INDIANA ECONOMIC COUNCIL: Power and authority of Planning Commission to regulate, restrict or limit sales and transfer of real estate irrespective of use intended.

March 29, 1944.

Opinion No. 32

Hon. Raymond L. Pike, Director,
Indiana Economic Council,
609 Board of Trade Building,
Indianapolis 4, Indiana.

Dear Mr. Pike:

This will acknowledge receipt of your recent letter requesting my interpretation of certain provisions of the City Plan Commission Act, being Chapter 268, Acts 1935 (Burns' R. S. 1943 Pocket Supplement, Sections 48-2212 et seq).

Your letter states that the city of Columbus, Indiana, has adopted a city plan commission and is preparing to enact a zoning ordinance, master regulations, maps, etc., relative to such zoning ordinances as provided by Chapter 268, Acts 1935. Your letter further states that within the corporate limits of the city of Columbus, Indiana, within the area to be included within the zoning ordinance, master regulations, etc., there are approximately one hundred lots of various sizes that were not parts of any platted subdivision or addition to the city. These lots are described by metes and bounds and as parts of certain sections, townships and ranges, and many of these lots have heretofore been improved and have been bought, sold and occupied as residences, and will continue to be so bought, sold and occupied. That in addition to such parcels of real estate within such area, aforesaid, there are also approximately five hundred or more parcels of real estate where fractional parts of platted lots have been improved, bought, sold and occupied as residence properties and will so continue to be bought, sold and occupied as residence properties.

Upon such a statement of facts your letter submits the following questions, to-wit:

"(1) After the passing of the proposed zoning ordinance and the recording of the master regulations, will it not be necessary for the Planning Commission to approve the conveyance of any now improved unplatted lots in the City? and,
(2) Under the present statute, would the City Plan Commission have authority to approve the conveyance of such improved unplatted lots, or fractional parts of platted lots that have heretofore been sold, conveyed and improved and now exist as inhabitable premises?

An answer to these questions requires an interpretation and consideration of Section 9 and 12 of Chapter 268, Acts 1935, (Burns' Pocket Supplement, Sections 48-2220 and 48-2223 respectively).

Section 48-2220, being Section 9 of Chapter 268, Acts 1935, reads as follows:

"Whenever a city plan commission shall have adopted a major street plan or thoroughfare plan of the territory within its subdivision jurisdiction or part thereof, and shall have filed a certified copy of such plan in the office of the county recorder of the county in which such territory or part is located, then no plat of a subdivision of land within such territory or part shall be filed or recorded until it shall have been approved by such commission, and such approval shall have been entered in writing on the plat by the president and secretary of the commission, and no conveyance of nor agreement to convey any parcel of ground of less than two (2) acres, within such territory or part, shall be filed or recorded until the written approval of such commission shall have been entered thereon, unless said parcel of ground comprises at least one (1) entire lot, as recorded, located within a subdivision already approved, according to law, and recorded in the office of the said county recorder: Provided, however, That any commission now existing may exercise jurisdiction over the subdivision of all territory within the area and under the provisions specified in section eight (Sec. 48-2208), Chapter 209 of the Acts of 1921, until such major street or thoroughfare plan is adopted." (Our emphasis.)

Section 48-2223, being Section 12, Chapter 268, Acts 1935, reads as follows:

"Whoever, being the owner or agent of the owner of any land located in a subdivision within the platting
jurisdiction of the plan commission of any city, as described in section eight (Sec. 48-2219) of this act, transfers, or sells, or agrees to sell, or negotiates to sell, any land by reference to or exhibition of, or by other use of a plat of a subdivision, before such plat has been approved by the commission and recorded or filed in the office of the appropriate county recorder, or whoever, being the owner or agent of the owner of any parcel of ground of less than two (2) acres within said territorial subdivision jurisdiction, not located within a subdivision approved according to law and recorded in the office of the appropriate county recorder, or, if so located, not comprising at least one (1) entire lot, as recorded, transfers, or sells, or agrees to sell, or negotiates to sell, such parcel of land without first obtaining the written approval of the city plan commission by its indorsement on the instrument of transfer, or contract of sale or other agreement to transfer, shall forfeit and pay a penalty of not less than one hundred dollars ($100) nor more than three hundred dollars ($300) for each lot or parcel so transferred, or sold, or agreed or negotiated to be sold; and the description of such lot or parcel, by metes and bounds, in the instrument of transfer, or other document used in the process of selling or transferring, shall not exempt the transaction from such penalties or from the remedies herein provided. Such city, through its attorney or other official designated by its council, may enjoin such transfer, or sale, or agreement, by action for injunction brought in any court of equity jurisdiction, or may recover the said penalty by a civil action in any court of competent jurisdiction.”

The question is therefore presented as to what right, power or authority is vested in the common council of a municipal corporation under the above statutes to restrict, limit and interfere with the right of the owners of the real estate above described to sell, convey and transfer their respective pieces of real estate without first securing the approval of the planning commission to such sale, conveyance and transfer.

In answering these questions the following rules of statutory construction are applicable, to-wit: statutes and ordinances
should be given a construction which will not give them a retroactive effect, especially where such a construction will either destroy or impair vested property or contractual rights. Consequently such ordinances and statutes should be construed, if possible, as applying only to future cases, that is as having no retrospective operation. In fact, prospective operation is to be presumed. Crawford Statutory Construction, Sec. 278.

Furthermore, there is a well recognized and defined difference and distinction between the ownership of real estate and the inherent incidental rights incident thereto, and the right to use such real estate for certain purposes. One of the principal inherent rights incident to the ownership of real estate is the right of alienation. This right is stated in the following language, in Volume 42, American Jurisprudence, page 229, as follows:

“One of the principal elements of property is the right of alienation or disposition. * * * Every interest in land is the subject of sale and transfer. * * * To such an extent is this true, that restraints on alienation are generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. * * *”

In the case of State ex rel, Baldwin v. Moore, 7 Wash. 173, 34 Pac. p. 461, the law with reference to the right to alienate property is stated as follows:

“* * * The right to alienate property is essential to its use and enjoyment, as well as the right to acquire it, and both are constitutional rights. It can not be said that this law does not interfere with the right to dispose of and acquire property, for unless the deed of transfer is recorded a subsequent purchaser for value without notice will take the title, and this is made so by other legislative enactments, and thus the original purchaser is placed without the protection of the law. Surely, such a state of affairs will most seriously interfere with and impair the right to sell and acquire; and when an unjust, illegal burden or restraint is imposed thereon, it is an unwarranted interference.”
In the case of Northern Pennsylvania etc. v. Pennsylvania etc. Commission, 333 Penn. 265, 5 Atlantic (2d), 133 on p. 134, the Supreme Court of Pennsylvania says:

"* * * The free alienation of property is an inherent right of the owner under our customs, law and constitutions, subject only to restraint if against the public interest. * * *.”

Finally, on the same subject, we quote the Supreme Court of Indiana in the case of State ex rel. Corwin v. The Indiana etc., 120 Ind. 575 on 583, wherein Judge Elliott says:

"* * *: It is not in the power of the Legislature to prevent one citizen from buying or another from selling property. The rights of property are not subject to such absolute legislative control. * * *.”

In addition to the above authorities I also call your attention to the cases of Pelham etc. v. Switzer, 224 N. Y. Supp. 56, and Inspector etc. v. Nelson, 257 Mass. 346, 153 N. E. 798, which hold that vested property rights in real estate are protected by both the State and Federal Constitutions.

It is well settled that a statute or ordinance may be valid and constitutional as applied to certain set of facts and be invalid and unconstitutional as applied to another set of facts.

Dahnke-Walker etc. v. Bondurant, 257 U. S. 282 on p. 289;
State v. Ferguson (1944) — Ohio —, 52 N. E. (2d) 980 on 983.

Zoning ordinances have been upheld as a valid exercise of the police power and as free from conflict with any provisions of the State or Federal Constitutions, where the regulations imposed by such ordinance have a reasonable tendency to promote the public health, public safety and public welfare, and regulate only the use of real estate. See Anno. 54 A.L.R. on 1030 to 1068.

It will be observed that such ordinances usually are drafted so as to apply, and refer only, to the use made of such property. In fact, I have not found a single authority which holds that such an ordinance can limit, restrict or prevent the right
to alienate real estate. Applying the foregoing principles of law to the questions propounded in your letter, it is my opinion that each of the questions should be answered in the negative. I am unable to see any reasonable connection between the public health, public safety, public welfare and an absolute right to sell, transfer and convey real estate, irrespective of the use to which such real estate may be devoted.

Therefore, it is my conclusion that the provisions found in Sections 48-2220 and 48-2223 (Sections 9 and 12, Chapter 268, Acts 1935), attempting to prohibit the right to sell, transfer and convey real estate without first securing the consent and approval of the planning commission to such sale, transfer and conveyance, are unconstitutional, null and void as constituting an unwarranted restriction and limitation upon the inherent property rights of the owners of the respective parcels of real estate referred to.

STATE CHEMIST: The action of an administrative officer, pursuant to authority delegated by statute, in denying the license to sell merchandise in this State, is subject to judicial review.

March 29, 1944.

Opinion No. 33

Hon. F. W. Quackenbush,
State Chemist,
c/o Purdue University,
Lafayette, Indiana.

Dear Sir:

Your letter of March 20, 1944, received requesting an official opinion, supplementing a previous opinion of this office under date of March 14, 1944, construing Ch. 281, Acts of 1937, same being Section 15-1901, et seq., the particular question now presented being as follows:

"When the State Chemist is satisfied that the claims are misleading and has refused to issue a permit, can he expect the courts to support him under the Act?"

In the case of Warren v. Indiana Telephone Company (1939), 217 Ind. 93, the court, in determining its jurisdiction