495

ZONING ORDINANCE—DULY ADOPTED BY MUNICIPALITY —NOT EFFECTIVE AS AGAINST THE STATE TO LOCATE, ACQUIRE, CONSTRUCT OR USE SUCH PUBLIC BUILDINGS AND INSTITUTIONS AS IT DEEMS NECESSARY IN PERFORMANCE OF DUTIES ENJOINED BY LAW.

SYLLABUS:

A zoning ordinance duly adopted by a municipality is not effective as against the state in locating, acquiring, constructing or using such public buildings and institutions as it deems necessary in the performance of its duties enjoyed by law.

Columbus, Ohio, October 8, 1945

Hon. Frazier Reams, Director Department of Public Welfare
Columbus, Ohio

Dear Sir:

I have before me your communication requesting my opinion, and reading as follows:

> "The State of Ohio, Department of Public Welfare and the City of Tiffin, Ohio, respectively request your opinion as to whether the State of Ohio, Department of Public Welfare, is exempt from complying with Section III, Sub-section 10 of Ordinance No. 922, known as the 'Zoning Ordinance,' passed by the Council of the City of Tiffin, Ohio, on the 4th day of December, 1935.

'ZONING ORDINANCE'

"SECTION III"

'A' RESIDENCE DISTRICT

In an 'A' Residence District no building or premises except as herein provided in this ordinance, shall be erected, altered or used, except for one or more of the following uses:

Sub-section 10:

"Hospitals or sanitariums, but not for contagious diseases, nor for the care of epileptics, or drug or liquor patients, nor for the care of the insanse or feeble-minded."

Briefly, the facts are as follows: The Junior Order U. A. M. owns certain real estate situate in the First Ward of the City of Tiffin, Ohio, which said premises are zoned as "A" residential district. Said owner has for many years prior to the passage of said ordinance and continuously up to approximately November 7, 1944, occupied and used said premises as an Orphans Home. In 1944 the State of Ohio, Department of Public Welfare, leased said premises, and on December 1, 1944, up to the present time have occupied and used said premises as a place for the treatment of persons afflicted with epilepsy, in violation of the above provision of said zoning ordinance.

The State of Ohio, Department of Public Welfare now contemplate the purchase of said premises and intend using same as a place for the treatment and care of insane persons.

Numerous protests have been made by the citizens of Tiffin, Ohio, to the use of said premises as an insane institution.

A complete copy of said Zoning Ordinance is enclosed herewith."

The power of a municipality to provide by ordinance for dividing the municipality into districts or zones, and to regulate the character, height, bulk and location of structures to be erected therein, the percentage of lot occupancy, setback building lines, and the character of use, has been recognized and a mode of procedure set up by general laws enacted by the General Assembly. These provisions are found in Section 4366-7 et seq. of the General Code. The validity of such regulations has been well established by the decisions both of our own Supreme Court and of the

Supreme Court of the United States. Pritz v. Messer, et al. 112 O. S. 628; Youngstown v. Building Company, 112 O. S. 654; State, ex rel. v. Lakewood, 41 O. App. 9, affirmed in State, ex rel. v. Lakewood, 124 O. S. 299; Euclid v. Ambler Building Company, 272 U. S., 365.

Independent of these statutes, municipalities would certainly have that power under the broad provisions of Article XVIII, Section 3, of the Constitution adopted in 1912, which provides:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

So long as this authority depended upon a grant by the General Assembly, it could, of course, have been modified or withdrawn at any time by the General Assembly. The question we now have to decide is whether under the powers of home rule given to municipalities by direct grant of the people of the state through the Consitution, a municipality may by a zoning ordinance so regulate the use of property within its boundaries as to prevent the state itself, acting through its legislature and its administrative officers from maintaining or using therein a building or institution forbidden by such zoning ordinance.

Shortly after the adoption of Article XVIII of the Constitution, the Supreme Court in a series of decisions pointed out that the purpose of that article was to authorize municipalities to secure some immunity from the uniform government which theretofore had been prescribed by the General Assembly and "to exercise all powers of local self-government." State, ex rel. v. Lynch, 88 O. S. 71. In the case of Fitzgerald v. Cleveland, 88 O. S. 339, the court sustained the right of a municipality to determine for itself what officers it should elect and how they should be elected. The court in its opinion, at page 348, said:

> "The very idea of local self-government, the generating spirit which caused the adoption of what was called the home-rule amendment to the constitution, was the desire of the people to confer upon the cities of the state the authority to exercise this *and kindred powers without any outside interference.*"
>
> (Emphasis added.)

That court, however, in a series of decisions has made it plain that by the adoption of Section 3 of Article XVIII, the state did not create a new sovereignty, but only surrendered to the inhabitants of a municipality the sovereign right to govern themselves *in local matters,* and as to all sovereign powers not thus surrendered the sovereignty of the state over such territory remained supreme, and the municipalities remained as they theretofore had been, political subdivisions of the state, agencies through which the state administered its government. Billings v. Cleveland Railway Company, 92 O. S. 478; Cleveland Telephone Co. v. City of Cleveland, 98 O. S. 358; Niehaus, Building Inspector v. State, ex rel. Board of Education, 111, O. S. 47; State ex rel. v. Davis, 119 O. S. 596. In the case last cited many other cases covering the same proposition are cited.

It is not necessary to review at length the many decisions of the Supreme Court touching on the effect of this so-called home rule amendment of the Constitution. To a considerable extent, they are discussed and summarized in the case of Cincinnati v. Gamble, 138 O. S. 220. The matter involved in that case was hardly of the same character as the situation we now have before us, as it related to the right of the legislature to control the operation of the police department established by a municipality and to compel the municipality to continue the maintenance of a police pension system which it had previously established under legislative authority. The discussion by the court, however, is highhly pertinent and instructive. Judge Williams speaking for the court said:

> "In Ohio there are constitutional provisions regulating municipal power. These are found in Article XVIII, and all of them were adopted September 3, 1912. Being in pari materia they must be construed together. Such powers as are enumerated therein can not of course be taken away by the Legislature. These controlling provisions confer upon the municipalities 'authority to exercise all powers of local self-government and to adopt and enforce within their limits such local, police, sanitary and other similar regulations, as are not in conflict with general laws.' * * * Obviously a municipality has no right or authority to put into its charter or to enact by ordinance any local regulation, police, sanitary or other, *that conflicts with the general laws of the state or interferes in any way with the exercise of governmental power by the state in matters of state-wide concern.* In other words, the dual capacity of the municipality continues notwithstanding such constitutional provisions. As to one func-

tion, a city or village exercises the powers of local self-government within imposed limitations and, as to the other, acts as an arm or agency of the sovereign state. * * *

As to the other power—the power of the municipality in acting as an instrumentality of the state—it was stated in Billings v. Cleveland Ry. Co., 92 Ohio St., 478, at 484, 111 N. E., 155, decided in 1915: 'It must not be overlooked that the municipal government, as well after a charter has been adopted as before, is an arm or agency—a part—of the state. * * * The charter (in a charter city) becomes the organic law of the municipality so far as such local powers are concerned. But the authority of the state is supreme over the municipality and its citizens as to every matter and every relationship not embraced within the field of local self-government'." (Emphasis added.)

After citing a number of authorities, the court proceeded:

"It is apparent from an examination of these authorities that the municipality may not take action by charter or ordinance contrary to statute in matters of state-wide concern for these remain essentially the prerogatives of state sovereignty."

The court then proceeded to apply that reasoning to the fire and police departments of a municipality. To like effect, State, ex rel. v. Houston, 138 O. S. 203. The same principle has been applied in a series of decisions to matters of public health and to the establishment of municipal courts as a part of the judicial system of the state. Bucyrus v. Department of Health, 120 O. S. 426; State, ex rel. v. Hutsinpiller, 112 O. S. 468.

In the case of Niehaus v. State, 111 O. S. 47, the court had before it an ordinance of the City of Dayton, which authorized its building inspector to exact a fee in connection with the examination and approval of all plans for the construction of buildings, and a provision of the statute requiring the building inspection department of municipalities to approve plans for the erection of public school buildings. The city claimed the right to exact this fee for examination and approval of plans for a school building. The court held:

"1. Section 1035, General Code, which requires the building inspection department of municipalities having a regularly organized building inspection department to approve plans for the erection of a public school building, is a state police regula-

tion, and the power of the General Assembly to enact such legislation is in no sense abridged by the provisions of Section 3, Article XVIII, of the Constitution of Ohio."

The court further held that the municipality was without power to thwart the operation of such general law by requiring the payment of a fee by the board of education. The court deemed it important to point out that the Constitution, in Section 7 of Article I, had made it the duty of the General Assembly to pass suitable laws to encourage schools and the means of instruction. In the course of the opinion, referring to Section 3, Article XVIII, Judge Robinson said:

> "* * * but the sovereignty of the state over the municipality is not divested by that provision, nor does the power of the sovereign to administer public affairs and at the corporation line. * * * Hence, the power to exercise sovereignty in local self-government, and local police power not in conflict with general law, does not confer upon municipalities the power to enact and enforce legislation which will obstruct or hamper the sovereign in the exercise of a sovereignty not granted away."

In the case of State, ex rel. v. Blakemore, 116 O. S. 650, the court had before it the question whether the county commissioners could construct a bridge or viaduct as a part of a road improvement into and through a municipality upon the consent of the council thereof, but against the disapproval of the city planning commission. The court held:

> "Neither the provisions of the charter of the city of Cincinnati nor the provisions of Section 4366-2, General Code, relative to the powers of a city planning commission, have any application to the erection of a bridge or viaduct on an intercounty or main market road."

This case is cited not because it is strictly analogous but because of the discussion of principles by the court in its opinion. Referring to the contention of the city that under its charter the plan for the construction of such viaduct must be submitted to and receive the approval of the city planning commission, the court referred to that part of the opinion in the case of Niehaus v. State, supra, which I have quoted, and then used this language which appears to me to be very pertinent to the situation which we have before us:

> "If a controversy such as this were to arise with reference to the location of a new statehouse or state office building in the city of Columbus, would it be contended that either the charter or the provisions of the statute relied upon here would apply and have the effect of authorizing the city planning commission of the city of Columbus to control the location thereof or exercise any authority whatever with reference to approving the plans or determining whether such structure should be or could be erected upon the statehouse grounds, or upon any other location determined upon by the state government? It is our opinion that no such power of the sovereign has been delegated to the municipality. The police power conferred upon the municipality is only local police power, and the provisions of the charter in question must therefore be held to have reference only to improvements of purely local and municipal concern constructed by municipal authorities at municipal expense."

I have already called attention to the reference made by the court in the Niehaus case, supra, to the fact that the Constitution imposed upon the General Assembly the duty of providing for schools. I am therefore directing attention to the provision of the Constitution which requires that the insane and other unfortunate citizens of the state shall have especial care. Article VII, Section 1 of the Constitution provides:

> "Institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the State; and be subject to such regulations as may be prescribed by the General Assembly."

Section 154-57, General Code, confers upon the director of public welfare substantially all the powers and duties theretofore vested in and imposed upon the Ohio board of administration, including the control and operation of all state hospitals for the insane, epileptic, feeble-minded and mentally defective, as well as various other state institutions. His powers and duties with reference to such persons and such institutions are set forth at length in Section 1890-6 et seq. of the General Code. I assume that the power of the state, through its duly constituted officers and departments to acquire the necessary property for and to provide buildings for housing its insane and other defective dependents is not questioned, and therefore do not deem it necessary to go into the statutes conferring such powers.

There is a well established principle of law relative to the effect of legislative acts on the conduct of the state itself, which I consider as

reflecting, by analogy on the effect of constitutional provisions. It was held in State ex rel. v. Board of Public Works, 36 O. S. 409:

> "The state is not bound by the terms of a general statute, unless it be so expressed."

In this case the court said in its opinion:

> "The doctrine seems to be that a sovereign state, which can make and unmake laws, in prescribing general laws intends thereby to regulate the conduct of subjects only, and not its own conduct."

The state has a duty to perform in the care of its insane citizens. The people of the state have recognized that duty, and have expressly provided in their constitution that it shall be attended to. Obviously the performance of that duty involves the construction or acquisition of asylums or hospitals. It certainly can not be said that the state in giving a municipality the right to regulate *its own affairs* has yielded to such municipality the power to dictate to the state where and how it shall perform the duties which it owes to the people of the entire state.

Accordingly and in specific answer to your question it is my opinion that the zoning ordinance of the City of Tiffin, forbidding the erection, alteration or use of buildings in certain specified areas of said city as hospitals for the care of the insane, can not be applied to the State of Ohio, acting through its department of public welfare.

Respectfully,

HUGH S. JENKINS

Attorney General