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Zoning for Churches

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ZONING FOR CHURCHES [1]

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IN CALIFORNIA, unlike the majority of states, a municipal ordinance which excludes all churches from residential districts is a valid exercise of the legislative police power.[2] A church, like any other property owner, is considered on its merits as it fits into the general scheme of comprehensive zoning.[3] A church, in California, does not have a per se right to the use of land within the regulation of zoning ordinances,[4] authorized by the California Government Code.[5]

Since the Code does not enumerate churches, the municipality must derive its power from the definition of *other purposes.* Does this phrase embody all known uses of land or is it limited to uses similar to those enumerated?

There are three types of ordinances which generally apply to churches:[6] (1) those expressly authorizing the location of a church in a specified zone; (2) the permissive or conditional use statute, allowing a church to locate in an otherwise restricted district after obtaining a permit from the designated administrative body; and (3) the wholly exclusive ordinance, limiting churches to defined districts, and by so doing effectively establishing private residential areas.

The most litigated question concerning the regulation of land use for church purposes is whether this exclusive ordinance may be justified as promoting the public health, safety, morals and the general welfare of the community.[7] The rationale urged for such a restriction is that the general welfare is greatly promoted by establishing solely residential areas wherein the family and home may be more peacefully enjoyed. A view more widely followed, however, is that the physical proximity of the church to the home furthers the convenience and well-being of the people and is therefore in furtherance of the general welfare, rather than in derogation thereof.

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[1] Hereinafter used to refer to all houses of religious worship regardless of faith.

[2] Corporation of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 P.2d 823 (1949).

[3] "The petitioner is not a congregation, but holds its property as a corporation sole." *Id.* at 660, 203 P.2d at 825.

[4] Minney v. Azusa, 164 Cal. App. 2d 12, 330 P.2d 255 (1958).

[5] CAL. GOV'T CODE § 65800: Pursuant to the provisions of the chapter, the legislative body of any county or city may by ordinance: (a) Regulate the use of buildings, structures, and land as between agriculture, industry, business, residence and other purposes.

[6] City of Englewood v. Apostolic Christian Church, 362 P.2d 172 (Colo. 1961) (McWilliams, J., concurring).

[7] See Robinson v. City and County of Los Angeles, 146 Cal. App. 2d 810, 304 P.2d 814 (1956).

The leading case in California is *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. City of Porterville.*[8] The petitioner sought a writ of mandamus[9] to compel the defendant city to issue a permit for the construction of a church. Some years before the passing of a municipal zoning ordinance, the petitioner had acquired vacant land partly within the city, which land was subsequently annexed and zoned restrictively for single family residences. The ordinance classified the property within the city as:[10]

> R-1: single family residence, . . .
> R-4: unlimited residences, all uses of the preceding zones are permitted plus libraries, museums, schools, churches, and religious institutions.

The petitioner contended that the ordinance bore no relation to the health, safety, morals, and general welfare and thus was beyond the police power of the state to enact. The trial court held that the petitioner failed to state a cause of action; and upon the petitioner's refusal to amend the complaint, defendant's demurrer was sustained without leave to amend. In affirming this ruling the District Court of Appeal said: "We conclude that since the City had the power to zone the property, herein affected, strictly for single family residences, there was no abuse of the power in prohibiting the erection and construction of church buildings therein."[11] The California Supreme Court denied a hearing and the United States Supreme Court dismissed the appeal for want of a federal question.[12]

This was the first specific statement concerning church zoning to be handed down in California. It had been previously established that general business enterprises, apartments, tenements and like structures might be excluded from private residential districts.[13]

In *City of Chico v. First Avenue Baptist Church,*[14] an ordinance allowed a church within a residence zone upon issuance of a use permit. The city sought to enjoin the defendants (a church and several fictitious defendants) from conducting a church service within the zone. The trial court sustained petitioner's demurrer to the answer of unconstitutionality, issuing a judgment on the pleadings. The church then applied for a use permit and it was granted. However, one of the fictitious defendants appealed on the constitutional ground that the decree violated his rights to the freedom of worship. The injunction, as against him, was affirmed. The appellate court held that since he had not exhausted his administrative remedies (by applying for a per-

[8] 90 Cal. App. 2d 656, 203 P.2d 823 (1949).
[9] CAL. CODE CIV. PROC. §§ 1084, 1086.
[10] 90 Cal. App. 2d at 658, 203 P.2d at 823.
[11] *Id.* at 659, 203 P.2d at 824.
[12] 338 U.S. 805 (1949).
[13] Miller v. Board of Pub. Works, 195 Cal. 477, 234 Pac. 381 (1925).
[14] 108 Cal. App. 2d 297, 238 P.2d 587 (1951).

mit), he was in no position to attack the ordinance. This was based upon the premise that the *Porterville* decision was a complete answer to appellant's contentions, in that a zoning ordinance restricting churches was a justifiable exercise of police power. It should be noted that the ordinance here in question was of the permissive use type, not wholly exclusionary as in the *Porterville* case.

In *Minney v. Azusa*[15] the District Court of Appeal affirmed the denial of petitioner's variance and sustained the defendant's demurrer to the complaint without leave to amend. The petitioner applied for a variance[16] to be admitted to an R-1 district under the following ordinance:[17]

> R-1: one family dwellings, agriculture, horticulture, libraries, museums, parks, public schools and community buildings, owned by the municipality or school districts. . . .
> R.3: any use permitted in R-1 . . . plus flat buildings, churches and parochial schools.

The sole question before the court on the application for a variance to the zoning ordinance was the appropriateness of the discretion used by the administrative board upon the petitioner's application. That five other churches had obtained variances under this ordinance, was held not to establish the existence of unreasonable discrimination. Therefore, the denial of this variance would not be disturbed in the absence of a clear showing of an abuse of discretion, since it is presumed that the ordinance is adapted to promote the public health, safety, morals and general welfare of the community.[18] The court would not hear the question of constitutionality since an application for a variance presupposes the reasonableness of the regulation; and one may not retain the benefit of an act while attacking the constitutionality of one of its important conditions.[19] Therefore, the application for the variance recognized the validity of the ordinance and precluded a subsequent attack thereon. The court relied upon the *Porterville* case for assuming the ordinance of the City of Azusa to be valid; as this was a similar ordinance, excluding all churches by implication. The court displayed a clear reluctance to interfere with the legislative plan.[20]

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[15] 164 Cal. App. 2d 12, 330 P.2d 255 (1958).

[16] 6 POWELL, REAL PROPERTY § 870 (1958).

[17] 164 Cal. App. 2d at 17, 330 P.2d at 257.

[18] Lockard v. City and County of Los Angeles, 33 Cal. 2d 453, 202 P.2d 38 (1949); 46 WEST CAL. DIG. *Zoning* §§ 671, 672, 674 (1952); 6 POWELL, REAL PROPERTY § 871 (1958).

[19] United States v. City and County of San Francisco, 310 U.S. 16, 29 (1939).

[20] "Though we might have included churches in the R-1 zone had we drafted the ordinance, that fact alone would not now justify interference with the results achieved by the public body charged with that duty." 164 Cal. App. 2d at 25, 330 P.2d at 262.

In *Garden Grove Congregation of Jehovah's Witnesses v. City of Garden Grove*,[21] this same court reviewed another decision denying petitioner a writ of mandamus to compel the administrative board to issue a permit allowing erection of the petitioner's church in a residence zone. Under the ordinance the lot could be improved by erection of a single family dwelling only, unless there had been a permit granted for a conditional use or a zone variance. The planning commission ruled that the church had not complied with certain requirements enumerated by the conditional use provisions. The petitioner contended these requirements were unconstitutional and that he should be granted a variance. The court refused the writ of mandate saying that the application for a zone variance does not involve a matter of right but becomes a matter of grace and permission, and therefore may not be controlled by the writ of mandamus. This differs from the ruling under a conditional use permit. The conditional use is prescribed by the ordinance and by conforming to its terms an applicant may gain a right thereunder.[22] The court distinguished the petitioner's position. By not complying with the requirements of the ordinance the church had not gained a right under the ordinance. The court found no abuse of discretion in refusing the application for the variance, therefore the writ of mandamus would not issue.

This decision put impetus behind the *Porterville* and *Azusa* rulings. It now became firmly established that a church would not be afforded a remedy against a zoning ordinance unless a right had been established thereunder. The only way to establish a right was by strict adherence to the provisions of the regulation. By construing the ordinance broadly, the courts refused to usurp the powers of the administrative board.

Some ordinances have attempted to restrict the construction of parochial schools. In *Roman Catholic Welfare Corp. of San Francisco v. City of Piedmont*,[23] the writ to compel issuance of a building permit was granted. The zoning ordinance excluded private schools from a district where public schools had already been built. The court distinguished this ordinance from the wholly exclusive type by noting that here only private schools are excluded—not *all* churches as in *Porterville*.

However, in *Tustin Heights Ass'n v. Board of Supervisors of Orange County*,[24] the ordinance in question was wholly exclusive. The petitioner sought a writ of mandamus to compel the Board of Supervisors to set aside the order granting a variance for establishment of a church and school in an area zoned for residences. No schools were present

[21] 176 Cal. App. 2d 136, 1 Cal. Rptr. 65 (1959).

[22] Redwood City Corp. of Jehoval's Witnesses v. City of Menlo Park, 167 Cal. App. 2d 686, 335 P.2d 195 (1959).

[23] 45 Cal. 2d 325, 289 P.2d 438 (1955).

[24] 170 Cal. App. 2d 619, 339 P.2d 914 (1959).

in the district. The co-defendant church argued that the ordinance was discriminatory on its face since the municipality could not regulate against state schools, and therefore, parochial schools were not allowed their equal protection under the fourteenth amendment.

The court held: first, by analogy to the *Porterville* case, the ordinance was non-discriminatory since it excluded all schools; and second, there was a distinction between equal protection under the law and the equating of private rights with those of the sovereign. The court held "due process under the law" and "equal treatment of private and state rights" not to be synonymous.

The only real distinction between these two cases was that since public schools had already been erected in the city of Piedmont, the court did not deem it proper to exclude private schools. However, in the *Tustin Heights* case the court was on firmer ground since no schools had been erected. For what other reason should the ordinance be declared valid simply because it wholly excluded, when the effect is identical to that of an ordinance which specifically excludes? There seems to be little difference where one ordinance excludes by law while the other does so on its face.

In summarizing the California decisions certain points stand out:

(1) Excluding all churches and schools is non-discriminatory under the fourteenth amendment to the United States Constitution.

(2) Houses of worship must be considered equally with other land uses in the planning of residential communities.

(3) The courts will seldom interfere with a zoning ordinance based upon public welfare.

(4) All of the decisions directly affecting churches were handed down by an intermediate court. Neither the California nor United States Supreme Court has directly passed upon the constitutionality of an ordinance which wholly excludes churches from specified districts. The fact that these courts have declined to review these causes does not imply a negative view upon the merits.[25]

The California ruling is a minority view, having been followed in only one other jurisdiction.[26]

The weight of authority[27] holds that churches may not be absolutely excluded from residential areas, either as a matter of the express language of a zoning regulation or as a matter of administrative application or enforcement of a neutrally worded ordinance. The contention is that such an exclusionary ruling bears no substantial relation to the public health, safety, morals or general welfare of the commu-

[25] Maryland v. Baltimore Radio Show, 338 U.S. 912, 917 (1950).

[26] Miami Beach United Lutheran Church of the Epiphany v. City of Miami Beach, 82 So. 2d 880 (Fla. 1955), (zoned for single family residences, golf courses, playgrounds, and municipal buildings); 74 A.L.R.2d 406-09 § 20 (1960).

[27] Cases collected in 74 A.L.R.2d 380-81, § 2 (1960); 2 METZENBAUM, ZONING, 1458-67 (2d ed. 1955). See 6 POWELL, REAL PROPERTY § 872 (1958).

nity. Generally, the rationale is that churches are not to be considered along with other users of land.

A recent Missouri case, *Congregation Temple of Israel v. City of Creve Couer*,[28] involved an attack upon an act empowering the municipality to zone. The wording of the act was similar to that in the California statute. The Missouri court applied *ejusdem generis*,[29] limiting general terms following specific ones to matters similar to those enumerated. The court held this doctrine negativing an implied authority to control the location of schools or other public buildings, under a general provision like that in the California Government Code section 65800, was well established. They reasoned that since First Amendment freedoms are considered to be even stronger constitutional provisions than those concerning public schools, it did not therefore seem that the legislature intended to include churches in the phrase *"other purposes,"* either.

California recognizes *ejusdem generis* as a rule of construction to aid in ascertaining the meaning of the legislature,[30] and it would seem feasible for it to have held that the legislature did not intend to include the regulation of church construction in the general provision *"other purposes."*

To uphold exclusionary ordinances it must be shown that the use would have such an effect upon the area that exclusion therefrom would promote the general welfare of the community.[31] To so hold it must be found that the increased traffic hazards, noise and congestion, which may interfere with the peace and quiet enjoyment of the home, outweigh the general welfare which would be promoted by allowing the physical proximity of the church to the schools and homes which traditionally it teaches and serves.

Further, it must be determined whether the exclusion of churches imposes a burden upon the freedom of worship which is not commensurate with the promotion of the general welfare secured by that exclusion.[32] Freedom of worship under the First Amendment to the United States Constitution has been defined as an absolute freedom to believe, but a qualified freedom to act,[33] but any regulation must be neither discriminatory nor unreasonable. This is the rationale of the California ruling.[34] The majority of states have determined that the

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[28] 320 S.W.2d 451 (Mo. 1959).

[29] "Of the same kind, class or nature," BLACK, LAW DICTIONARY 608 (4th ed. 1951).

[30] People v. Strickler, 25 Cal. App. 60, 142 Pac. 1121 (1914); Coleman v. City of Oakland, 110 Cal. App. 715, 295 Pac. 59 (1930); United States v. Alpers, 338 U.S. 680 (1950).

[31] State *ex rel.* Lake Drive Baptist Church v. Village of Bayside Bd. of Trustees, 108 N.W.2d 288, 296 (Wis. 1961).

[32] *Ibid.*

[33] Cantwell v. State of Connecticut, 310 U.S. 296 (1940).

[34] State *ex rel.* Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee, 50 Wash. 2d 378, 312 P.2d 195 (1957).

absolute exclusion of churches does not adequately promote the general welfare in order to justify any qualification of the First Amendment.

Conclusion

The distinction between the California view and the majority view appears to be in the definition of *general welfare.* The majority view emphasizes traditional humanistic values. It contends that different considerations are involved in any regulation when the user of the land is a church. The California position emphasizes the best and most reasonable utilization of land possible and holds that a church must fit into a comprehensive zoning plan as would any other property owner.

Reasonable minds may differ as to the more desirable view. Some argue the physical undesirabilities of churches outweigh the social value; others, that absolute freedom of religion as affecting the character of the individual is of greater importance than empirical values.

If the public laws are to be used to bar churches from specified areas, certain groups of citizens could conceivably control the practice of religion in widespread areas. Whole towns could successfully bar churches from within their limits. These abuses are fortunately theoretical, but legally possible under Cailfornia's present decisions.

To prevent such possible abuses and to clarify the law, it would be desirable for the legislature to make more definite its intent to regulate land use for church purposes. The wisdom of this decision should not be left to judicial review, on a case to case basis.