Opinion No. 60-70

April 12, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Mr. John M. Lenko City Attorney Las Cruces, New Mexico

QUESTION

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1. To which subdivisions do the words "all new subdivisions" refer, as used in the last paragraph of Article XIII-A of Las Cruces City Ordinance No. 355?

2. Is the following portion of Article XIII-A, Las Cruces City Ordinance No. 355 constitutional:

"They will, also, be required to set aside eight (8) percent of the area for park, play and school ground purposes. This item shall be paid in cash value if these park, play and school grounds are not located in the subdivision."

CONCLUSIONS

1. The words "all new subdivisions," as used in the aforementioned ordinance, pertain only to those new subdivisions for which approval is sought after the effective date of said Ordinance No. 355.

2. No.

OPINION

*{*428}* **ANALYSIS**

Section XIII-A of Las Cruces City Ordinance No. 355, states in part as follows:

"All new subdivisions shall be checked against the city master street plan which is on record. Subdividers must provide for the land needed for major streets on their land as shown on the master plan."

The plain meaning of the words "all new subdivisions" is that they refer only to those new subdivisions for which approval is sought after the effective date of said ordinance. That the ordinance was intended to be prospective in application, and not retroactive, is clear from the language in other portions thereof. or example, the immediately preceding paragraph of Article XIII-A provides for minimum street widths in "newly subdivided areas." Article XIII, part A (10) declares that said article shall have no

application "to a building in existence of the time of enactment of this ordinance." Furthermore, where statutory language is capable of two interpretations, it should be construed in the manner which will avoid its being subject to a constitutional objection.

The more important and the more difficult problem is that raised by the language quoted in *{*429}* Question No. 2, above; the issue being the constitutionality of the required donation of 8% of the subdivided land, or its cash value.

At the offset, it must be remembered that municipal corporations have only such powers and authority as are granted them by the state. They have no independent sovereignty. "Municipalities are creatures of the laws of the state of which they are a part and their powers are derived solely therefrom" **Munro v. City of Albuquerque, 48 N.M. 306, 150 P. 2d 733.**

It is clear that municipalities have the power under Sections 14-2-1, et seq., N.M.S.A., 1953 Compilation, to enact ordinances providing for the zoning, laying out platting and establishing of streets, alleys, playgrounds, parks and other features of such municipalities. There seems to be little question but that the city may, in connection with reasonable exercise of the police power, adopt standards governing the approval of subdivision plats. Such standards may include requirements for placement of utilities, for the location of streets, for minimum lot sizes, for securing safety from fire, flood, pollution or other dangers or other requirements necessary to the orderly, safe, healthy development of the city. However, we feel that the specific requirements under consideration cannot be justified as a reasonable exercise of the police power, for reasons which will be enumerated. We are not called upon to consider, nor do we presume to decide, whether a constitutional ordinance can be enacted requiring the dedication of land or the donation of its cash equivalent for park, play or school ground purposes. We merely conclude that the portion of the subject ordinance herein considered is constitutionally defective.

There are two provisions of the New Mexico Constitution which are germane to the present discussion and should be set forth. **Article II, Section 18,** of the State Constitution provides:

"No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied the equal protection of the laws."

Article II, Section 20 of the Constitution provides:

"Private property shall not be taken or damaged for public use without just compensation."

It should be borne in mind that the constitutional provision that private property shall not be taken for public use without just compensation (Article II, Sec. 20) applies only to property taken under the power of eminent domain. McQuillin, **The Law of Municipal Corporations** (3d ed.), § 32.05. However, the municipality is immune from the

constitutional requirement of compensating for injury to or "taking" of property only in the reasonable exercise of the police power. While "police power" is not susceptible of exact definition there are accepted limitations upon its exercise and prerequisites to its application, which we feel are not contained in the ordinance under consideration. The police power's inherent interference with private property rights is justified solely on the ground and only to the extent that it is **required** or **necessary** in order to advance the best interests of society in general. It must appear that the means adopted are reasonably necessary for the accomplishment of the desired purpose, and not unduly oppressive upon individuals. It is not an infinite and illimitable power.

"The police power ends precisely at the point where the reason for its exercise ends . . . it is limited, broadly speaking, to reasonable requirements, necessities or exigencies. While an exercise of the police power may be proper in a general sense, it may be unreasonable, confiscatory and hence, invalid, as applied in a particular case or to particular *{*430}* property." McQuillin (supra), § 24.09.

We feel that the ordinance under consideration exceeds the proper limits of reasonable exercise of police power. It is subject to the criticism that in particular cases or as applied to some subdivided property, it may be unreasonable, unnecessary and confiscatory. The subject ordinance does not take into consideration the prospective character of the subdivision, whether dense residence, open residence, business or industrial. It exacts the same eight percent toll without regard to the necessities of the particular subdivision. In other words, it is arbitrary in that it is not controlled by the actual **requirements** or **necessities** of the particular situation.

Furthermore, the ordinance does not provide that the land dedicated or the money donated be used for park, play and school ground purposes within the subdivisions or within a reasonable distance of such subdivision. Therefore it does not appear that the ordinance could be described as a regulation enacted in the reasonable exercise of the police power. It could be more reasonably regarded as a general taxation measure or as an attempt to exercise the powers of eminent domain.

Since the ordinance fails to qualify as a reasonable exercise of the police power, it must be deemed to authorize an unconstitutional taking of private property for public use without compensation.

"The question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or of the power of eminent domain. If the act is a proper exercise of the police power, the constitutional provisions that private property shall not be taken for public use, unless compensation is made, is not applicable. However, under the guise of the police power, there cannot be a taking which can be accomplished only by the power of eminent domain." McQuillin, (Supra) § 32.27.

By: F. Harlan Flint

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