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Esthetic Zoning--The Trend of the Law

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NOTES

Esthetic Zoning--The Trend of the Law

Recent years have witnessed increasing attention to the problem of esthetic zoning. The word "zoning" is defined as: "governmental regulations of the uses of land and buildings according to districts and zones."[1] The word "esthetic" (or aesthetic) has been defined as: "of or pertaining to the beautiful, as distinguished from the merely pleasing, the moral and especially the useful. . . ."[2] Thus a working definition of the phrase "esthetic zoning" would be: the regulation of the use of property for the purpose of preserving or attaining beauty.

The mid-twentieth century has brought forth two great problems of urban living—the need to regulate the expansion of the suburbs and the necessity of urban redevelopment in older areas with the accent on slum clearance. The key to these problems is planning.[3] Planning is a more comprehensive term than zoning, having its emphasis on a positive approach to the development of an area—e.g., laying out parks, roads, hospitals, etc. Zoning, on the other hand, is, in essence, negative, having its emphasis on preventing certain uses of land. Zoning, while thus being an adjunct of planning, is also the very crux of it, since without zoning, attempts at city planning would be unenforceable.

Contemporary concepts of planning a community have necessarily had

[1] MCQUILLIN, MUNICIPAL CORPORATIONS § 25.01 (3rd ed. 1950).

[2] WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1955).

[3] See NOTE, 7 WEST. RES. L. REV. 87.

to embrace esthetic zoning, because there is no doubt that a comprehensive community plan has as one of its objectives the creation of an attractive city. Such programs involving esthetic considerations may include ordinances permitting esthetic zoning. The purpose of this article is to ascertain to what extent the courts have permitted the various legislative bodies to zone esthetically.

ZONING AS AN EXERCISE OF THE POLICE POWER

Due process of law protects private property from being unduly restricted or taken away from its owner unless the welfare of society warrants this interference. The power of any government to take away or regulate the use of private property is within its police power. The police power is the inherent power of any government to prescribe regulations for the public health, comfort, morals, safety, and general welfare of its citizens. If this power is used to enhance the general welfare, it may regulate or acquire private property, since the welfare of the individual is subordinated to the good of all. A valid, *reasonable* use of the power satisfies the due process requirement. Therefore, as long as any ordinance reasonably tends to promote the health, comfort, morals, safety and general welfare of its citizens, it is a valid exercise of the police power.

Zoning has been held to be within the police power.[4] If a community attempts through zoning to keep residential sections free from the effects of industry, for example, there is no doubt that this act pertains to the health, safety and general welfare of the citizens.[5] Nevertheless, such laws must be reasonable in their application and are thus subject to review by the courts to determine if the general welfare of the community is being advanced,[6] or whether due process of law is being denied.[7] For example,

[4] Village of Euclid v. Ambler, 272 U.S. 365 (1926). See also Valley View Village v. Proffett, 221 F.2d 412 (6th Cir. 1955) in which the federal court stated that the Home-Rule Provision of the Ohio Constitution was self-executing and no enabling legislation was necessary for a local government to have the power of zoning, since zoning was held to be a power of local self government under the Home-Rule Provision.

[5] State v. Kievman, 116 Conn. 458, 165 Atl. 601 (1933); State v. New Orleans, 154 La. 271, 97 So. 440 (1923); St. Louis v. Friedman, 358 Mo. 681, 216 S.W.2d 475 (1948); Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925); Price v. Schwafel, 92 Cal. App.2d 77, 206 P.2d 683 (1949).

[6] Village of Euclid v. Ambler, 272 U.S. 365 (1926); River Forest State Bank v. Village of Hillside, 129 N.E.2d 171 (Ill. 1955); Trust Co. of Chicago v. Chicago, 408 Ill. 91, 96 N.E.2d 499 (1951); State v. Miller, 129 N.E.2d 209 (Ohio App. 1955); Henie v. City of Euclid, 97 Ohio App. 258, 118 N.E.2d 682 (1954); Cleveland Trust Co. v. Village of Brooklyn, 92 Ohio App. 351, 110 N.E.2d 440 (1952); Murdock v. City of Norwood, 3 Ohio Supp. 278 (1937).

[7] State v. Joseph, 139 Ohio St. 229, 39 N.E.2d 515 (1942).

trying to restrict an obviously commercial sector to residential housing would not be enhancing the general welfare.[8] Attempts to spot zone a community have also been held unconstitutional as being a deprivation of property without due process of law.[9] One court has held that the test of validity, when applied to certain land, must be that the zoning restriction qualifies at its inception under the police power, not that it qualify in the future.[10]

THE GENERAL RULE

As long as zoning laws contained only rudimentary features, such as provisions preventing industry from moving into a residential neighborhood, they were constitutional exercises of the police power. Difficulty arose, however, when zoning began to embrace esthetic considerations. The Ohio courts followed the general rule when they said that "mere esthetic considerations are not sufficient to restrict the use of property so as to interfere with private uses.[11] Many courts, however, have held that if the primary purpose of the zoning ordinance can be included under one of the recognized purposes of the police power, then esthetic factors may be included as a secondary purpose.[12]

The courts have ruled that esthetics alone are not essential to public health, welfare, etc.[13] Several reasons can be listed to explain the courts' reluctance to hold beautification in and of itself to be a valid exercise of the police power. In the first place, the courts are faced with the prob-

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[8] Henie v. City of Euclid, 97 Ohio App. 258, 118 N.E.2d 682 (1954).

[9] Youngstown v. Kahn Bros., 112 Ohio St. 654, 148 N.E. 842 (1925); State v. Woodworth, 33 Ohio App. 406, 169 N.E. 713 (1929). Spot zoning refers to a zoning ordinance which zones only parts of a city and leaves the remainder unrestricted.

[10] Gust v. Township of Canton, 342 Mich. 436, 70 N.W.2d 772 (1955).

[11] Cleveland Trust Co. v. Village of Brooklyn, 92 Ohio App. 351, 110 N.E.2d 440 (1952). See also Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N.E. 920 (1911); Hitchman v. Oakland Township, 329 Mich. 331, 45 N.W.2d 306 (1951); State v. Russell, 162 Ohio St. 281, 123 N.E.2d 261 (1954); Wondrak v. Kelley, 129 Ohio St. 268, 195 N.E. 65 (1935); Youngstown v. Kahn Bros., 112 Ohio St. 654, 148 N.E. 842 (1925); Appeal of Lord, 369 Pa. 121, 81 A.2d 533 (1951); State v. Woodworth, 33 Ohio App. 406, 169 N.E. 713 (1929); Murdock v. City of Norwood, 3 Ohio Supp. 278 (1937).

[12] Murphy, Inc. v. Westport, 131 Conn. 292, 40 A.2d 177 (1944); State v. Kievman, 116 Conn. 458, 165 Atl. 601 (1933); Chicago Park District v. Canfield, 370 Ill. 447, 19 N.E.2d 376 (1939); General Outdoor Adv. Co. v. Indianapolis Dep't. of Public Works, 220 Ind. 85, 172 N.E. 309 (1930); Barney & Casey Co. v. Town of Milton, 324 Mass. 440, 87 N.E.2d 9 (1949); 122 Main Street Corp. v. City of Brocton, 323 Mass. 646, 84 N.E.2d 13 (1949); St. Louis v. Freidman, 358 Mo. 681, 216 S.W.2d 475 (1948); West Bros. Brick Co. v. Alexandria, 169 Va. 271, 192 S.E. 881 (1937).

lem of defining beauty. An object of beauty to one man might be considered ugly by another. Secondly, the courts have hesitated to set precedent in the clear cases because of cases of a more difficult nature which may arise. Not to be forgotten also is the long tradition in the United States which lays stress on the maximum freedom in the use of one's property with a minimum of restrictions imposed upon it by a legislative body.[14] These are perhaps the real underlying reasons which have motivated the courts to try to find some other justification under the police power to uphold an esthetic zoning ordinance.

THE EXCEPTIONS TO THE GENERAL RULE

In some cases the courts have readily found enough traditional justifications under the police power to uphold ordinances whose chief objectives appeared to be esthetic. Foremost in this classification have been cases involving the regulation or prohibition of commercial signs[15] and billboards.

Billboards have long been held to be a valid subject of regulations.[16] When a community banned billboards altogether, the question arose whether the right to erect a billboard is a right incidental to the ownership of land. If it were, then condemnation proceedings would be necessary since the use of property cannot be unreasonably limited without due process of law.[17] If it were not, a simple ordinance banning them without compensation would suffice because the ordinance would be a valid exercise of the police power.[18]

Keeping billboards out of residential districts was justified on the grounds that billboards were fire hazards and convenient places for thieves to lie in wait for unsuspecting passers-by.[19] Despite this justification under the traditional concepts of the police power, the regulation of bill-

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[13] Youngstown v. Kahn Bros., 112 Ohio St. 654, 148 N.E. 842 (1925). See also Hitchman v. Oakland Township, 329 Mich. 331, 45 N.W.2d 306 (1951); Borough of Mt. Pleasant v. Point Pleasant Pavillion, 3 N.J.S. 222, 66 A.2d 40 (1949); Northport v. Carll, 133 N.Y.S.2d 859 (1954).

[14] 41 A.B.A.J. 501.

[15] Murphy, Inc. v. Westport, 131 Conn. 292, 40 A.2d 177 (1944); General Outdoor Adv. Co. v. Dep't. of Public Works, 289 Mass. 149, 193 N.E. 799 (1935); Criterion Service v. City of East Cleveland, 88 N.E.2d 300 (Ohio App. 1949).

[16] Thomas Cusack Co. v. Chicago, 242 U.S. 526 (1917).

[17] O'Mealia Outdoor Adv. Co. v. Mayor and Council of Borough of Rutherford, 128 N.J.L. 587, 27 A.2d 863 (1942).

[18] Mid-State Advertising Corporation v. Bond, 274 N.Y. 82, 8 N.E.2d 286 (1937) (dissenting opinion).

[19] Thomas Cusack Co. v. Chicago, 242 U.S. 526 (1917).

boards is probably more concerned with esthetics than with safety.[20] This is indicated by the regulation of billboards in the vicinity of public parks.

Protecting the beauty of public parks and their immediate surroundings is a purely esthetic matter, although the courts have found various reasons for preserving an unblemished view for the spectator. One court held that esthetic zoning was a valid exercise of the police power in this instance because parks were set aside for recreational purposes, and the health and welfare of the people was advanced by the unblemished view of these public places and the surrounding area.[21] Another court stated that parks are maintained for their beauty and that it is one thing to zone esthetically for the over-all planning of private property, and quite another thing to enhance the beauty of a park, since it is a public place.[22]

Other courts have not been so hesitant in upholding apparently esthetically grounded ordinances dealing with signs and billboards. A New York court has said:

> This court is not restricted to aesthetic reasons in deciding to sustain the validity of the ordinance in question, but if it were so restricted, it would not hesitate to sustain the legislation upon that ground alone. The court cannot believe that, with the legislature of the state specifically delegating the power to regulate or prohibit signs in the public streets, a municipal board in this day and age can be so restricted, as plaintiff contends, in thus promoting the happiness and general welfare of the community.[23]

The court quoted with approval a dissenting opinion of the New York Court of Appeals which had urged the same view.[24]

A lower Pennsylvania court has also recognized the esthetic zoning of billboards. The court held that billboards and signs could be banned from a certain street which the city of Harrisburg was trying to beautify. The judge said:

> This ordinance recited both the aesthetic and utilitarian reasons for abating nuisances and hazards of signs, and perhaps we need not go further than to couple the two together and base our opinion on the middle of the road cases which like *Welch v. Swasey*[25] and *Liggett's Petition*[26] hold that if the exercise of the police power is based upon any reason of public

[20] Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N.E. 920 (1911); Commonwealth v. Earl R. Trimmer, 53 Dauphin County Rep. 91 (Pa. 1942).

[21] General Outdoor Adv. Co. v. Indianapolis Dep't. of Public Works, 220 Ind. 85, 172 N.E. 309 (1930).

[22] Chicago Park District v. Canfield, 370 Ill. 447, 19 N.E.2d 376 (1939).

[23] Preferred Tires, Inc. v. Village of Hempstead, 19 N.Y.S.2d 374, 377 (1940).

[24] Mid-State Advertising Corporation v. Bond, 274 N.Y. 82, 8 N.E.2d 286 (1937) (dissenting opinion).

[25] 193 Mass. 364, 79 N.E. 745 (1907), *aff'd.*, 214 U.S. 91 (1909).

[26] 291 Pa. 109, 139 Atl. 619 (1927).

> safety or prosperity, the fact that considerations of an aesthetic nature may also enter into the reason for the regulation will not render it invalid. But we definitely hold also, in the light of the foregoing later decisions, that aesthetic considerations alone, in this day are sufficient upon which to base an exercise of the police power.[27]

Other inroads on the general rule may be found. The use of vacant lots in a residential area is one. Although the Ohio courts have emphatically rejected esthetic zoning as such, a court of appeals has upheld the constitutionality of an ordinance which required strict compliance with rules for the removal of top soil from vacant land.[28] More significantly, the Ohio court seemed to be citing favorably a Massachusetts case which resulted in the prohibition of the removal of any top soil from certain vacant land.[29] Esthetic zoning would appear to be one of the prime considerations in an *absolute* prohibition of the removal of top soil.

Another exception to the general rule is the preservation of places of historical interest, such as an old section of a city. Preserving these historical places has been held to be in the public interest, and has been treated similarly to the park cases.[30] If, for example, someone desired to erect a very modern structure in Williamsburg, Virginia, this writer has little doubt that if an ordinance were in existence preventing modern architecture, the maintenance of the historic atmosphere of that town would be held to be in the interest of the public welfare.

The New Rule

McQuillin has said that the old rule requiring some other justification under the police power for esthetic zoning is undergoing changes.[31] The transition was quite noticeable in the billboard cases, in which the courts have finally upheld such regulations on esthetic considerations alone.[32] One court has held, for example, that zoning pertains not only to the use of buildings, but to their structural and architectural design as well.[33] In these cases, it is extremely important to ascertain whether the court is laying down a general rule, or whether its rule, while appearing to be quite broad, is limited to the facts of the case. When the courts say that

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[27] Commonwealth v. Earl R. Trimmer, 53 Dauphin County Rep. 91, 105 (Pa. 1942).

[28] Miesz v. Mayfield Heights, 92 Ohio App. 471, 111 N.E.2d 20 (1952).

[29] Town of Burlington v. Dunn, 318 Mass. 216, 61 N.E.2d 243 (1945), *cert. denied,* 326 U.S. 739 (1945).

[30] City of New Orleans v. Pergament, 198 La. 852, 5 So. 2d 129 (1941).

[31] McQuillin, Municipal Corporations § 25.31 (3rd ed. 1950).

[32] Preferred Tires, Inc. v. Village of Hempstead, 19 N.Y.S.2d 374, 377 (1940); Commonwealth v. Earl R. Trimmer, 53 Dauphin County Rep. 91, 105 (Pa. 1942).

[33] Mills v. City of Baton Rouge, 210 La. 830, 28 So.2d 447 (1946), citing Mansfield & Swett v. Town of West Orange, 120 N.J.L. 145, 198 Atl. 225 (1938).

they are upholding a zoning ordinance on purely esthetic grounds, do they really mean what they say?

The Louisiana Supreme Court is often quoted as being "esthetically minded." The following is a characteristic passage:

> If by the term "aesthetic consideration" is meant a regard merely for outward appearances, for good taste in the matter of the beauty of the neighborhood itself, we do not observe any substantial reason for saying that such a consideration is not a matter of general welfare. The beauty of a fashionable residential neighborhood in a city is for the comfort and happiness of the residents, and it sustains in a general way the value of property in the neighborhood. Why should not the police power avail, as well as to suppress or prevent a nuisance committed by offending the sense of hearing or the olfactory nerves? An eyesore in a neighborhood of residences might be as much of a public nuisance, and as ruinous to property values in the neighborhood generally, as a disagreeable noise or odor, or a menace to safety or health. The difference is not in principle, but only in degree.[34]

A reading of the case underscores the breadth of this recognition of esthetics as a basis of zoning. The factual issue presented was whether the city had the power through zoning to keep businesses out of residential neighborhoods. This court upheld the esthetic regulation because it would promote the public welfare. A subsequent Louisiana case held that it was in the interest of the general welfare to preserve the architectural beauty of a city.[35]

In 1955, the United States Supreme Court decided the very important case of *Berman v. Parker*.[36] A large slum clearance program was inaugurated by the District of Columbia. The land was to be redeveloped by private interests who would either buy or lease the condemned land from the District of Columbia. There was a stipulation in the conveyance that the redevelopment must be done in strict compliance with the plans of the redevelopment commission. The plaintiff, an owner of a building used strictly for business purposes challenged the right of the District of Columbia to condemn his land since the building itself was not a substandard structure. The Supreme Court held, without a dissent, that this was within the scope of the police power. The language of the court leaves little doubt as to its exact meaning:

> The concept of public welfare is broad and inclusive (citation omitted). 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. . . . In the present case, the Congress and its authorized agencies have made a deter-

[34] State v. New Orleans, 154 La. 271, 284, 97 So. 440, 444 (1923).

[35] City of New Orleans v. Pergament, 198 La. 852, 5 So.2d 129 (1941). See also, HORACK & NOLAN, LAND USE CONRROLS, pp. 163-174 (1955).

[36] 348 U.S. 26 (1955).

> mination that takes into account a wide variety of values. It is not for us to reappraise them. *If those who govern the District of Columbia decide that the nation's capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.* (emphasis added)[37]

Although this was not a zoning case, it declares that the police power extends to esthetic considerations. One writer considered this opinion of great significance because of its effect upon our traditional concepts of private property:

> The decision seems to introduce a new era in democracy. Community symmetry and benefits are to be substituted for individual preferences, and the privileges of property ownership and the rights of property are to be directed and, in a larger measure than previously, controlled by public authority. The *decision* is of great political significance as well as *legal consequence.*[38]

The legal consequences were not long in forthcoming. A zoning ordinance in Fox Point, Wisconsin required as a condition precedent to the issuing of a building permit, a finding by the Building Board of the village that the exterior architectural appeal and functional plan of the proposed structure would not be at substantial variance with other structures already existing in the neighborhood so as to substantially depreciate property values. The Wisconsin Supreme Court upheld the ordinance on two grounds.[39] First, the court decided that the protection of property values was within the general welfare purpose of the police power because "anything that tends to destroy property values of the inhabitants of the village necessarily adversely affects the general welfare of the entire village."[40] The court then pointed out that the ordinance was grounded largely upon esthetic considerations, but that an esthetic basis would not make the law invalid. The court noted that the old rule forbidding zoning based on esthetics alone was undergoing change. It added that the case of *Berman v. Parker*[41] has made it extremely doubtful that the old rule is any longer the law.

The Wisconsin decision is probably the most far-reaching of any to date in its holding on the validity of esthetic zoning. There appears little doubt that the Wisconsin court has laid down a rule the implications of which are far broader than the immediate fact situation which brought it about.

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[37] *Ibid.*

[38] 41 A.B.A.J. 501, 503.

[39] State v. Wieland, 269 Wisc. 262, 69 N.W.2d 217 (1955), *cert. denied,* 76 Sup. Ct. 81 (1955).

[40] *Id.* at 222.

[41] 348 U.S. 26 (1955).