North Dakota Law Review

Volume 27 | Number 3 Article 6

1951

Constitutional Law - Racial Discrimination - Zoning Ordinances

Robert Alderman

CONSTITUTIONAL LAW—RACIAL DISCRIMINATION—ZONING ORDINANCES. Negro plaintiffs, owners of certain real property in an area zoned as white-residential, applied to the City of Birmingham for permits to build houses upon their property. These permits were denied under an ordinance making it a misdemeanor for negroes to reside in areas zoned as white-residential and for whites to reside in areas zoned as negro-residential. Plaintiffs brought this action for a declaratory judgment that the zoning ordinance denies plaintiffs' rights to use and occupancy of their property in violation of the Fourteenth Amendment. It was *held*, one judge dissenting, that the ordinance was unconstitutional, as violative of the Fourteenth Amendment, and was not a valid exercise of the state police power. *City of Birmingham v. Monk*, 185 F.2d 859 (5th Cir. 1950).

Generally municipal corporations have been given the power to enact and enforce zoning and use regulations by specific authorization of zoning or enabling acts[1] and the constitutionality of such powers has been upheld as a valid exercise of the police power.[2] Some cities have sought to extend this principle to include segregation ordinances[3] but since the 1917 decision in *Buchanan v. Warley*[4] such ordinances, though often cleverly worded,[5] have met with little success in the Supreme Court.[6] In the *Buchanan* case[7] the court held in a suit for specific performance that a Louisville ordinance for segregation of races was unconstitutional as a restraint on alienation. Cities which have sought to evade the effect of the *Buchanan* decision have justified their cause by contending that: (1) they are exercising their police power to prevent interracial conflict;[8] (2) they are seeking the betterment of the negro race[9] and the promotion of peaceful interracial relations;[10] and (3) the Supreme Court decision in *Plessy v. Ferguson*,[11] which upheld the validity of segregation in an intrastate carrier, supports their position. The instant case presents a variation of the first contention. Defendants argue that this is a

---

[1] See *e.g.*, Welch v. Swasey, 214 U.S. 91 (1909) (restricting the height of buildings); Reinman v. Little Rock, 237 U.S. 171 (1915) (restricting business or residential use of the property). North Dakota municipal corporations are authorized to zone by N.D. Rev. Code of 1943 §40-4701; also see Bismarck v. Hughes, 53 N.D. 838, 208 N.W. 711 (1926).

[2] 8 McQuillin, Municipal Corporations §25.05 at page 18 (3rd ed. 1950).

[3] Harden v. City of Atlanta, 147 Ga. 248, 93 S.E. 401 (1917); Harris v. City of Louisville, 165 Ky. 559, 177 S.W. 472, *impliedly rev'd*, 245 U.S. 60 (1917); Hopkins v. City of Richmond, 117 Va. 692, 86 S.E. 139 (1915).

[4] 245 U.S. 60 (1917).

[5] City of Richmond v. Dean, 37 F.2d 712 (4th Cir. 1930), *aff'd mem.*, 281 U.S. 704 (1930) (no person could reside on street on which the majority of the persons were those with whom he was forbidden to intermarry); Tyler v. Harmon, 158 La. 439, 104 So. 200 (1925), *rev'd mem.*, 273 U.S. 668 (1927) (person couldn't get building permit without consent of majority of those on block); Harden v. City of Atlanta, 147 Ga. 248, 93 S.E. 401 (1917) (unlawful for person to build house on street on which most of property owners are of the opposite race).

[6] *See* City of Richmond v. Dean and Tyler v. Harmon, *supra* note 5, and Buchanan v. Warley, 245 U.S. 60 (1917).

[7] 245 U.S. 60 (1917).

[8] Hopkins v. City of Richmond, 117 Va. 692, 86 S.E. 139 (1915).

[9] Harris v. City of Louisville, 165 Ky. 559, 177 S.W. 472, *impliedly rev'd.* 245 U.S. 60 (1917).

[10] Harden v. City of Atlanta, 147 Ga. 248, 93 S.E. 401 (1917).

[11] 163 U.S. 537 (1896).

zoning ordinance, not a segregation ordinance, and that the ordinance does not prevent plaintiffs from occupying their property solely because of race and color but "is based and justified in part upon the difference between the white and Negro races."[12] In *Clinard v. Winston-Salem*,[13] the court agreed that the attempt to justify segregation under a general zoning ordinance was distinguishable from cases declaring segregation ordinances invalid. But that court held that the decision in *Buchanan v. Warley*[14] was sufficiently broad to cover ordinances restricting a property owner's right to the use and occupancy of his property and declared the ordinance invalid. This case, as well as most other cases since *Buchanan v. Warley*,[15] points out that the matter is beyond the reach of the police power insofar as it conflicts with the constitutional right to use and occupy property. Zoning restrictions must bear some substantial relationship to public health, safety, morals or general welfare[16] and they must be concerned primarily with the use of the property, not with its ownership.[17]

In view of the settled concept that the protection of the Fourteenth Amendment is a personal right,[18] it would seem that the court in the instant case has properly reasoned that the proposed extension of the police power to justify an ordinance depriving plaintiffs of their right to the use and occupation of their property is an unwarranted encroachment on their rights under the Fourteenth Amendment. The Supreme Court has refused to allow this result by private contract[19] and it is not expected that it would approve of the devious means employed here. However commendable is the purpose to prevent race conflicts, this aim, as was said in *Buchanan v. Warley*,[20] "cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."[21]

Robert Alderman

---

[12] 185 F.2d 859, 861 (1950).
[13] 217 N.C. 119, 6 S.E.2d 867 (1940).
[14] 245 U.S. 60 (1917).
[15] *Ibid.*
[16] Women's Kansas City St. Andrew Soc. v. Kansas City, Mo., 58 F.2d 593 (8th Cir. 1932), where it is said at page 598, "While such police power is broad, there are limitations to its exercise, which the courts have not attempted to define. However, restrictions by zoning ordinances imposed upon the use of one's property to be valid must bear some 'substantial relationship to the public health, safety, morals or general welfare.' The reserved police power of the state must stop when it encroaches on the protection accorded the citizen by the Federal constitution."
[17] 8 McQuillin, Municipal Corporations §25.07 at page 29 (3rd ed. 1950).
[18] Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).
[19] Shelley v. Kraemer, 334 U.S. 1 (1948).
[20] 245 U.S. 60 (1917).
[21] *Id.* at 81.