Michigan Law Review

Volume 36 | Issue 4

1938

MUNICIPAL CORPORATIONS - POLICE POWER - BILLBOARD REGULATIONS FOR AESTHETIC PURPOSES

Bertram H. Lebeis
University of Michigan Law School

MUNICIPAL CORPORATIONS — POLICE POWER — BILLBOARD REGULATIONS FOR AESTHETIC PURPOSES — Plaintiff applied to defendant superintendent of buildings for permits to erect billboards for general advertising purposes on plaintiff's property in the city of Troy. Defendant refused to issue the permits on the authority of an ordinance which made it unlawful to erect any billboard and/or signboard within the city limits, except upon real property owned or leased by the occupants thereof and for the sole purpose of advertising the sale of such property or of merchandise kept for sale upon such premises. Plaintiff petitioned for a writ of mandamus to compel defendant to issue the

permits. *Held,* that the ordinance was void and that the writ was to be allowed. *Mid-State Advertising Corporation v. Bond,* 274 N. Y. 82, 8 N. E. (2d) 286 (1937).

The authority of a municipality to control the erection and maintenance of structures for outdoor advertising is based upon its exercise of the police power.[1] Dealing with such regulatory ordinances as an exercise of police power to limit the pursuit of a lawful enterprise, the courts generally recognize their validity only if they tend to promote public health, morals, welfare or safety, especially the latter.[2] When the ordinance confessedly is based on aesthetic considerations merely and is not sustainable on orthodox grounds, the traditional view dictates a declaration of its invalidity.[3] In bringing within police power regulation ordinances which obviously are directed toward aesthetic ends, the courts at times resort to the attenuated and fantastic arguments that billboards provide convenient places to harbor criminals, furnish a rendezvous for immorality, constitute receptacles for refuse and combustible materials, and intensify the heat by reflecting the sun's rays in the street.[4] This method of approach, while not immune to criticism,[5] does afford the courts a means of sustaining legislation which excludes billboards from residential districts or places limitations on their size and on the manner in which they may be constructed. But when the state or municipality wishes to preserve the public enjoyment of a beautiful view by prohibiting advertising structures which will interfere with such enjoyment, the question is squarely presented whether aesthetic considerations alone justify the

[1] 3 McQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., § 986 (1928).

[2] FREUND, POLICE POWER, § 182 (1904); St. Louis Gunning Adv. Co. v. City of St. Louis, 235 Mo. 99, 137 S. W. 929 (1911); People ex rel. Publicity Leasing Co. v. Ludwig, 218 N. Y. 540, 113 N. E. 532 (1916); Horton v. Old Colony Bill Posting Co., 36 R. I. 507, 90 A. 822 (1914); Cusack Co. v. City of Chicago, 242 U. S. 526, 37 S. Ct. 190 (1916); St. Louis Poster Adv. Co. v. City of St. Louis, 249 U. S. 269, 39 S. Ct. 274 (1919).

[3] Varney & Green v. Williams, 155 Cal. 318, 100 P. 867 (1909); City of Chicago v. Gunning System, 214 Ill. 628, 73 N. E. 1035 (1905); Commonwealth v. Boston Adv. Co., 188 Mass. 348, 74 N. E. 601 (1905); Wolverine Sign Works v. City of Bloomfield Hills, 279 Mich. 205, 271 N. W. 823 (1937); City of Passaic v. Paterson Bill Posting Co., 72 N. J. L. 285, 62 A. 267 (1905). The reason given for so holding is that artistic considerations are not such a necessity as to warrant the taking of property without compensation. Some courts advance as a practical objection the relatively impossible task of establishing standards of beauty. See, for example, St. Louis Gunning Adv. Co. v. City of St. Louis, 235 Mo. 99 at 202, 137 S. W. 929 (1911) ("tastes and ideas of beauty are as varied as are the leaves upon the tree—no two are alike, and thousands are dissimilar").

[4] Chandler, "The Attitude of Law Toward Beauty," 8 A. B. A. J. 470 (1922); Wolverine Sign Works v. City of Bloomfield Hills, 279 Mich. 205 at 208, 271 N. W. 823 (1937) (dissent); Cusack Co. v. City of Chicago, 242 U. S. 526, 37 S. Ct. 190 (1916); St. Louis Poster Adv. Co. v. City of St. Louis, 249 U. S. 269, 39 S. Ct. 274 (1919).

[5] Chandler, "The Attitude of Law Towards Beauty," 8 A. B. A. J. 470 at 472 (1922); Churchill v. Rafferty, 32 Philippine 580 (1915), appeal dismissed 248 U. S. 591, 39 S. Ct. 20 (1918); see also dissenting opinion in Wolverine Sign Works v. City of Bloomfield Hills, 279 Mich. 205 at 208, 271 N. W. 823 (1937).

exercise of the police power in this fashion. The trend of the recent decisions is to support the exercise of the police power for such aesthetic purposes. The Indiana Court took the first step in this direction when it upheld an ordinance prohibiting billboards within five hundred feet of public parks, parkways or boulevards,[6] while a recent Massachusetts case,[7] in sustaining regulations excluding billboards from certain limited areas in the interest of taste, fitness and scenic beauty, advances still further the cause of aestheticism in police power regulation [8] and suggests a new theory to justify such legislation. Although a

[6] General Outdoor Adv. Co. v. City of Indianapolis, 202 Ind. 85, 172 N. E. 309 (1930), noted in 29 MICH. L. REV. 381 (1931). The court held that plaintiff's billboards did not constitute a nuisance per se and therefore could not be taken without compensation under that section of the ordinance which required the removal of existing billboards which came within the statutory prohibition; but that the future erection of such structures might be forbidden in the interest of beauty alone. This latter doctrine is exactly contrary to that in Haller Sign Works v. Training School, 249 Ill. 436, 94 N. E. 920 (1911). Indiana thus appears to have its own unique rule.

[7] General Outdoor Adv. Co. v. Dept. of Public Works, 289 Mass. 149, 193 N. E. 799 (1935), appeal dismissed on motion of appellants in 297 U. S. 725, 56 S. Ct. 495 (1935), noted in 48 HARV. L. REV. 847 (1935) and 2 UNIV. CHI. L. REV. 638 (1935). See exhaustive discussion of this case in Gardner, "The Massachusetts Billboard Decision," 49 HARV. L. REV. 869 (1936).

[8] The regulations of the Department of Public Works and the ordinance of the city of Concord under consideration in the case were made under an enabling statute now embodied in 1 Mass. Gen. Laws (Ter. Ed. 1932), c. 93, §§ 29-33. The regulations provided, inter alia, that no permits would be issued for outdoor advertising in any location within three hundred feet of any public park if within view of any portion thereof, while the ordinance was applicable indifferently to all parts of the town. Holding them to be a valid exercise of the police power, the court speaks first in terms of public safety and protection of travelers on the highways from intrusion of commercial advertising, and in so doing places a novel connotation on "aesthetic considerations." In General Outdoor Adv. Co. v. Dept. of Public Works, 289 Mass. 149 at 185-187, 193 N. E. 799 (1937), the court said: "The rules and regulations here in question . . . do not rest primarily upon aesthetic considerations in the sense in which that phrase has been used to overturn legislative enactments. They are designed to promote safety of travel upon the highways, and enjoyment of resort to public parks and reservations, to shield travelers upon highways from the unwelcome obtrusion of business appeals, to protect property from depreciation, and to make the Commonwealth attractive to visitors from other States and countries as well as to her own citizens. . . . It is in substance exclusion of billboards and advertising devices by zoning. It is an attempt to segregate them to a certain extent in places where from the scenic or historic point of view the dominant use of land is indifferent or is the transaction of business, and to shut them out from regions where nature has afforded landscape of unusual attractiveness and where historic and other factors have created places hallowed by patriotic, literary and humanitarian associations. . . . It is . . . within the reasonable scope of the police power to preserve from destruction the scenic beauties bestowed on the Commonwealth by nature in conjunction with the promotion of safety of travel . . . and the protection of travelers from intrusion of unwelcome advertising." But more significantly, the court adds at p. 187: "Even if the rules and regulations of billboards and other advertising devices did not rest upon the safety of public travel and the promotion of comfort of travelers . . . we think that the preservation of scenic beauty and places of historical interest would be a sufficient support for them."

constitutional amendment [9] had been passed to overcome the effect of an earlier decision,[10] the result of the case cannot be based thereon because Article X of the Declaration of Rights [11] is still part of the Massachusetts constitution. It is said the decision is based upon the theory that the citizen's constitutional liberty does not include the right to force his thoughts upon the attention of others, and that the ownership of land confers no constitutional right to use it for projecting propaganda into neighboring areas.[12] This being so, the regulation of billboards in certain areas does not involve an exercise of police power to limit a lawful enterprise in the interest of public health, safety or morality, nor is it a question of taking private property for public use. Rather, the problem is one of a conflict of private enterprises between the seeker for recreation and the outdoor advertiser.[13] Without providing any compensation for the loser, the state may decide the issue in the manner which, in the judgment of the legislature, is of greater value to the public.[14] Whether or not artistic considerations alone are sufficient to sustain the validity of billboard ordinances is as yet an open question in New York. The ordinance in the principal case was a

[9] Articles of Amendment to Massachusetts Constitution. "Art. 50. Advertising on public ways, in public places and on private property within public view may be regulated and restricted by law."

[10] Commonwealth v. Boston Adv. Co., 188 Mass. 348, 74 N. E. 601 (1905), holding invalid a regulation of a park commission prohibiting billboards within sight of a public park or parkway.

[11] "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. . . . And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

[12] Gardner, "The Massachusetts Billboard Decision," 49 HARV. L. REV. 869 (1936). At page 872 the following language of one of the delegates to the Massachusetts Constitutional Convention of 1917-1918 is cited as the basis for the decision: " 'This leads me to inquire very briefly of the nature of this alleged right of the landowner to erect upon his premises advertising devices . . . to attract the notice of the passer-by or to intrude upon the observation of all who come within the range of human vision, his commercial enterprises or his perhaps legitimate commercial ambitions. I assert, sir . . . that the use of private real estate for the erection of conspicuous, ostentatious, diffusive advertising signs is not a right of property inherent in the ownership of the soil. . . . On the contrary, I assert that this method of advertising constitutes . . . an invasion of the property rights of others. . . .' "

[13] Gardner, "The Massachusetts Billboard Decision," 49 HARV. L. REV. 869 at 889-897 (1936), demonstrates that the General Outdoor Advertising Co. case is a correction of the fallacious reasoning and result in Commonwealth v. Boston Adv. Co., 188 Mass. 348, 74 N. E. 601 (1905), and that Art. 50 (supra, note 9) is but the means by which the logic is made clear. In the latter case, by forgetting that there is a conflict of private enterprises between the seeker for recreation and the advertiser, the court overlooked the fact that a solution of the conflict must necessarily sacrifice one of the two in some measure, and thus was led inadvertently to rule that the constitution prefers the second enterprise to the first; the court thus viewed the problem as one of a use of police power for the limitation of a lawful enterprise in the interest of public safety, health and morality.

[14] See Gardner, "The Massachusetts Billboard Decision," 49 HARV. L. REV. 869 at 898 (1936).

drastic one in that it provided for the total exclusion of all billboards throughout the entire city. The language of the opinion seems to indicate that the court would allow the prohibition of advertising structures on private property for aesthetic reasons, provided that such prohibition is confined to limited areas within public view and some standard of regulation is prescribed in the ordinance. In insisting upon this requirement, it would be demanding no more than was present in the regulations upheld in the Massachusetts case.[15] It is submitted that the view adopted by the Massachusetts court is sound in theory and consonant with popular sentiment regarding outdoor advertising,[16] and that only an undue respect for precedent should prevent other courts from adopting it.

Bertram H. Lebeis

[15] The Massachusetts court recognizes that the regulation and restriction "may extend to prohibition of such advertising in certain . . . areas . . . and districts, though not . . . without bound, throughout the Commonwealth." General Outdoor Advertising Co. v. Dept. of Public Works, 289 Mass. 149 at 180, 193 N. E. 799 (1935). And although the ordinance applied to the entire town of Concord, the court points out that it has no congested business district, but on the contrary is possessed of "exceptional attractiveness" due to the surroundings of historical importance. Ibid., p. 197.

[16] The English Parliament early acted to allow the regulation of billboards in the interest of scenic beauty. Advertisements Regulation Act of 1907, 7 Edw. 7, c. 27, § 2; Advertisements Regulation Act of 1925, 15 & 16 Geo. 5, c. 52, § 1. The latter section confers upon local authorities "powers to make by laws for regulating, restricting or preventing within their district . . . the exhibition of advertisements so as to disfigure or injuriously affect—(a) the view of rural scenery from a highway or railway, or from any public place or water; or (b) the amenities of any village within the district of a rural district council; or (c) the amenities of any historic or public building or monument or of any place frequented by the public solely or chiefly on account of its beauty or historic interest."