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Zoning Out Religious Institutions

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ZONING OUT RELIGIOUS INSTITUTIONS

I. INTRODUCTION

The application of zoning ordinances to thwart efforts of private groups wishing to erect schools and churches recently has given rise to litigation in several state courts. Naturally, questions of due process and equal protection of the laws are brought before the courts in these cases. Moreover, when the problem involves religious groups and organizations, cognizance must also be given to the provisions of the first amendment regarding the free exercise of religion. This recent litigation will be examined in order to determine whether these zoning ordinances prohibiting the establishment of churches and private schools in residential neighborhoods comply with the constitutional guaranties of the first and fourteenth amendments.

Comprehensive municipal zoning ordinances were first given validity by the Supreme Court of the United States in *Village of Euclid v. Ambler Realty Co.*[1] It is fundamental that the validity of zoning ordinances is based on the police power of the state or municipality. In its decision, the Court referred to an Illinois case[2] quoting from it with approval:

> With the growth and development of the state the police power necessarily develops, within reasonable bounds, to meet the changing conditions. . . . The exclusion of places of business from residential districts is not a declaration that such places are nuisances, or that they are to be suppressed as such, but it is a part of the

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1 272 U.S. 365 (1926).

2 Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1925). See also, State *ex rel.* Civello v. New Orleans, 154 La. 271, 97 So. 440, 444 (1923).

> general plan by which the city's territory is allotted to different uses in order to prevent, or at least to reduce, the congestion, disorder, and dangers which often inhere in unregulated municipal development.[3]

In a similar vein forty-two years earlier, Mr. Justice Field stated that ". . . the [fourteenth] amendment . . . was [not] designed to interfere with the power of the State, sometimes termed its police power . . . to prescribe regulations to promote the health . . . and good order of the people . . . ."[4] If the police power has precedence over the fourteenth amendment, as this statement of the Court seems to indicate, what of the first amendment which provides that Congress shall make no law respecting the establishment of religion or prohibiting its free exercise?

II. Exclusion Of Churches

In *City of Sherman v. Simms*,[5] the Supreme Court of Texas held that arbitrary and discriminatory regulations, under the guise of the police power, would not be upheld, and that the exclusion of churches from residential districts and the relegation of them to business and industrial districts was arbitrary and unenforceable.

The issuance of a building permit for the erection of a church in a residential district in *State ex rel. Roman Catholic Bishop v. Hill*,[6] was directed despite the provisions of a zoning ordinance which barred churches without the approval of 75 per cent of the property owners in the neighborhood. After citing a number of cases in which it was held that churches may not be barred from residential zones, the court said:

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3 149 N.E. at 788.
4 Barbier v. Connolly, 113 U.S. 27, 31 (1885).
5 143 Tex. 115, 183 S.W.2d 415 (1944).
6 59 Nev. 231, 90 P.2d 217 (1939).

> As against these authorities, cases involving livery stables, garages, gasoline stations, funeral parlors, billboards, two-family residences, morgues, laundries, etc., afford us little aid in the instant case. The law distinguishes between such cases and those relating to churches, schools, parks and playgrounds, art galleries, library buildings, community center buildings, etc. In some, if not most zoning ordinances, churches are expressly classified in first residence districts.[7]

Religious schools have fared equally as well as churches under the first amendment. As early as 1927, in *Western Theological Seminary v. Evanston*,[8] the Supreme Court of Illinois declared void a zoning ordinance which barred a private religious seminary from a residential district but permitted public schools in the same area. In 1932, the Supreme Court of Oregon in *Roman Catholic Archbishop v. Baker*[9] held that a zoning ordinance may not discriminate in favor of public schools and against private schools in the matter of their location in a residential zone. In *West Virginia State Bd. of Educ. v. Barnette*,[10] the court went even further in recognizing the limitations of state power to regulate first amendment freedoms:

> The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First becomes its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may law-

7 *Id.* at 220.
8 325 Ill. 511, 156 N.E. 778 (1927), *modified*, 333 Ill. 257, 162 N.E. 863 (1928).
9 140 Ore. 600, 15 P.2d 391 (1932).
10 319 U.S. 625 (1943).

fully protect.[11]

In view of the unanimity of these and a score of similar decisions, E. C. Yokley, probably the leading authority on zoning laws, stated:

> In the light of a well known Illinois decision affecting discrimination between classes of schools permitted in certain zones, it is well to again state the general principle that a zoning ordinance restricting the property rights of an individual without having any direct or substantial relationship to the promotion of the public health, safety, morals or welfare *is invalid.*
>
> There are many other cases . . . that uniformly follow this rule that discrimination between public and private schools will not be tolerated.[12]

However, a 1949 California case[13] placed in jeopardy what had appeared to be a settled principle of law.

Prior to 1948, a typical California comprehensive zoning ordinance had been adopted in the city of Porterville, dividing the city into four types of residential zones: (1) R-1, single family residential; (2) R-2, duplex or double family residential; (3) R-3, apartments or multiple residential, including hotels, boarding and lodging houses, clubs, fraternities, sororities, and hospitals; and (4) R-4, unlimited residential, including all of the foregoing, plus libraries, museums, schools, churches, religious institutions, etc. Several years *prior* to the adoption of this municipal zoning ordinance, the Porterville Mormons had acquired vacant land, taking title as "the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints." At the time of acquisition, this land was *outside* the city limits of Porterville. Subsequently this area was annexed to the city and became part of a "single family residential" zone (R-1).

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11 *Id.* at 639.

12 1 YOKLEY, ZONING LAW AND PRACTICE 89 (2d ed. 1953).

13 Corporation of Presiding Bishop v. Porterville, 90 Cal. App. 2d 656, 203 P.2d 823 (1949).

In 1948, the Mormons applied for a building permit, stating the building was to be used and occupied for religious worship functions and study and for youth activities and other church functions. When the building permit was denied, a petition for a writ of mandate was filed, to which the city of Porterville demurred. The trial court sustained this demurrer, *without leave to amend,* and the church appealed. The California District Court of Appeal unanimously affirmed the judgment of the trial court and appellant's petition for a hearing by the Supreme Court of California was denied. Further appeal was denied when the Supreme Court of the United States dismissed the case for want of a substantial federal question.[14] Thus, *for the first time* in any state, a municipal zoning ordinance was held superior to the constitutional guaranties of due process and the free exercise of religion.

Actually, close scrutiny of the record reveals an entirely opposite constitutional aspect to this case. Six years later in another epochal California case,[15] Andrew F. Burke, an outstanding authority on the religious aspect of zoning laws, declared before the California Supreme Court: "The Porterville decision is bad law, in that it is based upon an insufficient petition and record. We confidently predict that it will be over-ruled whenever this Court has the opportunity to fully consider the constitutionality of a zoning law which attempts to exclude churches from any part of a municipality."[16]

Careful reading of the *Porterville* opinion would seem to substantiate this viewpoint. The court held the original petition failed to state a cause of action. Nowhere in the petition did the plaintiff invoke the constitutional guaranty

14 338 U.S. 805, *rehearing denied,* 338 U.S. 939 (1949).

15 Roman Catholic Welfare Corp. v. Piedmont, 45 Cal. 2d 325, 289 P.2d 438 (1955).

16 Brief for Petitioner, answering Respondents' petition for a rehearing, p. 19, Roman Catholic Welfare Corp. v. Piedmont, 45 Cal. 2d 325, 289 P.2d 438 (1955).

of the free exercise of religion. The only constitutional issue raised was deprivation of petitioner's property without due process of law. The plaintiff argued that the trial court should not have sustained the demurrer to its defective petition without leave to amend. Yet the plaintiff did not request such leave to amend. The judgment even recited that the plaintiff had advised the court that leave to amend would be futile. Having elected to stand on the allegations of the petition and having declined to amend it, plaintiff's cause obviously was hopeless in the prosecution of any appeal. The district court of appeal could deal only with the allegations of the original trial court petition and therefore treated the case as if it involved a purely commercial enterprise, a corporation whose right was inferior to the rights of residents of a restricted zone. In this regard the court stated: "The petitioner is not a congregation, but holds its property as a corporation sole, the existence of which depends upon the laws of the State. Having such right from the State, the enjoyment of the property is subject to reasonable regulations."[17]

The *Porterville* decision produced many undesirable results. It was the exception which was to prove the rule and which set up the principle that zoning laws take precedence over the bill of rights. It held that personal convenience has a higher place in the law than the constitutionally guaranteed right of religious worship. Yokley unequivocally terms it, "an expression of the minority rule" and stresses that the ". . . overwhelming majority of decisions in all jurisdictions *other than California* is to the contrary." (Emphasis added.)[18]

Nevertheless, it was the law in California and as such it was to affect the lives, education, and faith of thousands, other than Mormons, for half a decade. In 1951, it caused

[17] Corporation of Presiding Bishop v. Porterville, 90 Cal. App. 2d 656, 203 P.2d 823, 825 (1949).

[18] 2 YOKLEY, ZONING LAW AND PRACTICE 111 (2d ed. 1953).

the discontinuance of the construction of a Baptist church in Chico, California.[19] It was used by the Planning Commission of Ross, a San Francisco suburb, to deny a building permit for a Seventh Day Adventist church. Similarly, the Orange County Planning Commission and the Board of Supervisors near Los Angeles, in 1955, refused a building permit to the Sisters of St. Louis for a convent and kindergarten in a district zoned for "estates." These two denials were not appealed to the courts.

III. Exclusion Of Private Schools

If a Mormon church could be excluded from a "single family residence" zone, what would be the status of a private school in such a zone? In 1953, the Wisconsin Lutheran High School Conference applied for a high school building permit in a "Class A" zone of Wauwatosa, a suburb of Milwaukee. The application was denied. The Conference petitioned for and was granted a writ of mandamus. Appeal was taken to the Supreme Court of Wisconsin, which reversed, ruling that a "Class A" residential district may be limited to single family dwellings, public elementary and high schools, and private elementary schools, to the exclusion of a private high school.[20] The majority opinion[21] made it emphatic that:

> . . . The present appeal is decided on the narrower ground that tangible differences . . . sustain the distinction made by the ordinance between the schools. To begin with, the term "public" is the antithesis of "private." The public school is not a private one. They serve different

[19] Chico v. First Ave. Baptist Church, 108 Cal. App. 2d 297, 238 P.2d 587 (1951).

[20] State *ex rel.* Wisconsin Lutheran High School Conference v. Sinar, 267 Wis. 91, 65 N.W.2d 43 (1954).

[21] For a thorough consideration of the "discrimination" doctrine as advanced by the majority, see, Seitz, *Constitutional and General Welfare Considerations in Efforts to Zone Out Private Schools,* 11 Miami L. Q. 68, 77 (1956).

> interests and are designed to do so . . . . Is that difference material to the purpose of zoning? In many respects the two schools perform like functions and in probably all respects concerning noise, traffic difficulties and other objectionable features already mentioned they stand on an equality, so that in several of the objects of zoning ordinances, — the promotion of health, safety and morals . . . we may not say that the two schools differ. But when we come to "the promotion of the general welfare of the community" — "Ay, there's the rub." The public school has the same features objectionable to the surrounding area as a private one, but it has, also, a virtue which the other lacks, namely, that it is located to serve and does serve that area without *discrimination.* Whether the private school is sectarian or commercial, though it now complains of discrimination, in its services it discriminates and the public school does not.[22] (Emphasis added.)

The Supreme Court of the United States again dismissed an appeal for want of a substantial federal question.[23]

It has been well said that the dissents of Mr. Justice Holmes and Mr. Justice Brandeis during the 1920's became the law of the land a decade later. Accordingly, the dissent in *Wisconsin Lutheran High School* seems deserving of study and consideration inasmuch as it was to be subsequently relied upon by a California petitioner in *Roman Catholic Welfare Corp. v. Piedmont.*[24] It is not too much to say that the majority of the Supreme Court of California in this case followed the reasoning of the dissenting Wisconsin minority. This dissenting opinion took the position no valid distinction may be made in a zoning ordinance between public and private schools which teach the same subjects and comply with the compulsory educational laws of the state. While admitting that valid classifications for zoning may be based upon distinctions between municipal

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[22] State *ex rel.* Wisconsin Lutheran High School Conference v. Sinar, 267 Wis. 91, 65 N.W.2d 43, 47 (1954).

[23] 349 U.S. 913 (1955).

[24] 45 Cal. 2d 325, 289 P.2d 438 (1955).

and private property, the dissenting opinion said:

> However, it is significant that the courts . . . in zoning cases have treated private school situations different than other endeavors of private enterprise. In the field of education the courts in zoning cases have made an exception to the rule and have not distinguished as between private and public schools. There is good reason for such exception. . . . Private schools must comply with state standards in matters of education. Privately owned recreation places need not so comply.[25]

The *Wisconsin Luthern High School* case, like *Porterville,* proved again the fallacy and danger of invoking *only* the fourteenth amendment in zoning law appeals involving churches and religious schools. In both of these cases, the constitutional question of free exercise of religion was entirely neglected. While these cases left much to be desired from the standpoint of constitutional procedure, the *Piedmont* case was to prove a model in this respect. Whereas the Supreme Court of Wisconsin had decided that a zoning ordinance took precedence over a private school, the Supreme Court of California, by a four to three majority, held unconstitutional a zoning ordinance which excluded *all* private schools, as arbitrary and unreasonable discrimination.[26] The court said: "Parents have the right to send their children to private schools, rather than public ones, which are located in their immediate locality or general neighborhood."[27] Establishment of a residential zone that is open to public schools but closed to private religious schools is a direct infringement on that right.

The overall impact of the *Piedmont* case can best be seen in relation to the earlier decision of the United States Supreme Court in *Pierce v. Society of Sisters,*[28] holding

[25] State *ex rel.* Wisconsin Lutheran High School Conference v. Sinar, 267 Wis. 91, 65 N.W.2d 43, 50 (1954).

[26] Roman Catholic Welfare Corp. v. Piedmont, 45 Cal. 2d 325, 289 P.2d 438 (1955).

[27] *Id.* at 441.

[28] 268 U.S. 510 (1925).

unconstitutional a state statute that made it mandatory for parents to send their children to public schools. In the *Pierce* case, the Supreme Court recognized that the child is not " . . . the mere creature of the State; those who nurture him and direct his destiny have the right . . . to recognize and prepare him for additional obligations."[29] Furthermore, the Court felt it unreasonable to expect parents to send their children out of the state to attend private schools.

In *Piedmont,* the California Supreme Court went beyond the *Pierce* decision by applying its doctrine to a residential city. As a result, it would seem the law in California in respect to private schools is that the *Pierce* rule applies to a "locality" or "neighborhood" unless the zoning authorities can show "exceptional circumstances."

The facts of the *Piedmont* case merit detailed consideration. In 1929 the city council of Piedmont, a suburb of 12,000 entirely surrounded by the city of Oakland, adopted a comprehensive zoning ordinance, dividing the city's area into four zones. In 1936, this ordinance was amended by the city council and approved by a referendum vote.[30] The amendment provided that in Zone A, embracing 98.7 per cent of Piedmont's corporate area, "No building shall be erected which is intended to be occupied or used for any purpose other than a single family dwelling, church or *public* school under the jurisdiction of the Board of Education of the City of Piedmont." (Emphasis added.) In Zone A there were three public elementary schools, one public junior high school and one public high school.

When Piedmont's long established Roman Catholic parish of Corpus Christi sought a building permit for its newly

29 268 U.S. at 535.

30 In West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 625 (1943), the court said at 638: "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights *may not be submitted to vote;* they depend on the outcome of no elections." (Emphasis added.)

planned school, the application was denied. Unlike the procedure followed in the *Porterville* and *Wisconsin Lutheran High School* cases, counsel for the Roman Catholic Welfare corporation filed a petition for a writ of mandate in the California Supreme Court, which has original jurisdiction in the matter of prerogative writs.[31] The court entertained the petition and transferred the proceedings to the District Court of Appeal which granted the writ in a unanimous decision.[32] Following appeal by the City of Piedmont to the California Supreme Court, the final decision affirming the issuance of the writ was rendered on November 23, 1955. The dissenting opinion relied largely upon the *Wisconsin Lutheran High School* and *Porterville* decisions. In flatly rejecting the former case, the majority stated: "It is difficult to make an argument that private schools are inimical to the public welfare while public schools are not."[33] In *State v. Northwestern Preparatory School, Inc.*,[34] the Supreme Court of Minnesota had held that a distinction between public and private schools is arbitrary. Counsel for the City of Piedmont argued that without this distinction, the owner of a private school could locate the school without any control on the part of the city. The majority of the court were not disturbed by this argument:

> This question is not before us .... we have only the question of a private school to be located adjacent to a Catholic Church in the area where public schools are found. Respondents' argument that a private school located in the precise location involved here would be inimical to the public welfare is not convincing.[35]

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31 Cal. Const. art. 6, § 4.

32 Roman Catholic Welfare Corp. v. Piedmont, 278 P.2d 943 (Cal. App. 1955).

33 Roman Catholic Welfare Corp. v. Piedmont, 45 Cal. 2d 325, 289 P.2d 438, 442 (1955).

34 228 Minn. 363, 37 N.W.2d 370 (1949). For comparative similarities between parochial and other private schools, see note, *State, Church, and Child—Statutory Provisions for School Permit*, 1 STAN. L. REV. 316 (1949).

35 Roman Catholic Welfare Corp. v. Piedmont, 45 Cal. 2d 325, 289 P.2d 438, 443 (1955).

IV. A Technique Of Indirection

The *Piedmont, Wisconsin Lutheran High School,* and *Porterville* cases had one thing in common, the prohibition of *construction* of a church or school by either specific or implied zoning law restrictions. In fact, all "religious" zoning law cases studied thus far have involved this common factor. Two cases decided by the Court of Appeals of New York, however, are unique on their facts in this regard, and deserving of attention. In both cases, community zoning boards utilized their discretionary powers to block the use of large tracts of land for religious purposes, a technique of evasion rather than outright prohibition. There is good reason to believe that future religious zoning law litigation will follow this new pattern. At this writing, for instance, the California District Court of Appeal has before it a San Mateo County Superior Court decision which upheld the denial of a permit for a church, based upon the grounds of "inadequate parking facilities" which would create a traffic hazard.

The first of these New York decisions, *Community Synagogue v. Bates,*[36] was concerned with the application by the synagogue for a *use* permit for a mansion situated in the village of Sands Point. The village building inspector, after a casual inspection of the existing premises, decided that the state fire laws had not been complied with although the synagogue had entered into a contract for alterations necessary for such compliance. Accordingly, the application for the *use* permit was denied, and the Village Zoning Board of Appeals affirmed. The New York Supreme Court, Appellate Division likewise affirmed.[37]

The Court of Appeals opinion by Chief Justice Conway,

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[36] 1. N.Y.2d 445, 136 N.E.2d 488 (1956). See also Great Neck Community School v. Dish, 158 N.Y.S.2d 379 (2d Dep't 1957).

[37] Community Synagogue v. Bates, 1 App. Div. 2d 686, 147 N.Y.S.2d 204 (2d Dep't 1955).

reversing the appellate division's denial of the use permit, seems deserving of consideration, especially with reference to the first amendment. The opinion did more than reiterate the principle that the question presented for review after the denial of an application by a zoning board is whether the board's action was arbitrary, capricious, unauthorized, or oppressive. Specifically, and for the first time, it was held that zoning authorities may not narrowly limit the functions of a church in the use of its property to public worship and other strictly religious uses. The court pointed out that ". . . all churches recognize that the area of their responsibility is broader than leading the congregation in prayer."[38] The consitutional question raised in this case was whether the zoning authorities may fix the location of a church "at a precise spot." The court said: ". . . If the municipality has the unfettered power to say that the 'precise spot' selected is not the right one, the municipality has the power to say eventually which is the proper 'precise spot.' That, we all can see is the wrong solution."[39]

In the second of these New York cases, *Diocese of Rochester v. Planning Board,*[40] the decisive question involved the validity of a decision of the planning board of the town of Brighton denying approval of an application for construction of a building for religious uses in a "Class A" neighborhood. The 1933 Brighton zoning ordinance permitted this type of building if approved. This is entirely different from outright and specific prohibition, yet the end result was identical.

The court examined the reasons upon which the planning board had denied approval — there was no school or church in the area; the adverse affect upon property values in the area; the loss of potential tax revenue, and

38 *Id.* at 493.
39 *Id.* at 496.
40 1 N.Y.2d 508, 136 N.E.2d 827 (1956).

decreased enjoyments of neighboring property — and then proceeded to reject them with this preliminary statement of policy: ". . . It must be borne in mind that churches and schools occupy a different status from mere commercial enterprise and, when the church enters the picture, different considerations apply."[41]

Was the planning board justified in attempting to exclude churches and schools from a built-up area, thus driving them to the outskirts of the community? The court's reply was: "We know of no rule which requires that churches may only be established in sparsely settled areas. On the contrary, '. . . wherever the souls of men are found, there the house of God belongs.' "[42] As to the alleged adverse effect upon property values caused by churches and schools, the court said: ". . . [I]n view of the high purposes, and the moral value, of these institutions, mere pecuniary loss to a few persons should not bar their erection and use."[43] The plea of loss of potential tax revenue was answered with: ". . . [T]he paramount authority of this State has declared a policy that churches and schools are more important than local taxes, and that it is in furtherance of the general welfare to exclude such institutions from taxation."[44] The opinion concluded: "That is not to say that appropriate restrictions may never be imposed with respect to a church and school and accessory uses, nor is to say that under no circumstances may they ever be excluded from designated areas. In this case, however, . . . the decisions of the town bodies are arbitrary and unreasonable."[45]

V. Conclusion

A common denominator in many zoning law cases is their suburban origin. One sixth of today's 170 million

41 *Id.* at 834.
42 *Id.* at 835.
43 *Ibid.*
44 136 N.E.2d at 836.
45 *Id.* at 837.

Americans reside in the suburbs and the rights of minorities frequently clash with the local public opinion of the majority in these areas. Scores of the suburbs are merely collections of hundreds of houses thrown up since World War II having no corporate existence. They are largely subject to county zoning laws and seldom does local bigotry and prejudice prevail at the county level. However, many of these new communities are being incorporated as villages, towns and cities. As these communities incorporate, they adopt their own local zoning laws, such laws frequently reflect the bigotry and, as in Piedmont, Sands Point, Wauwatosa and Brighton, they eventually may clash with the constitutional guaranties of the first and fourteenth amendments.

This country owes its origin to people who refused to be denied the right of the free exercise of religion. If the democratic system is to realize its proclaimed values, zoning ordinances must be designed and applied accordingly.

With a constantly increasing need for more private educational and religious facilities, zoning problems will continue to share an important part of this country's court calendars. As the more recent cases which were analyzed indicate, the trend of decision seems to be in favor of the churches and schools. The local dodge of arbitrary distinction and unreasonable action is being effectively controlled in many areas. By making use of the more concrete test provided by the first amendment provisions concerning freedom of religion, rather than the vague criterion of due process, constitutional privileges will be more readily assured and private religious organizations will realize the necessary guaranties for effective activity.

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