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Aesthetics and the Police Power

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IN EUCLID V. AMBLER REALTY COMPANY, decided in 1926, the United States Supreme Court said that comprehensive zoning in general is a valid exercise of the state's police power. Concerning this power Mr. Newton D. Baker, the distinguished attorney for the appellee, argued:

> . . . these powers must be reasonably exercised, and a municipality may not, under the guise of the police power, arbitrarily divert property from its appropriate and most economical uses or diminish its value, by imposing restrictions which have no other basis than the momentary taste of the public authorities.[1]

Police Power and the General Welfare

Under the Ohio Constitution municipalities have the authority to exercise all powers of local self-government.[2] This authority is exercised through police power which is sufficient to support the enactment and enforcement of a wide variety of regulations which serve the public welfare. The police power, then, is the means whereby there is delegated by the state to the municipality effective power to promote and protect the general welfare. The purpose of any enforceable ordinance established under the police power must be directly related to the general welfare of the community wherein it operates.

By limiting land to certain specific uses, both the city or municipality and the abutting property owners stand to gain;[3] the former by maintaining reasonable standards of public peace, health and safety so as to foster a desirable environment for its citizens while also remaining attractive to perspective domestic and business interests, and the latter by sustaining existing property values which result from the protective maintenance of those variables that effect the health, safety, moral fibre and general welfare of the community.

Most property regulations of a city usually find their legal justification in some aspect of the state police power; a power asserted for the public, not private, welfare,[4] and which may not properly be in conflict with general, existing state laws or statutes.[5] It is reasonable that a zon-

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1 Euclid v. Ambler Realty Co., 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926).

2 Ohio Const., Art. 18, §§ 3 & 7 (1912).

3 City of Cleveland Heights v. Glowe, 97 N.E.2d 226 (Court of Appeals, Cuyahoga County, Ohio 1950).

4 State ex rel. Euverard v. Miller, 98 Ohio App. 283, 129 N.E.2d 209 (Warren County 1954).

5 Broad-Miami Co. v. Board of Zoning Adjustment of City of Columbus, 185 N.E.2d 76 (Common Pleas, Franklin County, Ohio 1959).

ing ordinance cannot be used to control competition, for instance, since the end result would be a detriment to public welfare.[6] However, where the ordinance calls for a control of population density,[7] or provides standards for sanitation, health, fire safety and crime prevention, its validity is unquestioned, since the public welfare is enhanced.[8]

Municipal regulations, therefore, are justified to the extent that the police power is exercised in the interest of public health, safety and morals. In the event that the utilization of the police power is unreasonable or arbitrary the ordinance must fail.[9] For a municipal ordinance to qualify as unreasonable or arbitrary, it must bear no objective substantial relation to the public health, safety, morals or general welfare. If a regulation lacks this necessary substantial relation then it is constitutionally invalid, as it would arbitrarily interfere with the right of enjoyment and use of private property.[10]

Since zoning is primarily a legislative rather than a judicial function, the primary determination of whether or not there exists an objective substantial relation between the regulation and the general welfare rests with the legislative body of the municipality.[11] Because the legislative body of any municipality usually does not direct its effort towards creating laws that are inherently unfair, it is presumed that the products of their deliberative endeavors are constitutionally sound. To rebut this presumption, it must be very clear that the regulations enacted are arbitrary, and lacking in substantial relation to public health, morals and safety of the community.[12]

The Problem

The "obviousness" of lack of substantial or real relation between a municipal ordinance and the general welfare may become apparent only when the purpose for which the ordinance was enacted is carefully examined. For example, Sections 1411.21 (b1) and (b2) of the Codified Ordinances of the City of Shaker Heights, Ohio—Part Fourteen, the Housing Code which has been in effect since November 1, 1967—states,

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6 Rosenthal v. City of Bedford, 134 N.E.2d 727 (Court of Appeals, Cuyahoga County, Ohio 1956).

7 State ex rel. Grant v. Kiefaber, 114 Ohio App. 279, 181 N.E.2d 905, affirmed 171 Ohio St. 326, 170 N.E.2d 848 (1960).

8 Nolden v. East Cleveland City Commission, 12 Ohio Misc. 205, 232 N.E.2d 421 (Common Pleas, Cuyahoga County 1966).

9 Stulbarg v. Leighton, 113 Ohio App. 487, 173 N.E.2d 715 (1957).

10 City of Toledo v. Miller, 106 Ohio App. 290, 154 N.E.2d 169 (Court of Appeals, Lucas County 1957).

11 Shopping Centers of Greater Cincinnati, Inc. v. City of Cincinnati, 173 N.E.2d 196 (Common Pleas, Hamilton County, Ohio), affirmed 109 Ohio App. 189, 164 N.E.2d 593 (1959).

12 State v. Peebles, 25 Ohio L. Abs. 545, appeal dismissed, 133 Ohio St. 130, 10 Ohio Op. 130 (1937).

with reference to the maintenance of *exteriors* of dwelling and appurtenant structures, that:

> 1) All buckled, rotted or decayed walls, doors, windows, porches, floors, steps, railings, soffits, posts, sills, trim and their missing members must be replaced and put in good condition.
>
> 2) All replacement must match and conform to original design or be replaced completely.

Consider the citizen whose porch is enhanced by a delicate provincial trim, a small portion of which buckles in the heat or severe cold of the climate. It would seem reasonable for him to replace the damaged portion of the trim without matching and conforming to the original design, providing his efforts did not produce a condition inimical to the general well-being of his neighbors and the community at large. However, under Section 1411.21 (b2), the citizen must *replace* the damaged portion of trim to match the original design or replace the entire trim. Here, there is no undebatably substantial relation between regulation and the public health, morals, safety and general welfare of the community; and the ordinance may be arbitrary and unreasonable. The considerations behind the above sub-sections are primarily *aesthetic*; that is, repair the trim so that it does not appear offensive to the eye of the beholder. It would seem in this instance that aesthetic considerations are placed on equal footing with "the general welfare" of the people of Shaker Heights.

Another Shaker Heights' regulation which may be said to be less clearly as arbitrary as Sections 1411.21 (b1) and (b2) is Section 1411.24, which has also been in effect since November 1, 1967, and reads:

> Exterior property areas of all premises shall be kept free of any debris, object, material or condition which may create a health, accident or fire hazard, or which is a public nuisance, *OR* (emphasis added) which constitutes a blighting or deteriorating influence on the neighborhood. Lawns, landscaping and driveways shall also be maintained so as not to constitute a blighting or deteriorating effect in the neighborhood.

Perhaps the most precise interpretation is attained by the application of the either/or test; to paraphrase the ordinance, one would be in violation of Section 1411.24 if his exterior property area were in such a condition as to either impair the health, safety and welfare of the community or to appear blighting or deteriorating to the eye of the beholder. To follow the rules of English grammar and to observe logic would necessarily make the latter part of the ordinance as binding as the former. Here, the standard of determining that which threatens the promotion of the general welfare is subjective; what seems to be blighting or deteriorating to one man may not seem so to another. The issue in question is whether the police power is broad enough to prevent blight and deterioration. If the police power is invoked for such considerations then, I submit, the ordinance must fail for aesthetic subjectivism, since

that which would constitute blight and deterioration would be a fact question in continuous dispute.

For example, is grass that is neatly kept, but four inches high, *blighting*, as opposed to a yard with no grass at all; is a driveway that has one crack that appears ugly because it is safely sealed with tar more *deteriorating* than a driveway possessing many cracks that appears even uglier because they are all safely sealed with tar; is an untrimmed hedge more or less blighting and deteriorating than a trimmed hedge that is ten feet in height?

I submit that the police power is limited to the preservation and promotion of those perceptible aspects of the general welfare that are veritably threatened by adverse forces objectively discernible. The regulations enforceable by the police power must, therefore, be precise and specific as to the evils that they are intended to prevent.

Where, as with Section 1411.21 of the Shaker Heights Housing Code, the regulation may be interpreted through subjective aesthetic standards, I believe that it lacks the necessary substantial relation to the general welfare and is therefore an arbitrary and unreasonable restriction upon the use of private property. Again, it would appear that individual subjective aesthetic considerations are placed on an equal standing with "the general welfare" of the people of Shaker Heights, an equilibrium which is against the great weight of precedent in Ohio and throughout the country.[13]

Majority Considerations

The traditional rule, which holds that aesthetic considerations as a primary motivation to the enactment of municipal ordinances are insufficient to restrict the use of property, extends itself to hold ordinances valid where the regulation has a real or reasonable relation to the general welfare of the community and the aesthetic consideration is auxiliary or incidental to the health, morals and safety of the public.[14] The sections of the Shaker Heights' ordinances at issue cannot qualify under the majority of holdings, since the aesthetic considerations behind them are not incidental; rather they are equal to the consideration for the public welfare.

In an Ohio case decided in 1959,[15] the court summarized:

> In short, the benefit from zoning use limitations to the public health, safety, morals or general welfare must be sufficient to

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[13] Murdock v. City of Norwood, 3 Ohio Supp. 278, 9 Ohio Op. 399 (Common Pleas, Hamilton County 1937); Cleveland Trust Co. v. Village of Brooklyn, 92 Ohio App. 351, 110 N.E.2d 440 (Court of Appeals, Cuyahoga County), appeal dismissed, 158 Ohio St. 258, 108 N.E.2d 679 (1952).

[14] Pritz v. Messer, 2 Ohio L. Abs. 620, reversed 112 Ohio St. 628, 149 N.E. 30 (1925).

[15] Curtiss v. City of Cleveland, 170 Ohio St. 127, 163 N.E.2d 682 (1959).

reasonably outweigh the loss to the landowner in order to justify zoning legislation causing such loss by limiting such owner's right to use his property.

Wherein lies the benefit to the general welfare that outweighs the financial hardship to a Shaker Heights resident who is called upon to repair a worn and cracked driveway; a condition hardly threatening the health, safety or morals of the city? Or consider the resident whose lawn is weed-infested and discolored and who has already gone to reasonable lengths to remedy the situation. He too must finally submit to the police power and go to greater lengths and more costly means in an effort to prevent his premises from constituting a "blighting" influence on the neighborhood. It would seem to be stretching one's legal imagination to categorize these situations as public nuisances and thereby to justify the state's police power in order to abate them, since neither a driveway in need of repair nor a lawn that is weed ridden obstructs or causes inconvenience or damage to the public in the exercise of rights common to all people living in the community;[16] rather, there is no *substantial* annoyance, inconvenience or injury to the public.[17]

The use of the words "which constitutes a blighting or deteriorating influence on the neighborhood" in Section 1411.24 of the Housing Code seem to evidence a legislative attempt to conserve property values within a well-established community. Shaker Heights is a wealthy and handsome community, long established as such.

Thus, the idea is that if the condition of any residence is in a state of disrepair to the extent that it might adversely affect the value of abutting properties, the municipality, through its police power, may do whatever is necessary to remedy the ailing premises, thereby enhancing the property value of adjoining dwellings.[18] By utilizing its police power as an instrument of effective suburban maintenance and renewal, a municipality then takes upon itself a responsibility for providing teams of qualified housing inspectors who must canvass thousands of residences and give professional evaluation treatment to each. Those houses requiring notice of violation must be given special attention with reference to bringing the individual who is in violation of the law to an understanding of what has to be done and why he must do it. Financial inadequacy of the guilty generates the need for the municipality to offer assistance in securing financing adequate to restore that which provoked the notice of violation; meanwhile checking progress of those owners

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[16] State ex rel. Chalfin v. Glick, 113 Ohio App,. 23, 177 N.E.2d 293 (Court of Appeals, Hardin County, Ohio), quoting 66 C.J.S. Nuisances §§ 1, 111a & b, affirmed 172 Ohio St. 249, 175 N.E.2d 68 (1961).

[17] Gates Co. v. Housing Appeals Bd. of City of Columbus, 10 Ohio St. 2d 48, 225 N.E. 2d 222 (1967).

[18] Interview with Mr. Paul Donaldson, Assistant Law Director for the City of Shaker Heights (January 21, 1969).

required to repair or restore their premises and even commencing appropriate legal proceedings when necessary.[19] Suburban conservation effected through such a thorough exercise of the police power is an epic task indeed where the municipality houses in excess of 13,000 families,[20] with the time required to effectively service the properties of all of them being in the vicinity of ten years.[21] Such a municipal undertaking is commendable and unquestionably valid *provided* that the regulations are in line with the needs of the public. It must be noted however, that local governments are under no duty to utilize the police power to realize the most profitable use for the owner of a parcel of land.[22] Rather, local governments are bound to preserve and promote the health, safety, morals and general welfare of the governed.

If conservation of property values be the prime consideration of Section 1411.24 of the Shaker Heights Housing Code, then perhaps a redrafting nearer to the intended meaning would extricate the Section from controversy. As it stands, the police power probably is unauthorized merely for the purpose to promote and protect the *appearance* of the neighborhood for appearances sake.[23] Property values may not be guarded by aesthetic considerations alone; other factors such as sewage disposal, garbage collection, crime control and fire prevention are of greater significance to the general welfare, even with aesthetic appeal viewed as a highly favorable incidental consequence.

Minority Considerations

A more liberal and contrasting view, with which the courts seem to be flirting, expounds an aesthetic equation, the product of which makes aesthetics of equal or greater importance than the traditional considerations of the public need.[24] Newton D. Baker, a noted authority on zoning regulation, wrote an impressive but substantially tempered attack on the establishment of aesthetic subordination as a response to the problems generated by the onslaught of urban development that accompanied the maturation of the industrial epoch in the mid-1920's.[25] Baker considered beauty to be a valuable property right, and labeled those few courts sustaining aesthetic regulation as most progressive; however, his

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[19] *Ibid.*

[20] Furnished by the Finance Department of the City of Shaker Heights (January 28, 1969).

[21] *Supra,* note 18.

[22] Beachland Glass Co. v. Woodmansee, 11 Ohio Misc. 262, 230 N.E.2d 360 (Common Pleas, Cuyahoga County 1967).

[23] State ex rel. Srigley v. Woodworth, 33 Ohio App. 406, 169 N.E. 713 (Athens County 1929).

[24] Criterion Service v. City of East Cleveland, 88 N.E.2d 300 (Court of Appeals, Cuyahoga County), appeal dismissed, 152 Ohio St. 416, 89 N.E.2d 475 (1949).

[25] Baker, Aesthetic Zoning Regulations, 25 Mich. L. Rev. 124 (1926-1927).

mood softens as he concludes that aesthetic and cultural considerations in municipal developments ought to be fostered with reasonable limitations.[26]

Writing with equal conviction but sparing no reservation for the traditional, Professor Paul Sayre finds economic opportunity in the beautiful by reasoning that since aesthetics maintains property values, the greater the aesthetic content of the property the more it is worth, and consequently it will yield greater tax revenues which in turn can be used to pay for schools, playgrounds, sewers and other benefits which promote the health and safety of the public at large, thereby making aesthetics a community need worthy of the protection of the police power.[27] Professor Sayre can see no reason for differentiating between aesthetics and morals by using the reverse of the philosophical truism that there exists a moral element in all aesthetics; consequently, the general welfare may be defined as the health, safety and morals or aesthetics of the public.[28]

A most recent case, decided on December 31, 1968, by the Ohio Supreme Court, lends support to this liberal view by holding that under some circumstances aesthetic considerataions *alone* will justify the use of the police power.[29] However, in this case, which involved a junk yard inadequately fenced to the extent that the junk cars were stacked so high above the fence that they were visible from two highways, the court carefully limited its application of aesthetic justification to a particular fact situation which was "patently gross and offensive" to the general welfare.[30] The condition of the junk yard was beyond the subjectivism of taste; its flagrance posed an obstacle to the promotion of the general welfare. The court hastened to point out that its decision was not to be interpreted as a general admission that aesthetic considerations alone were sufficient to invoke the police power; each fact situation would have to be carefully considered with respect to its detrimental effect upon the general well-being of the public.[31] In view of the court's opinion, the general welfare might be defined as the safety, health, morals and sometimes the aesthetics of the community.

Section 1411.24 of the Shaker Heights housing ordinance possesses high meaning under the shade of the minority view. Appealing as it may seem, aesthetics as a controlling factor behind municipal housing ordinances poses a very real threat to the individual's right to use property in a reasonable manner in harmony with the rights of others. If the

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[26] *Ibid.*

[27] Sayre, Aesthetics and Property Values: Does Zoning Promote the Public Welfare? 35 A.B.A.J. 471 (1949).

[28] *Ibid.*

[29] State v. Buckley, 16 Ohio St. 2d 128 (December 31, 1968).

[30] *Ibid.*

[31] *Id.*

minority view were to prevail, it is conceivable that the municipality could easily become the sole dictator of what is reasonable and what is unreasonable; what is beautiful and what is ugly. Then, the exercise of the police power could not be tagged arbitrary since it would merely be enforcing the will of the legislature whose terrible task would be to decide what was aesthetically best for all. There would be little uniformity among municipalities and what was pleasing to the eyes of the legislators in one city would suddenly become ominous to the legislators in another. The consequences of aesthetic control would become untenable and ultimately conducive to the impairment and general destruction of the public welfare.[32]

A Proposal

Certainly, if Section 1411.24 were re-written to read as follows, the same legislative objectives could be attained as those hoped for under the present writing:

> Exterior property areas of all premises including lawns, landscaping and driveways shall be kept free of any debris, object, material or condition which may create a health, accident, or fire hazard, or which is a public nuisance.

I submit that if any exterior property area of any residence was not cluttered with debris, objects or material and in such a condition so as not to issue propensity to health, accident or fire hazards and which therefore would not pose a public nuisance would not constitute a blighting or deteriorating influence on the neighborhood wherein the dwelling resides. It must be conceded that as time goes on neighborhoods and the houses that constitute them will grow old and the general area will reflect the weathering of the decades. However, to describe a neighborhood as old is not to offer that it is in conflict with the general welfare of the community; on the contrary, many families of low income groups are directly benefited by time's consequence on residential areas once inhabited by the families of middle and high income groups. This economic benefit should not be regarded as a detriment to any city; rather, it should be thought of as an evolutionary advantage to those less fortunate citizens who have every right to the pursuits of life, liberty and happiness.

Indeed, an aging community may be kept just as safe, healthy and consequently just as neat and conducive to those high ideals of the general welfare as the fresh, new and undoubtedly more expensive community. It must be pointed out that in both instances the welfare of the public in general can be served without resorting to highly subjective aesthetic ideals.

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[32] Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 148 N.E. 842, 43 A.L.R. 662 (1925).