

December 1961

## Constitutional Law--Police Power--Regulation of Junk Yards

Herbert Stephenson Boreman Jr.  
*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

Herbert S. Boreman Jr., *Constitutional Law--Police Power--Regulation of Junk Yards*, 64 W. Va. L. Rev. (1961).

Available at: <https://researchrepository.wvu.edu/wvlr/vol64/iss1/8>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

### Constitutional Law—Police Power—Regulation of Junk Yards

*P*, a junk dealer, instituted a declaratory judgment proceeding in the Circuit Court of Kanawha County against the State Road Commissioner seeking a declaration of the validity of a state statute regulating junk yards. The statute, Chapter 89, Acts of the Legislature, Regular Session, 1959, amended Chapter 17 of the Code of 1931 by adding thereto a new Article 23. If enforced against *P*, the statute would require him to set back his business operations 100 feet from two highways and to erect a six-foot fence concealing the operations from the view of highway travelers. *P* contended basically that the provisions of the law, based on aesthetic considerations, exceeded the limits of the state's police power and were unconstitutional. The circuit court sustained in part and overruled in part a demurrer to the petition and certified the question of law arising on the pleadings to the Supreme Court of Appeals. *Held*, in a 4 - 1 decision, affirming the trial court's ruling and remanding the case with directions, that the statute is constitutional and that aesthetic values may be weighed, along with other pertinent factors, in upholding legislative action based on the exercise of police power. *Farley v. Graney*, 119 S.E.2d 833 (W. Va. 1960).

The regulation of property for aesthetic reasons has long been a vexing problem in West Virginia as well as in other jurisdictions. In *Fruth v. Board of Affairs*, 75 W. Va. 456, 84 S.E. 105 (1915), an ordinance of the city of Charleston establishing a building line for mere aesthetic purposes was held unconstitutional and the court refused to take "advanced ground" on the question of regulating property for aesthetic purposes under the police power. In 22 THE BAR (W. VA. L. REV.) 40 (1915), *Fruth v. Board of Affairs*, *supra*, is discussed and the view is presented that some court in the near future will declare restrictive ordinances regulating billboards for aesthetic reasons valid. In 30 W. VA. L.Q. 191 (1924), the view is expressed that public opinion will affect the law on this subject so that cities may legally beautify their streets by zoning ordinances. Again in 31 W. VA. L.Q. 222 (1925), the opinion is expressed that the decision in *Holswade v. City of Huntington*, 96 W. Va. 124, 124 S.E. 913 (1924), is strong argument that West Virginia has taken the "advanced ground" on the subject. Regulation of billboards for aesthetic purposes is again discussed in 38 W. VA.

L.Q. 268 (1932), where it is predicted that the courts will soon go the limit in sustaining legislation directed at aesthetic purposes.

Regulation of property for aesthetic purposes has been accomplished in West Virginia by nuisance suits as well as by municipal ordinances and zoning regulations. In *Parkersburg Builders Material Co. v. Barrack*, 118 W. Va. 608, 191 S.E. 368 (1937), 192 S.E. 291 (concurring opinion), the court in dictum observed that aesthetics have a proper place in community affairs, within limitations, and equity may interpose to eliminate an eyesore. Under the particular circumstances of the case, the court refused to exclude an auto-wrecking business from a district not clearly residential. But in *Martin v. Williams*, 141 W. Va. 595, 93 S.E.2d 835 (1956), the operation of a used car lot was enjoined on apparently aesthetic grounds because of lights, noise, unsightliness and resultant depreciation of property values. The "unanimous reluctance" of the courts to recognize aesthetics as a valid consideration is considered in a comment on the case in 59 W. VA. L. REV. 92 (1956).

The court in the principal case recognized the general rule that aesthetics may be considered but will not of themselves be sufficient. At least one writer takes the view that this rule has been expanded so greatly that it is largely a fiction when the aesthetic results obtained are considered. 27 SO. CAL. L. REV. 149 (1954).

The courts often labor to find bases on which to sustain legislation based on aesthetic considerations. *Farley v. Graney*, *supra* at 844. Some authorities have partially circumvented application of the rule by intimating a definite relation to the public welfare. Thus in *General Outdoor Advertising Co. v. Indianapolis*, 202 Ind. 85, 172 N.E. 309 (1930), a regulation eliminating billboards near public parks and boulevards was held sufficiently related to public health, comfort, and welfare to be a valid exercise of police power. In *New Orleans v. Pergament*, 198 La. 852, 5 So. 2d 129 (1941), prevention of eyesores in the form of advertising signs within the locality of the French and Spanish Quarters of New Orleans was held to be a valid exercise of the police power for public welfare. The rule, in its most liberal form, has been applied to a great deal of legislation involving regulation of outdoor advertising. The New York Supreme Court has indicated it would not hesitate to uphold ordinances regulating billboards on aesthetic grounds alone if necessary. *Preferred Tires v. Hempstead*, 173 Misc. 1017, 19 N.Y.S.2d

374 (Sup. Ct. 1940). For a collection of cases see Annot., 156 A.L.R. 581, 586 (1945).

Billboard cases, while often considered separately, are interwoven with, and may be good authority for, legislation upholding zoning regulations on partly aesthetic grounds. While purely aesthetic considerations may not be sufficient bases for upholding zoning regulations, they strongly influence the courts. 2 METZENBAUM, ZONING 1577 (2d ed. 1955). In *Gignoux v. Village of King's Point*, 199 Misc. 485, 99 N.Y.S.2d 280 (Sup. Ct. 1950), the court, in upholding zoning regulations designed to preserve the exclusive high class rural aspects of a community, observed the beauty of a community promotes the general welfare by tending to the comfort and happiness of the people.

It becomes obvious that the application of the rule on aesthetic considerations varies from jurisdiction to jurisdiction. The Supreme Court of North Carolina held unconstitutional a statute very similar to the West Virginia law involved herein. *State v. Brown*, 250 N.C. 54, 108 S.E.2d 74 (1959). The statute required the screening or fencing from public view any junk yard, trash, or garbage within 150 yards of highways outside of incorporated towns. Despite an obvious opportunity to consider the public health in relation to garbage and trash, the court considered the statute was an exercise of the police power predicated wholly on aesthetic grounds and did not bear a substantial relation to the public health, safety, morals, and welfare. See comment in 1960 DUKE L.J. 299, where the view is taken that the court erred in not following the concept of general welfare that sanctions aesthetic considerations in the use of the police power.

The West Virginia court in the principal case found as additional grounds for exercise of the police power that the legislature no doubt considered a plan to attract tourists to the state with a "view of promoting the economic well-being and the general welfare," *Farley v. Graney*, *supra* at 848, and seems to adopt the contention of defendant's counsel that junked automobiles and iceboxes are hazards to playful children. To this Judge Haymond answers, in a vigorous dissent, there is nothing in the proceedings that indicates that junk yards are unsafe, immoral, or detrimental to health or general welfare and these elements are not mentioned in the statute. It would seem the court has, in the language of the opinion,

“been at pains to assign other bases for the validity of legislation” based predominantly on aesthetic considerations.

Aside from the very important consideration of protecting personal property rights, discussed in Judge Haymond’s dissent, the difficulty of legislating to promote the aesthetic is made clear in *City of Youngstown v. Kahn Bldg. Co.*, 112 Ohio St. 654, 148 N.E. 842 (1925), where the court points out that some legislatures may prefer jazz, posters, and limericks to Beethoven, Rembrandt and Keats and there might never be any agreement as to the public’s aesthetic needs.

By adhering to the general rule, the West Virginia Court retains the power to strike down acts of some future jazz and limerick loving legislature without the necessity of overruling a decision if there seems to be extreme abuse of the regulation of property for aesthetic reasons. At the same time the flexibility necessary to and inherent in the police power is retained.

*Herbert Stephenson Boreman, Jr.*

---

### **Constitutional Law—Sunday Closing Laws—Validity Sustained**

In four recent cases from three states the Supreme Court of the United States has sustained Sunday observance laws as constitutional. In Maryland, in a state court case, *Ds*, employees of a discount department store, were convicted of violating Sunday closing laws. *Ds* appealed on the grounds that the laws were in violation of constitutional guarantees of freedom of religion, equal protection, and due process. *McGowan v. Maryland*, 81 Sup. Ct. 1101 (1961). In a Massachusetts case *P*, a super market, sought to enjoin enforcement of a Sunday closing law on the grounds that it was a statute respecting the establishment of religion or prohibiting the free exercise thereof and violating the equal protection clause of the fourteenth amendment. The United States District Court of Massachusetts held that the laws were unconstitutional and the case was appealed. *Gallagher v. Crown Kosher Super Market, Inc.*, 81 Sup. Ct. 1122 (1961). In one Pennsylvania case, *P*, a discount department store, brought an action to enjoin the enforcement of a Sunday closing law on the grounds that it was violative of the constitutional guarantees of equal protection and religious freedom. The United States District Court for the Eastern District of Pennsylvania