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LOCAL GOVERNMENT LAW—1955 TENNESSEE SURVEY

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MUNICIPAL CORPORATIONS

Police Power: Conformity of Ordinance to State Statute: The town of Fayetteville enacted an ordinance imposing higher standards than those established by state and federal laws upon producers of milk to be sold within the city. In *State* ex rel. *Beasley v. Mayor and Aldermen of Fayetteville*[1] plaintiff milk producer, having complied with state and federal requirements, was denied a permit to sell inside the city and sought a writ of mandamus to require the city authorities to issue the permit. Under the holding in *State* ex rel. *Nashville Pure Milk Co. v. Shelbyville*,[2] a municipality could not refuse to issue a permit to sell milk therein when the foreign milk producer had, according to state and local inspections at producer's home county, met the requirements of federal, state and county rules. Apparently in the *Shelbyville* case the standard in the city was no higher than that set by the federal and state authorities; the real question was whether the city had the right to rely on its own inspection facilities and to limit permits to those whom it could and did inspect and approve. The *Fayetteville* case presents a more significant issue: may a municipality, in the exercise of its delegated police power, adopt a more stringent rule than that of the delegating state? The general rule is that state regulation of milk standards does not preclude the municipality from acting in the same field, but that the city ordinance must be in conformity with the state statute.[3] It would seem that conformity does not require identity, but rather the absence of conflict. The question was not answered finally in the *Fayetteville* case, because a state statute was enacted during the progress of the suit expressly authorizing municipalities to adopt more stringent regulations.[4] Therefore, the only question finally answered is that, with state permission, a municipality may adopt more stringent regulations and higher standards than those established by state law governing the same subject.

Ordinances: Proof of Irregularity in Enactment: In *Brumley v. Town of Greeneville*[5] the minutes of the town board recited that an ordinance authorizing a condemnation proceeding by the town was "passed on first" and subsequent readings, as required by the town

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1. 268 S.W.2d 330 (Tenn. 1954).
2. 192 Tenn. 194, 203, 240 S.W.2d 239, 243 (1951).
3. 7 MCQUILLIN, MUNICIPAL CORPORATIONS § 24.415 (3d ed., Smith 1949).
4. Tenn. Pub. Acts 1953, c. 114, §11.
5. 274 S.W.2d 12 (Tenn. App. E.S. 1954).

charter.[6] The defendant in the condemnation proceeding attacked the ordinance as invalid because it had not actually been presented and read three times, and defendant offered the testimony of the person who prepared the minutes to prove his contention. The court admitted the testimony on the ground that the recitation in the minutes was ambiguous in that although it stated that the ordinance passed three readings it did not show that the ordinance was read three times; hence extrinsic evidence was admissible to clarify the ambiguity. Furthermore, the court commented that minutes reciting action which would clothe the town with rights which it was seeking to assert as a litigant against a private individual were in the nature of self-serving declarations, and thus by inference open to question. The language of the court indicates that it is not suggesting that in every instance the minutes of the municipal legislative body are open to question, but only where there is ambiguity, bad faith, or special interest. Just how important each of these factors may be is not entirely clear.

Generally, parol evidence is not admissible to contradict municipal records, and the rule applies to enactment of ordinances.[7] According to a leading authority, this rule as it applies to legislative action on a bill is giving way to the "extrinsic evidence rule" which holds that the validity of an enrolled bill may be attacked by any "clear, satisfactory and convincing" evidence.[8] The somewhat strained finding of ambiguity in the minutes in the *Greeneville* case permitted the court to consider extrinsic evidence without altering the basic rule.

Special Legislation: By private act[9] the legislature provided a new charter for the Town of Dayton, and expressly provided that the ". . . Charter of the City of Dayton shall not be subject to the provisions of the Public Acts of 1921, Chapter 173 . . . [which gives to every municipality the right to adopt a city manager form of government]." In *Furnace v. City of Dayton*[10] the Supreme Court struck down the provision as violating both Article I, Section 8, and Article XI, Section 8 of the Tennessee Constitution. That such provisions are patently unconstitutional does not serve to prevent their appearance periodically. Legislative manipulation of the government of individual cities dies hard.

Zoning: Political pressure and hard "sympathy" cases are twin enemies of the impartial and effective administration of zoning laws. In *Grant v. McCullough*[11] sympathy for a property owner who was

6. Tenn. Pub. Acts 1903, c. 563, § 12, requires all ordinances involving the appropriation of money to be "read once on three separate days and passed on its third reading by a majority of the entire board."
7. 5 MCQUILLIN, MUNICIPAL CORPORATIONS § 14.07 (3d ed., Smith 1949).
8. 1 SUTHERLAND, STATUTORY CONSTRUCTION § 1405 (3d ed., Horack 1943).
9. Tenn. Priv. Acts 1953, c. 267.
10. 274 S.W.2d 6 (Tenn. 1954).
11. 270 S.W.2d 317 (Tenn. 1954).

in an unfortunate personal economic position led to a zoning amendment which rezoned one lot in the middle of a block from Residential C to Commercial A. No other lots in the block were affected. The Supreme Court, being better insulated from the immediate pressures, stamped the ordinance as "spot zoning" and invalid under the Tennessee Constitution.[12]

COUNTIES

Zoning: Chapter 33 of the Public Acts of 1935[13] empowers county courts to zone county areas outside the corporate limits of municipalities and provides that a county court may amend its zoning plan by ordinance. A hearing must be held on proposed amendments; notice thereof must be given at least thirty days before the hearing; and the proposed amendment must be published in a newspaper of general circulation in the county.[14] *Clapp v. Knox County*[15] posed three questions under the amendment provisions of the statute: (1) Must the required notice be given by a county official? The court ruled that it need not be so given; if the notice sufficiently informs interested persons of the time, place and subject matter of the hearing, it is good. (2) Must the specific amendment be set out verbatim in the notice? The court held that substantial compliance was sufficient; that is, that the notice give sufficient information from which interested parties may determine the precise effect of the amendment. (3) Will a resolution satisfy the statutory requirement of amendment by ordinance? The court ruled that it would, reasoning that it was not the intention of the legislature to spell out exact procedures and formal requirements. This interpretation is supported by cases from other jurisdictions.[16]

SCHOOL DISTRICTS

Nature of School District: An incorporated school district is not a municipal corporation, but is a public corporation in the same class with counties, and occupying the same legal status, said the Supreme Court in *Barnett v. Memphis.*[17] A municipal corporation, though created by the state, may engage in proprietary activities which are not undertaken in pursuance of governmental duties. A school district, on the other hand, is created to perform one of the functions of government, and is an arm of the state for such purpose.[18] The case involved a tort action and evoked a statement that schools are a governmental

12. TENN. CONST. Art. XI, § 8.
13. TENN. CODE §§ 10268.1—10268.14 (Official Supp. 1950).
14. *Id.* § 10268.5.
15. 273 S.W.2d 694 (Tenn. 1954).
16. See 62 C.J.S., *Municipal Corporations* § 411, p. 787 (1949).
17. 269 S.W.2d 906 (Tenn. 1954).
18. This distinction is ably discussed in Note, 160 A.L.R. 7, 58-62 (1946).

function. That this is so is well settled.[19] The result in the case is consistent with the generally stated rule.[20]

HOUSING AUTHORITIES

Power: In *Harper v. Trenton Housing Authority*[21] a landowner sought to defeat the right of the Authority to take his unimproved land for purposes of a Negro housing project on the ground that the Authority had abused its discretion in selecting the particular land for a Negro project. The court ruled against this contention by restating the rule that "in the absence of a clear and palpable abuse of power, the determination of the necessity for the taking and what property shall be taken is not a question for the judiciary, but for the Legislature or the body to whom the right of eminent domain is delegated by it."[22] To this rule the instant case adds that "palpable" does not require a finding of fraud, bad faith or sinister motive.[23]

A second contention of the landowner was that the purpose of the housing authority is to clear slums, and that this purpose is not effectuated by condemning vacant lots. This contention was rejected also; the purposes of housing authorities extends beyond slum clearance to include the provision of adequate housing for low income groups.[24]

Declaration of Taking—Interest on Money Deposited in Court: The Tennessee Housing Authority Statute[25] provides that an authority may file a declaration of taking and deposit in court the estimated value of the land involved, and title to the land will vest immediately in the authority. The actual compensation to be paid to the owners is then arrived at in the usual manner. When the estimated sum is smaller than the compensation ultimately set, the authority must pay the difference with interest from the filing of the declaration of taking. *Nashville Housing Authority v. Doyle*[26] posed the question as to whether the authority must also pay interest on the amount deposited in court. The Tennessee Supreme Court holds that it must. This is in interesting contrast to the rule under the Federal Housing Act[27] to

19. Hamilton County v. Bryant, 175 Tenn. 123, 132 S.W.2d 639 (1939); Rogers v. Butler, 170 Tenn. 125, 92 S.W.2d 414 (1936); Kee v. Parks, 153 Tenn. 306, 283 S.W. 751 (1926).

20. "[T]here is a distinction between municipal corporations proper and quasi-municipal corporations [counties, towns, school districts and the like] concerning liability for torts. . . . [T]he general rule is that the latter are not liable for torts unless so provided by statute." 18 McQUILLIN, MUNICIPAL CORPORATIONS § 53.05, p. 142 (3d ed., Smith 1950).

21. 274 S.W.2d 635 (Tenn. App. W.S. 1954).

22. Williamson County v. Franklin & Spring Hill Turnpike Co., 143 Tenn. 628, 647, 228 S.W. 714, 719 (1921).

23. 274 S.W.2d at 642.

24. TENN. CODE ANN. §§ 3647.1—3647.29y (Williams Supp. 1952).

25. Tenn. Pub. Acts 1937, c. 183.

26. 276 S.W.2d 722 (Tenn. 1955).

27. 46 STAT. 1421, 40 U.S.C.A. §§ 258a *et seq.* (1952).

the effect that such interest is not payable.[28] As the Tennessee court pointed out, the provisions of the two statutes differ, so that the differing results are not necessarily the product of conflicting rationales.

OFFICERS

Justices of the Peace: State ex rel. *v. Brown*[29] was a suit to establish the proposition that a justice of the peace who accepted appointment as a county road commissioner thereby automatically vacated his office as a justice. The Supreme Court, in ruling to the contrary, was confronted by three questions: (1) Is a justice of the peace within the purview of Article VI, Section 7 of the Tennessee Constitution which provides that an inferior judge "shall not . . . hold any office of trust or profit under this State. . . ." The court pointed out that the same clause of the constitution prohibits an inferior judge from receiving any fees or perquisites of office, and as justices of the peace had always been entitled to fees and perquisites of office, the clause patently was not intended to apply to them. (2) Does Section 2986 of the Tennessee Code[30] which expressly states that no justice of the peace shall be a member of a road commission apply in this case? The words of the statutory provision certainly include all justices of the peace and all road commissions. As the court pointed out, however, a reading of the entire act from which the particular section was drawn discloses that the act was intended to apply only to road commissions which were set up pursuant to the act for the purposes of supervising the expenditure of funds raised through bond issues, and had no application to road commissions generally. (3) Is membership on a road commission which is charged with "supervision and control of the construction, maintenance and repairs of all public roads . . . in the County" occupying an office incompatible with that of a justice of the peace so as to be subject to the common-law rule that one who accepts a second office incompatible with one already held thereby vacates the first office? Here, it is submitted, is the significant question insofar as the law of officers is concerned. The first two questions answered by the court were problems of statutory construction. The solution to the third question turns upon the determination of incompatibility. The court had previously ruled that a position as teacher in the county school system was not incompatible with the office of justice of the peace because the only connection which a justice had with the school system was to levy taxes for its support.[31] Application of the same reasoning leads to the same result in the instant case—the only connection which the justice has with the

28. United States v. Miller, 317 U.S. 369, 381 (1943).
29. 270 S.W.2d 334 (Tenn. 1954).
30. TENN. CODE ANN. § 2986 (Williams 1934).
31. State *ex rel.* Boles v. Groce, 152 Tenn. 566, 280 S.W. 27 (1926).

road commission is to levy taxes to raise funds for the commission. Service on the commission is then not incompatible with service as a justice of the peace. Out of the two cases a general rule is beginning to emerge: a justice of the peace may, without vacating his office, become a public employee, if the county quarterly court of which the justice is a member does no more than levy taxes for support of the employing agency.

Officers De Facto: Where members of a county beer board have been improperly appointed, what is the proper method of attacking their authority to act? In *Evers v. Hollman*[32] the county beer board had been appointed by the county judge instead of by the county court as required by statute.[33] The board revoked plaintiff's license to sell beer, and she sued out a common-law writ of certiorari and took the case to the circuit court where she challenged the authority of the beer board to act. The Supreme Court, reversing the circuit court, held that the authority of the board could not be thus challenged in a collateral proceeding.

The holding of the court seems clearly correct. A person is a de facto officer where the duties of his office are exercised "under color of a known . . . appointment, void because . . . there was a want of power in the . . . appointing body."[34] This definition would seem to fit the beer board perfectly. The Tennessee Supreme Court has previously ruled in an exhaustive opinion that the acts of de facto officers with respect to third persons may not be collaterally attacked.[35] The proper proceeding to challenge the authority of the beer board would seem to be a proceeding in the nature of quo warranto.[36]

The petitioner in *Evers v. Hollman* may well have been misled in her procedure by the case of *Crowe v. Carter County*[37] where the petitioner sought to enjoin the action of a beer board on the ground that the board had not been properly elected. The court properly ruled that injunction was not the appropriate remedy, but appeared to base its holding on the ground that the statute[38] specifically provides that certiorari shall be the sole method of review of the action of a beer board. The proper basis for the holding is the same as that in the *Evers* case—an attack upon the status of a board is not a proceeding to review the action of the board. A review on the merits of board action is obtained solely by certiorari; quo warranto is the proper method of attacking the status of the members of the board.

32. 268 S.W.2d 97 (Tenn. 1954).
33. TENN. CODE ANN. § 1191.14 (Williams 1934).
34. 43 AM. JUR., *Public Officers* § 471 (1942).
35. Ridout v. State, 161 Tenn. 248, 30 S.W.2d 255 (1930).
36. TENN. CODE ANN. § 9336 (Williams 1934); State *ex rel.* Pike v. Hammons, 163 Tenn. 290, 43 S.W.2d 395 (1931).
37. 195 Tenn. 659, 263 S.W.2d 509 (1953); Sanders, *Administrative Law—1954 Tennessee Survey*, 7 VAND. L. REV. 733, 740 (1954).
38. TENN. CODE § 1191.14 (Official Supp. 1950).