CITIES, TOWNS & VILLAGES:
ZONING:
PLANNING & ZONING:

An interim or temporary ordinance enacted by a fourth class city providing that all territory annexed to the city shall be automatically classified in the single family dwelling district until otherwise classified by ordinance is a valid exercise of police power

OPINION NO. 189

April 7, 1970

FILED
189

Honorable Eric F. Fink
State Representative
District No. 46
1325 Froesel Drive
Ellisville, Missouri

Dear Representative Fink:

This is in response to your request for an official opinion on the question of the validity of an ordinance of a city of the fourth class which provides that all territory which may hereafter be annexed shall be automatically classified in the single family dwelling district unless otherwise classified by ordinance.

The ordinance set forth in your opinion request is as follows:

> "1. In any case where property is not specifically within a district shown on the district map, such property shall be considered as being within the R-1 single family dwelling district until or unless otherwise classified by ordinance. All territory which may hereafter be annexed to the city of Ballwin shall be automatically classified in the R-1 single family dwelling district until otherwise classified by ordinance."

Zoning ordinances and building regulations constitute the exercise of a governmental function referable to the police power. State ex rel Sims vs. Eckhardt (Mo.) 322 S.W.2d 903. Section 89.-020, RSMo 1959, empowers:

> ". . . the legislative body of all cities, towns, and villages . . . to regulate and restrict the height, number of stories, and size of buildings and other structures, the

> precentage of lot that may be occupied, size of yards, courts, and other open spaces, the density of population, the preservation of features of historical significance, and the location and use of buildings, structures and lands for trade, industry, residence or other purposes."

The standards by which this grant of authority is to be exercised are enumerated in Section 89.040 as follows:

> "Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers, to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to preserve features of historical significance; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the values of buildings and encouraging the most appropriate use of land throughout such municipality."

The procedure to be followed by the legislative body availing itself in the first instance of the zoning power granted to all cities, towns and villages in first establishing zoning in a municipality are set forth in Section 89.070 as follows:

> "In order to avail itself of the powers conferred by sections 89.010 to 89.140, such legislative body shall appoint a commission, to be known as 'The Zoning Commission', to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report and such legislative body shall not hold its public hearings or take action until it has received the final report of

> such commission. Where a city plan commission already exists, it may be appointed as the zoning commission."

This section is applicable to the establishment of zoning districts and restrictions in newly annexed territory. In Murrell vs. Wolff (Mo.) 408 S.W.2d 842, l.c. 847, the court said:

> ". . . Section 89.070 prescribes the procedure to be followed by the legislative body in availing itself in the first instance of the zoning powers granted to all cities, towns, and villages; in first establishing zoning in a municipality. It relates only to the original zoning ordinance fixing the boundaries of the original districts and prescribing the regulations to be followed therein. Logically, the term 'original districts' as used in §89.070 refers to the establishment of zoning districts in areas not previously zoned. . . ."

It appears therefore that a public hearing is necessary for all zoning legislation. That is to say, the persons living in and owning realty in the affected area may not be deprived of their right to have a voice in the zoning of their realty.

The purpose of zoning, as expressed in these statutes, is to limit the rights of a citizen to use his property in order to promote and protect the public health, safety, comfort, morals, and welfare of the people. The theory underlying these statutory provisions is that in order to achieve such results there should be a careful and scientific study made by a competent commission, and that after the commission has reached a conclusion, there should be an opportunity afforded to the public to express their views and make objections, if they have any objections, concerning the proposed enactment so that the legislative body can balance the objections against the advantages and reach a sound final conclusion. As pointed out by the court in the Eckhardt case:

> ". . . The statutes contemplate that zoning regulations, restrictions and districts be well planned, and that they be of a more or less permanent nature and subject to change only to meet genuine changes in conditions. . . ." 322 S.W.2d 903 l.c. 907.

It is apparent that the ordinance submitted with your opinion request is an interim ordinance intended as a temporary or emergency

measure to preserve the status quo of conditions until a premanent ordinance can be passed after the zoning commission has completed its investigation and secured the data and information to be used as a basis of a report to the legislative body looking to the enactment of a permanent zoning ordinance.

It appears therefore that the effect of the interim or temporary ordinance submitted with your letter is to serve notice that the city does not intend to issue any building permits other than those for residential purposes in the newly annexed area until the study is completed and an ordinance permanently zoning the annexed area has been enacted.

It would be illogical to hold that after the zoning commission had prepared a preliminary report and held public hearings on the proposed ordinance and while the ordinance was under consideration, any person merely by filing an application for a building permit could compel the municipality to issue a permit which would allow him to establish a use which he knew or could have known would be forbidden by the proposed ordinance, and by so doing nullify the entire work of the municipality in endeavoring to carry out the purpose for which the zoning law was enacted. On the other hand, it would seem reasonable to hold that a municipality may refuse a building permit for a land use repugnant to a pending and later enacted zoning ordinance even though application for the permit is made when the intended use conforms to existing regulations. This is in accord with the views expressed by the Kansas City Court of Appeals in the recent case of Smith v. City of Lee's Summit, Missouri, No. 25130, filed February 2, 1970. In that case the court stated:

> "Plaintiffs next contend that the rezoning here in question was invalid becuase the city had not adopted an overall zoning plan and classification for the entire annexed area. As authority supporting this contention, plaintiffs rely solely on the decision by our Supreme Court in the case of State ex rel. Sims v. Eckhardt, 322 S.W.2d 903. We conclude that the situation here presented is so factually different from that considered in Eckhardt that the latter case does not rule the case at bar.
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> "The overall zoning ordinance of the city of Lee's Summit provides that any land thereafter annexed by the city will automatically come under the provisions of the zoning ordinance and will be classified and used for agricultural purposes until such time as the city has

an opportunity to study and reclassify such annexed areas. This is obviously an interim classification which is designed to be temporary in nature and contemplates an orderly change in zoning classification as time permits. In the Eckhardt case, supra, the overall zoning ordinance of the city of Columbia did not provide for any such interim zoning classification. Rather, the city passed a zoning ordinance applicable to an annexed area permanently fixing its zoning classification. This was done without the formalities affirmatively required by statute as a condition to original zoning. The Supreme Court in the Eckhardt case held that such permanent zoning of the annexed area could be validly accomplished only by observing and following all of the forms and procedures required by statute for origianl zoning. The court there expressly declined to rule upon the validity of an interim zoning classification. Likewise, in the case at bar, the plaintiffs do not challenge the legality of the interim zoning classification of the land in question as agricultural. They only challenge the change therefrom by the rezoning ordinance. Consequently, the principles laid down in the Eckhardt case have no applicability to the case at bar. As heretofore stated, it is obvious that the classification of this land as agricultural was strictly temporary. If it were to be permanent there would have been no valid reason for the annexation of such an agricultural area. Both the original zoning ordinance and the annexation of this area contemplated a change in use. This land was annexed on January 1, 1965, and at the time of trial in November of 1967, a land use study by outside 'experts' had not yet been completed and the city had not received final report thereof. Plaintiffs cite no authority requiring us to hold that the zoning of such annexed area cannot be changed for years after the annexation until some overall study is completed. Both the overall zoning ordinance and the action of annexation contemplate change from agricultural use of the land. We cannot hold that the ten year permit for the use of this tract of land as a mobile home park is so arbitrary and unreasonable under all the circumstances shown as to render it invalid. We therefore rule this contention of plaintiffs against them."

The police power is not something that is rigid and definitely fixed, but in its very nature must be somewhat elastic in order to meet the changing and shifting conditions which from time to time arise through the increase of population and complex commercial and social relations of the people. Graff v. Priest (Mo.) 201 S.W.2d 945. The case of Women's Kansas City St. Andrews Soc. vs. Kansas City, Mo., 58 F.2d 593, involved an action brought to restrain the city from enforcing the term of a zoning ordinance to prevent the use of plaintiff's property as a philanthropic old ladies home. The court said:

> "Courts have gone far in sustaining the exercise of police power, and there has been a gradual expansion of such power justified by changing conditions. Originally the police power was exercised in the interest of public health, safety, peace, and morals. Then it expanded by including in its province questions of 'general welfare' and regulations designed to promote not only public health, morals, and safety, bur regulations to promote 'public convenience' and 'general prosperity.' . . ."
> 58 F.2d 593 l.c. 599

It was necessary and desirable to enact the ordinance described in your opinion request in order to properly provide for the orderly development of the municipality. It is well known that many people in the interim before annexation attempt to establish a use which would not be permitted after the property has been annexed and permanently zoned. The legislative body in this instance only took such steps as would control the area to permit zoning in a lawful and orderly manner if and when the territory were annexed to the city.

CONCLUSION

It is the opinion of this office that an interim or temporary ordinance enacted by a fourth class city providing that all territory annexed to the city shall be automatically classified in the single family dwelling district until otherwise classified by ordinance is a valid exercise of police power.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,

JOHN C. DANFORTH
Attorney General