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Validity of New Building Regulations Applicable to Existing Structures

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Validity of New Building Regulations Applicable to Existing Structures

X owns an apartment building within the corporate limits of city M. It was constructed in 1940, at a cost of $500,000, and complied with all existing building regulations. In 1957, there was a serious apartment house fire in the city of M, several tenants having burned to death. This fire attracted widespread attention and resulted in pressure upon the city council to take measures to prevent similar future disasters. The city council therefore passed a building regulation requiring a certain class of apartment buildings to install sprinkler systems. X, who feels he has spent sufficient funds to make his building safe, discovers it will cost him $20,000 to install the required sprinkler system in his building and will cause his tenants considerable aggravation. Therefore, X decides to contest the validity of the building regulation.

The interest of X in the above situation is that of the private property owner, striving to maintain the right to do with his property as he chooses, usually with an eye to his pocketbook. Opposed to this is the interest of the general public, acting through a legislative organ, in protecting the health, welfare and safety of its citizens. X's argument is that when the building was erected, it complied with the law. The public interest argument is that when surrounding circumstances change, the law must adjust to meet the new circumstances.

When the issue is litigated, the court must decide which interest shall prevail. The purpose of this note is to analyze the *attitude* of the courts toward each of the interests involved, and to see how they have reacted to various arguments advanced by the property owner in his fight against the building regulation.

LANDMARK CASES — AN INCIPIENT ATTITUDE

The landmark cases in this area reveal an attitude that has prevailed to the present, that unless the building owner has extremely strong grounds of objection, the regulation will be sustained if based upon some reasonable exercise of the police power. Obviously, the word "reasonable" suggests no concrete test, and indeed the courts in these early cases have not ventured any. There are of course numerous advantages to having black and white delineations, but the courts early recognized that in this area a social problem was involved and each situation depended primarily upon its own facts. In other words, what is required to make a specific building safe from fire, from crowded and unwholesome living conditions, and from obnoxious sewage conditions, depends upon the type

of building involved, what it is used for, its location, the number of inhabitants, its age, etc. Keeping this in mind, it seems sensible to avoid any set formula, and the attitude of the courts in recognizing that the problem is for the legislative branch is commendable.

A landmark case illustrating this attitude is *City of Seattle v. Hinckley*,[1] in which a municipal ordinance was passed requiring all buildings of a certain class, whether erected prior or subsequent to the passage of the ordinance, to be equipped with a specified type of fire escape. The building owner contended this violated a vested right, since he had met all fire escape requirements when the building was erected. In rejecting this argument, the court said: "There is no such thing as an inherent or vested right to imperil the health or impair the safety of the community."[2]

The fight against slums and similar poor living conditions, although a frustrating one, has not been hampered by the courts. Quite possibly the strong emotional argument that the statute in question is designed to alleviate shameful living conditions has influenced the court. In any event the early cases generally upheld this remedial type of legislation. In the famous case of *Health Department v. Trinity Church*,[3] the court sustained a statute, passed after the defendant's building was erected, requiring tenement houses to have a supply of water on each floor. The defendant argued that to comply would cost him money which was a taking of property without due process. The court held no rights of the owner are violated if the sum required to be spent is reasonable under the circumstances.

The early cases also show an equal sympathy to sanitation regulations. Again it is impossible to determine to what degree this attitude stems from the fact that Americans are extremely "sanitation conscious," and how much stems from pure legal reasoning. Either way, the results seem proper, since the courts are sustaining the wishes of the citizenry as manifested through the legislative branch.

Illustrative of this phase of the problem is *Commonwealth v. Roberts*.[4] In this case a Massachusetts statute required certain buildings, if situated on streets with public sewers, to have sufficient waterclosets connected with the sewer. The court interpreted the statute to apply to houses built before its passage, and held such fact did not make it unconstitutional.[5]

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1. 40 Wash. 468, 82 Pac. 747 (1905).
2. *Id.* at 471, 82 Pac. at 748.
3. 145 N.Y. 32, 39 N.E. 833 (1895).
4. 155 Mass, 281, 29 N.E. 522 (1892).
5. See Spear v. Ward, 199 Ala. 105; 74 So. 27 (1917); City of Leeds v. Avram, 244 Ala. 427, 14 So. 2d 728 (1943); Schmidt v. Village of Kimberly, 74 Idaho 48,

> There can be no doubt that the statute in question is within the constitutional powers of the legislature as a police power. It is an act for the preservation of the public health, and relates to the disposal of one of the most dangerous forms of sewage.[6]

This early attitude of the courts in cases concerning health and fire hazards was probably a natural one, since it is appalling to the average person to see slums, firetrap buildings and the like. This sympathetic attitude has been strengthened by the additional consideration of *public morals,* stemming from a realization that slums are prolific breeders of such evils as juvenile delinquency, crime, and perverted moral standards. An apt illustration of this influence is *Adamec v. Post.*[7] In this case plaintiff contended the New York Multiple Dwelling Law, which was made applicable to existing buildings and required them to be kept in conformity with new standards enacted by the legislature, was arbitrary, unreasonable, and a taking of property without due process. In sustaining the statute as reasonable, the court stated:

> . . . [T]here has come a general recognition that dwellings which are unsafe or unsanitary *or which fail to provide the amenities essential to decent living,* may work injury not only to those who live there, *but to the general welfare.*[8]

Keeping this general attitude in mind, we turn to the treatment of specific objections raised by building owners.

PARTICULAR OBJECTIONS

Retroactive Law

Regardless of the ominous ring of the phrase "retroactive law" in other areas, in the field of building regulations this objection has attained little, if any, weight. Since most states have no constitutional prohibition against retrospective laws that do not impinge upon a vested right,[9] this objection is usually coupled with other stronger defenses as a secondary issue. Consequently the courts have passed upon it with cursory treatment, making it difficult to pin down the exact grounds of decision. But one of three general reasons usually is discernible, namely 1) retroactive

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256, P.2d 515 (1953); City of Nokomis v. Sullivan, 153 N.E.2d 48 (Ill. 1958); Nourse v. City of Russellville, 257 Ky. 525, 78 S.W.2d 761 (1935); Fristoe v. City of Crowley, 142 La. 393, 76 So. 812 (1917); Fenton v. Atlantic City, 90 N.J.L. 403, 103 Atl. 695 (1917); Harrington v. Board of Aldermen, 20 R.I. 233, 38 Atl. 1 (1897).

6. Note 4, *supra,* at 282, 29 N.E. at 523. See also Tenement House Dep't. v. Moeschen, 179 N.Y. 325, 72 N.E. 231 (1904).

7. 273 N.Y. 250, 7 N.E.2d 120 (1937).

8. *Id.* at 254, 7 N.E.2d at 122.

9. 6 MCQUILLAN, MUNICIPAL CORPORATIONS § 20.70 (3d ed., 1949).

laws are permissible; 2) it is not a retroactive law at all; or 3) it is the type of retroactive law that is proper. An example is *Clarke v. City of Chicago*,[10] in which the plaintiff sued for damages for the closing of his theater, resulting from a failure to comply with certain ordinances. Plaintiff claimed the city could not retroactively apply the ordinances. The court held that since the provision was necessary for the protection of persons attending public theaters, it could apply retroactively.

This case clearly indicates the danger involved if the courts were to recognize retroactivity as a valid constitutional objection. A person could build a structure, comply with all laws in force at the time, and be free from future regulation. But buildings commonly last a hundred years or more, and in the intervening time a multitude of new ideas, inventions, and materials may decree a completely different type of protection. Obviously the thought of using the plumbing of 100 years ago is revolting. But if the courts recognized retroactivity as a valid objection, this result would follow in some cases. Therefore the defense is usually disposed of by one method or another.

In *Daniels v. City of Portland*,[11] an ordinance required dwelling rooms each to have a window as a condition precedent to occupancy. The court answered the building owner's argument that it was a retroactive law by saying the ordinance destroyed no vested right, and hence was not retroactive. A similar result with slightly different reasoning was reached in *Kansas City Gunning Advertisement Co. v. Kansas City*.[12] The court held an ordinance strictly regulating billboards was not retroactive since it interferred with no vested right, and operated prospectively from the time of passage.[13]

Other arguments of unconstitutionality on the ground that the regulation is retroactive have been met by holding the ordinance is valid because the "general welfare" is involved,[14] or because the regulation is a "reasonable and a proper exercise of the police power."[15] Regardless of the diversity of reasoning, the conclusion is inescapable that retroactivity is not a favored defense. What is or is not retroactive is largely a mat-

10. 159 Ill. App. 20 (1910).

11. 124 Ore. 677, 265 Pac. 790 (1928).

12. 240 Mo. 659, 144 S.W. 1099 (1912).

13. For cases dealing with the retroactive argument as applied to "handrail statutes" (the issue usually arises in negligence cases) see Rau v. Redwood City Woman's Club, 111 Cal. App. 2d 546, 245 P.2d 12 (1952); Dewolf v. Marshall Field and Co., 201 Ill. App. 542 (1916); Fay v. Allied Stores Corp., 43 Wash. 2d 512, 262 P.2d 189 (1953) — all sustaining the ordinauce.

14. City of St. Louis v. Warren Commission & Investment Co., 226 Mo. 148, 126 S.W. 166 (1910).

15. Abbate Bros., Inc. v. City of Chicago, 11 Ill. 2d 337, 142 N.E.2d 691 (1957).

ter of judicial opinion. If the interest of the property owner were favored, a court, in its discretion, could call building regulations that applied to existing buildings retroactive as interfering with a vested right. The fact that they refuse to do so indicates that the interest of the public is the one favored.

Due Process

Due process has been a catch-all objection including such arguments as 1) the regulation is not a valid exercise of the police power; 2) the regulation constitutes a taking of property without compensation; 3) the regulation is unreasonable; 4) the regulation is invalid because the owner was afforded no notice or opportunity to be heard. A survey of various cases indicates that this objection, while of some solace to the building owner, has been generally repudiated as a constitutional objection to building regulations applicable to existing buildings. This is illustrated by *Queenside Hills Realty Co. v. Saxl.*[16] In 1940, appellant constructed a four-story building which complied with all applicable laws. Under a 1944 law appellant was ordered to install an automatic wet pipe sprinkler system. Appellant alleged the market value of the building was about $25,000, the cost of compliance would be about $7,500, and that the benefits to be obtained were negligible. The court held the order was a reasonable exercise of the police power, stating:

> It is for the legislature to decide what regulations are needed to reduce fire hazards to the minimum. Many types of social legislation diminish the value of the property which is regulated.

As indicated previously, the courts have been liberal with regulations which attempt to prohibit the use of outdated sanitation devices. Thus it has been held that it is not a taking of property without due process to suppress the use of privy vaults,[17] even though no notice was given,[18] on the theory that this is such a nuisance that may be abated by summary proceedings. In the area of fire control regulation, such far-reaching ordinances as one requiring the demolition of a building because it was a fire hazard have been sustained[19] in the face of a due process argument. And even when the owner is required to expend huge amounts, he has found little sympathy with the courts. For example, in *Richards v. City of Columbia,*[20] the plaintiff was required to repair his rental property

16. 328 U.S. 80 (1945).
17. Sprigg v. Town of Garrett Park, 89 Md. 406, 43 Atl. 813 (1899).
18. Harrington v. City of Providence, 20 R.I. 233, 38 Atl. 1 (1897).
19. City of Houston v. Lurie, 148 Tex. 391, 224 S.W.2d 871 (1949).
20. 227 S.C. 538, 88 S.E.2d 683 (1955).

under an ordinance containing specific standards, which was passed after his building was built. His costs would have been $575-750 per dwelling, and he owned over a hundred dwellings. The court held the ordinance was reasonable,[21] and was not a taking of property without compensation, "since all property is held subject to reasonable regulation by the State."[22] This case plainly illustrates that the early attitude has lost none of its vigor, and that the overtones working in favor of these regulations are powerful enough to prevail against the most appealing of arguments.

But it would be misleading and ludicrous to convey the idea that all regulations have been and will continue to be sustained in all situations. In cases in which the building owner has some peculiar factor in his favor, he has been able to prevail. Illustrative of this proposition is *Central Savings Bank v. New York*,[23] in which a defense was sustained on the issue of notice. A statute allowed city authorities to make certain repairs on old-law tenements and assess the cost as a lien prior to existing mortgages, without affording mortgagees a hearing as to the reasonableness of the proceedings or the expenses. The court held this was a taking of property without due process and impaired the mortgagee's contract with the mortgagor in violation of the contract clause. And in *Crossman v. City of Galveston*[24] the court held the owner of a lawfully constructed building has such a vested property right in the building that he could not be denied the right to repair it to keep it fit for use in lieu of demolition.[25]

While due process has been relatively the most successful defense, it seems to afford small comfort to the building owner. Even in the *Crossman* case where the owner prevailed on his argument of a vested property right to repair a building, he was faced with the financial onus of repairing his building. Even a great financial burden to the building

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21. See also Bellerive Investment Co. v. Kansas City, 321 Mo. 969, 13 S.W.2d 628 (1929).

22. Richards v. City of Columbia, 227 S.C. 538, 553, 88 S.E.2d 683, 690 (1955). Two of the five judges dissented reasoning that the ordinance was an unreasonable exercise of the police power due to the excessive costs involved.

23. 279 N.Y. 266, 18 N.E.2d 151 (1938).

24. 112 Tex. 303, 247 S.W. 810 (1923).

25. But see Baird v. Bradley, 109 Cal. App. 2d 365, 240 P.2d 1016 (1952), in which a statute and ordinance preventing the repair of buildings damaged by fire to an extent in excess of 50% of their existing value, and in excess of 60% of their physical proportions, unless the alterations and repairs would conform to all requirements for new buildings, were held as not a taking of property without due process. See also Fidelity & Guaranty Insurance Corp. v. Mondzelewski, 49 Del. 306, 115 A.2d 697 (1955); Glenn v. The Mayor of Baltimore, 5 Gill. & J. 424 (Md. 1833).

owner will not help his argument, in the absence of other cogent factors. In these cases especially is the attitude of the courts clearly manifested.

Equal Protection

In a few cases the building owner has had available an "equal protection" argument. However, the favorable attitude of the courts toward building regulations coupled with the general law under the equal protection clause (*i.e.* if a civil rights question is not involved the discrimination will not be scrutinized too closely) has generally nullified this as a persuasive objection. For example, in *Bellerive Investment Co. v. Kansas City*,[26] an ordinance was passed providing that no dwelling place could have a garage underneath that stored *more than three* automobiles. Plaintiff, who owned an apartment building with a garage underneath for tenant parking, contended that this ordinance violated the equal protection clause because it discriminated against garages containing more than three cars. The court held it was a reasonable classification on the theory that the greater the number of cars the greater the danger of fires from gasoline leakage etc.[27]

OTHER FACTORS

Certain other factors may be present in a given case, which, though not determinative of the issue, may strengthen the building owner's case.[28] But it must be noted in this type of case that there are other strong factors present, and also the risk of nullifying the statute or ordinance was not too dangerous to the public. This is illustrated by *Masonic Temple Ass'n. v. City of Chicago*,[29] in which it was held that the city was without power to order the reconstruction of a building for fire safety at a tremendous cost when the building was not used for a public purpose (as are theaters, concert halls, etc.) and the owner had complied with existing ordinances when the building was built, *and the building was reasonably safe in its present condition.* Thus the factor of a *private* building is worth some weight, but it is probably the combination of all the factors involved that was determinative of the issue.

The fact that the building owner is plagued with some extenuating circumstances may also help his case. For example, in *Realty Revenue Corp. v. Wilson*[30] plaintiff's injunction was granted to enjoin the Com-

26. 321 Mo. 969, 13 S.W.2d 628 (1929).

27. See also Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946).

28. For a case realing with the "questionable motives" of the legislature, see Dobbins v. City of Los Angeles, 195 U.S. 223 (1904).

29. 131 Ill. App. 1 (1907).

30. Realty Revenue Corp. v. Wilson, 50 N.Y.S.2d 941, 182 Misc. 552 (Sup. Ct. 1944).

missioner of Housing from enforcing an order requiring plaintiff's building to be vacated. Plaintiff, *whose building was valued at $800,000,* could not comply with the defendant's order because of material securities imposed by the Federal government during wartime exigencies. But here again plaintiff had another strong factor in that the building in its present condition was reasonably safe.

As in any case dealing with a statute, the building owner may have an argument, based upon statutory construction, that the statute was not intended to apply to his building. Here particularly each case turns upon its own facts, and prior cases are of little value.

CONCLUSION

Unquestionably, issues of public safety, health and welfare are for the legislative branch to deal with. With the age of huge and crowded municipalities, with the advent of modern and efficient means of sanitation, with new concepts and awareness of health problems, with new devices and safeguards for the prevention and control of fires, both local and state legislative organs have moved heavily into the area of building regulation, to a degree that it is accepted as a matter of course. Giving way to this tide is the protection of property rights, *i.e.* the right to do with one's property as one chooses. Courts have recognized in theory, and implemented in the decided cases, that the public interest is paramount in general to private property rights. The duty of government is to protect its citizens. Although the private property owner is not without some protection, the distinct tendency of the courts is to allow the legislative branch to handle the problem as it sees fit. Only when some peculiar factor is in favor of the property owner, *and the consequence of holding the regulation invalid is not too detrimental to the public,* will the property owner prevail. Otherwise his only recourse is the common sense of the legislative control.

Despite this fact, courts today are still filled with litigation on this matter. Obviously, each case turns upon its own facts, as is necessary in dealing with concepts like "due process," "equal protection," "reasonableness," and "valid exercise of the police power." No more definite rule can be formulated than that the regulation is valid if "reasonable and not arbitrary." The above cases indicate that the burden of proving "unreasonable and arbitrary," or some other defense, is a difficult one.

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31. See for example City of St. Louis v. Warren Commission & Investment Co., 226 Mo. 148, 126 S.W. 166 (1910).