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MUNICIPAL CORPORATIONS - ZONING ORDINANCES - AESTHETIC CONSIDERATIONS UNDER THE POLICE POWER

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MUNICIPAL CORPORATIONS — ZONING ORDINANCES — AESTHETIC CONSIDERATIONS UNDER THE POLICE POWER — Plaintiff brought suit to enjoin the enforcement of the zoning laws of the city of Miami Beach. His property was in a zone reserved for apartment hotels and first-class family residences, but adjacent to an area in which business structures were allowed. Plaintiff sought to erect structures of a business character on his property, despite the zoning law. *Held*, the zoning law is sustained, for plaintiff's property rights must yield to the interest of the community in maintaining the attractiveness of this resort area. *City of Miami Beach v. Ocean & Inland Co.*, (Fla. 1941) 3 So. (2d) 364.

Although the interest of a landowner in the free use of his property is protected under the due process clauses of the federal and state constitutions,[1] it is nevertheless subject to the exercise of the state's police power.[2] Thus, to satisfy the due process clauses, the particular zoning law must be shown to be properly within the scope of the state's police power as fostering the public health, safety, morals and general welfare. Ordinances which restrict the type of materials and manner of construction used in buildings and which exclude from residential areas offensive trades, industries and structures likely to create nuisances have been readily upheld as health or safety measures.[3] A more difficult question arises when apartment buildings, stores, business houses and buildings of a similar character are excluded from residential districts. Such regulations are upheld by a majority of the courts as facilitating fire protection, mitigating parking problems, protecting small children at play and preventing traffic accidents.[4] In the principal case the court upholds a zoning ordinance which excludes stores and business structures from an area devoted to first-class apartments and apartment hotels on the ground that aesthetic considerations contribute to the general welfare and are thus within the scope of the police power. Although the courts in general have been reluctant to recognize aesthetic purposes as a legitimate subject of the exercises of the police power, these have been deemed a proper objective for the exercise of other state power. Thus, while the spending power of the state is limited to expenditures made for a public purpose,[5] it has been held that expenditures can properly be made for the beautification of a given municipal area, such as the erection of fountains or the construction and maintenance of parks.[6] Similarly the exercise of the power of eminent

[1] ROTTSCHAEFER, CONSTITUTIONAL LAW, § 244 et seq. (1939).

[2] Id.

[3] Hadacheck v. Chief of Police of City of Los Angeles, 239 U. S. 394, 36 S. Ct. 143 (1915); Reinman v. City of Little Rock, 237 U. S. 171, 35 S. Ct. 511 (1915); Fischer v. St. Louis, 194 U. S. 361, 24 S. Ct. 673 (1904).

[4] Village of Euclid, Ohio v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114 (1926); Zahn v. Board of Public Works of City of Los Angeles, 274 U. S. 325, 47 S. Ct. 594 (1926).

[5] Jones v. City of Portland, 245 U. S. 217, 38 S. Ct. 112 (1917); Green v. Frazier, 253 U. S. 233, 40 S. Ct. 499 (1920).

[6] Hodges v. City of Buffalo, 2 Den. (N. Y.) 110 (1846); Kingman v. City of Brockton, 153 Mass. 255, 26 N. E. 998 (1891); Attorney General ex rel. Bissell v. Burrell, 31 Mich. 25 (1875); State ex rel. Douglas County v. Cornell, 53 Neb. 556, 74 N. W. 59 (1897); Foster v. Board of Park Commissioners of City of Boston, 133 Mass. 321 (1882).

domain, which may be used only to take private property for a public use,[7] has been upheld when employed to further improvements aesthetic in nature.[8] But in sustaining the use of the police power as a general welfare measure, the courts at first either denied the validity of such ordinances altogether [9] or said that a recognized police regulation could be upheld despite incidental aesthetic motives.[10] However, some courts upheld regulations designed primarily for aesthetic purposes, if they could be justified as measures to protect the public safety, health or morals.[11] A few courts have suggested that zoning ordinances should be upheld under the police power with only aesthetic considerations to support them.[12] The Florida court has adopted this suggestion as the basis for its decision without resorting to the usual public safety or health justifications. There is much justification for this position, since the law should take some recognition of the desirability of attractive surroundings. When the fear of depreciation in property values by unaesthetic neighboring structures has been removed, private capital will invest more freely with a view toward beautification.[13] The objection may be pressed that aesthetic considerations cannot be

[7] See 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 1124 (1927), and cases cited therein.

[8] Owners of Ground v. Mayor of Albany, 15 Wend. (N. Y.) 374 (1836); Higginson v. Inhabitants of Nahant, 93 Mass. 530 (1866); In re Clinton Ave., 57 App. Div. 166, 68 N. Y. S. 196 (1901); Cascade Town Co. v. Empire Water & Power Co., (C. C. Colo. 1910) 181 F. 1011; Attorney General v. Williams, 174 Mass. 476, 55 N. E. 77 (1899); Bunyan v. Commissioner of Palisades Interstate Park, 170 App. Div. 941, 154 N. Y. S. 1114 (1915).

[9] Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co., 72 N. J. L. 285, 62 A. 267 (1905); Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N. E. 920 (1911); City of Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 148 N. E. 842 (1925); Women's Kansas City St. Andrew Society v. Kansas City, Missouri, (C. C. A. 8th, 1932) 58 F. (2d) 593; Baker v. Somerville, 138 Neb. 466, 293 N. W. 326 (1940); Wolverine Sign Works v. City of Bloomfield Hills, 279 Mich. 205, 271 N. W. 823 (1937).

[10] Welch v. Swasey, 193 Mass. 364, 79 N. E. 745 (1907), affd. 214 U. S. 91, 29 S. Ct. 567 (1909); In re Opinion of the Justices, 234 Mass. 597, 127 N. E. 525 (1920).

[11] Cusack Co. v. City of Chicago, 242 U. S. 526, 37 S. Ct. 190 (1916); City of Rochester v. West, 164 N. Y. 510, 58 N. E. 673 (1900); State ex rel. Civello v. City of New Orleans, 154 La. 271, 97 So. 440 (1928); Cochran v. Preston, 108 Md. 220, 70 A. 113 (1908); Atkinson v. Piper, 181 Wis. 519, 195 N. W. 544 (1923).

[12] The dictum in State ex rel. Carter v. Harper, 182 Wis. 148, 196 N. W. 451 (1923), relied upon by the court in the principal case, that in State ex rel. Civello v. City of New Orleans, 154 La. 271, 97 So. 440 (1928), and the dissenting opinion in State ex rel. Twin City Bldg. & Investment Co. v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159 (1919), urge this result; particular emphasis has been given to aesthetics in Ware v. City of Wichita, 113 Kan. 153, 214 P. 99 (1923). See also the excellent discussion in Churchill & Tait v. Rafferty, 32 Philippines 580 (1915).

[13] State ex rel. Carter v. Harper, 182 Wis. 148, 196 N. W. 451 (1923); Chandler, "The Attitude of the Law Toward Beauty," 8 A. B. A. J. 470 (1922).

judged by objective standards so that regulation of private property will be without limit, but this argument might be addressed to the lawmakers rather than to the courts.[14]

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[14] There has been some attempt to work out an objective standard to guide the courts in passing upon the validity of aesthetic enactments. One test suggested would uphold all regulations excluding what a reasonable man would consider objectionable. See 80 UNIV. PA. L. REV. 428 at 434 (1932). See generally, Chandler, "The Attitude of the Law Toward Beauty," 8 A. B. A. J. 470 (1922); Baker, "Aesthetic Zoning Regulations," 25 MICH. L. REV. 124 (1926); Light, "Aesthetics in Zoning," 14 MINN. L. REV. 109 (1930); Baker, "Municipal Aesthetics and the Law," 20 ILL. L. REV. 546 (1926).