

MAINE STATE LEGISLATURE

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EIGHTY-SECOND LEGISLATURE

HOUSE

No. 256

House of Representatives, March 3, 1925.

Referred to Committee on Judiciary and 500 copies ordered printed.

CLYDE R. CHAPMAN, Clerk.

STATE OF MAINE

IN THE YEAR OF OUR LORD ONE THOUSAND NINE
HUNDRED AND TWENTY-FIVE

To the House of Representatives of the Legislature of Maine:

The undersigned Justices of the Supreme Judicial Court acknowledge the receipt of a copy of an order passed by the House of Representatives January 13, 1925, requesting the opinion of the Justices relative to a pending bill entitled, "An Act Relating to the Limitation of Buildings in Specified Districts of Cities and Towns"; a copy of the bill referred to is made a part of the order. The question propounded for our consideration is as follows:

"Has the Legislature the right and authority under the Constitution to enact a law according to the terms of the following bill?"

We also acknowledge the receipt of a copy of another order passed by the House of Representatives February 3, 1925, re-

lating to the same pending bill, by which an answer to the following supplemental question is requested:

“Has the Legislature the power under the Constitution to authorize cities and towns to limit buildings according to their use or construction to specified districts thereof?”

Before answering the questions propounded we think it proper to avoid any possibility of misapprehension as to our views of the character and scope of the pending bill. We, therefore, take occasion to point out that the bill in question does not by its terms limit the use, height or construction of buildings; it is not a “zoning law.” An apt definition of zoning is “the regulation by districts of building development and uses of property.” Harv. Law Review, May 1924, page 834.

We regard the proposed law as an enabling act, relegating to cities and incorporated villages authority to exercise the police power. It relates solely to action by municipalities under the police power; there is no provision whatever for the exercise of the power of eminent domain, with attendant compensation.

The underlying question, then, is whether the Legislature may delegate to the legislative bodies of cities authority to exercise the police power. Of that we have no doubt. The ordinary form of a city charter granting authority to enact ordinances not inconsistent with the Constitution and laws of the state is a delegation of authority to exercise the police power. *Reinman vs. Little Rock*, 237 U. S. 171, 59 L. Ed. 900. The term “incorporated villages” is not applicable in

Maine; the term refers to a form of municipality found in some other states, having, we understand, some type of legislative body, such as a council. Our village corporations are not the same; they have no legislative bodies; the inhabitants conduct their affairs in open meeting as inhabitants of towns do.

Again, although the proposed bill may lawfully delegate authority to exercise the police power, every ordinance enacted by a city government must stand or fall on its own merits. A favorable opinion, therefore, on any part of the proposed bill must not be understood as an opinion that an ordinance supposed to be framed under it will necessarily be valid.

With these reservations, turning to section one of the proposed bill, we answer:

(a) Regulation of the height of buildings. We are of the opinion that such regulation is a valid exercise of the police power, and may be accomplished by the creation of districts. *Welch vs. Swasey*, 193 Mass. 364; affirmed 214 U. S. 91. *Cochran vs. Preston*, 108 Md. 220. *Ayer vs. Comrs. on Height of Buildings in Boston*, 242 Mass. 30.

(b) Regulation of the construction of buildings. This is also a valid exercise of the police power. We already have in this State very comprehensive authority for such regulation. R. S. chap. 4, sec. 98, Par. VIII. *Houlton vs. Titcomb*, 102 Maine 272; 10 L. R. A. (N. S.) 580. *Lewiston vs. Grant*, 120 Maine 194.

(c) Regulation of the location and use of buildings for trade. We cannot make a more definite answer than to say

that the location of some kinds of business is undoubtedly subject to regulation under the police power. R. S. chap. 23, sec. 5; *Reinman vs. Little Rock*, *supra*. *Hadacheck vs. Sebastian*, 239 U. S. 394, 60 L. Ed. 348; and it has been held that regulation under the police power is not confined to the suppression of what is disorderly, offensive or unsanitary. *C. B. & Q. Ry. Co. vs. Illinois*, 200 U. S. 561, 592; 50 L. Ed. 596, 609. *Bacon vs. Walter*, 204 U. S. 311, 318; 51 L. Ed. 499, 502.

(d) Regulation of density of population. Just what method of regulation is proposed, and to what extent, we are not advised. Undoubtedly the regulation of the height of buildings serves to regulate to some extent the density of population; so does the regulation of the construction of buildings in the interest of sanitation and health. Both of these forms of regulation are valid under the police power. But if regulation of density of population is attempted by the establishment of building lines, it probably cannot be justified under the police power, as stated in the following paragraph.

(e) Regulation of the percentage of a lot that may be occupied, the size of yards, courts and other open spaces. Such regulation involves the establishment of building lines. The weight of authority seems to be, that building lines cannot be justified under the police power, (12 A. L. R. 681; 2 Dillon, *Mun. Corp.* 5th Ed., sec. 695; 1 Lewis, *Em. Domain*, 2d Ed., sec. 144a), but must be accomplished by the exercise of the right of eminent domain with compensation; such by law of this State is the method for the establishment of parks. R. S. chap. 4, sec. 87.

(f) The bill provides for appeals to a Board of Adjustment from an administrative official. We have been unable to discover what powers are conferred, or what duties are imposed upon an administrative official. Any opinion on such a provision must be based upon the ordinance as enacted.

(g) The bill also confers authority to make special exceptions to, and to authorize variance from, the terms of an ordinance. Upon such general provisions we are unable to give an opinion as to the proposed delegation of authority. It is well settled that there cannot be arbitrary discrimination in municipal regulation on the subjects proposed. *City Council of Montgomery vs. West*, 149 Ala. 311; 123 Am. St. 33, note on page 36.

It is obvious that any opinion as to the validity of administrative details of a regulatory ordinance must be based upon the exact language of the ordinance as enacted. Compare *Eubank vs. Richmond*, 226 U. S. 137, 57 L. Ed. 156, with *Thos. Cusack Company vs. Chicago*, 242 U. S. 526, 61 L. Ed. 472, 476.

February 20, 1925.

Respectfully submitted,

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NOTE.—The above answers were prepared by Mr. Justice Morrill.

L. C. C.