1957

Jurisdiction of Zoning Boards

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Recommended Citation
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JURISDICTION OF ZONING BOARDS

I

INTRODUCTION

With the rapidly increasing urbanization of American life has come a realization that thoughtful, intelligent, and creative planning is necessary to the creation of communities adequate for the needs of modern living. The effective control of land use and building construction and location is essential to the realization of community planning and the ultimate goals of the community. These goals are accomplished through a plan of comprehensive community zoning. The planning and zoning of a city is usually conducted through a planning and zoning board which puts its ideas and plans into effect through the enactment of ordinances by the city council. It is the purpose of this note to discuss, in general, the jurisdiction of zoning boards and the problems involved in carrying out the planning and zoning program.

What is zoning? In general, zoning is the division of a designated area into districts for the purpose of regulating the present and future use, construction, and location of buildings and the use of land.1 Zoning does not include those building construction regulations which seek to minimize the risk of health and fire hazards, or other related controls which are encompassed by building codes.2 There has been a tendency in the past to confuse such regulations with zoning laws.

The purpose of zoning is to influence development toward the accomplishment of an over-all community plan which will preserve existing neighborhood values and encourage new development of high quality. This purpose is served generally by grouping together uses that belong with each other and by protecting residential, business, and industrial areas against the encroachment of inappropriate uses or buildings. Without zoning restrictions, commercial enterprises such as factories, laundries and slaughter houses may directly adjoin single-family houses; open spaces surrounding houses may be inadequate; and “the tempo of building obsolescence and neighborhood blight”3 is often speeded.

The power of the municipality to adopt or amend a zoning ordinance is based upon and limited by the police power delegated to it by the state. Inasmuch as this power is legislative, only the legislative body of the municipality may establish the boundaries of the zone dis-

2 American Sign Corporation v. Fowler, 276 SW 2d 651 (Ky. 1955).
3 Supra, note 1 at 2.
Since the Supreme Court of the United States first upheld a zoning ordinance, the use of zoning legislation to achieve the desired goals of community planning and development has spread to the point where all states now have statutes which authorize municipalities to adopt and enforce zoning regulations. Also, county zoning is expressly authorized by legislation in thirty-one states. Because of the disparity in the legislation of the various states authorizing zoning, and because of different interpretation placed on them by the judiciary, no attempt will be made in this note to digest individual state zoning laws. Instead focus will be on the several problems of jurisdiction which are common to all municipalities in their efforts to zone, with emphasis on extraterritorial zoning by municipalities in Kentucky. A comparative digest of state enabling statutes has been published as indicated in footnote 6.

II

JURISDICTIONAL PROBLEMS

There are three major types of jurisdictional problems which have arisen with regard to zoning. (1) When two cities have a common boundary but each has a different policy as to the development of land situated on its side of the line; (2) Where two or more cities expand their jurisdictional controls either through annexation or through the use of their extraterritorial powers so that each seeks to exercise control over the same land; and, (3) Conflicts between city and rural areas surrounding the city where the urbanization and zoning of farm land is opposed. The second and third problems encompass the fundamental problems of extraterritorial zoning.

The first problem arises when owners of land in one municipality attempt to use their property in such a way that it affects the rights of an owner of property in another municipality. The property involved may be split only by an imaginary line which separates the two municipalities. Inasmuch as each city has sole power to zone the area within its corporate limits, the question arises as to whether a municipality must take into consideration the use of property across the line but in another municipality. This question has been answered in the affirmative by the New Jersey Court which said that zoning is for the benefit of the public health, morals, and welfare, and includes any person who

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6 Comparative Digest of Municipal and County Zoning Enabling Statutes, Housing and Home Finance Agency 2 (1952).
7 Ibid.
is benefited or affected by the restriction. This Court went further and said that the public health, morals, and welfare are not limited by the boundaries of any particular zoning district, nor even by the boundaries of the municipality adopting the ordinance. If property outside the municipality is affected by the zoning, the use of such property must be taken into consideration. It is almost inevitable that an adjoining municipality will be affected in some degree by the zoning regulations of its bordering neighbor, and it would be unjust and unreasonable for one municipality to zone an area for residential purposes and for another to zone an adjacent area for industrial or business purposes. Hence, it becomes a legal requirement that the zoning regulations of one municipality must be made with consideration and conformance to the character and use of the land lying along its border but under the jurisdiction and control of another municipality. The ordinance must take into consideration the physical, economic, and social conditions prevailing within the adjoining municipality, and the nature of the entire region for which it may be used in the future. The fact that much of the contiguous use is in an adjoining municipality is no reason for disregarding land use in that municipality. It is a question of existing conditions and not of geographical and territorial limits or of the powers of the neighboring municipality.

The second and third problems of extraterritorial zoning are brought about by the power of municipalities to zone extraterritorially and can be discussed together. As previously noted, municipalities cannot exceed their statutory authorization in zoning. Therefore, unless express authority is given, the municipality cannot zone beyond its corporate limits. Some states expressly authorize their municipalities to zone extraterritorially while others do not. However, the increasing development of areas on the fringe of cities has intensified the interest in the grant to cities of power to zone extraterritorially. Municipalities need this power in order to protect themselves against undesirable property use and to prevent inconsistent land use prior to the time the land is incorporated into the city by annexation. City planners also desire to protect adjacent areas of scenic beauty from the hazards of billboards, improvidently planted crops, and structures improperly constructed or located. Adequate land-use regulation is now recognized as a necessity in planning for the economic development of any municipality and the surrounding area.

9 See Duffcon Concrete Products v. Borough of Cresskill, 1 N.J. 509, 64 A 2d 347, 9 ALR 2d 678 (1949).
10 Forbes v. Hubbard, 348 Ill. 166, 180 NE 767 (1932).
Several states have recognized the need for granting municipalities the power to zone extraterritorially and have made such provisions by statute. However, where such zoning is involved, the problem has arisen as to the extent a city should be permitted to zone beyond its corporate limits. The constitutionality of such zoning is also in issue where the county residents have no say in how their property is zoned. Some states have tried to solve this problem by putting a mileage limit on the extraterritorial powers of the city.\textsuperscript{11} This, however, has the disadvantage of setting an arbitrary limit to the area in which zoning powers may be exercised. Suppose, for example, that an area within three miles of the city may be zoned. Later the city incorporates that area. Inasmuch as no provisions were made for zoning beyond that area, inconsistent land use may now exist at the very edge of the corporate limits. Such arbitrary limit may, in fact, prevent the city from expanding. Or suppose an industry desires to locate close to the municipality. This would have a decided effect on the future planning and welfare of the city and would create many new problems for the city and county. Therefore, it is believed that an arbitrary limit is not the answer to the problem.

Kentucky, recognizing the need for extraterritorial zoning by municipalities, has attempted to solve this problem in a different manner. It has, by statute, divided its cities into three categories for zoning purposes.\textsuperscript{12} First class cities are grouped together, second class cities are grouped together, and third, fourth, fifth, and sixth class cities comprise the third group.

With regard to any first class city and the county containing such city, the legislature has provided for an agreement between them to regulate the planning and zoning of the entire county.\textsuperscript{13} Such agreement, after approval by the legislative body of the city and the fiscal court of the county, is put into effect by the adoption of a mutual ordinance passed by both bodies which governs the use of land in the entire county. Provisions are made for equal representation on the planning and zoning board so that county citizens cannot claim that they are being deprived of the use of their land without representation on the board. A provision is also made to the effect that any other incorporated municipality located in such county may avail itself of the benefits of the city-county agreement at any time with the consent of said city and county.\textsuperscript{14} Thereafter, such municipality is subject to

\textsuperscript{12} Ky. Rev. Stat., Chapter 100 (1953) (Hereinafter referred to as “KRS”).
\textsuperscript{13} KRS, sec. 100.031 (1953).
\textsuperscript{14} KRS, sec. 100.033 (1953).
the city-county zoning. Louisville is the only designated first class city in Kentucky, and the provisions of this statute, therefore, affect only Louisville and Jefferson County. Other less suitable provisions are made for the remaining cities, which as they now stand, do not solve the problems involved in extraterritorial zoning.

With regard to second class cities, the legislature has provided that each city shall have the power to zone within its corporate limits and its "municipal area." Municipal area is defined as the surrounding territory which bears relation to the planning and zoning of the city. However, the further provision is made that before the city can zone outside its corporate limits it must submit the report of the zoning commission to the fiscal court of the county in which that city is located. If the commission's report is disapproved by the fiscal court, it is ineffective for any purpose outside the city limits, unless the city has jurisdiction beyond its corporate limits by virtue of its charter. The fiscal court cannot alter or amend the report but must accept or reject it in toto. Thus, a county containing a second class city can prohibit any city within that county from exercising zoning power beyond its corporate limits. This could be detrimental to the best interest and welfare of the city, especially if the county refuses to cooperate in regulating the use of land in the county but outside the corporate limits of the city. Further, no statutory provisions are made for the county to zone itself. Therefore, in the absence of such an agreement between the second class city and the county in which it is situated, land within that county can be used for any purpose as long as it does not create a nuisance. Thus, inconsistent and undesirable land use may exist up to the very corporate limits of the municipality.

III

COUNTY ZONING—WHAT BEARS A RELATION TO THE PLANNING AND ZONING OF THE CITY

Even if there is an agreement between the city and county, the problem is not solved, for the zoning power may be exercised outside the city only over the area which bears a relation to the planning and zoning of the city. What bears a relation to the planning and zoning of a city? What tests should be applied in determining this? Who

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15 KRS, sec. 100.320 (1953).
16 KRS, sec. 100.010(6) (1953).
17 KRS, sec. 100.410(1) (1953).
18 KRS, sec. 100.410(2) (1953).
19 KRS, sec. 100.410(2) (1953).
20 Supra, note 12.
should determine that the necessary relationship exists? These are questions which are not easy to answer. An attempt was made to solve these problems in the recent case of *American Sign Corporation v. Fowler.* In that case the Court ruled that the city of Lexington, Kentucky, a city of the second class, acting in conjunction with the county, did not have power to prohibit a drive-in theatre located some six miles from the city limits. In accordance with statutory authority previously discussed, the city and county had zoned the entire county of Fayette. However, the Court held that the area sought to be zoned did not bear a substantial relation to the planning and zoning of the city. The Court said that "the phrase 'bears relation to the planning and zoning of the city' means just what it says—that the territory must bear relation to the planning and zoning of the city; in other words, the territory must be so situated as to have a bearing on the planning and zoning scheme for the city." This language is pure Gertrude Stein ("a rose is a rose is a rose"). It does not answer the question of what facts must be shown before a city and county can zone on the ground that such area "bears a substantial relation to the planning and zoning of the city." The Court went on, however, to approve the circuit court's "declaration on the question of 'municipal area'." Whether this means the Court approved the circuit court's "declaration" of fact or of law is not clear but presumably it means the latter. The test adopted by the circuit court, relying on the case of *Smeltzer v. Messer,* was that the area over which the city and county can zone outside the city's corporate limits is limited to that area which in the foreseeable future might be annexed to the city.

There are a number of objections to reading such a test into the statute. If the legislature had intended to restrict the powers of second class cities to such an extent, it could have done so by express language. And the same arguments can be made against this as were previously made against setting an arbitrary mileage limit. The primary objection, however, is that ambiguous statutory language should be given a meaning which will enable the planning and zoning commission to execute properly the powers granted it by the legislature; the meaning apparently approved by the court seriously restricts the ability of the planning and zoning commission to accomplish objectives spelled out in the Enabling Act.

The Kentucky Court misconceived the purpose of zoning and the objectives of the Enabling Act when it stated, disapprovingly, that the

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21 276 SW 2d 651 (Ky. 1955).
22 *Supra,* note 2 at 655.
23 Ibid.
24 *Smeltzer v. Messer,* 311 Ky. 692, 225 SW 2d 96 (1949).
county-wide zoning involved had been "approached, not from the standpoint of relation to the planning and zoning of the city, but from the standpoint of the economic, commercial and social interests of the city." The promotion of these interests is the very purpose of zoning. The objective of the entire planning and zoning system is to increase, among other things, the community's economic, commercial and social welfare. Unless the zoning ordinance as applied promotes the welfare of the community, it will be stricken down as being an unlawful exercise of the police power. It is hard to see how the Court could adopt the position that the economic, social and commercial interests of the city have no bearing on the question of validity of the county zoning scheme. The planning and zoning scheme would be an unlawful exercise of the police power if it did not have those very interests in mind. The Court should have looked to see if the ordinance as applied was in furtherance of the planning objectives of the city. If it was, then it bears a relation to the objectives of the city plan. The city and county should be permitted to have a flexible zoning plan which has as its objective increasing a wide variety of values, and when land use in the county substantially affects the preservation and increase of these values, the city and county should have jurisdiction over the land. Such land use quite obviously "bears relation to the planning and zoning of the city."

The vice of the American Sign Corporation case is not the result, but the reasoning. The result is justifiable—perhaps compelled—because the zoning ordinance did not make available for drive-in theatres any land in Fayette County. The ordinance established an "Amusement-2" zone which covered the operation of drive-in theatres, but it did not designate any territory in this classification. Under the ordinance the Planning Commission had to wait until a person applied for this classification before allotting it to any specific land. And even then the Commission did not have the final word on the application. If the land lay in the county the Commission could only recommend to the County Fiscal Court—which might accept or reject. No standards were set up for passing on the application.

To prevent a legitimate business enterprise which is not a nuisance from locating anywhere in the county is a clear abuse of the zoning power. And if an activity is kept out not by blanket prohibition but by the device used here—i.e., allowing it only with the consent of the

25 Supra, note 2, at 655.
26 Supra, note 9.
27 Zoning is only one method used to keep drive-ins out. For another, see Note, "Scope of Discretion of County Court in licensing Drive-In Theaters," 43 Ky. L.J. 417 (1955). To date only two drive-in theaters have been allowed in Fayette County (population in 1950: 100,746).
Commission and the Fiscal Court, which consent may be arbitrarily given or refused—the abuse is equally clear. If the activity is to be allowed only with permission of the zoning authorities (which may be proper where the activity generates extra heavy traffic, is unsafe or unusually unsightly, or is a “psychological nuisance” to the neighbors), the authorities should be required to set up standards specifying under what conditions the activity will be permitted. Otherwise a grave problem of equal protection arises. Because no such standards were set up here, the refusal to reclassify was arbitrary and thus an unconstitutional restriction of the applicant’s right to use her property as she saw fit. Here were the proper grounds for the result.

The American Sign Corporation case has had an interesting aftermath. Because of the unrealistic and restrictive ruling of the Court in that case, which left uncertain the Planning and Zoning Commission’s jurisdiction outside the city limits, the Commission was faced with the problem of determining what area in the county might in the foreseeable future be annexed to the city. The Commission, for want of prophetic vision, drew an arbitrary line three miles from the present city limits (which line is about 1½ miles beyond the built-up suburban area). This gave the Commission control of very little land that might be used as factory sites outside the city, however, and the president of the Lexington Industrial Foundation—an organization interested in bringing new industry to Fayette County—requested the County Judge to take immediate action to determine “municipal area” so that orderly planning for industrial development might proceed. In accordance with this request, the County Judge requested the Commission to take the necessary steps to determine “realistically the proper geographical limits for planning and zoning in this county.” The Commission then appointed James Pickford as a consultant to make a study of what comprised Fayette County’s “municipal area.”

After a survey of Fayette County, Pickford submitted his report to the Planning and Zoning Commission. He based his determination of Fayette County’s “municipal area” on the existence of four factors: (1) existing commercial, residential and industrial land use; (2) availability of public water and gas facilities; (3) traffic generators and (4) potential industrial sites. Where these factors are present, the land is primarily “urban oriented,” Pickford concluded, and may in the foreseeable future be annexed by the city. Pickford’s report was approved by the Planning and Zoning Commission and submitted to the County Fiscal Court for approval. The Fiscal Court refused to approve the report because the “municipal area” it proposed did not cover enough territory in the county. The Fiscal Court took the posi-
tion that the horse farms—a major “industry” in Fayette County—need protection from haphazard and uncontrolled business and industrial growth. The report as submitted did not give that protection.

On April 19, 1957 the Fayette County Fiscal Court passed the following resolution:

Whereas, an emergency exists in regard to the unprecedented urban growth in Fayette County; and many large industries selected locations in this area in 1956, and others may quickly follow,

And Whereas, the jurisdiction of zoning in counties containing second class cities is restricted by law and by court decisions interpreting the law; and the last court decision regarding the jurisdiction of zoning in this county was based on old conditions,

And Whereas, the Lexington Fayette County Planning and Zoning Commission has not recently defined the area of its jurisdiction,

And Whereas, there exists great danger of unhealthy and unregulated growth in this county which could be a detriment to the farmers, horsemen and urban residents of this county,

And Whereas, many agencies of government and others are planning to introduce and promote legislation in January, 1958 providing for county wide zoning and this legislation is reasonably sure of passage, and will provide for county wide zoning in all counties containing cities of the second class,

And Whereas, our problems are similar to those in Jefferson County where by law county wide zoning exists,

And Whereas, the growth in this county is outside the corporate limits of the city of Lexington; and the city is not as directly concerned as the County Government,

Resolved, that for the reasons set forth above and under the circumstances stated, it is hereby determined that the entire area of Fayette County is the municipal area; and that pursuant to the inherent powers of the county government to protect and preserve the community from these expressed dangers, and to protect the property of its citizens and the unusual use of its agricultural area; and further to promote the health, safety and welfare of its citizens, it is declared that the planning and zoning jurisdiction and the rules and regulations of the City County Planning & Zoning Commission shall henceforth include all of Fayette County, Kentucky, and the Planning & Zoning Commission as an agency of the Fiscal Court is directed to give effect to this Resolution.

On Monday, April 22, 1957, the City-County Planning and Zoning Commission approved the resolution of the Fiscal Court. This resolution reassumes jurisdiction over the entire county and attempts to nullify the Court of Appeals' decision in the American Sign Corporation case on the grounds of "emergency". If the legislature in 1958 does pass a statute giving second class cities jurisdiction over the county, the resolution may be effective as an "interim ordinance". If the legislature does not pass such a statute, however, grave problems as to the effectiveness of this resolution will arise, unless in a subsequent case the Court of Appeals overrules American Sign Corporation.
The issue of constitutionality may be involved in the exercise of extraterritorial power where the county is not represented at all in the zoning scheme. There is no doubt that zoning of unincorporated territory by the city of the first class and the county in which it is located is constitutional because of equal representation on the city-county zoning board. Likewise, zoning by second class cities and the county in which it is situated is probably constitutional, because the city-county planning commission is comprised of both city and county representatives, and the county fiscal court has to approve the zoning before it can be effective outside the city. This seems sufficient to meet the property owners' objection that they are being governed without representation. It is believed, however, that cities of the third, fourth, fifth, and sixth class do not have authority to zone extraterritorially and that, even if they do have such authority, extraterritorial zoning by these cities is unconstitutional, because there is no provision for a joint city-county commission or for approval by the county fiscal court.

The Kentucky Court has not ruled directly on this issue of constitutionality. However, the Court of Appeals in the case of Smeltzer v. Messer, supra, indicated that there might be doubt as to the constitutionality of a statute which authorized cities of the third, fourth, fifth and sixth classes to zone outside their corporate limits. The Court pointed out, with regard to such cities, that the property owners in the fringe areas had no voice in the legislative policies of the municipality to which their property was being subjected. That case involved a fourth class city which had enacted a zoning ordinance, under alleged authority of the enabling statute, which extended to all land within three and one-half miles of the city limits. The Court did not rule on its constitutionality because that issue was not before the court. The plaintiff's property was in another county and the court ruled only that the Enabling Act did not empower a municipality to impose zoning restrictions on land outside the city limits in another county. Nor did the Court reach the issue of whether cities of the third, fourth, fifth and sixth classes had been enabled to zone outside the city limits in their own county. It pointed out, nevertheless, that under Kentucky Revised Statutes, Sec. 100.500 there is a rather clear implication that the power granted to third through sixth class cities is limited to the territorial boundaries of the city. KRS Section 100.610 authorizes a city in one of these classes to create, by ordinance, a city planning
commission, and Section 100.650 provides that the commission shall make and adopt a master plan for the physical development of the city and the municipal area. However, no provisions are made for zoning the municipal area outside the corporate limits, and a distinction can be drawn between the authority of the commission to plan beyond the city limits and the power to zone beyond the city limits. In the case of Selignam v. Belknap,\textsuperscript{28} the Court made such a distinction and under the Enabling Act then in effect, since amended, denied Louisville the power to zone beyond its corporate limits.

Another indication that cities in this third grouping do not have authority to zone extraterritorially is gleaned from a study of the Enabling Act. It is noted that both the city and county of a first class city must both pass on the zoning ordinance before it is effective. And with regard to second class cities, the county fiscal court must approve of the plan before it can affect land outside the corporate limits. However, no such restriction is placed on cities in this third grouping. There appear to be no reasons why the legislature would want to give such cities greater power to zone extraterritorially than cities of the first and second class. An inference can be drawn from this that the legislature did not intend to give such cities the power to zone beyond their corporate limits. But assuming the contrary, since no provision is made for representation by the inhabitants of the unincorporated territory on the planning commission, extraterritorial zoning by such cities may well be—as pointed out above—unconstitutional.

V

CONCLUSION

It is obvious that the Kentucky enabling statutes are not at all clear as to what extraterritorial jurisdiction planning commissions of the second through the sixth class cities have. Nor has the Court of Appeals thrown much light on the matter. If Kentucky should do as a majority of states have done and give the county express authority to zone its unincorporated territory, many problems of extraterritorial zoning would be solved. The county could work hand in hand with the city to realize the objectives of a single comprehensive plan for the whole city-county area. The objective of such a plan would be to promote the welfare of the county residents as well as the city dwellers, two groups whose well-being, inseparably interrelated, is still in Kentucky legally separated.

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\textsuperscript{28} Seligman v. Belknap, 288 Ky. 133, 155 SW 2d 735 (1941).