

THE GOVERNOR'S COMMITTEE ON PREPARATORY RESEARCH

for the

NEW JERSEY CONSTITUTIONAL CONVENTION

Z O N I N G

by

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ZONING

Legal Aspects

Zoning is exercised under the police power of the state -- the inherent power of the sovereign to provide for the health, safety, morals and general welfare of the people. Zoning may therefore be practised without any explicit authorization in the constitution of the state, but the extent to which zoning is permitted depends upon the courts. On the one hand, with reference to the Federal Constitution, the courts interpret the 14th Amendment (which protects the individual from being deprived of liberty or property "without due process of law") to prevent such zoning as may be considered to be an arbitrary and unreasonable interference with liberty or property rights. On the other hand, the courts, in the absence of any provision for zoning in a particular state constitution, limit zoning according to their interpretation of the extent to which the police power of the state may justify the zoning statute or ordinance. If the state constitution provides for zoning, the courts are necessarily called upon to consider whether a specific zoning statute or ordinance is authorized under the constitutional provision. Certain phases of zoning have been well established under the police power, but many new proposals for governmental activity in the field of zoning and planning, such as the more advanced attempts at the control of billboards along highways, may encounter constitutional obstacles.¹

In New Jersey zoning was expressly authorized under a constitutional amendment adopted in 1927. The reason for this amendment is discussed below. In revising the Constitution the question is raised whether it is desirable to have any provision relating to zoning in the revised Constitution and, if so, whether the present provision should be altered.

1. New York State Constitutional Convention, Report, 1938. Vol. IV, State and Local Government in New York, p. 364.

History of Zoning

While zoning was instituted at the close of the 19th Century in several German cities, it was not until 1916 that the first comprehensive zoning ordinance was adopted in the United States. From that time on zoning spread rapidly. Starting with the regulation of certain districts in cities, it was later applied to suburban communities. In 1933 the zoning method was used for the first time to cope with a distinctly rural problem: promoting the development of forestry and recreation in cut-over, decadent forest areas in Wisconsin.² This extended use of the zoning power was given approval by the author of the article on Zoning in the Encyclopedia of the Social Sciences in the following words:³

"Zoning should develop as an integrated part of a regional planning program, and its objectives should include... recreation and watershed protection;... the regulation of the cultivation of soils subject to excessive erosion or the zoning of such areas for pasture or forestry; the regulation of development along highways in the interest of both traffic efficiency and protection of the beauty of the countryside."

Where the court's interpretation of the extent of the police power has been considered as leaving the state without powers adequate to accomplish a desired regulation, a constitutional amendment has sometimes been adopted to achieve the aim. Thus, in Massachusetts when the police power was deemed inadequate to control billboard advertising a constitutional amendment was approved in 1918 as follows:⁴

"Advertising on public ways, in public places, and on private property within public view may be regulated by law."

However, comparatively few states have included a zoning provision in their constitution: Delaware, Georgia, Louisiana, Massachusetts and New Jersey. The "Model State Constitution" of the National Municipal League makes no

2. Ibid, p. 328

3. Encyclopedia of the Social Sciences. Vol. XV, p. 538

4. Illinois Legislative Reference Bureau, Constitutional Convention Bulletins, 1920. Bulletin 7, "Eminent Domain and Excessive Condemnation," p. 486

provision for zoning. In most states a constitutional provision has been considered unnecessary.

Zoning in New Jersey

The zoning provision in the New Jersey Constitution (Art. IV, Sec. VI, Par. 5) reads as follows:

"The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the exercise of such authority shall be deemed to be within the police power of the state. Such laws shall be subject to repeal or alteration by the legislature." (Amendment of 1927)

This amendment was necessitated by adverse decisions of the New Jersey courts. The proposal was not opposed by either major party and it was carried by an overwhelming veto.⁵ The proposal for the amendment was criticized at the time by a writer in the New Jersey Law Journal,⁶ but discussion in recent years has turned on the question whether or not the power of zoning under the present Constitution is adequate. In the proposed revised Constitution of 1942 the power to zone was extended to counties and was broadened to include the regulation of land uses and of property adjacent to any public parkway, highway or other public improvement or public place (Art. III, Sec. VII, Par. 6):

"The Legislature may enact general laws under which municipalities and counties may limit and restrict to specified districts and regulate therein, land uses, buildings and structures according to their construction, and the nature and extent of their use. The Legislature may similarly limit and restrict the uses of property adjacent to any public parkway, highway, other public improvement or public place for the protection and conservation thereof. Such laws shall be deemed to be within the police power of the State and shall be subject to repeal or alteration by the Legislature."

In the Report of the Commission on Revision of the New Jersey Constitution, 1942, it was stated that changes "relating to protection of public property and beauti-

5. Erdman, Charles R. The New Jersey Constitution -- a Barrier to Governmental Efficiency and Economy, 1934, p. 22

6. On the ground that the amendment would empower municipalities, if authorized by the Legislature, to regulate the nature and extent of the use of buildings. "The enormity of this power is, on reflection, startling." Hardin, Chas. R., "Proposed Amendment of the New Jersey Constitution Relating to Zoning," 50 N.J.L.J. 221 (1927).

fication of highways and the building of parkways, are included so as to remove any possible implication from present provisions in the Constitution that such power does not already exist."⁷

Dean George S. Harris of the then University of Newark Law School urged the necessity for this extension of the zoning power:⁸

"...great strides have been made in the public consciousness of the necessity for limiting and restricting use of property adjacent to public owned lands, including highways. ... I deem it highly essential that the grant of power for these purposes should be included in the fundamental law since I have grave doubts that our Courts would sustain a mere legislative grant of power for these purposes."

Russell Watson, representing the New Jersey State Chamber of Commerce, agreed that this change was "eminently desirable."⁹ On the other hand, the proposal was opposed by Mr. R. Robinson Chance, representing the Manufacturers Association of New Jersey, who said:¹⁰

"We feel that the present limitation on the police power should not be broken down so as to allow the restriction of the use by a man of his own property any more than it is now restricted."

7. Proceedings before the New Jersey Joint Legislative Committee...as to... change in the New Jersey Constitution, 1942, p. 918

8. Ibid, p. 202

9. Ibid, p. 124

10. Ibid, p. 151

In spite of strong representations by the Committee of the New Jersey Federation of Official Planning Boards¹¹ the provision for zoning as in-

11. The Committee's proposal in 1944 read as follows:

"The Legislature may enact general laws empowering municipalities to adopt ordinances restricting to specified districts and regulating therein: land uses; uses of buildings and structures, their location and construction, their maximum and minimum height and bulk; minimum lot sizes; density of population; and, to the extent only that is necessary to prevent depreciation of other property values, the design of buildings and structures. The Legislature may grant similar powers to counties to be exercised within the limits of any municipality which has not adopted such an ordinance and to remain in effect pending the adoption of such an ordinance by the municipality. The Legislature may by law authorize a State agency to limit and restrict, for the protection and conservation of any State-owned parkway, highway, or other public improvement or public place owned by the State, the uses of property adjacent thereto. Laws enacted under this section shall be deemed to be within the police power of the State."

Commenting on this proposal the Committee wrote: "Much of the recommended phraseology and even some whole provisions are recommended by the Committee as being unusual and superfluous in the usual constitutional construction. They have been inserted and are recommended, however, because the Courts of New Jersey, unlike those of most other states, have been extraordinarily conservative. As a result there were prior to the constitutional amendment, numerous adverse decisions on such widely accepted community practices as zoning."

This Committee consisted of a senior member of a manufacturing corporation with plants throughout the country, the editor of an outstanding magazine on municipal operations and well known in planning and zoning circles, a high ranking employee of a large life insurance company, two members of planning staffs, a city engineer, and two lawyers.

New Jersey Federation of Official Planning Boards, Committee on Constitutional Revision, "Planning and Zoning Clauses Recommended for Inclusion in the Revised Constitution of New Jersey" and "Reasons for the Content and Construction of the Constitutional Provisions on Planning, Zoning and Related Matters." 1944. Mimeographed.

incorporated in the 1944 proposed Constitution eliminated counties as zoning agencies and did not include the extension of the zoning power to cover property adjacent to public improvements. However, as compared with the existing constitutional provision, the 1944 proposal did extend the zoning power to the uses of land. The 1944 provision read as follows

(Art. III, Sec. VI, Par. 5):

"The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures according to their construction, and the nature and extent of their use and the nature and extent of the uses of land. The exercise of such authority shall be deemed to be within the police power of the State and such laws shall be subject to repeal or alteration by the Legislature."

In general, with respect to desirable practice in regard to constitutional revision a legal commentator wrote:¹²

"It is submitted, however, that in the constitutional revision too much should not be provided in relation to zoning practices, for zoning has just been born into a rapidly changing world and to hedge it in with too stringent limitations, or those that may in the future become so, could gravely hinder its growth toward the public good."

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ZONING

ZONING - COPSEY PROPOSAL

The Legislature may enact general laws under which municipalities, and counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings, structures, land and the use of air as an avenue of commerce, according to the nature and extent of their use, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature.

ZONING - FIFIELD PROPOSAL

"The Legislature may enact general laws under which political subdivisions of the State may limit and restrict to specified districts and regulate therein, buildings and structure according to their construction, and the nature and extent of their use and the nature and extent of the uses of land; and may require the discontinuance, after a reasonable time from the adoption of such regulations, of structures and uses which are contrary to said regulations. The Legislature may similarly limit and restrict the uses of property adjacent to any public parkway, highway, other public improvement or public place, for the protection and conservation thereof."

MUNICIPAL MAPS - FIFIELD PROPOSAL

The Legislature may authorize municipalities to adopt an official map showing the location of the public streets and other public ways and places which it is intended to establish in the future, and may enact reasonable regulations concerning the erection of any building or structure in such location after the adoption of such map.

**CONSTITUTION OF THE STATE OF CALIFORNIA,
ARTICLE XI, SECTION 11.**

Any county, city, town or township
may make and enforce within its limits all
such local, police, sanitary, and other
regulations as are not in conflict with
general laws.

**CONSTITUTION OF THE STATE OF DELAWARE, ARTICLE II,
SECTION 25, ADOPTED 1929.**

The General Assembly may enact laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts, and regulating therein buildings and structures, according to their construction, and the nature and extent of their use, and the exercise of such authority shall be deemed to be within the police power of the State.

**CONSTITUTION OF THE STATE OF GEORGIA, ARTICLE III,
SECTION VII, PARAGRAPH XXV.**

The General Assembly of the State shall have authority to grant to the governing authorities of the cities of Atlanta, Savannah, Macon, Augusta, Columbus, LaGrange, Brunswick, Waycross, Albany, Athens, Rome, Darien, Dublin, Decatur, Valdosta, Newnan, Thomaston and East Thomaston, and cities having a population of 25,000 or more inhabitants according to the United States census of 1920 or any future census, authority to pass zoning and planning laws whereby such cities may be zoned or districted for various uses and other or different uses prohibited therein, and regulating the use for which said zones or districts may be set apart, and regulating the plans for development and improvement of real estate therein. The General Assembly is given general authority to authorize the cities of Atlanta, Savannah, Macon, Augusta, Columbus, LaGrange, Brunswick, Waycross, Albany, Athens, Rome, Darien, Dublin, Decatur, Valdosta, Newnan, Thomaston and East Thomaston, and cities having a population of 25,000 or more inhabitants according to the United States census of 1920 or any future census, to pass zoning and planning laws. (Acts 1927, pp. 127, 128, ratified Nov. 6, 1928.)

CONSTITUTION OF THE STATE OF LOUISIANA - 1921 -
ARTICLE 14, SECTION 29.

All municipalities are authorized to zone their territory; to create residential, commercial and industrial districts, and to prohibit the establishment of places of business in residential districts.

By an amendment of 1918, Article LX
was added to the Constitution of Massachusetts.

The article is as follows:

"The general court shall have
power to limit buildings according to their
use or construction to specified districts
of cities and towns."

Provisions of the 1945 Constitution
of Missouri relating to Zoning, Article VI,
SPECIAL CHARTERS, Section 18 (c):

Provisions Authorized in County
Charters - Participation by County in Govern-
ment of Other Local Units. - The charter may
provide for the vesting and exercise of legis-
lative power pertaining to public health,
police and traffic, building construction, and
planning and zoning, in the part of the county
outside incorporated cities; and it may provide,
or authorize its governing body to provide, the
terms upon which the county shall perform any
of the services and functions of any municipality,
or political subdivision in the county, except
school districts, when accepted by vote of a
majority of the qualified electors voting thereon
in the municipality or subdivision, which accep-
tance may be revoked by like vote.

Source: Now.