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Nebraska Law Review

Volume 35 | Issue 1 Article 16

1955

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Recommended Citation

W. D. Lorensen, *Municipal Corporations—Aesthetic Zoning under the Police Power*, 35 Neb. L. Rev. 143 (1956)
Available at: https://digitalcommons.unl.edu/nlr/vol35/iss1/16

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MUNICIPAL CORPORATIONS—AESTHETIC ZONING UNDER THE POLICE POWER

Plaintiff was denied a building permit solely on the ground that the village building board, composed of two architects and one other person, had failed to make a finding, as required by ordinance, that the "exterior architectural appeal and functional plan" of the proposed building would not be so at variance with other structures in the neighborhood as to substantially reduce property values. The trial court held the provision of the ordinance requiring the determination to be invalid and issued a peremptory writ of mandamus directing the building inspector to issue the permit, notwithstanding the decision of the board. *Held*: reversed. The ordinance was a valid exercise of the police power and was not so indefinite as to subject the applicant to the arbitrary discretion or caprice of the building board.[1]

This decision may well mark a new trend of open acceptance of aesthetic considerations as a valid basis for exercise of the police power.[2] The restriction here is not upon the use of the

[1] State ex rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955).

[2] Berman v. Parker, 348 U.S. 26, 33 (1954), distinctly places aesthetic considerations within the meaning of "public welfare." "The concept of public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." For the implications of this decision, See Comment, 23 Geo. Wash. L. Rev. 730 (1955); 4 Municipal Law Service Letter (A.B.A.) No. 9, p. 4 (Nov. 1954).

property, but upon its appearance. The decision thus marks a departure from the generally accepted rule that aesthetic considerations are not, of themselves, a valid basis for the exercise of the police power.[3] Courts have recognized that the protection of property values is an end at which restrictions on the use of property are aimed.[4] However, under the established view that aesthetic controls are based on individual taste and are thus indefinite, that end of itself had not been held adequate to justify restrictions on the appearance of property.[5]

Restrictions on the use of property originated in the law of nuisance,[6] and expanded through adoption of fire zones, height restrictions, tenement house codes, and building and sanitary codes.[7] These restrictions on the use of property were founded on the exercise of the police power to protect the public health, safety and welfare and laid the foundation for one of the most widespread of modern restrictions on property use—comprehensive zoning laws. Just a decade after the first comprehensive zoning law was adopted in New York City in 1916,[8] the zoning scheme of systematic districting of entire communities to restricted uses was held valid by the Supreme Court in the landmark case of *Village of Euclid v. Ambler Realty Co.*[9] This decision held that regulating property uses by zoning was related to the public health, safety and welfare and thus a valid exercise of the police power. It further affirmed a presumption of validity toward property use restrictions by stating that unconstitutionality of zoning can only be proved when the restrictions on property clearly have no relation to the public health, safety and welfare.[10]

This presumption of validity which had existed prior to the *Euclid case*,[11] afforded a foundation for primarily aesthetic controls through nebulous claims of protecting public health, safety and welfare. Thus it was that unsightly billboards were regu-

[3] 8 McQuillin, Municipal Corporations § 25.20 (3d ed. 1950); Baker v. Somerville, 138 Neb. 466, 293 N.W. 326 (1940).

[4] Hutchinson v. Cotton, 236 Minn. 366, 53 N.W.2d 27 (1952); 8 McQuillin, op. cit. supra note 3, § 25.25. See also, Landels, Zoning, An Analysis of Its Purposes and Legal Sanctions, 17 A.B.A.J. 163 (1932).

[5] Bostock v. Sams, 95 Md. 400, 52 Atl. 665 (1902).

[6] 8 McQuillin, op. cit. supra note 3, § 25.03.

[7] Metzenbaum, The Law of Zoning 80-91 (1930).

[8] Id. at 134.

[9] 272 U.S. 365 (1926).

[10] Id. at 395.

[11] Cusack Co. v. Chicago, 242 U.S. 526 (1917); Dobbins v. Los Angeles, 195 U.S. 223 (1904).

lated because they were hiding places for criminals, hindrances to fire fighters, dumping grounds for trash and shields for the "lowest forms of prostitution."[12] Building heights around the Washington Monument in Baltimore, Maryland, were regulated, not to protect the view of the Monument, but because tall buildings posed a fire threat.[13] And in Nebraska, when a city engineer testified that a minimum floor area restriction was based on aesthetic motives, the restriction was held invalid.[14] But it was later stated in dictum that a similar restriction affecting the same area was valid because the second restriction was based upon public health, safety and welfare.[15] As a result, while courts were saying, with a few exceptions,[16] that aesthetics was not a proper vehicle for the police power, aesthetic ends were obtained by strained, almost fictional, relationships to public health and welfare.[17]

The restriction on property appearance imposed and affirmed in the instant case has avoided the obvious rationales against enactment of aesthetic controls, i.e., what is or is not aesthetically pleasing is subject to frequent and radical change, and beauty is not capable of definition.[18] These infirmities were avoided by limiting the restriction within an objective test based on property values and the architectural make-up of the neighborhood. In setting up this standard, the ordinance also avoids the pitfall of an improper delegation of legislative authority by limiting the building board to the use of administrative discretion in applying a set standard.[19]

[12] St. Louis Gunning Adv. Co. v. St. Louis, 235 Mo. 99, 137 S.W. 929 (1911), appeal dismissed, 231 U.S. 761 (1913).

[13] Cochran v. Preston, 108 Md. 220, 70 Atl. 113 (1908).

[14] Baker v. Somerville, 138 Neb. 466, 471, 293 N.W. 326, 328 (1940).

[15] Dundee Realty Co. v. Omaha, 144 Neb. 448, 455, 13 N.W.2d 634, 637 (1944).

[16] Preferred Tires, Inc. v. Village of Hempstead, 173 Misc. 1017, 1020, 19 N.Y.S.2d 374, 377 (Sup. Ct. 1940); State ex rel. Civello v. New Orleans, 154 La. 271, 97 So. 440, 444 (1923).

[17] Dukeminier, Zoning for Aesthetic Objectives: A Reappraisal, 20 Law & Contemp. Prob. 218 (1955); Rodda, The Accomplishment of Aesthetic Purposes Under the Police Power, 27 So. Calif. L. Rev. 149 (1954). Comment, 23 Geo. Wash. L. Rev. 730 (1955).

[18] "Certain legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats. Successive city councils might never agree as to what the public needs from an aesthetic standpoint, and this fact makes the aesthetic standard entirely impractical as a standpoint for use restrictions upon private property." Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 148 N.E. 842. (1925).

[19] 8 McQuillan, op. cit. supra note 3, § 25.215.

The decision in the instant case lends weight to the view that the validity of regulations on the use of property should not be imperiled because they are aimed at aesthetic ends.[20] The test should be based upon a consideration of whether the regulation allows for reasonable development of the community as a whole, provides for the various social and economic groups within the community, and guards against burdens resulting from the artistic idiosyncracies of administrative or legislative bodies.

W. D. Lorensen, '57

[20] See Dukeminier, supra note 17.