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Municipal Corporations—Community Planning

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Such an interlocal controversy was before the Court in the case of *Town of Pelham v. City of Mount Vernon.*[8] The municipalities had for many years shared equally the cost of maintenance and repair of an inter-municipal bridge. When major repairs became necessary a dispute arose as to which of two statutes was applicable. The Court held (4-3) for the defendant city, accepting its contention that the situation was governed by Highway Law §250,[9] which provides that each municipality shall pay "its just and equitable share". The dissenters, attacking flaws in the reasoning of the majority, urged that the applicable statute, as contended by plaintiff town, was County Law §61,[10] which provides for payment "in proportion to the assessed valuation of [the] city and town." This case is not of major legal significance, but it is illustrative of the type of controversy which follows from the creation of local units with broad and pervasive powers. A municipality exercising the powers granted to it almost inevitably comes into conflict with the rights and powers of others.

Community Planning

Among the powers given to municipalities are those which contemplate community planning, the most obvious of which is the zoning power.[11] The Court of Appeals during the last term had two occasions to discuss this power.

It is the law of New York that uses which do not conform to a zoning ordinance but which existed before its enactment, will, as a general rule, be permitted to continue.[12] It is frequently explained that the owner has secured a "vested" right in the particular use.[13] The rationale seems to be that the destruction of substantial structures or businesses developed prior to the ordinance is not balanced by the advantage to the public of effective zoning.[14] In *People v. Miller*[15] defendant was convicted of vio-

8. 304 N. Y. 15, 105 N. E. 2d 604 (1952), *motion for reargument denied,* 304 N. Y. 594, 105 N. E. 2d 604 (1952).

9. Now HIGHWAY LAW §232.

10. Now HIGHWAY LAW § 131-b.

11. See MCQUILLIN, *op. cit.,* §§ 25.01 *et seq.*

12. For a general discussion of what constitutes a nonconforming use, see MCQUILLIN, *op. cit.,* §§ 25.185-25.188.

13. *People ex rel. Ortenberg v. Bales,* 224 App. Div. 87, 229 N. Y. Supp. 550 (1st Dep't 1928), *aff'd without opinion,* 250 N. Y. 598, 166 N. E. 339 (1929).

14. For a discussion of a recent development in the area see 1 BFLO. L. REV. 286 (1952).

15. 304 N. Y. 105, 106 N. E. 2d 34 (1952).

lating a zoning ordinance which prohibited the maintenance of any premises or structure for the harboring of pigeons. Defendant contended on appeal that the pre-existing use of his premises for harboring pigeons rendered the ordinance unenforceable as against him. The Court of Appeals in unanimously sustaining the conviction held that the nonconforming use was not such as will be protected, in that only a relatively slight and insubstantial property right was affected. Judge Fuld set out the rule which the Court will apply:

> In this state . . . existing nonconforming uses will be permitted to continue despite the enactment of a prohibitory zoning ordinance, if, and only if, enforcement of the ordinance would, by rendering valueless substantial improvements or business built up over the years, cause serious financial harm to the property owner.

This, it would appear, presents the formula to be applied to future fact situations.

The Court had an opportunity to examine another aspect of the problem of nonconforming uses in *City of Buffalo v. Roadway Transit Co.*[16] The drafters of zoning ordinances, recognizing the protection afforded pre-existing nonconforming uses, frequently impose limitations upon changes in such uses.[17] A Buffalo ordinance[18] thus provided: "A nonconforming use shall not be changed except to a more restrictive use." An amendment to this ordinance in 1930 substituted other language: "(A) nonconforming use may be changed, when changed to a more restricted use." The property involved in the instant case was located in a residential section. Prior to the passage of the zoning ordinance, the premises were used as a public garage. This use was continued as a matter of right until 1946. Defendant at that time leased the premises and converted the same into a freight terminal, a use of the same grade under the zoning ordinance as a public garage. The Court of Appeals in holding that this conversion was not authorized, refused to accept defendant's contention that the 1930 amendment should be interpreted to authorize a change to a use of equal grade since it did not expressly prohibit any change. The Court pointed out that such a strained interpretation would not be in harmony with the basic purpose of zon-

16. 303 N. Y. 453, 104 N. E. 2d 96 (1952).

17. McQUILLIN, *op. cit.*, § 25.181 at 364.

18. § 23 of Chap. LXX (1926).

ing laws, "to bring about ultimate conformity in the use districts."[19]

A power kindred to that of prescribing the uses to which land may be put is that of taking land for public use by condemnation. This power of eminent domain, which is inherent in the sovereign, has been granted to municipalities by the New York State Legislature.[20] There is no dispute that the holder of a fee is entitled to an award upon condemnation. Difficulties sometimes arise, however, when the condemnation affects incorporeal hereditaments. Such a case was considered by the Court of Appeals in the 1951-52 term.[21] A street closing condemnation proceeding was instituted in order to consolidate city owned abutting properties for the purpose of constructing a bus garage and shop. Claims were filed by the electric and gas companies for alleged damages to their franchises, mains and services. The damages awarded the utilities were measured solely by the stipulated cost of relocating their facilities.[22] A claim of the gas company for an antiquated main which had been abandoned was disallowed. The Appellate Division unanimously affirmed the lower court.[23] Both the gas company and the city appealed by permission. The Court of Appeals, in affirming (5-2), pointed out that the municipal function here involved was "proprietary" and not "governmental" and that, therefore, even under the common law rule the utilities would be entitled to more than the right to remove their installations; but held that the common law rule has been abrogated in New York City by statute.[24] The dissenters, in an opinion by Fuld, J., approached the problem from a different viewpoint. The city had only an easement to maintain the street, they pointed out; had it given up that easement instead of acquiring the fee, the sole right of the claimants would have been to remove

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19. For a discussion of another aspect of community planning see *Brous v. Smith*, 304 N. Y. 164, 106 N. E. 2d 503 (1952), holding constitutional TOWN LAW § 280a, which requires that a suitably improved road give access to a subdivision before building permits be issued, over a developer's contention that it was violative of the equal protection and due process clauses, arbitrary, unreasonable, oppressive and capricious.

20. See, *e.g.*, COUNTY LAW §215; BUFFALO CITY CHARTER § 10 (3).

21. In re *Gillen Place, Borough of Brooklyn, City of New York*, 304 N. Y. 215, 106 N. E. 2d 897 (1952).

22. 195 Misc. 685, 90 N. Y. S. 2d 641 (Sup. Ct. 1949).

23. 278 App. Div. 779, 104 N. Y. S. 2d 62 (2d Dep't 1951).

24. Street closing condemnation proceedings are authorized by NEW YORK CITY ADMINISTRATIVE CODE § E 15-3, 0 (b), which provides that compensation is to be paid to owners of real property affected or damaged; § 15-1.0 (5) defines real property to include all surface and subsurface structures, all easements and hereditaments, corporeal and incorporeal.

their chattels. The situation here, they urged, is analogous; the closing of the street terminated the franchise and the utilities' sole right should be to remove their property.[25]

Municipal Borrowing

Like the other incidents of local government, the power to borrow money and contract indebtedness is not inherent, nor can it be exercised unless it is conferred either expressly or by necessary implication.[26] In New York State the power is expressly granted to municipalities by the State Constitution.[27] Although there is some trend toward pay-as-you-go financing by local units, millions of dollars of capital improvements are financed by bond issues. At the present time, because of the tax-free nature of income from municipal bonds,[28] this borrowing is accomplished at very favorable interest rates.[29] Such was not always the case, however, and there are still municipal bonds in the hands of investors at interest rates of four to six percent and higher. Obviously, it is to a municipality's advantage to pay off these obligations if it is financially and legally able to do so, thus saving the interest cost.

In 1908 the City of Buffalo issued water bonds aggregating $500,000 for a 50 year term at 4% interest. These bonds were by their terms callable by the city "at the expiration of 20 years from the date of issue." The obligations were clearly callable in 1928. The question whether they were callable only then or at any time thereafter was before the Court in *City of Buffalo v. Strong & Co.*[30] The city sought a declaratory judgment that it had a right to call the bonds; the bondholders contended that the terms of the bonds gave the city an option to call them which had to be exercised upon a "pin-pointed" day, or at the most within a reasonable time after that day. The majority of the Court, finding this argument of the bondholders to be unreasonable, examined the

25. For another case involving condemnation, see *Delaware County Electric Co-operative v. City of New York,* 304 N. Y. 196, 106 N. E. 2d 605 (1952), which turns upon the construction of a lease in which the utility had agreed to limitations on the City's liability under the ADMINISTRATIVE CODE, Title E, Chap. 15.

26. MCQUILLIN, *op. cit.,* § 39.07.

27. Art. VIII.

28. INT. REV. CODE § 22(b)4.

29. So important a factor is this tax advantage that LOCAL FINANCE LAW §§ 58:00, 59:00 now provide that a municipality requesting bids may give the bidder the right to refuse to accept delivery if the income tax regulations change.

30. 304 N. Y. 132, 106 N. E. 2d 217 (1952).