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THE LEGAL BASIS OF EXTRATERRITORIAL ZONING IN OKLAHOMA

JERRY L. GOODMAN*

INTRODUCTION

The concept of a municipal corporation as the incorporation of a territory with definitely prescribed boundaries is often the frame of reference first employed by the lawyer analyzing a problem involving a municipality's exercise of its powers. Interestingly, a different concept of a municipal corporation prevailed at early common law. At that time a city was regarded as a community of interests having no detailed geographical boundaries. Had this early concept of a municipal corporation continued in the law, the subject of extraterritorial powers of cities would be moot. As the metropolitan area grew, the jurisdiction of the city to police and zone its peripheral area would automatically have followed. The short life and early death of this early common law concept are underscored, however, by the fact that the thought of a municipal corporation exercising police and zoning powers outside its "city limits" is usually foreign to the reasoning processes of the present-day legal practitioner.

Nevertheless, the practitioner's emphasis on the geographical limits of the municipality's exercise of its powers fails to take into account the fact that the ability of a municipal corporation to effectively govern is often impeded by its inability to govern matters immediately outside its boundaries. As one author has stated:

> The fact that municipal corporations possess prescribed boundaries results in many of the metropolitan area problems. Germs do not stop at corporate limits.

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> Vice, protected by inadequate police supervision in the outlying area, will infest the core city. . . .[3]

Moreover, the rapid spread of urban development in and around large cities further emphasizes the fact that the political city seldom, if ever, corresponds with the physical city.

EXTRATERRITORIAL EXERCISE OF THE POLICE POWER IN GENERAL

In response to the above problems, the legislative delegation of extraterritorial police powers to cities has been utilized as a mechanic for mitigating the severe effects of the principle that a municipal corporation has prescribed boundaries. Thus, the general rule is:

> The Legislature has power to confer on a municipal corporation police jurisdiction over adjoining territory immediately next to and within a specified distance of the corporate limits. There is no violation of the fundamental law in a statute or charter provision under which some of the police regulations of a municipality extend beyond its territorial limits. . . .[2]

Since the power to zone is unquestionably an attribute of the police power,[3] an examination of the cases involving extraterritorial exercise of municipalities' police power will serve to show that the modern extraterritorial exercise of the zoning power is firmly bottomed on principles long established in the common law of this country.

"Cases involving questions of the municipalities' exercise of the police power are many and varied."[4] They can usually be classified as to whether the particular ordinance involved affected the territory outside the corporate limits either incidentally or directly.

[1] Sengstock, *Extraterritorial Powers in the Metropolitan Area,* p. 3, (Michigan Legal Publications, 1962).

[2] 37 AM. JUR. *Municipal Corporations,* § 284, (1941).

[3] Yokley, *Zoning Law and Practice,* §1-1, p. 1, (3rd ed. 1965).

[4] Bartelt, *Extraterritorial Zoning: Reflections On Its Validity,* 32 NOTRE DAME LAW. 367, 386 (1957).

Territories are incidentally affected when activities carried on therein are subject to the regulations of a municipality as a condition to the exercise of a right or privilege. Such cases usually involve ordinances requiring the inspection or licensing of businesses located beyond the city limits, but marketing their products within the city. With respect to this category of cases, suffice it to say that the courts have overwhelmingly sustained the validity of such ordinances.[5]

Municipalities directly affect noncorporate territories when their ordinances operate within such territories independently of the exercise of rights or privileges within the corporate limits. Since the concept of extraterritorial zoning means the application of municipal zoning ordinances to noncorporate territory, it therefore involves a direct exercise of the police power.

Consequently, this article will be confined to an analysis of those cases involving a direct exercise of the police power in noncorporate territory.

Cities are frequently given authority to enact health ordinances having extraterritorial effect and Oklahoma municipalities are no exception. Municipalities are given the power to make regulations designed to prevent the introduction of contagious diseases within their borders by enacting and enforcing guarantine ordinances with respect to areas within five miles of their borders.[6]

Oklahoma municipalities are likewise given authority to enact ordinances having extraterritorial effect for the protection of their water supplies located outside the city limits.[7]

Lakeview v. Davidson[8] involved the validity of such an ordinance. The defendant attacked the validity of an Okla-

[5] *Id.* at 387.
[6] OKLA. STAT. tit. 11 § 666 (1961).
[7] OKLA. STAT. tit. 11 §§ 292-94 (1961).
[8] 166 Okla. 171, 26 P.2d 760 (1933).

homa City ordinance requiring all boats operating on Lake Overholser, the municipal water supply located considerably beyond the city limits, to be equipped with one life preserver for each passenger. It was contended that the ordinance was invalid because "... said lake is located beyond the territorial limits of said city and the city does not possess the power to give extraterritorial effect to its police power."[9]

In upholding the validity of this ordinance the Supreme Court of Oklahoma stated as follows:

> It is true that ordinances of municipality do not extend beyond the geographical limits of the municipality unless a specific grant of power to enact such ordinances is granted by the laws of the State.
>
> Section 6070, O.S. 1931, grants such authority. After providing for acquisition of land within or without the corporate limits of such municipality for waterworks purposes, provision is made by the statute for policing the same. . . .
>
> Thus we find a specific grant of authority to sustain the ordinance in question.[10]

In *Lakeview*, the Court's only concern was with the presence or absence of the necessary legislative authority for the city to exercise police power over the extraterritorial water supply.

After pointing out that an enabling statute, almost identical to that of Oklahoma, empowered Utah cities to construct waterworks without their limits and protect the water supply from pollution, the Supreme Court of Utah matter-of-factly sustained the validity of a Salt Lake City ordinance prohibiting the keeping of horses, pigs, cattle and other animals near a stream for ten miles above the place where the water was taken for municipal drinking purposes.[11] This case is especially relevant to the subject of the extraterri-

[9] *Id.* at 176, 26 P. 2d at 765 (1933).
[10] *Ibid.*
[11] Salt Lake City v. Young, 45 Utah 349, 145 Pac. 1047 (1915).

torial zoning power of a city when one realizes that by its holding the court restricted the use the defendant could make of the property through which the stream ran by compelling him to keep his livestock from the stream.

In *City of West Frankfort v. Follop*,[12] the municipal corporation enacted an ordinance prohibiting oil and gas operations from around its municipal water supply located some eight miles beyond the city limits. The trial court refused to enjoin the defendants from drilling or operating oil and gas wells on sites seven miles from the city and approximately one and one-half miles from the water supply. On appeal the Supreme Court of Illinois reversed the trial court decision, after emphasizing that the ordinance had been enacted pursuant to enabling legislation passed by the Illinois Legislature. In upholding the ordinance the Illinois court held that while cities have no jurisdiction outside their boundaries, the legislature may confer such power and when granted it is effective extraterritorially.

Jourdan v. City of Evansville[13] involved the extraterritorial regulation of the sale of alcoholic beverages. The court readily acknowledged the power of the legislature to determine the boundaries of the jurisdiction of municipalities and stated that once the determination is made by the legislature the latter's judgment is conclusive on the courts.

State v. Rice[14] sustained the constitutionality of the power of the City of Greensboro to exercise its police power beyond the corporate limits. The ordinance under attack made it unlawful to keep pigs within the city limits and for a quarter mile beyond. After determining that the legislature had given the city jurisdiction to exercise police power within one mile of its city limits in all directions, the court unequivocally upheld the ordinance in the following langu-

[12] 6 Ill. App. 2d 609, 129 N.E.2d 682 (1955).
[13] 163 Ind. App. 512, 72 N.E. 544 (1904).
[14] 158 N.C. 635, 74 S.E. 582 (1912).

age: "The Legislature has unquestioned authority to confer upon the town authorities jurisdiction for sanitary or police purposes of territory beyond the city limits."[15]

However, the light of *Malone v. Williams*,[16] an earlier case, cast a shadow of doubt upon the unequivocal statement made in the *Rice* case. Under attack in *Malone* was the constitutionality of a Tennessee Act authorizing Memphis to ". . . have and exercise within the city limits, and for two miles outside thereof, all governmental powers and police powers. . . ."[17] The Tennessee Supreme Court conceded it to be within the power of the Legislature to authorize subordinate corporations to pass ordinances or laws having restricted effect beyond their limits.

This reluctant acceptance of limited extensions of municipal police power over noncorporate territory was restricted, however, by the following language:

> . . . but even this is hard to justify on any principle other than that the municipality is in such matters the agent of the state itself for the protection of the people of the state. But that agency cannot be used as a basis for conferring power upon municipalities over territory outside of them any further than bare necessity requires. Certain it is there can be no justification for extending over and outside strip of country, two miles in width, or of any less width, all the governmental powers of the city, or even all of the police powers of the city.[18]

The crux of the arguments opposing the exercise of police powers by municipalities over noncorporate territories is that the grant to municipalities of such powers creates government without the consent of the governed. Thus, the Court succinctly stated in the *Malone* case:

> The control in the present instance is given, not to anyone chosen or elected by the [extraterritorial] people . . . but to the officers of a foreign body, chosen for

[15] *Ibid.*
[16] 118 Tenn. App. 390, 103 S.W. 789 (1907).
[17] Tenn. Acts 1907, ch. 184, art. I, § 3, at 565.
[18] *Supra note* 16, at——, 103 S.W. at 806.

> the service of that body, and not for the people to be affected by the powers given. . . . But upon the general question we do not hesitate to say that the Legislature has no more power . . . to impose burdens upon the citizen in favor of a municipal corporation of which he is not a member than it has to impose burdens upon him in behalf of another man who has rendered to him no equivalent.[19]

The same argument was utilized in a Kentucky case, *Smeltzer v. Messer*,[20] which held that an attempt to zone noncorporate territory was beyond the purview of the zoning statutes. In the course of its opinion, the court declared:

> The above principles [municipal powers terminating at corporate boundaries] are significant in this case because the city's action, if sustained, seriously impairs the rights of a person owning property beyond its limits who has no voice in its legislative policies, and who receives no legally recognizable benefit to such property from the city government.[21]

It is submitted that the so-called lack of consent of the governed argument propounded in the *Malone* and *Smeltzer* cases is invalid. Extraterritorial powers are exercised by the municipality pursuant to a delegation of authority by the state legislature. Thus, those beyond the city limits have actually consented to the extraterritorial exercise of these municipal powers through their representatives in the state legislature. That this is so is implicit in the *Malone* case where the court stated that if the power to govern extraterritorially which had been specially given to Memphis had been generally given to other cities and towns of the state, ". . . such general legislation would immediately produce an uprising which would insure its repeal."[22] Thus, the court itself acknowledges that if the legislature were to generally confer extraterritorial jurisdiction on all the municipalities of Tennessee, the extraterritorial citizens would

[19] *Ibid.*
[20] 311 Ky. 692, 225 S.W.2d 96 (1949).
[21] *Id* at———, 225 S.W.2d at 97.
[22] *Supra* note 16, at———, 103 S.W. at 806.

rise up to elect representatives to the legislature who would insure the repeal of such legislation. Consequently, it is seen that the lack of consent of the governed argument when analyzed proves invalid as a reason for opposing the extraterritorial exercise of power by municipalities.

EXTRATERRITORIAL EXERCISE OF THE ZONING POWER

At the time he wrote his monumental article, "Extraterritorial Zoning: Reflections On Its Validity," Professor Louis F. Bartelt, Jr., Valparaiso University, stated that there were no cases which directly answered the question of the validity of extraterritorial zoning. This statement was made with full knowledge of *Smeltzer* which Professor Bartelt dismissed in the following language:

> In *Smeltzer* v. *Messer,* the issue of fringe zoning was squarely before the Kentucky appellate court. Through strategic maneuvers, the court managed a successful outflanking operation, emerged unscathed, and decided almost nothing. The fringe, over which the city attempted to exert its zoning powers (with statutory authorization), included lands situated in two adjoining counties. Inasmuch as it had been decided in an earlier case that cities could not annex in other counties, the court felt that *its use was not so reasonably related to the city's development as to fall within the purview of of the statutes.*[23]

Regarding the vacuum of authority pertaining to the validity of extraterritorial zoning, Professor Bartelt went on to state that "[t]he writer believes that this situation will be short-lived. The rumblings emanating from the hinterlands indicate the approach of an irresistible force to an immovable object. The collision will soon echo in appellate courts."[24] The prophetic insight of this statement has proven to be true.

The case of *Morand v. City of Raleigh*[25] found the Supreme Court of North Carolina taking a view toward the

[23] *Supra* note 4, at 397-98 (Footnotes omitted).
[24] *Supra* note 4, at 375, footnote 25.
[25] 247 N.C. 363, 100 S.E.2d 870 (1957).

"... ultimate fate of extraterritorial zoning"[26] hinted at in its earlier *State v. Owen*[27] decision. The Owen case had involved the single question whether the Winston-Salem extraterritorial zoning ordinance was supported by enabling legislation adequate to make it enforceable outside the city limits. The court held that the ordinance, originally invalid because enacted without statutory authority, was not automatically activated by the subsequent enabling amendment.

> In confining itself to the statement that a municipal ordinance invalid under an enabling act existing at the time of its enactment is not validated by mere amendment of the statute, so that an ordinance might be validly enacted, the court may have been implying that it would deal charitably with authorized extraterritorial zoning ordinances.[28]

In *Morand,* the North Carolina Supreme Court was finally confronted head-on with the constitutionality of the extraterritorial zoning power delegated to cities by the enabling legislation adopted subsequent to the enactment of Winston-Salem's extraterritorial zoning ordinance. Pursuant to this statute, Raleigh adopted an ordinance zoning an area one mile beyond its corporate limits for residential use. Morand and his wife operated a trailer camp just beyond the city limits but within the one-mile perimeter which the city enjoined. On appeal, the Morands contended that since their property was outside the city limits in an area neither subjected to city taxes nor inhabited by residents of Raleigh, the latter's extraterritorial zoning ordinance was therefore unreasonable and arbitrary. In short answer to this contention, the North Carolina court significantly reiterated its unequivocal language in *Rice* that: "The Legislature has unquestioned authority to confer upon the town authorities jurisdiction for sanitary or police purposes of territory

[26] *Supra* note 4, at 393.
[27] 242 N.C. 525, 88 S.E.2nd 832 (1955).
[28] *Supra* note 4, at 394.

beyond the city limits."[29] Continuing in *Morand*, the court stated:

> We hold that the ordinance under consideration, which prohibits the construction and maintenance of a trailer camp within areas zoned for residential purposes within the City of Raleigh and within one mile of its corporate limits, is a valid exercise of the police power and may be enforced by injunctive relief.[30]

Moreover, the only argument seriously made against extraterritorial jurisdiction, the so-called lack of consent of the governed argument, has been clearly confronted and disposed of in the recent case of *Schlientz v. City of North Platte*.[31] Here, the plaintiff, Schlientz, sought to enjoin the City of North Platte, Nebraska from enforcing its extraterritorial zoning ordinance on the theory that the ordinance and the enabling legislation pursuant to which it was adopted were both unconstitutional. In support of this theory, Schlientz stated the lack of consent of the governed argument in its most precipitate form:

> . . . the persons lying in the area adjacent to and 1 mile beyond the corporate limits of the city have no voice in the selection of elective officers and officials of the city, which amounts to a disfranchisement of such persons because they are subjected to the jurisdiction of elected officers and officials whom they had no voice in choosing, and, therefore Section 16-901, R.S. Supp., 1959, is unconstitutional, and ordinance No. 922 is invalid.[32]

The court succinctly disposed of this argument as follows:

> Such persons as heretofore mentioned [those living in the area adjacent to and one mile beyond the corporate limits] have neither a constitutional nor inherent right to local self-government. The Legislature may subject them to the jurisdiction of officers for whom they have no voice in the selection. This does not constitute a violation of any constitutional provision.[33]

[29] *Supra* note 14.
[30] *Supra* note 25 at——, 100 S.E.2d at 874.
[31] 172 Neb. 447, 110 N.W.2d 58 (1961).
[32] *Id.* at 66.
[33] *Id.* at 66-67.

Thus, it is seen that what one author has described as ". . . the most cogent objection to extraterritorial zoning. . . ."[34] has been judicially overruled.

CONCLUSION

The legality of extraterritorial zoning by municipal corporations is now established as a general proposition of law. The theoretical basis of the proposition lies in the principle that the legislature of a state can delegate to municipal corcorporations the power to zone property beyond their corporate boundaries. The widespread judicial acceptance of this theory has led one author to conclude that municipalities may operate beyond their limits without restriction if the state legislatures grant such authority.[35]

Thus, the delegation of power by the Oklahoma Legisature to cities in excess of 180,000 population to zone an area five miles from their corporate limits is in strict accord with long established principles of law.[36]

[34] Sengstock, *supra* note 1, at 64.

[35] Bouwsma, *The Validity of Extraterritorial Zoning,* 8 VAND. L. REV. 806, 811 (1955).

[36] OKLA. STAT. tit. 19 §§ 863.1-86343 (1961) as amended by OKLA. STAT. tit. 19 §§ 863.2-863.27 (Supp. 1963) and OKLA. STAT. tit. 19 §§ 863.44-863.48 (Supp. 1965).