Wyoming Law Journal

Volume 4 | Number 3 Article 10

December 2019

Limiting the Nonconforming Structure Doctrine

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LIMITING THE NONCONFORMING STRUCTURE DOCTRINE

Plaintiff applied for a building permit to construct an addition to its church; this was refused. Subsequently an ordinance was adopted which established a fire zone in the area in which the church was located. The ordinance provided that no building should be enlarged or extended unless such building should be reconstructed to conform with the requirements of the ordinance for new construction. The ordinance contemplated masonry bearing walls to be twelve inches thick whereas the walls of the existing church building were eight inches thick; the proposed additon, however, would have met all the requirments of the ordinance. Action was brought to compel issuance of a permit. From judgment for the plaintiff, the defendant appeals. *Held,* that mere police legislation of this character operates only prospectively and does not demand the sacrifices of existing physical property. Unless the property itself amounts to a nuisance, and is a source of imminent public danger. The insistence that the existing structure be reconstructed is unreasonable and arbitrary in the circumstances. Judgment affirmed. *Mt. Zion Baptist Church of Lodi TP. v. Melillo,* 3 N.J. 61, 68 A. (2d) 741.

The authority to pass zoning ordinances is referable to the police power of the state delegated to the municipalities, but this power is not unlimited, being subject to review by the courts relative to the manner in which it was exercised.[1] The only limitation on this exercise is that the regulation shall be reasonably necessary, and reasonably exercised;[2] reasonableness, therefore, is the test of the legality of a zoning ordinance.[3] This must be determined by the circumstances in each particular case.[4]

Applying this test to the reported case, it is apparent that denial of the permit by the city would not promote public safety to any great extent. A zoning ordinance, unless made to do so by its own terms, will not be construed rectroactively as to a nonconforming existing structure.[5] Here the proposed addition was to fully comply with the terms of the ordinance, and the court felt as the ordinance could not affect the existing structure, to allow the addition would make the building no less safe than it originally was. However, by application of the reasonableness test, the municipality was forced to grant the permit sought, and consequently extend the life of nonconforming structure beyond its normal usefulness. As a nonconforming structure does not comply with the building regulations for the district in which it is zoned,[6] it is analagous to a nonconforming

1. Weber v. City of Cheyenne, 55 Wyo. 202, 97 P. (2d) 667 (1940).
2. City of Chicago v. Schultz, 341 Ill. 208, 173 N.E. 276 (1930).
3. Palmer v. City of Detroit, 306 Mich. 449, 11 N.W. (2d) 199 (1943).
4. Pere Marquette Ry. Co. v. Township Bd. of Muskegon Township, 298 Mich. 31, 298 N.W. 393 (1941).
5. Shaw v. Calvary Baptist Church, 184 Okl. 454, 88 P. (2d) 327 (1939), where the court held, "zoning ordinances will be construed to apply prospectively only, and not to buildings in existence at the time of their enactment, unless a contrary intent clearly appears." Accord, Weitz v. United States Trust Co., 143 Neb. 703, 10 N.W. (2d) 623 (1943).
6. Palmer v. City of Detroit, note 3 supra.

use which has been defined as the "use of buildings or land that does not agree with the regulations of the use district in which it is situated."[7]

The doctrine of nonconforming uses is a concession of the part of the municipality to recognize a pre-existing property right. Usually this right will not be extended beyond the normal life of the property,[8] or beyond such time as some change in the premises is contemplated by the owner.[9] The customary method of eliminating nonconforming uses is to forbid their alteration, rebuilding or extension,[10] the continuance of nonconforming buildings and the erection of new additions being inconsistent with the objective of the ordinance.[11] To extend the life of a nonconforming structure by allowing alterations or additions to the property will serve to defeat the purpose of the nonconformance doctrine which is predicated on the assumption that the nonconforming structure will terminate within a reasonable period and not continue indefinitely. Therefore, as a logical corollary, a building that does not comply with the regulations of a zoning ordinance as to structure is perhaps no more desirable, when considered in the light of a comprehensive zoning plan, then a nonconforming use, and may be eliminated by the same means, i.e. forbid alteration and rebuilding of the nonconforming property.

Had the court in the reported case looked upon the building as retaining its original character with the addition, there is an increase in nonconformance. Nonconformity in no case should be allowed to increase.[12] On the other hand, had the court felt the addition to the existing structure destroyed the original character of the structure and created a new building, the building as a whole must comply with the regulations for new buildings. By following the former line of argument, the permit should have been refused as extending the life of a nonconforming structure, and as the existing structure would not comply with regulations for new buildings, the permit should not have been granted under the latter view. Thus by applying the reasonableness test, the court has in effect granted a variance to the zoning regulations. If there were sufficient need for the enactment of such a zoning ordinance, there should be a corresponding need for full compliance with its terms. The zoning ordinance is a product of far sighted planning calculated to promote the general welfare of the city at some future time.[13]

The courts have recognized pre-existing property rights and allow a nonconforming use to die a natural death. In the case of nonconforming structures the ordinance will have no retroactive effect. These concessions to the property owners are fair enough and no extension of this concession should be granted

7. Appeal of Hallar Baking Co., 295 Pa. 257, 145 A. 77 (1928).
8. Thayer v. Board of Appeals, 114 Conn. 15, 157 A. 273 (1931).
9. Ibid, e.g. changing the premises to a higher use classification.
10. Rev. ord., City of Laramie 1947, Art. II C. 18, Zoning Regulations and Restrictions; expressly forbids the extension of a nonconforming use.
11. See note 8 supra.
12. Ibid.
13. Averne Bay Const. Co. v. Thatcher, 278 N.Y. 222, 15 N.E. (2d) 587, 117 A.L.R. 1110.

by the courts. An ordinance like any other law will be effective only if it retains its full integrity and applies equally to all.

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REASONABLE SEARCH UNDER THE FOURTH AMENDMENT

The appellee was convicted in the District of Columbia for hindering and obstructing a health officer in the performance of his duties by refusing him admittance to her home on the ground that he had no search warrant. The health officer was answering a complaint that the building's halls were strewn with trash and uncovered garbage, and that the occupants of the building had failed to avail themselves of the building's toilet facilities. The regulation empowering the health officer to make the inspection contained no provision requiring or allowing the officer the use of a search warrant. On her appeal to the Municipal Court of Appeals, the conviction was reversed, and the District of Columbia appealed. *Held,* Congress has never enacted a statute providing for the enforcement of criminal law, demonstrating conclusively that Congress intends that the right of privacy shall not be invaded except in criminal cases. The Constitution prohibits unreasonable searches, and by implication permits reasonable searches. The intended search of the officer was not in the eyes of the court a reasonable search despite the character of his mission, for the reasonableness of a search without a warrant is to be judged by the extremity of the circumstances of the moment and not by the general characteristics of the officer or his mission. Affirmed. District of Columbia v. Little, 178 F. (2d) 13 (App. D.C. 1949).[1]

Holtzoff, District Judge, dissenting, urged that, "The Fourth Amendment relates only to searches and seizures in connection with criminal prosecutions or enforcement of penalties, and does not affect inspections conducted in the course of administration of statutes and regulations intended to promote public health or public safety."[2]

On certiorari to the U.S. Supreme Court, the majority opinion sidestepped the constitutional question. The opinion of Justice Burton, and Justice Reed, dissenting, will be hereinafter discussed.

The court in the decision at hand seems to have taken a restricted and not altogether warranted view of the existing law, thus circumscribing the modern view of the Fourth Amendment. It is submitted that the regulation[3] was enacted under, and exhibited a valid exercise of the reserved police power.

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1. Certiorari granted November 7, 1949, 338 U.S. 866.
2. District of Columbia v. Little, 178 F. (2d) 13 (App. D.C., 1949).
3. This regulation, in pertinent part, is: "2. It shall be the duty of every person occupying premises, or any part of any premises in the District of Columbia, . . . to keep such premises or part, . . . clean and wholesome. If upon inspection by the Health Officer or an inspector of the Health Department it be determined that any such part thereof, or any building yard, . . . is not in such condition as herein required, the owner thereof, as hereinbefore specified shall be notified and required to place same in a clean and wholesome condition."