Zoning - Ordinance Requiring Dedication of Property to City for Street Widening Purposes as Condition Precedent to Obtaining Building Permit Held Not a Taking of Property Without Just Compensation. Southern Pacific Co. v. City of Los Angeles (Cal.App. 1966)

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Southern Pacific Company applied for a building permit to construct a warehouse on its property, the area being zoned M-3 (heavy industrial), a classification permitting such construction. The City of Los Angeles refused to issue the permit unless Southern Pacific complied with the municipal code requirement that no building should be erected on any lot in an R-3 or less restrictive zone abutting a major or secondary highway, unless the highway had been dedicated and improved to the full width as contemplated in the master plan of community development.¹

In the mandamus proceedings² to compel issuance of the permit, the trial court rejected Southern Pacific's claim that the code requirement was unconstitutional on its face, and as applied to the specific facts at bar. On appeal to the District Court of Appeal, held, affirmed. Southern Pacific Co. v. City of Los Angeles, 242 Adv. Cal. App. 21, 51 Cal. Rptr. 197 (1966), petition for hearing denied, (June 29, 1966).

In affirming, the District Court reasoned that: (1) Since the appellant sought to change the character of the land and reap the benefits therefrom, it ought to meet all reasonable requirements imposed by the ordinance; (2) the necessity and form of zoning regulations is primarily a legislative function, to be tested not by what the courts may think of the wisdom or necessity of the legislation, but rather, whether there is any reasonable basis in fact to support the legislative determination of the regulation's wisdom and necessity; (3) the requirement of dedication of the land was proper under the police power of the state, and was not an unconstitutional taking

¹ Los Angeles, Cal., Municipal Code § 12.37. No building or structure shall be erected or enlarged, and no building permit shall be issued therefor, on any lot in any R3 or less restrictive zone (as such order of restrictiveness is set forth in Subsection B of Section 12.23), if such lot abuts a major or secondary highway, unless the one-half of the highway which is located on the same side of the center of the highway as such lot has been dedicated and improved for the full width of the lot so as to meet the standards for such highway provided in Subsection H of this section, or such dedication and improvement has been assured to the satisfaction of the Bureau of Right of Way and Land and the City Engineer, respectively . . . .

² Cal. Code Civ. Proc. § 1085 authorizes a writ of mandate, “to compel the admission of a party to the use and enjoyment of a right . . . to which he is entitled . . . .”
without just compensation, as the condition was reasonably related to the increased traffic that would be generated by the warehouse; and, (4) the ordinance was not repugnant to the equal protection clause of the federal and state constitutions since the owners in an R-3 or less restrictive zone do not stand in precisely the same relation to the law as do owners in R-2 zones.

The court drew support for its findings from two California Supreme Court decisions: *Ayres v. City Council of City of Los Angeles* and *Bringle v. Board of Supervisors*. In a 4-2 decision, the *Ayres* court held that ordinances requiring a subdivider to dedicate a portion of the land for street purposes were proper, since he sought to acquire the advantages of lot subdivision. He therefore had a correlative duty of complying with reasonable conditions for the design, improvement, and restrictive use of the land, including reasonable access by streets.

In *Bringle*, the court deemed reasonable the right of a zoning board to condition the granting of a variance with a requirement that the party seeking the variance dedicate to the county, without compensation, an easement for a right of way for street widening purposes. The underlying rationale of the *Bringle* decision was that because a variance sanctions a deviation from the standard set by the general zoning ordinance, the granting of such a variance rests largely in the discretion of the granting body. Hence, conditions may be attached to the variance in order to preserve the general purposes and intent of the zoning ordinance.

By analogy, the *Southern Pacific* court aligned its decision with *Ayres* and *Bringle*, stating:

> [S]ince the courts have recognized that the Legislature may properly insist upon dedication of the means of access—and that, of necessity, implies sufficient access—both in subdivision and non-subdivision cases, a flexible police power may require the dedication

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4 34 Cal. 2d 31, 207 P.2d 1 (1949).
5 54 Cal. 2d 86, 351 P.2d 765, 4 Cal. Rptr. 493 (1960).
6 *But see* Wine v. Council of City of Los Angeles, 177 Cal. App. 2d 157, 171, 2 Cal. Rptr. 94, 103 (1960) ("The Ayres Case is not authority for the proposition that the subdivider may be required to pay the cost of improving offsite streets, nor may such meaning be ascribed to the statute."); see generally 34 Ops. Cal. Atty Gen. 119 (1959) and 22 Ops. Cal. Atty Gen. 168 (1953).
7 *But see* 13 Hastings L.J. 401 (1962) (criticizing the result reached in *Bringle*).
of additional access, under the circumstances here, when the need therefor arises.\(^8\)

The analogy seems questionable since *Ayres* involved a conditional privilege associated with the Subdivision Map Act, and *Bringle* dealt with a request for a zoning variance. In these situations, the approval of the subdivision map and the granting of the variance rest largely in the discretion of the appropriate governmental authority.\(^9\)

To thus justify the analogy to *Ayres* and *Bringle*, the court must begin with the premise that the erection of a warehouse, in an area zoned for such construction, is likewise a privilege to which conditions precedent may be attached. This would seem repugnant to the constitutional provision which guarantees to all men the inalienable right to acquire, possess, and protect property.\(^10\) Granted this right is subject to the police power, but nonetheless that power should not be used as a subterfuge to acquire property desired for public use.\(^11\) In *Pennsylvania Coal Co. v. Mahon*,\(^12\) Mr. Justice Holmes observed that the constitutional protection of private property presupposes that it is wanted for public use. When this protection is qualified by the police power, the tendency is to expand the application of that power until private property rights disappear. However, such taking without just compensation is forbidden by the fifth and fourteenth amendments to the Constitution.\(^13\)

The *Southern Pacific* court, relying on *Consolidated Rock Products Co. v. City of Los Angeles*,\(^14\) held the *Pennsylvania Coal* case inapplicable since it had been decided before the principles of comprehensive zoning were established. However, as pointed out by one writer: "It is significant . . . that the United States Supreme Court

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\(^9\) See Beverly Oil Co. v. City of Los Angeles, 40 Cal. 2d 552, 254 P.2d 865 (1953); City of Buena Park v. Boyar, 186 Cal. App. 2d 61, 8 Cal. Rptr. 674 (1960).

\(^10\) CAL. CONST. art. I, § 1.


\(^12\) 260 U.S. 593 (1922).

\(^13\) Id. at 415.

\(^14\) 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962). *Consolidated* was an action to enjoin the city from enforcing a zoning restriction that prevented rock and gravel operations on plaintiff's property. In affirming the district court's holding that the restriction was valid, the California Supreme Court indicated that the primary purpose of comprehensive zoning was to protect the general public from uses of property that would prove injurious to them. The court at page 524 then cited with approval *In re Kelso*, 147 Cal. 609, 612, 82 Pac. 241, 242 (1905) ("So far as such use of one's property may be had without injury to others it is a lawful use which cannot be absolutely prohibited . . . .") (Emphasis added.)
cited the *Pennsylvania Coal* decision with approval, in a case involving municipal ordinances and gravel pits, within a month following the decision in *Consolidated.*"\(^{15}\)

Southern Pacific claimed further that the ordinance violated the equal protection clause of the federal and state constitutions. Appellant cited *People v. Western Fruit Growers, Inc.,*\(^{16}\) which declared that a law

is special legislation if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.\(^{17}\)

Southern Pacific argued that because the ordinance did not require owners in an R-2 zone to dedicate a portion of their land should they desire to erect a duplex, the ordinance imposed a peculiar disability on owners in an R-3 or less restrictive zone, persons standing in the same relation to the subject of the law. The court rejected this contention, reasoning that R-3 owners do not stand in precisely the same relation to the law as do R-2 owners, since a new duplex in an R-2 district does not generate the same increase in traffic that would result if a new warehouse were built in an R-3 or less restrictive area. It is interesting to note that the ordinance itself requires no reasonable relationship between the proposed construction and the condition imposed. With certain limited exceptions,\(^{18}\) the ordinance establishes a blanket restriction on any construction and does not distinguish projects not generating an increase in traffic.\(^{19}\)

Assuming the distinction between R-2 and R-3 owners' relationships to the law to be valid, other possible difficulties are posed. For example, under the terms of the ordinance, other R-3 owners whose property does not abut a major or secondary highway would not be required to dedicate land, even though they might build larger warehouses and generate even greater traffic on the same street. Furthermore, those owners of land abutting the same highway who refrain

\(^{15}\) 50 CALIF. L. REV. 896, 899 n.21 (1962).
\(^{16}\) 22 Cal. 2d 494, 140 P.2d 13 (1943).
\(^{17}\) Id. at 506, 140 P.2d at 19-20.
\(^{18}\) LOS ANGELES, CAL., MUNICIPAL CODE § 12.37(B) (exempting additions and accessory buildings incidental to existing nonresidential buildings, provided the total cumulative floor area does not exceed 200 square feet).
\(^{19}\) It is conceivable that an R-3 owner could construct an addition of only 250 square feet that would not generate additional traffic; yet by the terms of the ordinance, that owner would nonetheless be required to dedicate land to the city.
from construction until the City acquires the land by eminent domain proceedings will receive severance damages. These property owners, having been compensated for their land, are then free to construct a warehouse or any other facility that might increase the traffic flow.

In a hypothetical five year situation the net result with respect to several property owners in the R-3 or less restrictive zones might be this: Prior to any eminent domain proceedings, Southern Pacific, as an abutting owner, has been required to dedicate its land without compensation to the city as a condition precedent to building. Adjacent owner B, who waited and received severance damages before building his warehouse, received just compensation for the taking of his land, yet now generates possibly even greater traffic from his newer building. Likewise, adjacent owner C, who built his warehouse prior to the enactment of the ordinance, received compensation for his property when it was subsequently taken. Owners D, E, and F, whose properties are within the same area, but not abutting a major or secondary highway, could have built at any time during the hypothetical five year period, yet they would not have been required to dedicate and improve any land, merely because their property, while in the same area and generating increased traffic, did not happen to abut a major or secondary highway. Can this be equal protection? It is submitted that, as among these hypothetical owners and other residents of the city who contribute to the increase of traffic and bring about the necessity for street widening, the equal protection clause requires that the land be acquired by eminent domain proceedings rather than by zoning restrictions.

In the instant case the court pointed out that the City was not seeking petitioner's land, but rather it was Southern Pacific which was seeking a permit to build; thus, the proceeding did not involve eminent domain. This was essentially the opinion of the majority in Ayres. However, in his dissent, Justice Carter, joined by Justice Schauer, answered the Ayres majority with some compelling logic:

The majority say that petitioner may not prevail in his contention that, since the use of the land . . . was contemplated in any event, the dedication and use reservation requirements in this proceeding

21 But see Brous v. Smith, 304 N.Y. 164, 106 N.E.2d 503 (Ct. App. 1952). Brous also involved subdivision approval. The court mentioned that if the town wanted to construct a road across the petitioner's property, it would have to condemn the land and compensate the owner; but the town had no such desire or design and was merely conditioning its approval upon compliance with reasonable conditions for the protection of purchasers.
are unconstitutional as an exercise of the power of eminent domain. A sufficient answer [say the majority] is that the proceeding here involved is not one in eminent domain nor is the city seeking to exercise that power. Why is this a sufficient answer? Is a Court to be precluded from a determination of whether or not Constitutional mandates have been disobeyed because of the form a proceeding takes? It would seem that because the conditions imposed were said to have been imposed under the police power should not preclude this Court from determining whether or not such was the case.22

Eminent domain has been distinguished from the police power by its underlying purpose. Thus, if the property is taken from the owner and utilized for some specific public improvement, the proceeding should be one of eminent domain. In contrast, a regulation or limitation upon the use of the property, for the common good of all the public, is within the police power.23 The California Supreme Court indicated in Rose v. State of California24 that the police power generally operates in the field of regulation, except in cases of emergency such as conflagration and flood. Applying these guidelines, it would seem that the proceeding in the instant case should properly be one of eminent domain. The purpose of the ordinance is to facilitate the acquisition of property for a specific public improvement, i.e., the widening of a public street. The benefits thus derived will inure to the public generally; and, while the need for wider streets may be great, the situation can hardly be characterized as the type of emergency to which the Supreme Court referred.

The test suggested by the Southern Pacific court as to the necessity and form of the regulation—Is there any reasonable basis in fact to support the legislative determination of the regulation’s wisdom and necessity?—is derived from Consolidated Rock.25 In applying this test, the court pointed to section 12.02 of the Municipal Code, which declares the purposes of the comprehensive zoning plan to be: to lessen congestion on city streets; to facilitate adequate provisions for community utilities such as transportation; and to promote health, safety, and the general welfare. With these purposes supplying the “reasonable basis” for the legislative determination of the necessity of the ordinance, the court turned to the question of whether section 12.02 could properly be applied to the instant case. Answering in the affirmative, the court reviewed evidence presented by the City

22 34 Cal. 2d at 46, 207 P.2d at 10.
24 19 Cal. 2d 713, 123 P.2d 505 (1942).
25 57 Cal. 2d at 522, 370 P.2d at 346, 20 Cal. Rptr. at 642.
to the effect that the warehouse could be operated on a twenty-four hour basis, and if so used, more than 1,000 trucks could be accommodated each day. Since the traffic count of the adjacent street was estimated to reach 50,000 vehicles per day by 1980, the court reasoned that the widening of even one block would have a beneficial effect on the overall traffic flow and would, in addition, enhance the value of the appellant's property.

There is a distinction, however, between judicial review of legislative form and judicial determination of the constitutionality of any particular enactment. While review of form is not within the court's authority, a decision as to the constitutionality of a particular legislative enactment is a judicial function. Thus, the fact that widened streets are reasonably necessary in Los Angeles should not preclude the court from determining whether the ordinance provides a constitutional method of acquiring the necessary land.

Assuming the warehouse will generate an increase of 1,000 trucks per day, such increase is insignificant compared with either the present volume of traffic or the projected volume in 1980. The increase in traffic and the necessity for the widening of the street evolve from the tremendous growth of the City of Los Angeles, rather than from Southern Pacific's proposed warehouse, and thus the cost of the widening should not be borne solely by the appellant.

Southern Pacific indicates an expansion of the police power to require the dedication of land through zoning regulations. It extends the doctrine from the subdivision and variance cases to include the requirement of dedication where the proposed construction is reasonably related to the condition imposed. Where the court will draw the

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28 242 Adv. Cal. App. at 31, 51 Cal. Rptr. at 203 (Appellant had introduced evidence showing that the warehouse and the type of business were not compatible with a rapid turnover of goods and trucks and contended that a maximum of 56 trucks per day was more realistic.).

27 But see Crescent City v. Moran, 25 Cal. App. 2d 133, 77 P.2d 281 (1938) (The court recognized that while street improvement is a benefit to the abutting owner, it is secondary, and the general public receives the greater use and benefit.)

28 Lockard v. City of Los Angeles, 33 Cal. 2d 453, 202 P.2d 38 (1949); Pringle v. City of Chicago, 404 Ill. 473, 478, 89 N.E.2d 365, 367-68 (1949) ("Whether . . . [a zoning] ordinance has any such relation [to the public health, safety, morals or welfare] is subject to review by the courts, and highly injurious restrictions lacking a basis in the public weal come within the constitutional inhibition against taking private property for public use without just compensation.").

20 Pioneer Trust & Savings Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 380, 176 N.E.2d 799, 801-02 (1961) (In referring to Ayres, the court indicated that a municipality may not require a subdivider to provide a major thoroughfare, the need for which stems from the total activity of the community); Mansfield & Swett v. Town of West Orange, 120 N.J.L. 145, 198 Atl. 225 (1938).
line between police power acquisition and eminent domain is open
to conjecture. It will be interesting to note the result in Sommers v.
City of Los Angeles, now on appeal to the Second District Court
of Appeal wherein the applicant desired to remodel a service station
and was required by the same ordinance to dedicate a portion of his
property. It would seem that the limits of police power acquisition
will have to be more clearly defined since service stations do not
usually increase the flow of traffic on an adjacent street, but rather
they tend to service the existing traffic.

Perhaps the limitation expressed by Mr. Justice Holmes in Pennsylvania Coal is still applicable, even in the days of "comprehensive zoning":

When this seemingly absolute protection [of private property under
the fifth amendment] is found to be qualified by the police power,
the natural tendency of human nature is to extend the qualification
more and more until at last private property disappears. But that
cannot be accomplished in this way under the Constitution of the
United States.

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