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AESTHETICS AS A ZONING CONSIDERATION

By MELVIN ROSE* *and* GEORGE YIM*

ZONING, with regard to aesthetic considerations has long been a source of conflict in courts. Most courts have denied the exercise of the police power for aesthetic purposes alone, basing their avoidance on claims that such exercise is unconstitutional under the "due process of law" clause. However, courts are developing a sensitivity to aesthetic considerations even though the application of this sensitivity to zoning problems has been generally disguised under the familiar phrase public health, safety, welfare and morals.

There seems to be a definite trend toward recognizing ordinances purely for aesthetic considerations. Such an application of the police power for aesthetic purposes need not be unconstitutional. The term aesthetics has been applied by the courts with three distinctions: (1) when a definite social benefit is involved; (2) aesthetics based on individual taste; and (3) when it is obvious that aesthetics is the primary purpose of the zoning law, but the courts have without mention of aesthetics in their decision, sustained the exercise on some other ground.

A few courts have attempted to define "aesthetic" as "relating to that which is beautiful and in good taste,"[1] and as relating "to character, form and appearance of proposed constructions."[2] Webster defines it as "of or pertaining to the beautiful, as distinguished from the merely pleasing, the moral, and especially the useful."[3]

The courts' definition of these values is as varied as their application in relation to the police power. All-inclusive definitions are neither satisfactory nor successful;[4] they merely afford further license for the broadening of the scope. Recourse has been had to the gradual process of inclusion and exclusion in order to ascertain the nature of the power.[5] Since there are very few specific constitutional limitations upon the use of police power other than it must bear reasonable relation to the promotion of public welfare the general limitations are the result of court decisions.[6]

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[1] People v. Wolf, 216 N.Y. Supp. 741, 744, 127 Misc. 328, Nassau County Ct. (1926).

[2] General Outdoor Advertising Co. v. Department of Public Works, 289 Mass. 149, 193 N.E. 799, 815 (1935).

[3] WEBSTER, NEW INTERNATIONAL DICTIONARY 42 (2d ed. 1954).

[4] See Stone v. Mississippi, 101 U.S. 814 (1879).

[5] *E.g.*, Hudson Water Co. v. McCarter, 209 U.S. 349 (1907).

[6] Baker, *Aesthetic Zoning Regulations*, 25 MICH. L. REV. 124 (1926).

Aesthetics—Legislation and Judicial Interpretation

The failure of the courts to liberalize their policy toward aesthetic zoning appears to be largely caused by the indefiniteness of the standard of what *is* reasonable aesthetic regulation. Courts are wary of an application which would leave too much scope for the personal judgment of the particular court. Much of the difficulty lies in the failure of the courts to distinguish the following three categories of legislation to which the label "aesthetic" has been applied:

1. Legislation wherein rights are affected and which produces a proven, tangible benefit to society; where aesthetics is considered but is only an underlying factor to the qualifying purposes of public health, morals or safety;

2. Where the offensiveness of the condition legislated against is dependent upon the artistic taste of the individual (where the aesthetic consideration is paramount) and;

3. Where no justification can be found through reasons of health, morals or safety and yet the courts choose to ignore aesthetic considerations in relying on tenuous reasoning of justification under the police power.

Those ordinances have been upheld where through the exercise of the police power there has been a tangible social benefit. Although aesthetic considerations may be within the general purposes, it was not in itself the primary motivation for the legislation or ordinance in this category. Included in this area are the powers of eminent domain, public housing, planning commissions and zoning ordinances. Slum clearance and public housing projects for low income families are public uses and purposes for which public money may be expended under the powers of eminent domain.[7]

City planning has sufficiently proven its merits to be supported by the courts, by implementation through the power of zoning. The value of the zoning device has been so thoroughly demonstrated that the constitutionality of the principle of zoning laws and ordinances is no longer open to question, so long as they are reasonable in object and not arbitrary in operation.[8]

Although aesthetics should be a valid consideration under the exercise of police power, there are very practical reasons for the limitation of legislative or committee powers where the determination of offensiveness is dependent on the particular individual taste of those of keener sensibilities. Ordinances based on aesthetic considerations alone have not been upheld.

A standard of beauty to be applied by the individual court to determine whether the ordinance promulgated under the police power

[7] CAL. CODE CIV. PROC. § 1238, subd. 3, 18 & 21; San Benito County v. Copper Mountain Mining Co., 7 Cal. App. 2d 82, 45 P.2d 428 (1935).

[8] Miller v. Board of Public Works, 195 Cal. 477, 234 Pac. 381 (1925).

was reasonable or not would be inoperable as a rule of law. It is very difficult to outline a reasonable standard for a cognition through the senses rather than through analytic thought.[9]

It may be suggested that a jury of art experts or architects, qualified through experience or educational training, be utilized, with authority to approve or disapprove building design and land use at their discretion. On this alternative, the potential fault would be that the opinion of the jury as to beauty might not represent the average person's viewpoint, which, in a final sense, is the essential principle in justifying aesthetics as a valid consideration under the police power. The jury's decision might deny society the architectural philosophies and skill of building geniuses who are before their time; those whose works may be initially condemned, but who transcend and remold whole concepts of design.[10]

Courts which have denied any form of aesthetic regulation have undoubtedly considered all such legislative measures within this category of the ultra-aesthetics and have reacted to avoid being enmeshed in these difficulties.

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[9] The cases have not been consistent as to the standard to be applied. For a case where the clear showing of a breach of exercise of police power has not been met see Zahn v. Board of Public Works, 195 Cal. 497, 234 Pac. 388 (1925) (where there was a fluctuation in property values beneficial to some and detrimental to others on the opposite sides of the street). See also, Lockard v. City of Los Angeles, 33 Cal. 2d 453, 202 P.2d 38 (1949); Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 175 P.2d 542 (1946); Rehfield v. San Francisco, 218 Cal. 83, 21 P.2d 419 (1933) (where no injury to public will be caused by the prohibited use); Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930) (where hospital and sanitarium excluded on the basis that the restricted districts are mainly residential in character).

Some courts have failed to distinguish between the exercise of police power and the law in regard to nuisances, and have held regulations unreasonable and invalid where an attempt is made to exclude from a district an established use of business which is not a nuisance. Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930); *Ex parte* Hadacheck, 165 Cal. 416, 132 Pac. 584 (1913); Laurel Hill Cemetery Ass'n v. San Francisco, 152 Cal. 464, 93 Pac. 70, (1907), *aff'd*, 216 U.S. 358 (1910).

Regulations were deemed unreasonable and invalid in Bernstein v. Smutz, 83 Cal. App. 2d 108, 188 P.2d 48 (1947) (restrictions create a monopoly). See also Yick Wo v. Hopkins, 118 U.S. 356 (1886) (valid ordinance administered in an unfair and discriminatory manner); *In re* White, 195 Cal. 516, 234 Pac. 396 (1925); Bank of America v. Atherton, 60 Cal. App. 268, 140 P.2d 678 (1943) (entirely unsuitable for the uses to which it is restricted by ordinance); Andrews v. City of Piedmont, 100 Cal. App. 700, 281 Pac. 78 (1929); Wickham v. Becker, 96 Cal. App. 443, 274 Pac. 397 (1929).

[10] In November of 1961 a proposal for a "design control ordinance" was submitted to the San Francisco City Planning Commission. The proposal is in essence like those found in other California cities (Sacramento, Monterey, Gilroy, and Kern County). Ordinances of similar import are enacted in New Orleans and Washington, D.C. These consist of a special committee made up of trained personnel who will determine whether any design submitted to them is up to required standards. The ordinance will be invoked (if passed) only in those areas of the city where 51% of the occupants have elected to accept it. Its basic purpose is to preserve areas of beauty by 1) preventing new buildings out of pattern, and 2) prevent too much pattern.

The court's failure to sanction the use of police power is appropriately applied in this area where the only measurement is the individual taste.

The third area, within which the true controversy lies, is brought to point by those particular cases which fall into neither one of the preceding categories. These cases are exemplified by instances where the structure or use of the land is not itself offensive to health, morals, or general welfare, but where the courts have deemed the ordinances prohibiting or restricting such structure or use of land as valid within the broad definition of the police power without regard for the definition. Originally the use of the police power was considered justifiable in restricting the use of property only to protect the public peace, health, safety, and morals of the community. This concept has been expanded to include the power to promote general welfare, public convenience or general prosperity.[11]

The early attitude appears to have been that control of billboard advertising was a purely aesthetic regulation and as such was condemned as unconstitutional.[12] Even with strong public support, courts still resorted to searching for fictitious reasons supporting health, morals, and public welfare.

One of the first cases to evidence expansion of the doctrine was *St. Louis Gunning Advertising Co. v. St. Louis*,[13] a suit to prevent the defendant from enforcing a city ordinance prohibiting the erection and display of advertising billboards on vacant lots within the city of St. Louis. The court, in sustaining the ordinance, mentioned the aesthetic considerations only in passing while developing a highly unlikely and poorly disguised theory of the promotion of health, safety, and morals of the community. "Signboards," the court held, ". . . endanger the public health, promote immorality, constitute hiding places and retreats for criminals and all classes of miscreants."[14] Then in one short sentence Justice Woodson hurried over the aesthetic essence of the ordinance and said, "they are also inartistic and unsightly."[15] The rest of the decision goes on adding more camouflage.

Though the true reason for the decision was somewhat obscured, this was one of the first courts to show any flexibility in the rule against zoning for aesthetic reasons. The court dared venture into a controversial subject matter but few courts were willing to follow the lead, much less expand on it.

Some few courts attempted to clear the way and found they had stepped further than was thought reasonable by the higher courts in

[11] Miller v. Board of Public Works, 195 Cal. 477, 234 Pac. 381 (1925).

[12] Murphy, Inc. v. Westport, 131 Conn. 292, 40 A.2d 177 (1944).

[13] 235 Mo. 99, 137 S.W. 929 (1911).

[14] *Id.* at 145, 137 S.W. at 942.

[15] *Ibid.*

the jurisdiction.[16] The third area is, then, primarily made up of cases highly inconsistent in their logic but extremely uniform in their studied avoidance of the true issue. It seems highly unrealistic to seek goals of public welfare by ignoring aesthetics, or skirting around the problem so that the doctrine develops haphazardly.

Trend Toward Aesthetic Zoning

The trend of the law toward aesthetic zoning has developed over the last half century and has been mainly centered in this third area.

In 1915, it was stated that:[17]

> . . . [T]his [police] power *might* be used to promote beauty in fields that could be entered by eminent domain or taxation we find it held that restriction upon the use of property for purely aesthetic purposes, as limiting the heights of buildings, or forbidding unsightly billboards . . . have so far been generally denied validity in this country. (Emphasis added.)

This was the position of the law at a period just beginning to see the growth of slums, their attendant economic and social repercussions, and the surrounding vast urban communities with their complexities. The pressures of these new social interests have caused the courts to revise their former method of dealing with individual interests.

The basic rights inherent in land ownership have never been immutable. "They can, have been, and must be continuously reshaped to meet changing needs."[18]

The interdependence of urban living and the effects of the utilization of property upon the adjoining land has made a "laissez faire" attitude toward land-use impossible, but the courts have treaded lightly when limiting the common law rights of a person who owned land.

The constitutionality of legislating for aesthetic purposes appeared too ephemeral to the early courts for the denial of those rights. It was held that aesthetic considerations were a matter of luxury and indulgence rather than necessity, "and it is necessity alone which justifies the exercise of the police power to take private property without com-

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[16] Murphy, Inc. v. Westport, 131 Conn. 292, 40 A.2d 177 (1944). The superior court of Connecticut was refreshingly candid in surveying the history of billboard regulation claiming that prior decisions were falling short in their duty and that the courts should now recognize the fact that aesthetics is the principal reason for most billboard ordinances and aesthetics is the reason that should be given. The court termed reasons such as those given in *St. Louis Gunning* as complete nonsense. The appellate court reversed the decision giving the same reasons, with few changes, that the court gave in *St. Louis Gunning* and claimed the superior court obviously lacked facts necessary to make the decision.

[17] HALL, CONSTITUTIONAL LAW 143 (1915); see also BURDICK, THE AMERICAN CONSTITUTION 567 (1922).

[18] HAAR, LAND PLANNING IN FREE SOCIETY 2 (1952).

pensation."[19] However, the fourteenth amendment did not spell out any absolute legal rights, and "due process" is a weighing or balancing of the various conflicting interests a constantly changing concept.[20]

Part of the reason behind the increasing cognizance by the courts of the aesthetic values desirably incorporated into regulatory ordinances lies within the courts themselves.

The courts are increasingly rejecting the old "subjective view" for determining the validity of legislation. This old view required the court to decide the question solely on its own conception of reasonableness. It took into account none of the factors giving rise to the legislation and affected by it, nor of the public opinion supporting or initiating the legislation. The standard set by the court was a purely personal one and it ignored the opinion, experience, and research of those supporting the legislation.[21]

Today the courts are adopting a more exacting theory which may be termed the objective view. This holds that the surrounding circumstances should be taken into consideration and weight placed on individual circumstances according to realistic values. Those holding the objective view are free to give much weight to legislative action when considering the constitutionality of an ordinance. No longer need the court rely on its own sense of value or judgment. Rather the rationale of the legislation itself is the final criterion.

This view allows the use of scientific information and investigation which the legislative body itself used in formulating the ordinance. The issue then becomes not a question of evidence presented by the parties, but rather whether the general economic, social, and political experience furnishes a solid basis for the legislation under attack.

The other main reason behind the upholding of ordinances, where aesthetics are the major consideration is the more expansive administrative recourse which the property owner must exhaust before the question gets to the court.

California has been one of the leaders in advancing the trend toward recognizing aesthetic factors in zoning. It is one of the states along with New York and Massachusetts who are closest to the adoption of the objective view.

In 1940, a New York tire firm sought to place a sign over a street and brought action to enjoin the village of Hempstead from enforcing an ordinance prohibiting "any" kind of signs to project or hang from the front of buildings. The court denied the injunction and its opinion stated: "This court is not restricted to aesthetic reasons in deciding to

[19] Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co., 72 N.J.L. 285, 287, 62 Atl. 267, 268 (Ct. of Errors & Appeals 1905).

[20] Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 4 (1943).

[21] Truax v. Corrigan, 257 U.S. 312 (1921).

sustain validity of the ordinance in question, but if it were so restricted it would not hesitate to sustain the legislation on that ground alone."[22]

A Massachusetts court has held that the legislature has a constitutional right to enact statutes that protect the grandeur and beauty of scenery since it contributes highly to the public welfare of the state.[23]

California, though lacking cases which recognize aesthetics in a straightforward manner, has instituted an act which provides unusual opportunities for California to advance the trend upholding these ordinances, and perhaps even those based on aesthetics alone.

The act providing such opportunity is referred to as the Outdoor Advertising Act.[24] On first glance the act seems hardly different from acts in other states intending the same control over advertising on and along highways. It appears to be the state acting within its proper police power in controlling the advertising on public highways in unincorporated areas from the standpoint of safety; that is, to provide state regulation and restriction so that the safety of those traveling the highway is not impaired.

However, the act authorizes counties to regulate advertising displays as part of county zoning even when only indirectly involving freeways. Thus it seems clear that in unincorporated areas a county may in the course of district planning, as commonly practiced, control advertising. For example, if an ordinance specified an area to be zoned for residential purposes and a freeway passes through the zone, then as a part of comprehensive planning, it would be proper to provide that no billboards etc. could be placed in such areas *including the land adjacent to,* but not touching, the freeway.[25]

Why then does this give California the opportunity to advance? Courts elsewhere have already gone so far as to indicate that the preservation of scenic beauty and places of historic interest would be sufficient to support zoning regulations.[26]

The act seems to be a clear intention on the part of the legislature to place within the state itself exclusive domination and control of advertising on the public highways in unincorporated areas. This is illustrated by the fact that not only may land adjoining freeways be restricted, but also land adjacent to it. Therefore it seems to rule out the safety aspect in many cases and be purely for aesthetics.

The Attorney General has concluded that all indications, under the present state of the law, are that courts will eventually uphold ordi-

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[22] Preferred Tires v. Village of Hempstead, 19 N.Y.S.2d 374, 377, 173 Misc. 1017, 1021 (Nassau County Ct. 1940).

[23] General Outdoor Adv'g Co. v. Board of Public Works, 289 Mass. 149, 193 N.E. 799 (1935).

[24] CAL. BUS. & PROF. CODE § 5200.

[25] People v. Norton, 108 Cal. App. Supp. 767, 288 Pac. 33 (1930).

[26] General Outdoor Adv'g Co. v. Board of Public Works, 289 Mass. 149, 193 N.E. 799 (1935).

nances forbidding advertising displays with due recognition to aesthetic considerations.

> It would appear that if zoning for aesthetic reasons alone is to be upheld, such zoning in connection with freeways, as we know them in California, should have an excellent chance of being upheld. Freeways pass through the more congested areas, enormous sums of money are spent on them, they are a source of local pride and they provide major approaches to our metropolitan centers. The aesthetic impact is apparent.[27]

Thus the California courts have the opportunity to squarely face the long neglected but increasingly vital issue of whether aesthetic conditions are sufficient justification for a zoning regulation. The courts' recognition of the issue and its ramifications is extremely important because, as was earlier pointed out, the courts may with superficial justification retreat into the judicial cliché of promotion of safety, and thus circumvent the prime policy question of aesthetics.

Conclusion

It seems then there is a definite trend toward recognizing ordinances purely for the aesthetic considerations. However, in order to accomplish this objective it is apparent that the courts are going to have to abandon the subjective view and adopt the more practical view of placing the legislative considerations in passing an ordinance on the weighted level they deserve. Necessarily, this will involve a recognition of the legislation as almost inviolate, but with the system with which zoning is endowed, *i.e.*, political answerability, it would seem that acts of abuse or indiscretion would be held to a minimum.

Writers on the subject have expressed views favoring use of aesthetic zoning ordinances; California's attorney general has hinted his favor and the practical value of property demands them. Therefore, the only obstacle remaining is the court and the restraints placed thereon by the courts themselves rather than by any constitutional right of property owners.

"It is conceded that police power is adequate to restrain offensive noises and odors. A similar protection to the eye should also be afforded."[28]

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[27] 21 CAL. OPS. ATT'Y GEN. 43 (1953).

[28] FREUND, POLICE POWER 182 (1904).