 N.Y. Supp. 312 (Sup. Ct. 1925); 8 McQUILLEN, MUNICIPAL CORPORATIONS §§ 25.32, .35 (3rd ed. 1957).

14. *Kansas City v. Liebi*, 298 Mo. 569, 252 S.W. 404 (1923) (en banc).

15. See cases cited note 6 *supra*.

16. *City of Birmingham v. Monk*, 185 F.2d 859 (5th Cir. 1950).

17. *City of Sherman v. Simms*, 143 Tex. 115, 182 S.W.2d 415 (1944).

general welfare of the community and thereby violates the due process requirement.<sup>18</sup> Among the cases holding certain ordinances invalid when excluding these uses, on the ground that such exclusion was arbitrary and unreasonable, may be found some decisions which are seemingly based on the denial of equal protection rather than the denial of due process.<sup>19</sup> This would seem proper if the excluded uses were closely parallel to those permitted but it would also seem that the similarity of undesirable effects should not preclude the city from distinguishing the uses in terms of social value.

In the church cases the churches may rely on the protection of the first amendment to the United States Constitution, as applied to the states by the fourteenth amendment; and article I, section 5 of the Missouri Constitution, concerning the free exercise of religion, is an available argument for exclusion from the zoning authority.<sup>20</sup> Yet courts and litigants generally seem to avoid these provisions. In the *Congregation Temple Israel* case the court approached the free exercise of religion aspect only for support of the idea that the enabling act's enumeration of powers was not intended to extend to churches.<sup>21</sup> However, this opinion has exhaustive citations to cases holding invalid ordinances which

18. In *Diocese of Rochester v. Planning Bd.*, 1 N.Y.2d 508, 136 N.E.2d 827, 154 N.Y.S.2d 849 (1956), the court held that a zoning board of appeal's denial of a permit to build a church and school was improper when based on the facts that there were no schools or churches in the area, that a loss of potential tax revenue would result and that the enjoyment of neighboring property would be decreased. The denial bore no substantial relation to the purpose of the zoning ordinance to promote the public health, safety, morals and general welfare, and such a decision was arbitrary and unreasonable. *Accord*, *City of Sherman v. Simms*, 143 Tex. 115, 183 S.W.2d 415 (1944). *Contra*, *City of Chico v. First Ave. Baptist Church*, 108 Cal. App. 2d 297, 238 P.2d 587 (Dist. Ct. App. 1951); *Church of Jesus Christ v. City of Porterville*, 90 Cal. App. 2d 656, 203 P.2d 823 (Dist. Ct. App.), *appeal dismissed*, 338 U.S. 805 (1949) (exclusion held a valid exercise of police power); *Miami Beach United Luthern Church of the Epiphany v. City of Miami Beach*, 82 So.2d 880 (Fla. 1955). See also *Matthews v. First Christian Church*, 355 Mo. 627, 197 S.W.2d 617 (1946); *Rombauer v. Compton Heights Christian Church*, 328 Mo. 1, 40 S.W.2d 545 (1931); *Proetz v. Central Dist. of Christian & Missionary Alliance*, 191 S.W.2d 273 (St. L. Ct. App. 1945). These Missouri cases hold restrictive covenants valid and that to allow a church in the restricted areas would in essence be a violation of due process as to the owner's property rights under the restrictive covenants. *Contra*, *State ex rel. Bishop of Reno v. Hill*, 59 Nev. 231, 90 P.2d 217 (1939) (a restrictive covenant was held to deprive the church of its property without due process). In *Peters v. Buckner*, 288 Mo. 618, 232 S.W. 1024 (1921) (en banc), the court required the *school district* to pay just compensation for rights secured under deeds containing covenants restricting an area to solely residential uses and giving each owner in a subdivision an easement in every other parcel. These, the court held, constituted substantial property rights for which the condemning authority must pay compensation. It was noted that the power of the school district to condemn under the state's authority was not bound by such agreements in any way other than the requirement of just compensation being paid for the property rights secured under them.

19. *E.g.*, *Valley View Village v. Proffett*, 221 F.2d 412 (6th Cir. 1955).

20. *Board of Zoning Appeals v. Decatur, Ind., Co. of Jehovah's Witnesses*, 233 Ind. 83, 117 N.E.2d 115 (1954).

21. 320 S.W.2d at 454.

have excluded churches or religious schools from residential areas where no question of authority under an enabling act was raised.<sup>22</sup>

These two Missouri cases carry implications far beyond their holdings on their particular facts. They plainly suggest that there are uses other than the public school and church uses previously mentioned which are immune from a municipality's zoning regulations—an undefined twilight zone of quasi-public uses. On motion for rehearing the court in the *Congregation Temple Israel* case shows some degree of concern for this problem;<sup>23</sup> however, the court did not indicate a definite formula for illuminating this twilight zone. Nor are the courts consistent from jurisdiction to jurisdiction.<sup>24</sup>

In at least two parts of the public and quasi-public use area noted above there is no confusion. When federal projects come into conflict with local zoning restrictions, the federal statutes authorizing construction are part of the supreme law of the land and therefore cannot be challenged as an invasion of the state and municipal field of zoning regulation.<sup>25</sup> Also, zoning restrictions cannot apply to state agencies vested with the power of eminent domain to condemn for public purposes.<sup>26</sup>

But in other parts of the public and quasi-public use area relative darkness prevails. In these parts public or quasi-public uses may or may not fall within the scope of the zoning power although the enabling act may seemingly include them. Churches and public schools present only the most common of the controversies. Not so common examples would be the construction of airport facilities<sup>27</sup> or the exclusion of non-profit humanitarian uses.<sup>28</sup> To exclude private or parochial schools from an area in which public schools are allowed may be invalid,<sup>29</sup> while to exclude schools of higher learning from areas where public and parochial schools are admitted may be proper.<sup>30</sup> As to hospitals, the city

22. *Ibid.*

23. 320 S.W.2d at 457 (quoted in text accompanying note 12 *supra*).

24. For an example concerning admission to residential area of a municipal garbage disposal plant see *O'Brien v. Town of Greenburgh*, 239 App. Div. 555, 268 N.Y. Supp. 173 (1933), *aff'd*, 266 N.Y. 582, 195 N.E. 210 (1935) (city cannot erect plant). *Contra*, *De Palma v. Town Plan Comm'n*, 123 Conn. 257, 193 Atl. 868 (1937).

25. *Tim v. City of Long Branch*, 135 N.J.L. 549, 53 A.2d 164 (Ct. Err. & App. 1947).

26. *State ex rel. Ohio Turnpike Comm'n v. Allen*, 158 Ohio St. 168, 107 N.E.2d 345 (1952).

27. *Stengle v. Crandon*, 156 Fla. 592, 23 So.2d 835 (1945) (exclusion of an airport held to be arbitrary, unreasonable and therefore invalid). Such exclusions are generally invalid as violation of due process unless a proper relation to the public health, safety, morals or welfare can be shown.

28. *Village of University Heights v. Cleveland Jewish Orphans' Home*, 20 F.2d 743 (6th Cir. 1927); *Women's Kansas City St. Andrew Society v. Kansas City*, 58 F.2d 593 (8th Cir. 1932) (philanthropic old people's home).

29. *Roman Catholic Welfare Corp. v. City of Piedmont*, 45 Cal. 2d 325, 289 P.2d 438 (1955); *Diocese of Rochester v. Planning Bd.*, 1 N.Y.2d 508, 154 N.Y.S.2d 849, 136 N.E.2d 827 (1956); *Lumpkin v. Township Comm.*, 134 N.J.L. 428, 48 A.2d 798 (Sup. Ct. 1946).

30. *Yanow v. Seven Oaks Park, Inc.*, 11 N.J. 341, 94 A.2d 482 (Sup. Ct. 1953).

may regulate within reasonable limits their admission to residential areas<sup>31</sup> and in some jurisdictions they can be completely excluded.<sup>32</sup>

In the matter of set-back requirements in zoning ordinances, they are proper if related to the public health, safety and welfare and if statutory requirements are fulfilled.<sup>33</sup> It has been held that an otherwise valid set-back requirement can be properly applied against a church.<sup>34</sup> It therefore seems proper to consider it as within a municipality's power to apply similar regulations to other quasi-public buildings.

Area restrictions are another field in which questions arise when quasi-public uses are involved. The power of a city to enact ordinances that impose area restrictions will depend upon the particular enabling act. Where it is within the city's power to so act, its action must still bear a substantial relation to the health, safety, and general welfare of the public and not be unreasonable or arbitrary. For example, in *State ex rel. Westminster Presbyterian Church v. Edgecomb*,<sup>35</sup> the proper relation to the public welfare was not found by the court and the attempted application of a twenty-five per cent coverage restriction was deemed unreasonable and arbitrary, even though the court apparently assigned no special category to the plaintiff because it was a religious society. This will occur in most church cases and in many other quasi-public use situations.

One last example in this area is that of off-street parking requirements imposed by municipalities. Such ordinances are valid if properly related to the public health, safety and general welfare, if they are within the scope of the state's enabling act, and if they are definite and certain in their terms. But they have been held invalid when applied to churches.<sup>36</sup> The Missouri court, however, shows a disposition toward allowing such requirements to be applied to churches.<sup>37</sup>

Thus this twilight zone of quasi-public uses defies any set formula of elucidation when the question of municipal zoning is raised. There seems to be, however, little doubt that any reasonable zoning regulations in the nature of actual safety precautions, sanitation requirements, electrical and plumbing codes, etc., can be imposed on most public or quasi-public uses. Also, according to the *Ferriss* case, proprietary public uses and, apparently, proprietary quasi-public uses, fall within the enabling act.

The court's distinction in the *Congregation Temple Israel* case between uses making charges and those not so charging adds some light to the enabling act's authority but still leaves the problem clouded. This distinction in itself is far from satisfactory and upon examination does not appear to be sound

31. *Shepard v. City of Seattle*, 59 Wash. 363, 109 Pac. 1067 (1910).

32. *Jones v. City of Los Angeles*, 211 Cal. 304, 295 Pac. 14 (1930).

33. *Wood v. Town of Avondale*, 72 Ariz. 217, 232 P.2d 963 (1951).

34. Board of Zoning Appeals v. Decatur, Ind., Co. of Jehovah's Witnesses, 233 Ind. 83, 117 N.E.2d 115 (1954).

35. *State ex rel. Westminster Presbyterian Church v. Edgecomb*, 108 Neb. 859, 189 N.W. 617 (1922).

36. *State ex rel. Tampa, Fla., Co. of Jehovah's Witnesses v. City of Tampa*, 48 So.2d 78 (Fla. 1950); Board of Zoning Appeals v. Decatur, Ind., Co. of Jehovah's Witnesses, *supra* note 34.

37. 320 S.W.2d at 456.

even as applied in the case before the court. It is true that no membership fee or specific charge is levied by a church. But the fact is that a church is anything but a free institution to its membership. Further, this distinction would fail to maintain the city's protection of private property rights in such cases as a free pauper's cemetery, a free museum or perhaps something as uncommon as a free leper's sanatorium when such uses are attempted in a solely residential area. One need not go so far as this to provide examples that point to the fact that the charge distinction must ultimately fail if the purpose of the enabling act is to be preserved.

At this point one should realize that quasi-public uses are generally immune from zoning restrictions enacted under Missouri's enabling act and that the municipal corporation's power over city development and growth is thereby burdened with a serious impediment. But possibly there is another route available to gain the end desired by the city without utilizing the enabling act. This is the power to act in the interest of the public health, safety and general welfare without reliance upon the enabling act. The independent existence of this power is intimated throughout the cases.

A movement toward recognizing this as an alternative theory upon which to uphold a zoning regulation is apparent in *Flora Realty & Inv. Co. v. City of Ladue*.<sup>38</sup> There the city had enacted a three acre area requirement for single family residences and had relied on the enabling act in so doing. This approached economic segregation to maintain high cost residences in the area; yet the court upheld the city's action on the theory that it was the exercise of the city's power to act for the health and general welfare. While the enabling act was relied on in this case, the relation between the three acre requirement and the enabling act's criteria was not readily apparent. The peculiar location and needs of the city were considered with the somewhat thin arguments that street congestion, fire safety, health and adequate light and air demanded the rather unreasonable requirement.

In considering the control a municipality may exercise without the support of the enabling act, it must be remembered that in Missouri the power of the municipal corporation is limited to that expressly granted to it or to those powers necessarily or fairly implied as incident to such express powers.<sup>39</sup> Any fair and reasonable doubt concerning the existence of a city's powers is resolved against it and the power is denied.<sup>40</sup> Possible support for property regulation without the enabling act may be found in article IV, section 37, of the Missouri Constitution. The health and general welfare of the people are there said to be matters of primary public concern, and the General Assembly is given authority to grant power with respect to these subjects to counties, cities, and other political subdivisions of the state. Chapter 192, Revised Statutes of Missouri (1949),

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38. 246 S.W.2d 771 (Mo. 1952) (en banc); noted, Eckhardt, *Property*, 18 Mo. L. Rev. 366, at 372 (1953).

39. *Williams v. Kansas City*, 104 F. Supp. 848 (W.D. Mo. 1952), *aff'd*, 205 F.2d 47 (8th Cir.), *cert. denied*, 346 U.S. 826 (1953).

40. *Ibid.*

providing for the creation of a Division of Health, is an example of the legislature's exercise of this authority to delegate power in the interest of public health and welfare. There is also some case law on this matter. *Kalbfell v. City of St. Louis*<sup>41</sup> declares the city's police power in the interest of the general welfare to be a continuing one that may require the rights of private property to yield to the public good when such becomes a menace to the health and welfare of the community. The city can make a declaration controlling such uses when the public good demands it as long as it is not an arbitrary declaration of nuisance.<sup>42</sup> It is not unreasonable for area requirements in their light and air facet to be upheld under the power to protect the health of the city's inhabitants. The arguments of the *Flora Realty & Inv. Co.* case should be capable of supporting regulations by their own weight. While the court in *Flora* did not apply its reasoning to the issue of institutional uses, if a true relation to health or safety can be made out this may be sufficient to support municipal action restricting such uses.<sup>43</sup> The same would seemingly apply to off-street parking and set-back requirements.

If a nuisance in fact can be found, quasi-public uses may be controlled by the injunction device,<sup>44</sup> but the cases point out the obvious fact that such uses are seldom nuisances per se and that a nuisance in fact would of necessity have to be proved for the remedy to exist. The nuisance remedy is thus seen to be more effective in the hands of the adjoining land owner than as a tool of the city.

To resolve the confusion that seems to exist in this area, the enabling act should be amended to allow the municipalities more exclusionary power as long as it is exercised in a reasonable manner. It is true that schools, churches and other public and quasi-public uses carry with them an aura of high moral purposes and social value. It is a result of this that the pecuniary losses of a few, when pleaded alone, are not generally allowed to bar the erection of these institutions in residentially zoned areas. Yet, when the existence of a restrictive covenant is added, the property rights secured under it will usually be protected.<sup>45</sup> Also, the enforcement of reasonable safety ordinances will be upheld as a valid exercise of the police power even when asserted against a public or quasi-public use. Would it not then follow that the right of immunity from particular uses of adjoining property as set out in reasonable zoning ordinances should be supported as against churches and certain public and quasi-public uses although some public uses, such as schools, are properly admitted under the rationale of

41. 357 Mo. 986, 211 S.W.2d 911 (1948).

42. *Ibid.*

43. "[M]unicipalities under the police power have the power of regulation of the facilities of public schools, and we hold the same thing is true of churches, such as safety of boilers, smokestacks and similar facilities . . . sanitation . . . , manner and type of construction for fire protection . . . and certainly likewise off-street parking facilities, sewage disposal and other matters related to the public health, safety and welfare." *Congregation Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451, 456 (Mo. 1959).

44. *Murphy v. Cupp*, 182 Ark. 334, 31 S.W.2d 396 (1930); *Waggoner v. Floral Heights Baptist Church*, 116 Tex. 187, 288 S.W. 129 (1926).

45. *Peters v. Buckner*, *supra* note 18.