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Constitutional Law--Ohio Billboard Statute--Unconstitutional

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Recent Decisions

CONSTITUTIONAL LAW — OHIO BILLBOARD STATUTE — UNCONSTITUTIONAL

Ghaster Properties, Inc. v. Preston, 184 N.E.2d 552 (Ohio C.P. 1962)

A recent decision by an Ohio trial court invalidates the Ohio outdoor advertising control statutes, jeopardizes the validity of existing municipal sign legislation, and disqualifies Ohio from receiving extra federal highway aid.[1] In *Ghaster Properties, Inc. v. Preston,*[2] three cases were consolidated at trial to determine the constitutional validity of the Ohio outdoor advertising control statute.[3] One case was an action for a declaratory judgment and an injunction against enforcement of the statute. Preston, Ohio Director of Highways, instituted the other two suits under the statute to abate the existence of two billboards. Contending that the prohibition against outdoor advertising signs bore no reasonable relationship to the public health, safety, morals, or general welfare, the property owners alleged the statute deprived them of their property without due process of law. They also complained that the classifications of section 5516.02 of the Ohio Revised Code were unreasonable and, therefore, a denial of equal protection of the laws.[4] The trial court ruled that the statutes took the owners' property without due process of law because they bore no reasonable relation to the state police power.[5]

The Ohio Director of Highways pointed to highway safety as the basis for the Ohio outdoor sign prohibition.[6] This argument was not novel. Indeed, recent cases of other jurisdictions sustaining outdoor advertising regulations postulate that signs are an attraction to drivers and, therefore, a hazard to highway safety.[7]

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1. Under 72 Stat. 904 (1958), as amended, 23 U.S.C. § 131 (Supp. III, 1958), a state which maintains a program designed to regulate advertising on interstate highways may receive one half of one per cent of the cost of an interstate highway from the federal government.

2. 184 N.E.2d 552 (Ohio C.P. 1962).

3. OHIO REV. CODE § 5516.02 prohibits the erection of advertising devices within 660 feet of an interstate highway. Advertising devices which violate § 5516.02 are classified public and private nuisances under § 5516.04.

4. OHIO REV. CODE § 5516.02 prohibits the erection of all advertising devices along interstate highways except the following: "(A) Directional or other official signs or notices that are required or authorized by law; (B) Signs advertising the sale or lease of the property upon which they are located; (C) Advertising devices indicating the name of the business or profession conducted on such property or which identify the goods produced, sold, or services rendered on such property. . . ."

5. Ghaster Properties, Inc. v. Preston, 184 N.E.2d 552, 555-56 (Ohio C.P. 1962).

6. *Id.* at 556.

7. See, *e.g.,* Los Angeles v. Barrett, 153 Cal. App. 2d 776, 315 P.2d 503 (1957); Swisher & Son, Inc. v. Johnson, 149 Fla. 132, 5 So. 2d 441 (1941); Angola v. Hulbert, 130 Ind. App. 97, 162 N.E.2d 324 (1959); Schulman v. People, 11 App. Div. 2d 273, *rev'd on other*

To counter this hypothesis the property owners in the *Ghaster* case presented two highway safety studies showing no significant relation between highway advertising signs and highway accidents. The trial judge held that outdoor advertising devices were not traffic safety hazards. He concluded that

> if any such relation is shown at all, it is to the effect that such devices are beneficial to safety in that they tend to alert drivers, to keep them actively attentive to roadway conditions and tend to prevent "highway hypnosis."[8]

The decision that billboards are neither a traffic hazard nor a public nuisance provides the precedent for a successful assault on Ohio municipal billboard regulations. This is exactly what occurred in another jurisdiction in *United Advertising Corp. v. Metuchen.*[9] After considering the Iowa and Michigan traffic accident studies, the court held that billboards were neither a traffic hazard nor a nuisance in the City of Metuchen.[10]

The trial judge also ruled favorably on the property owners' contention that arbitrary and unreasonable classification of signs in Ohio Revised Code section 5516.02 violated the equal protection clause of the fourteenth amendment. This section specifically permits the erection of signs

> indicating the name of the business or profession conducted on such property or which identify the goods produced, sold, or services rendered on such property.[11]

The trial judge reasoned that the permissible signs would have an identical effect on traffic safety and would create the same nuisance as signs which have no relation to the business conducted on the property. This observation has not been so obvious to other courts.[12] To eliminate the intruding billboard and to placate local businessmen, cities make this special and "arbitrary"[13] exception to their outdoor advertising ordinances.

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grounds, 219 N.Y.S.2d 241 (Ct. App. 1961); New York State Thruway Authority v. Ashley Motor Court, Inc., 12 App. Div. 2d 223, *aff'd,* 218 N.Y.S.2d 640 (Ct. App. 1961); Perlmutter v. Greene, 259 N.Y. 327, 182 N.E. 5 (1932); Larchmont v. Sutton, 30 Misc.2d 245, 217 N.Y.S.2d 929 (Sup. Ct. 1961); Landau Advertising Co. v. Zoning Bd. of Adjustment, 387 Pa. 552, 128 A.2d 559 (1957).

8. Ghaster Properties, Inc. v. Preston, 184 N.E.2d 552, 557 (Ohio C.P. 1962).

9. 76 N.J. Super. 301, 184 A.2d 441 (1962).

10. Since sign regulation was but a small portion of a comprehensive zoning ordinance, the court refused to consider an attack on the constitutionality of the small part unless the attack be sufficient to overcome the general welfare basis of the entire zoning plan. The plaintiff could not meet this stiff burden of proof.

11. OHIO REV. CODE § 5516.02(C).

12. See, *e.g.,* Murphy, Inc. v. Town of Westport, 131 Conn. 292, 40 A.2d 177 (1944); United Advertising Corp. v. Borough of Raritan, 11 N.J. 144, 93 A.2d 362 (1952); State v. Leonard, 124 N.E.2d 187 (Ohio C.P. 1953); Landau Advertising Co. v. Zoning Bd. of Adjustment, 387 Pa. 552, 128 A.2d 559 (1957).

13. Triborough Bridge & Tunnel Authority v. Crystal, 2 App. Div. 2d 37, 153 N.Y.S.2d 387 (1956); Ghaster Properties, Inc. v. Preston, 184 N.E.2d 552 (Ohio C.P. 1962).

Due to the *Ghaster* case, existing Ohio municipal zoning ordinances which contain these exceptions are particularly vulnerable to constitutional objection.

In invalidating outdoor advertising regulations, judges conclude that the real basis for the regulations is the promotion of beauty.[14] Aesthetics cannot be the sole basis for a regulation which denies an owner of the use of his property under present Ohio law.[15] As the trial judge stated in the *Ghaster* case:

> The police power of the State cannot be invoked for aesthetic reasons and property rights cannot be invaded on any such basis under said power.[16]

Although the traditional view is that aesthetics cannot support regulations under the police power, certain recent cases indicate that the rule is flexible where special aesthetic interests exist. The Florida Supreme Court recognizes that many Florida cities possess unusual qualities of beauty which attract tourists, and that the tourist trade is vital to the economies of these cities. Consequently, the court has sustained ordinances based on aesthetics which regulate the erection of advertising signs.[17] Another special aesthetic interest is that of a state in the natural beauty of its "scenic highways" where the state economy depends heavily on tourist trade.[18] As viewed by the Justices of the Supreme Court of New Hampshire:

> The maintenance of the natural beauty of areas along interstate highways is to be taken into account in determining whether the police power is properly exercised.[19]

Except for these two special instances, no other court holds that aesthetic reasons *alone* can support the exercise of the police power to regulate billboards.[20] Many courts state, however, that aesthetics can be

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14. See, *e.g.*, Varney v. Williams, 155 Cal. 318, 100 Pac. 867 (1909); Santa Barbara v. Modern Neon Sign Co., 11 Cal. Rptr. 57 (Cal. App. 1961); Passaic v. Patterson Bill Posting Co., 72 N.J.L. 285 (Sup. Ct. 1905); Johnstown Poster Advertising Co. v. Borough of Portage, 27 Pa. D. & C.2d 617 (Cambria County Ct. 1961).

15. Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 148 N.E. 842 (1925). Aesthetics as an additional consideration will not invalidate the exercise of the police power. Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925).

16. Ghaster Properties, Inc. v. Preston, 184 N.E.2d 552, 557 (Ohio C.P. 1962).

17. Daytona Beach v. Abdo, 112 So. 2d 398 (Fla. 1959); Merritt v. Peters, 65 So. 2d 861 (Fla. 1953); Dade County v. Gould, 99 So. 2d 236 (Fla. Ct. App. 1957). The court reaffirmed its position on aesthetic zoning in Sunad, Inc. v. Sarasota, 122 So. 2d 611 (Fla. 1960), although it invalidated the ordinance for not being reasonably designed to serve its aesthetic purpose.

18. General Outdoor Advertising Co. v. Department of Pub. Works, 289 Mass. 149, 193 N.E. 799 (1935); Opinion of the Justices, 103 N.H. 268, 169 A.2d 762 (1961).

19. Opinion of the Justices, 103 N.H. 268, 270, 169 A.2d 762, 764 (1961).

20. Although there is an absence of judicial support for aesthetics as a basis for regulating or prohibiting outdoor advertising, text writers have long been advocating that the view is tenable. See, *e.g.*, Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW &