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One Year Review of Municipal Law

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ONE YEAR REVIEW OF MUNICIPAL LAW

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The Supreme Court, during the past year, handed down several important decisions in this phase of the law. Zoning matters, taxation and police power were determined by these decisions and the Court was called upon to construe several municipal ordinances and charter provisions.

1. *Zoning. In Board of Adjustment, et al., vs. Perlmutter Construction Co., et al.,* 1954-55 *C.B.A. Adv. Sh. No.* 8 the Court held the Board of Adjustment exceeded its jurisdiction in entering an order denying petitioners the right to change a nonconforming use of property to a more restrictive use when that right is granted by ordinance. The property in question had not been subdivided but had been zoned, one portion being business "A" zone, while the remainder was residence "B" zone. The entire south half of the area was subject to a nonconforming use as a brick yard. Petitioners contended the north half of the area was also subject to a nonconforming use. A building permit was issued on the basis of an affidavit supporting the application for a permit relating to continuance of the nonconforming use. However the permit was later revoked for the reason the north half of the area was amenable to the requirements of the zoning ordinance. The Board of Adjustment not only sustained the building inspector, but found that the petitioners had lost the right to operate a nonconforming use on any part of the area. In sustaining the trial court in its findings that the petitioners had not abandoned or discontinued the nonforming use, the Supreme Court held the situation presented a clear case for application of a part of the zoning ordinance which prohibits a change in a nonconforming use "unless to a more restrictive use." Petitioners having sought to substitute a more restrictive use for nonconforming property the inspector and the board were without jurisdiction to deny the permit. The more restrictive use was authorized and given as a right to the property owner by the terms of the ordinance.

2. *Taxation.* The constitutionality of an ordinance levying an occupational tax on cigarette and tobacco sales was determined in favor of the city in *City of Pueblo vs. Pullaro, et al.,* 1954-55 *C.B.A. Adv. Sh. No.* 3. The ordinance provided that a wholesale dealer shall affix a stamp purchased from the city to each package of cigarettes or tobacco before delivery to the retailer and shall collect the amount of the tax from the retailer the wholesaler being allowed a discount of eight per cent for trouble and expense. The ordinance provided that it was intended that the tax ultimately be collected from, and paid by the consumer. Retailers challenged the ordinance as being discriminatory and unconstitutional as applied to them as retailers received nothing for collecting the tax from the consumer whereas the wholesaler was compensated by a discount for his trouble in affixing the stamp and

collecting the tax from the retailer. Judgment of the District Court holding the ordinance unconstitutional and invalid was reversed, the Court holding the retailers failed to establish that the operation of the ordinance was discriminatory as to them inasmuch as a retailer had the same opportunity to obtain the discount where cigarette stamps were purchased direct from the city and affixed rather than purchasing cigarettes through a wholesaler who provided this service. In support of this position the Court held that a seller can be required to collect an excise tax from a purchaser without compensation and may be required to keep an accurate account thereof; that tobacco dealers may, for taxation purposes, be classified as wholesale and retail dealers as they are clearly separate and distinct occupations, and where such statutes and ordinances are in effect, they have been sustained as not being discriminatory or unconstitutional as to retailers.

3. *Bonded Debt.* The decision in *Hebel, et al., vs. School District R-1, County of Jefferson, et al.,* 1954-55 *C.B.A. Adv. Sh. No.* 6, relates to the authority of a school district to issue bonds within the lawful debt limit as authorized by a vote of the taxpaying electors of the district. The result is of interest to municipalities. It was held that a bonded indebtedness is not created by the authorization of a bond issue, but only when bonds are actually issued; that the applicable debt limit is determined at the time of the issuance of bonds whether issued in one or more series and when the limitation is based on a percentage of the valuation, the limit of the debt is determined by the percentage of the assessed valuation in effect when the actual debt is created as in this case the fixed percentage of the assessed valuation of the year next preceding *the date* of the bonds. The school district bonds were held valid. The board, in arranging for an election and time thereof, is not required to determine the date on which bonds are issued. The function of the board is to propose and suggest an amount; the electors determine whether the bonds shall be issued, which as there may be from time to time, within the then lawful limit. "Time to time" could only be at such times when, under the applicable statute, the property valuations of the year before would keep the issue within the statutory limit.

4. *Power of Arrest.* In *Matt L. Walker and Town of Sheridan vs. Lee Tucker and Glen Tucker,* 1954-55 C.B.A. Adv. Sh. No. 7, the plaintiffs in error were relieved of judgments entered in the lower court on the claim of false imprisonment arising out of the defendant-in-error's arrest by Walker, the town marshall. The Town of Sheridan had authorized the closing of an area used but not dedicated as a public street; barricades were installed and subsequently destroyed by the Tuckers. The marshall who witnessed the destruction of the barricades, acting without a warrant, placed the Tuckers in the county jail under arrest. In reversing the judgment of the trial court against Walker the court held that public policy requires and supports the maintenance of an authorized peace officer in an incorporated town, and to hold that a peace officer, be he policeman, town marshall, constable or sheriff,

must stand by and witness the violation of a town ordinance and the destruction of its property without resisting the violation, and apprenhending the violator would be a travesty upon justice and the police powers inherent in any municipal corporation. It was further held that the town was not liable to the Tuckers as the Board of Trustees by statute had the power to regulate the use of the streets, and the placing of the barricade was in the exercise of its lawful governmental capacity. The town acting within its governmental capacity falls within the rule of immunity against liability in connection with the enforcement of its ordinances.

5. *Contracts to Lowest Bidder.* It was held in *William H. McNichols, as Auditor, vs. City and County of Denver, et al.*, 1954-55 C.B.A. Adv. Sh. No. 1, that under a charter provision providing that "all contracts for local improvements . . . shall be let to the lowest reliable and responsible bidder, . . .", the courts should not interfere with the determination of the authorities involved in such matters as to who was the lowest reliable and responsible bidder where made in good faith and to the interest of the public, without collusion or fraud and free of personal favoritism as the basis of reasonable discretion. The exercise of discretion is provided for and expected. In the exercise of this discretion, a determination of responsibility is first made, and if this were not so, then the charter would undoubtedly have been so worded that contracts be let to the lowest bidder regardless. A further question was decided by the court in that it was held that the charter provision concerning letting of contracts was not applicable to architects and others in skilled professions. Though the facts of the case involved a contract with an architect, the court sustained the trial court's finding which in substance was that in the exercise of discretion the Manager of Improvements and Parks acted in good faith without any taint of fraud and recommended the letting of the contract to the lowest responsible bidder.

6. *Pension Plans.* In *William H. McNichols, as Auditor, et al., vs. City and County of Denver, et al.*, 1954-55 C.B.A. Adv. Sh. No. 8, the auditor questioned the validity of an ordinance which terminated an employee pension plan and directed distribution to employees of the unexpended contributions of the city. A taxpayer alleged that distribution to employees of city contributions was prohibited by Article XI, Sec. 1, 2 of the Constitution of the State of Colorado. It was held:

(1) The ordinance was valid under the charter of the city which empowered the City Council to fix the "compensation" of employees by ordinance. Under the pension ordinance all persons subsequently employed became members of the plan as a condition of their employment, and benefits arising therefrom were part of the "compensations" to be received by employees. The plan under the ordinance contemplated termination in the event of coverage under social security. The Council had discretion to terminate the plan as well as to create it.

(2) There is no distinction between employees who voluntarily became members of the plan and those who were required to become members as a condition of their employment.

(3) The contributions of the beneficiary as well as those of the city were to be distributed pursuant to the provision of the ordinance.

(4) Persons receiving retirement or disability payments did not have a right to continuation of payments or any claim against the fund for future payments as the ordinance creating the pension fund contained provisions under which those rights could be ended, and participation in the distribution of assets upon termination of the plan ended the right to other benefits.

(5) The employee who withdrew his contributions on termination of his employment received nothing from distribution of the fund as provided by the creating ordinance.

(6) Credit Union claims against the fund by assignment of employees were held valid.

(7) In computing service records of employees only full years of service were counted.

7. *Civil Service. City and County of Denver, et al., vs. Ethel D. Norris,* 1954-55 C.B.A. Adv. Sh. No. 8, involved the interpretation of a charter amendment which the city contended abolished the position of police matron held by the defendant in error. No mention or provision was made in the charter amendment for the position of matron. The trial court held the amendment did not abolish the position, which ruling was sustained by the Supreme Court, it being stated that any reorganization of an existing department of government attempted by charter amendment does not mean or require the abolition of prevailing offices, unless the intention to eliminate the specific office is clearly apparent. A later amendment which is not inconsistent with a prior amendment does not repeal the latter by implication.

8. *Public Park.* An injunction was sought in the case of *Carl A. McLaughlin, et al., vs. The City and County of Denver, et al.,* 1954-55 C.B.A. Adv. Sh. No. 8, to restrain the city from installing athletic facilities and from expending the proceeds of the bond issue of 1948 for athletic purposes in Congress Park. The Manager of Improvements and Parks is vested, under charter provisions, with the sole authority to lay out, regulate and improve Congress Park. A swimming pool and bathhouse were planned for the park It was held that this jurisdiction has adopted the modern concept for a dedicated public park in that it is proper and legitimate that a reasonable portion of the park area be set aside and used for playground and recreational purposes. These uses would include tennis courts, swimming pools and numerous other activities. The broad discretion granted the Manager of Improvements and Parks under the charter provision will not be disturbed as long as it is used fairly, reasonably and honestly. Here less than 50% of the total park area was proposed for playground and recreational facilities, and the trial court was sustained in dismissing the action.

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