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Zoning For Aesthetics Substantially Reducing Property Values

CASE COMMENTS

ZONING FOR AESTHETICS SUBSTANTIALLY REDUCING PROPERTY VALUES

In recent years, courts in several jurisdictions have recognized that the pleasant appearance of a community makes a direct and beneficial contribution to the general welfare and that aesthetic considerations, long considered insufficient to justify any restriction on private property, may validly form the basis of a zoning ordinance.[1] However any zoning ordinance, regardless of its basis, is subject to fundamental constitutional limitations which prohibit private property from being taken for public use without just compensation.[2] Accordingly, if an aesthetically based ordinance subjects a small area to restrictions more burdensome than those imposed on adjacent property, thereby causing the value of the property affected to be diminished, the validity of such an ordinance may be challenged.[3]

In the recent decision of *City of St. Paul* v. *Chicago, St. Paul, Minneapolis and Omaha Railway Co.*,[4] the United States Court of Appeals for the Eighth Circuit, applying Minnesota law, upheld a zoning ordinance based on aesthetic considerations which substantially reduced the market value of a small area[5] while not similarly burdening adja-

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[1]*See*, e.g., Cronwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967) (aesthetically based anti-billboard ordinance held valid); Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965) (aesthetically based anti-junkyard ordinance held valid). *Compare* Stoner McCray Sys. v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843 (1956) *with* City of Des Moines v. Lohner, — Iowa —, 168 N.W.2d 779 (1969). In *Stoner McCray* the court stated the traditional view that "aesthetic considerations are a matter of luxury and indulgence rather than of necessity and it is necessity alone which justifies the exercise of the police power to take private property without compensation." 78 N.W.2d at 848, *citing* City of Passaic v. Paterson Billposting Co., 72 N.J.L. 285, 287, 62 A. 267, 268 (1905). But many states will still not permit aesthetics alone to justify a zoning ordinance. *See* Masotti and Selfon, *Aesthetic Zoning and the Police Power*, 46 J. URBAN L. 773 (1968).

[2]The United States Constitution provides that private property shall not be taken for public use, without just compensation or the requisite due process of law, U.S. CONST. amend. V; U.S. CONST. amend. XIV.

[3]Zopfi v. City of Wilmington, 273 N.C. 430, 160 S.E.2d 325 (1968); *see* Hannifin Corp. v. City of Berwyn, 1 Ill. 2d 28. 115 N.E.2d 315 (1953); *cf.* Skalko v. City of Sunnyvale, 14 Cal. 2d 213, 93 P.2d 93 (1939). *See also* 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING, Ch. 6 (3d ed. 1969).

[4]413 F.2d 762 (8th Cir.), *cert. denied*, 90 S. Ct. 478 (1969).

[5]The fair market value of the property in question prior to the passage of the ordinance was $320,000 and its value after the passage of the ordinance was $150,000. 413 F.2d at 765.

cent tracts.[6] The ordinance imposed a height restriction on property owned by the railroad in order that structures would not be built above the level of a nearby city park, thus insuring an aesthetically desirable gateway[7] to the core-renewal area of downtown St. Paul, Minnesota.[8]

In reversing the district court's determination of invalidity,[9] the circuit court held that since the ordinance in question was based on the legitimate police power objective of improving the appearance of the downtown core-renewal area, it was within the power of the city to make reasonable regulations to promote this end. Such regulations would not be invalidated unless an examination of the entire record indicated that it was "possible to say that the legislative choice [was] without rational basis."[10] Finding the ordinance in question to be

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[6]The area immediately adjacent to the property in question had undergone intensive development and many high rise buildings had been constructed or were planned. Property within one hundred feet of the subject property was condemned by the Housing Authority, the owner was paid compensation and the property was sold to private interests as the site of a luxury high-rise apartment building. *Id.* at 764.

[7]The property lies between two bridges across the Mississippi river and the park "serves to open up the southern approach" to the downtown area which lies to the north. *Id.* at 764.

[8]The property involved is situated at the foot of a sharp bluff, forty to ninety feet below the level of a city park. The area surrounding the park is part of the core-renewal area of downtown St. Paul and is undergoing rapid high rise development. In 1963, the city realized that the railroad was attempting to sell this property and feared that this sale would result in the erection of structures above the level of the park. Consequently in 1966, the present ordinance was enacted which effectively prohibited such an eventuality. *Id.* at 763-65.

[9]The district court in an unreported opinion found the ordinance to be unreasonable and arbitrary because:

> (1) it bore no substantial relationship to health, safety, morals or the general welfare, and was enacted for aesthetic reasons only; (2) it was an instance of spot zoning and not part of a comprehensive plan; and (3) it was a confiscation without compensation in that the benefit to the public was small in comparison to the detriment of the property owner. The court concluded that the ordinance was "unconstitutional as violative of due process of law."

Id. at 765-66.

[10]*Id.* at 766-67. In his dissent, Judge Mehaffy criticized the rationale of the majority stating that:

> [t]he specific premise of the majority opinion rests upon a patently erroneous basis in that it completely overlooks the requirements of constitutionality in its approach to this case... [A] city, state or even the Congress cannot validly invoke any ordinance or statute regardless of its "reasonableness, wisdom and propriety" if such ordinance or statute violates fundamental provisions of the Constitution.

Id. at 773-74 (dissenting opinion).

reasonable, the court noted that it was adopted only after thorough study coupled with a public hearing, and that the restriction was in conformity with the comprehensive city plan.[11] The fact that the subject property was substantially diminished in value was not deemed sufficient to invalidate the ordinance. The court felt that the benefit derived by the public from the pleasant appearance of the locality outweighed the loss suffered by the railroad.[12]

Zoning ordinances enacted pursuant to a legitimate police power objective generally have been held constitutionally valid so long as they are not unjustly discriminatory, arbitrary, unreasonable, or confiscatory.[13] The fact that the property involved may have been diminished in value has not been sufficient in itself to render an ordinance invalid since individual property rights have always been subordinate to the general welfare.[14] However, when compared with the benefit derived by society from the restriction, the extent to which property values are diminished is a significant indication of whether the ordinance in question is reasonable.[15] Other factors generally considered in ascertaining the reasonableness and consequent validity of an ordinance have been: the character of the neighborhood, the zoning classi-

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[11]*Id.* at 768-69. Judge Mehaffy in his dissenting opinion disputed the existence of a comprehensive plan for the tract in question, since the railroad property is not within the redevelopment or renewal area of downtown St. Paul. *Id.* at 776 (dissenting opinion). *See generally* Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

[12]*Id.* at 767, 770.

[13]*See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Appeal of Lord, 368 Pa. 121, 81 A.2d 533, 535 (1951); *cf.* McMahon v. City of Dubuque, 255 F.2d 154 (8th Cir.), *cert. denied*, 358 U.S. 833 (1958). *See generally*, 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING, Chs. 2-5 (3d ed. 1969).

[14]McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 264 P.2d 932 (1953); Jefferson County v. Timmel, 261 Wis. 39, 51 N.W.2d 518 (1952); *see* Stevens v. Town of Huntington, 20 N.Y.2d 352, 229 N.E.2d 591, 283 N.Y.S.2d 16 (1967). *See also* Miller v. Shoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

[15]Courts have not hesitated to uphold ordinances involving safety regulations. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); City of Marysville v. Standard Oil Co., 27 F.2d 478 (8th Cir. 1928). The same is true where an abatement of a nuisance is concerned. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915). In these situations the ordinances were upheld even though there was substantial reduction in the market value of the property. Where, however, the benefit to the public is small compared to the burden imposed on the the individual property owner, the ordinance will be invalidated. *See* Stevens v. Town of Huntington, 20 N.Y.2d 352, 229 N.E.2d 591, 283 N.Y.S.2d 16 (1967); Vernon Park Realty v. City of Mt. Vernon, 307 N.Y. 493, 121 N.E.2d 517, 125 N.Y.S.2d 112 (1954); *cf.* Dufau v. Parish of Jefferson, 200 So. 2d 335 (La. Ct. App. 1967).

fication and use of nearby property, and the motivation behind a particular ordinance.[16]

Whenever the enactment of an ordinance based primarily or exclusively on aesthetics has caused substantial diminution in property values, courts in Minnesota[17] and elsewhere[18] have tended to invalidate such restrictions, reasoning that the aesthetic enhancement of the community does not promote the general welfare sufficiently to justify diminishing or destroying valuable property interests. But the recent recognition in several jurisdictions, including Minnesota, that the pleasant appearance of a locality promotes the general welfare seems to partially undermine the authority of these earlier decisions.[19] These more recent decisions, however, did not involve substantial reduction in property values, consequently they are distinguishable from the earlier cases.[20]

In situations where zoning ordinances based solely or predominantly on aesthetic considerations have been upheld, courts generally have stated that the exercise of the police power in this area is not unlimited, and that if a municipality exceeds reasonable bounds in the singular pursuit of an aesthetically pleasing locality, the restrictions involved will be invalidated as constituting "unreasonable devices of implementing community policy."[21] Ordinances based upon aesthetics,

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[16]La Salle Nat'l Bank v. County of Cook, 28 Ill. 2d 497, 192 N.E.2d 909 (1963); Trust Co. of Chicago v. City of Chicago, 408 Ill. 91, 96 N.E.2d 499 (1951).

[17]Alexander v. City of Minneapolis, 267 Minn. 155, 125 N.W.2d 583 (1963); Golden v. City of St. Louis Park, 266 Minn. 46, 122 N.W.2d 570 (1963); Pearce v. City of Edina, 263 Minn. 553, 118 N.W.2d 659 (1962); Olsen v. City of Minneapolis, 263 Minn. 1, 115 N.W.2d 734 (1962).

[18]Barney v. Casey Co. v. Town of Milton, 324 Mass. 440, 87 N.E.2d 9 (1949); Senefsky v. Lawler, 307 Mich. 728, 12 N.W.2d 387 (1943); Cleveland Trust Co. v. Village of Brooklyn, 92 Ohio App. 351, 110 N.E.2d 440 (1952).

[19]*Compare* Naegele Outdoor Adv. Co. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968) *with* Pearce v. City of Edina, 263 Minn. 553, 118 N.W.2d 659 (1962) *and* Olsen v. City of Minneapolis, 263 Minn. 1, 115 N.W.2d 734 (1962). *See also* Opinion of the Justices, 333 Mass. 773, 128 N.E.2d 557 (1955); State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217, *cert. denied,* 350 U.S. 841 (1955).

[20]Cases cited note 19 *supra.*

[21]People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 275, 240 N.Y.S.2d 734, 738, *appeal dismissed,* 375 U.S. 42 (1963); *see* Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965). *See generally* Cronwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967). In upholding an anti-billboard ordinance based solely on aesthetics, the court in *Cromwell* noted that not any aesthetic consideration will justify a zoning ordinance.

> The exercise of the police power should not extend to every artistic conformity or non-conformity. Rather what is involved are those aesthetic considerations which bear substantially on the economic, social and cul-

heretofore declared valid, have also had a very limited effect on private property values, imposing burdens on the landowner more in the nature of an inconvenience than a hardship and causing little or no diminution in property value.[22] These ordinances, furthermore, have been confined generally to restrictions eliminating uses which are particularly offensive and unsightly, such as automobile wrecking yards[23] and billboards,[24] or have been concerned with the promotion of tourism[25] or the preservation of historic areas.[26]

By permitting a municipality to implement an aesthetically based ordinance which substantially reduced the market value of a small area by restricting permissible building heights, the court in *City of St. Paul* has extended the narrow limits accorded prior ordinances founded on aesthetic considerations.[27] Such ordinances have previously been confined to the restriction of uses highly offensive in nature, such as billboards and junkyards,[28] which are clearly distinguishable from the structure contemplated for the property involved in the instant case.[29] More significantly, the court has sanctioned a diminution in property value considerably greater than heretofore permitted in the furtherance of an aesthetic objective.[30]

> tural patterns of a community or district.... The eye is entitled to as much recognition as the other senses, but of course, the offense to the eye must be substantial and be deemed to have material effect on the community or district pattern.

Id. at 752, 279 N.Y.S.2d at 30.

[22]Cases cited note 21 *supra.*

[23]Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965).

[24]State v. Diamond Motors, Inc., — Hawaii —, 429 P.2d 825 (1967); Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967).

[25]City of Miami Beach v. Ocean & Inland Co., 141 Fla. 480, 3 So. 2d 364 (1941).

[26]City of Santa Fe v. Gamble-Skogmo Inc., 73 N.M. 410, 389 P.2d 13 (1964).

[27]Cases cited notes 21-25 *supra.*

[28]Cases cited notes 23 & 24 *supra.*

[29]A study made by the railroad for the purpose of ascertaining the highest and best use for the property determined that a motel and four high rise apartments should be constructed on the property. These structures would be similar to those located on or contemplated for nearby tracts. 413 F.2d at 764-65.

When vacant land is taken by eminent domain, it is valued at its highest and best use which means that "[t]he measure of compensation is the market value of the land as a whole, taking into consideration its value for building purposes if that is its most available use." J. SACKMAN, 4 NICHOLS' ON EMINENT DOMAIN § 12.3142[1], at 181 (rev. 3d ed. 1962). *See also* U.S. v. Virginia Elec. & Power Co., 365 U.S. 624 (1961).

[30]The court in effect allowed a fifty-three per cent decrease in property value. 413 F.2d at 765. In other situations where aesthetically based ordinances were upheld, no diminution in market value of property was involved; the only loss resulted from the inability to erect a billboard or to operate a junkyard. *see, e.g.,* Cronwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967); Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965).

The only apparent limitation imposed by the court in *City of St. Paul* is that the restriction be reasonable; however, the determination of what is reasonable is in effect left generally to the city government.[31] This approach seems to grant considerable discretion to municipal planning officials which may be necessary since the subjective, indefinable nature of aesthetic considerations makes "objective classifications and standards . . . particularly difficult to establish."[32] Yet requiring a municipality to show precisely the extent to which an aesthetic objective benefits the public could severely limit the scope of the zoning power in the area of aesthetics and render many ordinances invalid solely because of an inability to meet this indefinite standard of proof.[33]

The utilization of this test, however, presupposes that municipal planning officials, who have the primary responsibility for developing the city in a manner that meets the public needs and who presumably are in the best position to ascertain those needs, will act reasonably.[34] These officials may not, in fact, always act reasonably, and in an area such as aesthetics where the basic values involved are subjective and intangible the likelihood that private property may be subjected to arbitrary and discriminatory regulation becomes increasingly probable.[35]

This potential for abuse seems apparent from the situation in *City*

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[31]413 F.2d at 767. *See* Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965). The court in *Hartke,* followed this same approach in upholding an ordinance which for aesthetic reasons excluded automobile wrecking yards from the city. It should be noted, however, that in *Hartke* there was no diminution in property values as a result of the ordinance, and the court felt no need to impose strict limitations on the action of the city where aesthetics were concerned. The court reasoned that:

> [t]he city commission has the responsibility for the planning and development of the city in a manner that meets the needs of the community. The commission may interpret those needs as including the elimination of uses which are not in keeping with the character of the city as it then exists or as the community would desire it to be in the future.

Id. at 43, 400 P.2d at 263.

[32]Norton, *Police Power, Planning and Aesthetics,* 7 SANTA CLARA LAW, 171, 182 (1967); *see* Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal,* 20 LAW & CONTEMP. PROB. 218 (1955).

[33]This factor has caused many courts to hold all ordinances based on aesthetics invalid. *See, e.g.,* Trust Co. of Chicago v. City of Chicago, 408 Ill. 91, 96 N.E.2d 499 (1951); Hitchman v. Township of Oakland, 329 Mich. 331, 45 N.W.2d 306 (1951).

[34]*See* Naegele Outdoor Adv. Co. v. Village of Minnetanka, 281 Minn. 492, 162 N.W.2d 206 (1968); Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965).

[35]*See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). In *Mahon* Mr. Justice Holmes stated that:

> [t]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for public use without compensation. . . . When this seemingly absolute

of St. Paul. Since the instant ordinance not only placed the railroad's property in a more restrictive zone than the surrounding realty,but also substantially reduced its value,[36] it may be possible that the ordinance constituted an instance of discriminatory "spot" zoning.[37] A "spot" zoning ordinance may be held valid only where the gain to the public is substantial, clearly offsetting the hardship imposed on the property owner affected.[38] Since the court apparently was unable to calculate the public gain resulting from the maintenance of an aesthetically desirable gateway to the downtown area, it ignored the possible "spot" zoning issue and upheld the ordinance since it was found to be reasonably related to the promotion of the general welfare.[39]

The granting of considerable discretion to municipal authorities to enact aesthetically based ordinances may be satisfactory in situations where there is little or no resultant diminution in property value and the uses restricted are particularly ugly and unsightly.[40] But in situations where there is some doubt as to the offensiveness of a particular structure and substantial reduction in value is involved, municipal discretion should be curtailed in order that basic constitu-

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protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

Id. at 415. *See generally* Gooder, *Brakes for the Beauty Bus,* A.B.A. PROCEEDINGS, JUNKYARDS, GERANIUMS, JURISPRUDENCE: AESTHETICS AND THE LAW (June 2-3, 1967).

[36]413 F.2d at 764.

[37]"Spot" zoning is the practice whereby a small area or individual lot has burdens imposed upon it which are not imposed upon adjacent, similarly situated property. 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING Ch. 26 (3d ed. 1969). There has been some confusion as to the meaning of the term "spot" zoning. It has been used as a legal term expressing a conclusion of law and any finding that an ordinance is in effect spot zoning, generally has invalidated it. *See, e.g.,* Rogers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951). The term also has been used in a descriptive sense to describe a situation where a small area has been zoned differently from surrounding property. *See, e.g.,* Pennings v. Owens, 340 Mich. 355, 65 N.W.2d 831 (1954). It has even been held that because of the recognized corrosive effects of spot zoning ordinances, the ordinary presumption of legislative resonableness is neutralized and the burden is on the municipality to justify the ordinance. *See, e.g.,* Smith v. County of Washington, 241 Ore. 380, 406 P.2d 545 (1965).

[38]Kissinger v. City of Los Angeles, 161 Cal. App. 454, 327 P.2d 10 (Dist. Ct. App. 1958); Hannifin Corp. v. City of Berwyn, 1 Ill. 2d 28, 115 N.E.2d 315 (1953); *see* La Salle Nat'l Bank v. City of Chicago, 5 Ill. 2d 344, 125 N.E.2d 609 (1955).

[39]Judge Mehaffey in his dissent criticizes the majority for ignoring "the deliberate and obviously discriminatory spot zoning in the instand case," stating that the Minnesota Supreme Court has held that the enactment of spot zoning ordinances which result in the substantial diminution of the value of the property affected without just compensation constitutes a taking of property without due process. 413 F.2d at 777 (dissenting opinion).

[40]Cases cited notes 21-24 *supra.*

tional rights of individual property owners are not violated.[41]

The city could have used its power of eminent domain,[42] paid just compensation to the railroad and sold the restricted property with the height restriction to a private developer.[43] If this method had been utilized, the aesthetic objectives of the city could have been maximized while allowing the property owner just compensation. This would cause the general public, who realize the ultimate benefits from the ordinance, to bear the cost of improving the appearance of the locality.[44]

As increasing pressure is placed on municipal governments to create a pleasing and viable urban environment, there may be further tendency for municipalities to stretch the constitutional limitations of their zoning powers. The desire to attain the maximum possible benefit for the community at the lowest possible cost to the taxpayer may cause serious invasion of private property rights. In the realm of zoning ordinances based upon aesthetics where the tangible benefits to the public are difficult to measure,[45] the limits of the police power should be more precisely defined in order to insure that both public and private interests are fairly balanced.

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[41]There must be some limiting framework in order to protect the rights of property owners from the action of well-meaning but misdirected municipal officials. *See* Norton, *Police Power, Planning and Aesthetics*, 7 SANTA CLARA LAW. 171 (1967). *See also* People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (dissenting opinion), *appeal dismissed*, 375 U.S. 42 (1963).

[42]Eminent domain is generally defined as the power of a governmental unit to "condemn private property for public use, and to appropriate the ownership and possession thereof for such use upon paying the owner a due compensation." City of Knoxville v. Heth, 186 Tenn. 321, 210 S.W.2d 326, 328 (1948).

[43]Berman v. Parker, 348 U.S. 26 (1954). The decision in *Berman* permitted the District of Columbia Redevelopment Agency to acquire by eminent domain real property which in turn would be sold or leased to purchasers on the condition that they carry out the redevelopment plan. This plan was held to be valid even though its primary purpose was aesthetics—to make the community more attractive. *Id.* at 29-30, 33. *See also* Searles, *Aesthetics in the Law*, 22 RECORD OF N.Y.C.B.A. 607 (1967).

[44]In this situation the city could also have taken a development easement which would have prohibited development above a certain height. If this method had been utilized the city would not have had to compensate the railroad for that portion of the $320,000 value of the land which came from proximity to the adjacent urban renewal area, since government action, the creation of the urban renewal area, may have increased the value of the property. *See* U.S. v. Miller, 317 U.S. 369, 373 (1943). *See also* Glaves, *Date of Valuation in Eminent Domain: Irreverence for Unconstitutional Practice*, 30 U. CHI. L. REV. 319 (1963); 43 IOWA L. REV. 303 (1958).

[45]"Beauty is a matter neither subject to rational criticism nor capable of measurement by precise standards...." Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218, 225 (1955).