Montana Law Review

Volume 24
Issue 2 *Spring 1963*

Article 9

January 1963

Doull v. Wohlschlager, 377 P.2d 758 (Mont. 1963)

Kemp J. Wilson

In the instant case, under the rationale of the dissent, it would appear that the three factors considered heretofore are present. The source of the income, *i.e.*, the act which generates it, was the entry of the taxpayer into the contest. Control over the source of the income is found in the taxpayer's designation of income to his daughter. Finally, the taxpayer received economic worth by designating his daughter as the person to receive the income.

However, the rationale of the dissent fails when the *Horst* case is read in connection with *Poe v. Seaborn*.[30] In the *Seaborn* case Mr. Justice Roberts stated that "The very assignment in that case (referring to the *Earl* decision) was bottomed on the fact that the earnings would be the husband's property else there would have been nothing on which it could operate.'"[31] This qualification of the *Earl* case was more explicitly stated in *Helvering v. Horst* where Mr. Justice Stone, writing for the majority, said that:[32]

> [T]he rule that income is not taxable until realized has never been taken to mean that the taxpayer . . . *who has fully enjoyed the benefit of the economic gain represented by his right to receive income,* can escape taxation because he has not himself received payment of it from his obligor. (Emphasis supplied.)

It is submitted that the majority is correct in its conclusion that a taxpayer must have a right to receive income which he generates before he can be taxed upon it. If a taxpayer has no right to receive the income, he does not have sufficient control over it to justify taxing him. He could in no way use the income for his own economic benefit. Further, this position will not deprive the United States of revenue inasmuch as someone will be taxed upon the income in such situations. Under the facts in the instant case, it would appear that the daughter is taxable on the income which she received.[33]

HARRY A. HAINES

FAILURE TO APPEAL FROM REVERSAL OF VARIANCE GRANTED FOR NONCONFORMING USE UNDER ZONING ACT PRECLUDES CLAIM OF AGRICULTURAL EXEMPTION.—Pursuant to the Montana County Planning and Zoning Act,[1] defendant and other landowners signed a zoning petition giving the Board of County Commissioners authority to creat a zoning district. The district

[30] *Supra* note 10.
[31] Poe v. Seaborn, 282 U.S. 101, 117 (1930).
[32] *Supra* note 6 at 116.
[33] The daughter does not come within the exception of section 74 of the INT. REV. CODE. The exception in that section allows Nobel prize winners and Pulitzer prize winners tax free income. See, H. Rept., No. 1337, 83d Cong., 2d Sess., pp. 11, A27 (1954); S. Rept., No. 1622, 83d Cong., 2d Sess., pp. 13, 179 (1954). Although the daughter falls within a different income bracket than another with higher income, in theory the United States is not deprived of the revenue.

[1] REVISED CODES OF MONTANA, 1947, §§ 16-4101 to 4107. Hereinafter REVISED CODES OF MONTANA are cited R.C.M.

was established and zoned as residential; however, the ordinances pertaining to the district also permitted agricultural uses. At the time the district was established, defendant was operating an auto repair shop and grazing horses on his land. Three years thereafter, defendant petitioned the Board of County Commissioners for a variance from the district ordinances to allow him to construct a garage for his repair business. The Board of County Commissioners granted defendant's petition. Plaintiffs, other landowners within the district, notified defendant that they were appealing the Board's decision to the district court.[2] Defendant erected the building pending the filing of the appeal. The district court reversed the board, thus denying the variance. Defendant failed to appeal, but began using the building solely for agricultural purposes. Plaintiffs then petitioned the district court for a mandatory injunction to force removal of the building. On the basis of a decision of another district court that the County Planning and Zoning Act was unconstitutional, the district court ruled that the question was moot. The Montana Supreme Court reversed and remanded both cases, holding that the Act was constitutional.[3] On remand, the district court held that since defendant's lands were being used for grazing, they were exempt from the district ordinances inasmuch as the County Planning and Zoning Act states that zoning districts shall not regulate grazing and agricultural lands.[4] Upon rehearing to the Montana Supreme Court, *held*, reversed. A determination of defendant's right to claim the agricultural exemption from the County Planning and Zoning Act was inherent in the reversal of the variance, and that determination is now *res judicata*. *Doull v. Wohlschlager*, 377 P.2d 758 (Mont. 1963) (Mr. Justice Doyle dissented on other grounds.[5] Mr. Justice Adair dissented without opinion).

Montana's County Planning and Zoning Act, with its exemption of agricultural lands from regulation by zoning authorities, is not unique legislation.[6] The purpose of zoning legislation is generally stated by the enabling statutes in terms of furthering the public health, safety, and welfare.[7] The court in the instant case noted that one of the primary functions of the County Planning and Zoning Act is to promote the orderly and planned expansion of municipalities.[8] This interpretation is consistent with the view that an essential purpose of zoning laws is to stabilize property uses.[9] An examination of the construction to be given the

[2]R.C.M. 1947, § 16-4105 provides in part, ". . . (A)ny person aggrieved by any decision of the commission or the board of county commissioners, may, within thirty (30) days after such decision or order, appeal to the district court in the county in which the property involved, is located."

[3]City of Missoula v. Missoula County, 139 Mont. 256, 362 P.2d 539 (1961).

[4]R.C.M. 1947, § 16-4102 provides in part, "No planning district or recommendations adopted under this Act shall regulate lands used for grazing, horticulture, agriculture or for the growing of timber."

[5]Mr. Justice Doyle based his dissent on the fact that defendant had constructed the building in the two days interval after the granting of the variance and before the filing of the appeal with the district court.

[6]See, *e.g.*, IDAHO CODE ANN. §§ 31-3803 to 3804 (1961); N.D. CENTURY CODE ANN. §§ 11-33-01 to 20; WYO. STAT. ANN. §§ 18-289.1 to .9 (1961).

[7]*Ibid.*

[8]Instant case at 763.

[9]Smith v. F. W. Woolworth Co., 142 Conn. Supp. 88, 111 A.2d 552 (Sup. Ct. 1955); Schmidt v. Bd. of Adjustment of City of Newark, 9 N.J. 405, 88 A.2d 607 (1952).

exemption of agricultural lands from zoning regulation must be pursued with these purposes in mind.

The court in the instant case stated that inasmuch as the County Planning and Zoning Act does not distinguish agricultural lands from those used for other purposes in defining the physical area of districts, agricultural lands can be included in county zoning districts.[10] If a zoning district is established so that it surrounds agricultural land, to say that such land cannot be included in zoning districts would lead to the conclusion that a later use of the land for purposes foreign to agriculture would not be subject to the district regulations. This would defeat any stabilization of uses that the regulations had accomplished.[11]

Once it is established that agricultural lands can be included in zoning districts, the treatment which the legislature intended to be given such lands must be determined.

Property uses within zoning districts are generally classified in one of four basic property-use categories; as either permitted uses, nonconforming uses, variances, or exceptions.[12]

Permitted uses are the specified permissible uses of land within the zoning district.[13] Such uses need not be in existence at the time the ordinance is adopted, and the only prerequisite to the construction of buildings in conjunction with such uses is the issuance of a permit by the County Planning and Zoning Commission.[14] The district ordinance involved in the instant case enumerates in detail eleven uses which can be lawfully conducted within the district, and *it will be noted that agriculture is among them.* These eleven uses are "specifically permitted" by the zoning ordinance.[15]

While technically any use which does not comply with the zoning regulations is a nonconforming use, courts have used this term to designate those uses in existence when the zoning district was created.[16] The County Planning and Zoning Act provides, as do other zoning enabling statutes,[17] that nonconforming uses may be continued after the zoning district is established.[18] In compliance with the County Planning and Zoning Act, the ordinance in the instant case provides that nonconforming uses may be continued, and also provides a two-year grace period during which the nonconforming use may be abandoned without losing the right to continue such use.[19]

[10] *Supra* note 8.
[11] For example, if a 10 acre corn field was located within a 40 acre zoning district which had been zoned residential, and the 10 acres were later used as the site of a factory, the purposes for which the district had been established would be defeated.
[12] Tustin Heights Ass'n. v. Bd. of Supervisors, 107 Cal. App. 2d 617, 339 P.2d 914, 919 (Dist. Ct. App. 1959).
[13] *Ibid.* See, *e.g.*, instant case at 764.
[14] R.C.M. 1947, § 16-4105.
[15] Instant case at 764-65.
[16] See, *e.g.*, Bd. of County Comm'rs of County of Sarpy v. Petsch, 172 Neb. 263, 109 N.W.2d 388, 391 (1961).
[17] *Supra* note 6.
[18] R.C.M. 1947, § 16-4102.
[19] Missoula County, Mont., County Planning and Zoning District Number One, Ordinance 3, May 16, 1955. Instant case at 765.

Variances, the third property-use category, embrace uses which were not in existence when the zoning district was established, and which are not permitted by the zoning ordinances. The Board of County Commissioners may grant a variance from the district ordinances in order to allow a particular use not in existence when the zoning district was created, if a strict enforcement of the ordinances would work unnecessary hardship on the landowner, and such use would not be contrary to the public interest.[20] The granting of variances lies within the discretion of the Board. This discretion is necessarily broad and unrestricted as the legislature cannot frame a definite rule to cover every case of hardship.[21]

The fourth property-use category is composed of "exceptions" or "conditional uses."[22] An exception differs from a variance in that:[23]

> In the case of an exception, the [zoning] law itself has forseen the possibility that a departure from its provisions may be desirable if certain specified facts or circumstances are found to exist. A variance, on the other hand, involves an overriding of the law itself, based upon a finding that the law as written would inflict unnecessary hardship on the property owner.

It is apparent that if agriculture is classified as a permitted use, agricultural operations could be instituted within a zoning district at any time, subject to the issuance of a building permit by the Planning and Zoning Commission for the construction of buildings to be used in conjunction with the agricultural use.

If agriculture is classified as a nonconforming use, several policy questions are presented concerning technical changes in agricultural operations. For example, when a wheat farmer determines that his land would return a higher yield by using it to raise livestock, can he erect a barn on the land if the land was used for wheat raising when the district was created? Or, can a dairy farmer construct barns to expand his operations on land where there were no barns when the zoning ordinances were encated?

Even though one purpose of zoning is to eventually eliminate nonconforming uses by restricting their expansion, it is recognized that when a change in a nonconforming use is sought, the determinative question is, "(W)hether the change is reasonably required to preserve the original right [to continue nonconforming use], or would [such change] create some new or additional right, exercise of which would be detirmental to the public or other property owners."[24] Courts in other states have impliedly recognied that the wide diversity of uses inherent in the general field of agricultural will not allow the application of standard variance requirements, and have liberally granted variances to allow the expansion or adoption of the facet of agriculture which the individual

[20]R.C.M. 1947, § 16-4103.
[21]Freeman v. Bd. of Adjustment of City of Great Falls, 97 Mont. 342, 34 P.2d 534 (1934).
[22]These terms are used interchangeably by the courts.
[23]Application of Emmett S. Hickman Co., 49 Del. 13, 108 A.2d 667, 673 (1954). As the Montana County Planning and Zoning Act does not provide for the granting of exceptions, no further mention of them will herein be made.
[24]Ricciardi v. Los Angeles County, 115 Cal. App. 2d 569, 252 P.2d 773, 778 (Dist. Ct. App. 1953).

farmer has determined is best suited to his land.[25] The right to continue the nonconforming agricultural use is preserved by allowing changes within a broad definition of "agriculture."[26] The Montana Supreme Court has given the term "agriculture" a broad definition in respect to Montana's homestead laws.[27] A similar treatment of the term could easily be applied to the County Planning and Zoning Act if it is recognized that Montana's farmers should not be hindered be zoning regulations in attempting to realize the maximum agricultural potential of their land.

The provisions of the County Planning and Zoning Act do not in themselves disclose whether the legislature intended that agriculture be placed in a specific use category. No mention is made of agriculture in the purpose of the Act as stated by the legislature.[28] and the exemption itself provides no clue to legislative intent.[29]

However, following the adoption of the County Planning and Zoning Act, the City-County Master-Plan Act,[30] a more comprehensive plan for land use control through the joint efforts of Montana's cities and counties, was enacted. The Master-Plan Act is indicative of the legislature's recognition of the needs of agriculture in respect to zoning legislation. Even though the Montana Supreme Court has ruled the Master-Plan Act to be an unconstitutional delegation of legislative powers to counties,[31] this does not render an examination of it futile in determining legislative policies concerning agricultural lands with respect to zoning laws.[32]

The purpose of the City-County Master-Plan Act was stated to be, "(T)o encourage local units of government . . . to plan for the future development of their communities to the end that . . . the needs of agriculture . . . be recognized in future growth."[33]

The legislative limitations of the City-County Master-Plan Act provided that, "Nothing in this Act shall be deemed to authorize an ordinance, resolution, rule, or regulation *which would prevent the complete use, development, or recovery* of any mineral, forest, or agricultural resources by the owner thereof."[34] (Emphasis supplied.)

The agricultural exemption contained in the City-County Master-Plan Act does not differ in substance from the County Planning and Zon-

[25]Stout v. Mitschele, 135 N.J.L. 406, 52 A.2d 422 (Sup. Ct. 1947); Moulton v. Bldg. Inspector of Milton, 312 Mass. 195, 43 N.E.2d 662 (1942).
[26]*Ibid.*
[27]Agriculture was defined by the court to be, "(T)he art or science of cultivating the ground, especially in fields or in large quantities, including the preparation of the soil, the planting of seeds, the raising and harvesting of crops, and the rearing, feeding, and management of livestock; tillage; husbandry; farming." De Fontenay v. Childs, 93 Mont. 480, 19 P.2d 650, 651 (1923).
[28]R.C.M. 1947, § 16-4102 mentions only the furtherance of the health, safety, and general welfare of the county's residents.
[29]*Supra* note 4.
[30]R.C.M. 1947, §§ 11-3801 to 3858, as amended.
[31]Plath v. Hi-Ball Contractors, Inc., 139 Mont. 263, 362 P.2d 1021 (1961). R.C.M. 1947, § 11-3801 provides in part "(T)hat additional powers be granted legislative bodies of cities and counties to carry out the purposes of this Act." The court stated that the legislature intended, by these words, to grant legislative powers to counties, and therefore the Act was unconstitutional.
[32]Baird v. Hutchinson, 179 Ill. App. 435, 53 N.E. 567 (1899).
[33]R.C.M. 1947, § 11-3801.
[34]R.C.M. 1947, § 11-3853, as amended.

ing Act exemption, but is only a more explicit statement of legislative policy concerning the conservation of agricultural lands within zoning districts. That is, zoning ordinances are *not to regulate*[35] agricultural uses either by prohibiting such uses entirely, or by allowing only certain specified agricultural uses. Thus, the agricultural exemption is a statutory guarantee that Montana's farmers and ranchers will not be denied the right to develop their land to its fullest potential.

The Montana court has recognized that the legislature intended the agricultural exemption to serve as a *guideline*[36] for zoning authorities in adopting district ordinances. This guideline is complied with so long as agriculture is not prohibited either wholly or in part by the ordinances. Therefore, the treatment to be given agricultural uses should be left to the discretion of the county planning and zoning board and the board of county commissioners. In characterizing agriculture as either a nonconforming use or a permitted use, the zoning authorities will have to balance the interests of agricultural land owners and the interest of the public in the conservation of agricultural land against the interest of the public in the orderly and planned expansion of urban and suburban development.

The court in the instant case stated that it was unnecessary to pass upon the construction to be given the agricultural exemption. It felt that a determination of defendant's right to claim the exemption was inherent in the district court's reversal of the variance granted by the Board, and that that determination is now *res judicata*.[37] However, it will be remembered that the variance had been granted for a commercial and not for an agricultural use.

It is difficult to follow the reasoning of the court in reaching its conclusion, for the testimony the court cited in support of the reversal of the variance[38] was taken at the trial concerning the mandatory injunction.[39] Also, it is submitted that the court incorrectly applied the doctrine of *res judicata* to defendant's claim of the agricultural exemption.

The Montana court on prior occasions has determined the extent to which a judgment is a bar to a subsequent action.[40] A distinction has been drawn between a judgment as an absolute bar when the second action is upon the same claim or demand, and a judgment as an estoppel as to particular facts when the subsequent suit is upon a different claim or demand.[41] However, the only statement as to the scope of the doctrine of *res judicata* which has been repeatedly used by the Montana court is that "A judgment not appealed from is conclusive as to all issues raised by the

[35]R.C.M. 1947, § 16-4102 provides that district regulations shall not regulate lands used for agricultural purposes. "'To regulate' means to adjust; to govern by rule; to direct or manage according to certain standards or laws; to subject to rules, restrictions or governing principles." State ex rel. State Bd. of Equalization v. Glacier Park Co., 118 Mont. 205, 164 P.2d 366, 370 (1945).

[36]*Supra* note 3.

[37]Instant case at 764.

[38]*Ibid.*

[39]Transcript on Appeal, pp. 131, 139.

[40]See, *e.g.*, Missoula Light and Water Co. v. Hughes, 106 Mont. 355, 77 P.2d 1041 (1938); Brennan v. Jones, 101 Mont. 550, 55 P.2d 697 (1936) (and cases cited therein).

[41]Brennan v. Jones, 101 Mont. 550, 55 P.2d 697, 700 (1936).

pleadings, actually litigated and adjudged, as shown on the face of the judgment, and necessarily determined in order to reach the conclusion announced.'"[43]

If it is recognized that agriculture was a *permitted use* under the ordinances in the instant case, and the zoning ordinance so provided, then defendant's claim of the agricultural exemption should not be barred by the doctrine of *res judicata* merely because the decision reversing the variance to construct the building for a *nonconforming use* was not appealed.

The issue of defendant's right to claim the agricultural exemption was not raised in the petition for review of the granting of the variance, nor in the answer thereto,[44] and it was not mentioned in the findings of fact or conclusions of law made by the court in its reversal of the order of the county commissioners granting the variance.[44]

Further, defendant's right to claim the agricultural exemption was not necessarily determined in order to reach the conclusion that the variance was improperly granted.[45]

> In a proceeding for a variance any issue as to whether, as a matter of law, the contemplated use of a petitioner's property is forbidden or allowed by the zone ordinance is collateral. It is neither relevant to the question involved, nor is it within the scope of the issue properly before the board or court for decision. For implicit in every variance proceeding is the justified assumption that the ordinance prohibits the proposed use.

The only issue properly before zoning authorities or the courts upon an application for a variance on the ground of unnecessary hardship is whether from the facts presented the property owner will suffer a hardship which is exceptional, special or unique when contrasted with the hardship suffered by other owners in the district.[46]

It has been stated that where an application for a variance has been made on the erroneous assumption that the use sought is prohibited by the zoning ordinances, and the granting of the variance is later reversed with no appeal taken, such reversal is not *res judicata* when the use is later correctly claimed as a use permitted under the ordinances.[47] This position follows from the types of relief a landowner may obtain in respect to permitted uses.

A variance can be granted by the zoning authorities as a matter of discretion when a building in furtherace of a permitted use is sought, but this relief is not exclusive.[48] It is concurrent with the relief given by the ordinance itself as an absolute right in the form of a permitted use, and a denial of one form or relief will not bar the other.[49]

[43]Missoula Light and Water Co. v. Hughes, *supra* note 40 at 1047.
[44]Transcript on Appeal, pp. 75, 77.
[44]Transcript on Appeal, pp. 80-85.
[45]Kaufman v. Glen Cove, 180 Misc. 349, 45 N.Y.S.2d 53, 62 (Sup. Ct. 1943), *aff'd mem.*, 266 App. Div. 870, 42 N.Y.S.2d 508 (App. Div. 1943).
[46]*Ibid.*
[47]Application of Furman Ave. Realty Corp., 275 App. Div. 731, 86 N.Y.S.2d 429 (Sup. Ct. 1949), *rev'd on other grounds* 299 N.Y. 768, 87 N.E.2d 676 (1949), *affirming* 275 App. Div. 779, 87 N.Y.S.2d 693 (1949).
[48]*Supra* note 45.
[49]*Supra* note 45.

Therefore, a reversal of the variance in the first action in the instant case should not prevent defendant from claiming the agricultural exemption, as the district ordinances specifically included agriculture as a permitted use.[50]

The holding in the instant case thta the reversal of the variance is *res judicata* as to defendant's claim of the agricultural exemption can be reconciled with the above reasoning only by interpreting the agricultural exemption as meaning that agriculture is to be treated as a nonconforming use within zoning districts. Viewed in this light, the holding of the court is correct. If agriculture is a conconforming use, a variance would have to be granted before a building could be constructed in furtherance of such use. In that event defendant's claim of the agricultural exemption would be barred by failure to appeal the first decision reversing the granting of the variance.

It is submitted that the court in the instant case, in its zeal to promote the stabilization of uses within county zoning districts, has failed to recognize the intent of the legislature, as expressed by the agricultural exemption, to conserve agricultural lands. It has ignored the measure of discretion to categorize agricultural uses given to county zoning authorities by the legislature, for the ordinance in the instant case expressly categorized agriculture as a permitted use, and finally the court has denied the right of the county zoning authorities to adopt such a classification.

The court has set a dangerous precedent, which may result in a judicial amortization of not only agricultural uses, but also the other uses included in the County Planning and Zoning Act exemption clause.

KEMP J. WILSON

[50] *Supra* note 45. This also means that if defendant had originally applied for and received a permit to construct the building in conjunction with a permitted use and this was reversed on appeal, such reversal would not bar a later granting of a variance by the zoning authorities. Gillis v. Zoning Bd. of Appeals of the Town of Greenburgh, 27 Misc. 2d 1092, 212 N.Y.S.2d 510 (Sup. Ct. 1961).