

6  
Remanded

53.

45 sides

Frank C. Bostock  
and Edgar M. Noel

vs

Conway W. Somms  
and others  
Judges of the Appeal  
Tax Court of  
Baltimore City

argued before

Full Bench except  
Briscoe (J)

Opinion by Jones (J)

to be reported

Filed June 19, 1902.

This case originated in a petition for a mandamus filed in the Court of Common Pleas of Baltimore City by the appellants against the appellees to compel the latter to issue to the former a permit to erect a building upon a lot situated at the Northeast corner of Mount Royal and Maryland Avenues in the City of Baltimore. The case will turn upon the powers and duties of the appellees, composing the Appeal Tax Court, a subdepartment of the Municipal Government of Baltimore City under the provisions of its charter, in respect to the issuing of a permit of the kind applied for. These powers and duties are defined in the following provisions of the ordinances of the City now codified and appearing in the City Code in Article 50 as sections 24, 25, 27 and 28 and which read as follows, section 24 "It shall not be lawful for any person, without a permit from the Appeal Tax Court, to erect within the limits of the City, any building upon a new foundation, whether in connection with an existing building or not, or to

pull down any old building or part of a building to the ground, and build upon the old foundation, or to put an additional story upon any building or part of a building by increasing the height of the walls; and any person or persons who may build within the city of Baltimore shall be required to take out a permit for each and every house he or they may propose to build."

Section 25 "All persons receiving permission for the erection of any special improvements from the City Council shall, before commencing the erection of the same, obtain the endorsement of the Appeal Tax Court on said permit."

Section 27 "Whenever application accompanied by the payment of the cost of the advertisement provided for in Section 28 is made to the Judges of the Appeal Tax Court for a permit or permits to erect any new building or buildings on any street or avenue of the width of fifty feet or more, the person or persons

making such application shall be required, before such permit or permits shall be granted, to file with the Appeal Tax Court a plat accurately describing the piece or parcel of ground to be improved, giving the front, and depth thereof, its distance from the nearest established corner of a street, lane or alley, and the number of improvements (if more than one) proposed to be erected thereon; also an accurate description of the frontage, height, depth, material to be used in the proposed building or buildings and the general appearance and cost of same"

Section 28 "It shall be the duty of the Judges of the Appeal Tax Court to grant such permits on application, without charge, except as hereinbefore provided, and to keep a record of all permits issued; provided, that no such permit shall be granted unless in the judgment of the said Judges of the Appeal Tax Court, or a majority of them, the size, general

character and appearance of the building or buildings to be erected, will conform to the general character of the buildings previously erected in the same locality, and will not in any way <sup>tend to</sup> depreciate the value of surrounding improved or unimproved property; and provided further, that before any such permit shall be granted, at least ten days notice by advertisement inserted in some daily newspapers shall be given by the Appeal Tax Court that application for such permit has been made. And before any permit shall be granted to erect any building or buildings within the limits of the City of Baltimore, the applicant shall first satisfactorily prove to the judges of the Appeal Tax Court that provision has been made for such drainage <sup>as</sup> the topography of the ground requires."

The petition for Mandamus filed by the appellants alleged that the appellant Frank C. Bostock had leased for a valuable consideration from a certain William P. Harvey,

who was the owner thereof, the lot of ground which has been referred to, and was in possession thereof with authority from the owner to erect thereon the building <sup>the erection of</sup> for which a permit was applied for; and that he had entered into an agreement with the appellant Edgar M. Noel to erect, for a consideration a building on the said lot; and that for the purpose of executing this agreement the said Noel had duly applied to the Appeal Tax Court for a permit to erect said building.

The petition then sets out the provisions of the ordinances of the City, regulating the application for and the granting of permits for the erection of buildings within the city and shows upon its face that all of the requirements of the said provisions were complied with by the appellants in making application for the permit which they seek to have granted in this case. The petition then shows that the appellees composing the Appeal Tax Court refused the application of the appellants for a permit to erect the building therein indicated and

passed an order to that effect in which they assigned as reasons for their refusal, that the plans and specifications for the proposed building "presented to the Inspector of Buildings and examined by the Appeal Tax Court" did not in their opinion "conform to the general character of the buildings in the said locality" and that the use of the building proposed to be erected "will be for the purposes of a zoo; among which purposes was to show wild animals, in reality conducting a continuous circus upon one of the most beautiful streets in the City of Baltimore". It also appeared from the petition that Mount Royal Avenue, the street upon which the building was proposed to be erected was more than fifty feet in width. The appellees in their answer admit all the allegations <sup>of fact</sup> of the petition except those contained in the first paragraph thereof; which were that the appellant, Bostock, had leased and was tenant in possession of the lot upon which the building for the erection of

which the permit was applied for, was to be erected, and had entered into an agreement with the appellant Noel to construct a building thereon. These allegations they refused to admit and called for proof of the same. The defense made by the answer was in substance and effect that the appellees had a discretion as to the granting or refusing of the permit and were justified in their refusal thereof because the building, for which the permit was applied for, "would not conform to the general character of the buildings previously erected in the same locality and would tend materially to depreciate the value of the surrounding improved or unimproved property".

The answer was demurred to and the demurrer was overruled. The petitioners then joined issue upon that part of the answer which did not admit the allegations of the petition contained in the first paragraph thereof, and demurred to all other parts thereof which demurrer being overruled the petitioners joined issue thereon "as



far as said answer in any way denies the averments of facts contained in the petition". <sup>The case was then tried before the court without a jury.</sup> Testimony was taken and there was proof on the part of the appellants going to show that the appellant Bostock had, with the owner of the lot upon which the proposed building was to be erected, a contract founded upon a valuable consideration which gave him the right to erect a building upon said lot and that said Bostock had possession of the lot for that purpose if a permit could be obtained; and that he had entered into an agreement with the appellant Noel for a consideration to have a building erected thereon. At the conclusion of the testimony the petitioners offered a prayer to the effect that if the <sup>court</sup> should find from the evidence (1) "That on the 22<sup>nd</sup> day of October 1901, the petitioner Frank C. Bostock was and now still is, the tenant in possession of the lot of ground mentioned in the petition, with authority from the owner thereof to erect thereon the building mentioned in said petition"; (2) "and that on said day the petitioner Edgar M. Noel, as agent and builder for the

petitioner, Frank C. Bostock, applied for the permit mentioned in said petition"; (3) "That then, under the pleading in this case the verdict must be for the petitioners". This prayer was refused by the Court to which refusal the petitioners excepted. The Court ordered that the writ of Mandamus be refused and the petition therefor be dismissed. From this order the petitioners have appealed.

It will be seen from the course of the pleading and the nature of the defence relied upon by the appellees that the most important and the substantial inquiry involved in the case before us is as to what lawful discretion is given to the appellees to withhold a permit, upon application made, by virtue of the proviso in the ordinance of the City, regulating the issuing of permits which is embodied in Section 28 of the City Code and which reads as follows "Provided, that no such permit shall be granted unless in the judgment of the said Judges of the Appeal Tax Court, or a majority of them, the size,

general character and appearance of the building or buildings to be erected, will conform to the general character of the buildings previously erected in the same locality, and will not in any way tend to depreciate the value of surrounding improved or unimproved property". Treating this proviso as not being contained in the provisions of the ordinances relating to the granting of permits that have been recited, and assuming that the allegations of the petition ~~for~~ mandamus, in respect to the tenancy and possession of the appellant, Bostock, of the lot of ground mentioned in the petition as the site of the proposed building, to have been sufficiently proved, it having been admitted <sup>on the face of the pleadings</sup> that all the requisites and formalities prescribed by the ordinance to accompany an application for a permit to build had been complied <sup>with</sup>, it became the duty, by the very terms of the ordinance, of the Appeal Tax Court to issue

the permit upon the application of the appellants as made. What remained to be done therefore by the appellees would, upon the hypothesis stated, have become a plain duty and a mere ministerial act which they could not arbitrarily refuse to perform and upon such refusal Mandamus would lie to compel the performance of the duty. *Brayshaw vs Ridout* 79 Md 1154. Taking up now for consideration the defense set up by the appellees based upon the discretion with which they claim to be invested perforce the proviso, which has been recited, the fundamental question to be determined is whether this proviso is a valid part of the ordinance under which the appellees were called upon to act, and as to this the first inquiry is, was the Corporation The Mayor and City Council of Baltimore empowered, by any provision of its charter, to prescribe the conditions contained in the proviso in the connection in which it occurs. As a guide to this in

-quiry we may very aptly quote from what was said by Mr  
 Dillon in his admirable work on Municipal Corporations  
 in relation to the construction of the powers of such Cor-  
 porations - "The fundamental and universal rule  
 which is as reasonable as it is necessary is, that while  
 the construction is to be just, seeking first of all for  
 the Legislative intent in order to give <sup>it</sup> fair effect, yet  
 any ambiguity or doubt as to the extent of the power  
 is to be determined in favor of the State or general  
 public and against the State's grantee". Then after  
 saying that <sup>this</sup> is not so directly applicable to Munic-  
 ipal as to private Corporations, <sup>he</sup> proceeds as fol-  
 lows - "but it is equally applicable to grants of power  
 to Municipal and public bodies which are out of  
 the usual range, or which may result in public bur-  
 dens or which in their exercise touch the right  
 to liberty or property, or as it may be compendious-  
 ly expressed any common law right of the Citi-

-zen or inhabitant" 1 Dillon on Mun. Corp page 48  
 sec. 91 (4<sup>th</sup> Ed). Again at page 394 sec 317 of the same  
 work it is said "since all the powers of a Corporation are de-  
 rived from the law and its charter it is evident that no  
 ordinance or bylaw of a Corporation can enlarge,  
 diminish or vary its powers". The foregoing citations  
 are made as a clear and terse statement of the rules and  
 principles of law applicable to the case at bar and not  
 because we think there is need that they should be fortifi-  
 ed by citing authority. Now undoubtedly the proviso in the  
 ordinance here under consideration attempts to confer  
 powers that affect the citizen in his right of property  
 and his common law right. It cannot be pretended that  
 the citizen has not the common law right to acquire title  
 to a lot of land, qualified or absolute, in a city, as elsewhere  
 and to build upon, and improve, it as his taste, his con-  
 venience or his interest may suggest or as his means may  
 justify without taking into consideration whether

his buildings and improvements will conform in "size, general character and appearance" to the "general character of the buildings previously erected in the same locality"; even though there might be those in whose "judgment" his so building might "in some way" tend to depreciate the value of surrounding improved or unimproved property". Notwithstanding the delicate power conferred by the proviso in question - a power to control the citizen in the exercise of important and valuable rights of property, the power is conferred in the most vague and general terms and an unlimited and unregulated discretion is given to an agency of the city government thereunder. No standard is set up according to which this judgment is to be exercised; nor means provided by which it is to be instructed, <sup>or controlled</sup> and the citizen is left helpless to question its exercise in any particular case. What is meant by the "general character of the buildings previously erected"?

and what <sup>is to</sup> define and fix this? what is to determine the locality within the bounds of which the conformity of building, provided <sup>for</sup> by the ordinance, is to be required? what is to be its extent and what its limits? what is the depreciation of property against which the ordinance seeks to guard? Is it a present and immediate depreciation, or is it to be a depreciation which may, in the judgment or opinion of the Appeal Tax Court, occur sometime in either a near or <sup>or</sup> remote future, and which in fact may never occur? <sup>A right to create</sup> a power so vague and undefined in its scope, so entirely unrestricted in its exercise, and so essentially arbitrary in its character, designed to abridge important and valuable property rights of the citizen, if it can be conferred at all upon a municipal Corporation, ought <sup>to be</sup> found to be so conferred in very clear terms or by some necessary implication. Nowhere in the Charter of the City of Baltimore can it be found that there is Confer-



red upon the Corporation, by any express legislative provision, the power implied in the ordinance under consideration. Nor can such power be deduced by any reasonable implication from any of the specific or general powers enumerated and granted in the Charter. The general powers are found enumerated in section 6 of the Charter as enacted by Act 1898 Chap 123. Without undertaking to quote at large this enumeration of powers granted, it may be affirmed of them that those which are therein contained to authorize the regulation of building within the city look to regulations to guard against dangers to arise from an unsafe construction of buildings; or from constructing them of inflammable materials; or in such manner as might prove offensive, or deleterious to health; or in a way to involve danger to other property, or to life or limb. In other words they are powers which fall within

the purview of what is known as the Police Power. The proviso under consideration has no reference to any of the objects specified or provided for in the authority given the Corporation to make regulations as to buildings. It contains no suggestion that it was intended to provide for the public safety, nor to safeguard the health or morals of the community; nor to preserve public order; nor in any way to be promotive of any object which calls for the exercise of the police power. Under subtitle Police Power of section 6 of the Charter this power is conferred that the City may "pass ordinances for preserving order, and securing property and persons from violence, danger and destruction, protecting the public and City property, rights and privileges from waste or encroachment and for promoting the great interests and insuring the good government of the City". While thus a broad discretion is given the Corporation to use the Police Power the nature of the power is clearly indicated in the terms and in the connection in which it is granted; and the nature of the objects

and purposes, for which it is to be used, is pointed out. None of these objects or purposes can be subserved by compelling the citizen to conform a building, which he may desire to erect, to the "general character" of the building which his neighbor may, previously, have erected; nor to take into consideration whether, however lawful the character of his structure, or the use for which it is intended, maybe, its erection, will, in the uncontrolled opinion of a designated agency of the Corporation, ~~or~~ "in any way tend" to depreciate <sup>the value of</sup> property in an undefined locality. It is further provided in section 6 of the Charter Subtitle "Welfare and Other Powers" that the City may pass "such ordinances as it may deem expedient in maintaining the peace, good government, health and welfare of the City of Baltimore". This, in effect, is but a repetition of the grant of the general power which has just been referred to as contained in Subtitle "Police Power" of this same section and does not, further, enlarge the scope of the powers of the Corporation. Under this general power the municipality, acting within

the limits of legitimate corporate authority, and to carry  
 out and make effective its lawful powers, may pass  
 ordinances prescribing general regulations applica-  
 ble alike to all citizens, and by which each may regulate his  
 conduct and know his rights and his duty as a member of  
 the corporation; but it is not consistent with any express  
 or implied power that is to be found in the **Municipal**  
~~Charter~~ <sup>provision</sup> that any individual, or any agency of  
 the Corporation should be invested with the unrestrained  
 and unregulated power and authority, to say, in each par-  
 ticular case as it arises, what the good government  
 and welfare of the community may demand when deal-  
 ing with, and undertaking the control of, the rights of the citizen  
 in respect to the enjoyment and use of his property, as has  
 been done by the provision in the ordinances of the City here  
 brought under consideration if the same is to be held valid.  
 The right of the Corporation to confer such a power cannot  
 therefore be derived from any implication. Since we can

find no legislative grant of authority, to the City of Baltimore under its Charter to enact the provision of municipal legislation upon which we have here to pass, either express or to be implied from any of the legitimate and recognized powers of the Corporation we are constrained to hold the same ultra vires and void. The case at bar bears a strong analogy to the case of Baltimore vs Radeke 49 MD 217 in which the question was as to the validity of a provision in an ordinance giving to the Mayor of the City the power to revoke permits that had been granted for the use of steam engines within the limits of the City. This Court found that ample power had been granted to the City to regulate the use of steam engines within the limits thereof; but that the character of power <sup>attempted to be exercised in enacting the provisions of municipal legislation</sup> there drawn in question was not appropriate or legitimate to be implied for carrying the granted power into effect; <sup>the provision referred to</sup> and was pronounced inoperative and void because it committed

the doing of an act affecting valuable rights of the citizen "to the unrestrained will of a single public officer" and laid down "no rules by which its impartial execution" could be secured or "partiality or oppression prevented". The court saying that if the officer chose to act only in particular cases, there was nothing "in the ordinance to guide or control him". The characterization of the power attempted to be exercised in that case and the reasoning of the court in regard thereto apply with force and pertinency in the case at bar. The case of *Baltimore vs Radeke* supra and the case at bar differ from the case of *Commons of Easton vs Covey* 74 Md 262 much relied upon by the appellees in that the ordinance drawn in question in that case was one regulating the erection of new buildings within the town of Easton and the permit that had been refused was applied for to authorize the erection of a frame stable. There the ordinance looked to guarding the public safety and was held to come within the police power

which had been conferred upon the Corporation enacting  
 the ordinance; and to be in consonance with the general  
 powers and purposes of the Corporation. It is argued  
 that though the authority to enact the proviso of the  
 ordinance here in question was not originally given by  
 the Legislature yet it was ratified and made effective  
 by the 3<sup>d</sup> Section of the Act of 1898 Chap 123. This does  
 not result from a proper construction of the Section of  
 the act of 1898 referred to. In the first place only such  
 ordinances as were not inconsistent with the act were  
 ratified and if this ordinance contained provisions  
 that implied powers conferred upon the Corporation  
 which the act did not intend to grant but with-  
 held then the ordinance was plainly inconsistent  
 with the act. But the provision of the Act of 1898 which  
 is here invoked as ratifying the ordinance in question  
 has no reference to validating invalid ordinances; and  
 was not intended to have such operation and effect.

It was merely intended to preserve the municipal status as to all laws and ordinances that might be in force at the date of the adoption of the Charter provided by the act of 1898 Chap 123, and to continue them in force, in the passing of the Corporation from the control of the old Charter to that of the new, with the same effect and no more, as if the change in the Charter had not been made.

We have not thought it necessary to notice specially the ground of the refusal of the appellees to grant the permit applied for by the appellants based upon the alleged use which the building proposed to be erected was intended for. The ordinance in question does not profess to give the appeal Tax Court the right or power to go into such an inquiry upon application being made for these permits; and no such inquiry is within the scope of their duty or their powers in that connection. If the building which the appellants propose to erect shall be put to the use it is alleged to be intended for, and a question shall then be raised as to the legality of that use such question will then become one of interest to the communi-



ty and of more serious import to those owning and making use of the property in question; but it has no place in this discussion. We may take up now the action of the trial court upon the pleadings and upon the appellants' exception. The demurrer to the whole answer of the appellees was properly overruled. The petition in its first paragraph alleged matters of fact which the answer did not admit and it was proper these allegations as to the tenancy and possession of the property, and the right of the appellants to build thereon should be sustained by proof in order to show that the petition for Mandamus was bona fide and founded upon substantial right. The second demurrer to all that part of the answer not embraced in the denial it made of the facts alleged in the first paragraph of the petition ought to have been sustained for reasons appearing in the foregoing expression of views. The prayer of the appellants ought to have

been granted. All the facts of the case except those set out  
 in the prayer had been admitted and upon a finding by  
 the court of the only facts in issue the appellants were en-  
 titled to a finding in their favor. The proof showed that  
 they had acquired for a valuable consideration a right  
 to build upon the lot described in their application  
 for a permit, and had authority from the owner of the  
 lot so to do; and were in possession of the same for the  
 purpose of building upon it and this was sufficient  
 to entitle them to the permit. In holding that part of  
 the ordinance of the City upon which the appellees re-  
 lied for their defense, and which was specifically  
 quoted in stating this defense, void, the rest of the  
 ordinance is not affected thereby since it can have  
 full effect as to its general objects and purposes  
 with this provision stricken out. In the case of *Baltimore*  
*vs Radeke supra* as also in the case of *Mansant Compt vs Har-*  
*lem Stage Co.* 59 Md 330 the ordinances drawn in ques-

tion were only avoided in part. It follows from the views expressed in the foregoing opinion of the court that the order of the court below refusing the mandamus in this case must be reversed.

Order reversed <sup>and cause remanded</sup> with costs to the appellants.