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Municipal Corporations--Compulsory Repaving of Aesthetic Purposes

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STUDENT NOTES AND RECENT CASES

MUNICIPAL CORPORATIONS—COMPULSORY REPAVING FOR AESTHETIC PURPOSES.—The question of how far the law will uphold the action of municipal corporations when such action is directed toward the beautification of the city has been much discussed of late. The question has usually presented itself to the courts in the form of ordinances, which, framed under the police power, seek to satisfy the aesthetic sense of the majority of the community, but which must be sustained as protective of the welfare, health, safety and morals of the people. So under this police power, obnoxious business uses of property may be prohibited,[1] and other businesses, not obnoxious *per se*, may be prohibited with certain districts,[2] the erection of signboards in residential blocks without the consent of a majority of the owners may be prohibited,[3] and in certain cases the height of buildings may be limited.[4] In this type of case, it is quite apparent that the courts have regarded the various ordinances involved as really protective of the health, safety and morals of the community. In none of these decisions is there a legal recognition of the so-called aesthetic interest of the community. These cases then, may be said to represent one class of decisions.

The next class of cases in which this question has been dealt with under the police power is the typical one where the aesthetic purpose is secondary, but admitted to be present. It is usually held that provisions incidentally aesthetic will not vitiate otherwise valid restrictions,[5] though the effort of the courts to sustain the ordinances under the police power seems somewhat forced.

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[1] Watertown *v.* Mayo, 109 Mass. 315 (1872); Manufacturing Co. *v.* Van Keuren. 23 N. J. Eq. 251 (1872).

[2] Hadacheck *v.* Sebastian, 239 U. S. 304 (1915); People *v.* Village of Oak Park, 266 Ill. 365, 107 N. E. 636 (1915); Salt Lake City *v.* Western Foundry Works, 55 Utah 447, 187 Pac. 829 (1920).

[3] Thomas Cusack Co. *v.* City of Chicago, 267 Ill. 344, 108 N. E. 340, same case 242 U. S. 526 (1917).

[4] Cochran *v.* Preston, 108 Md. 220, 70 Atl. 113 (1908). Compare State *ex rel.* Sale *v.* Stahlman, 81 W.Va. 335, 94 S. E. 497 (1917). See also citations in Note 1, 30 W. VA. L. Q. 191.

[5] St. Louis Poster Advertising Co., *v.* City of St. Louis, 249 U. S. 569 (1919); *In re.* Wiltshire, 103 Fed. 620 (1900); City of Rochester *v.* West, 164 N. Y. 510, 58 N. E. 673 (1900); Gilmartin *v.* Standish Barnes Co., 40 R. I. 219, 100 Atl. 304 (1917).

There remains the third class of cases, where the aesthetic purpose is paramount and the action of the municipal corporation aims solely at the beautification of the city. Judge Dillon has this to say upon the question:

> ". . . . By virtue of the police power neither the legislature nor the municipal corporation exercising delegated power to legislate by ordinance, can impose restrictions upon the use of private property, which are induced solely by aesthetic considerations, and which have no other relation to the safety, convenience, comfort or welfare of the city and its inhabitants. The law on this point is undergoing development and perhaps cannot be said to be conclusively settled as to the extent of the police power."[6]

Thus the courts have, broadly speaking, refused to adopt the aesthetic consideration as alone sufficient,[7] although it has been predicted that the courts might alter this position if the preponderant settled public opinion should favor a recognition of the aesthetic interest of society.[8] The West Virginia Supreme Court spoke on the subject about ten years ago, in the case of *Fruth* v. *Board of Affairs*:[9]

> "Our conclusion is, that under the present status of the law, and considering the present conditions as to population existing in the cities of our state, we should not go counter to the great weight of authority and take advanced ground on the question of the police power to regulate and control the use of private property based on mere aesthetic grounds, and having no reasonable reference to the safety, health, morals and general welfare of the people at large."

In another case, in 1917,[10] this case was approved, and a more recent dictum seems to be the same effect.[11]

A recent West Virginia case[12] has raised this question in a different form. Owners of property abutting on a certain street in the city of Huntington brought suit to enjoin the repavement of a street in a valuable business and residential district, alleging, *inter alia,* that the paving already laid met the needs of the property owners as well as the repaving proposed, and that the repav-

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[6] DILLON, MUN. CORP., 5th Ed., Vol. 2, Sec. 695.
[7] City of Passaic *v.* Paterson Bill Posting Co., 72 N. J. L. 283, 62 Atl. 267 (1905); Com. *v.* Boston Adv. Co., 188 Mass. 348, 74 N. E. 601 (1905); People *v.* Murphy, 105 N. Y. 126, 88 N. E. 171 (1909); Haller Sign Works *v.* Physical Culture Training School, 249 Ill. 436, 94 N. E. 920 (1911).
[8] See Hardman, "LEGAL LIMITATION OF MUNICIPAL BEAUTIFICATION," 30 W. VA. L. Q. 191.
[9] 75 W. Va. 456, 84 S. E. 105 (1915).
[10] State *ex rel.* Sale *v.* Stahlman, note 4, *supra.*
[11] Nunley *v.* Mayor and City Council of Montgomery, 94 W. Va. 189, 117 S. E. 888 (1923).
[12] Holswade *v.* City of Huntington, 124 S. E. 913 W. Va. (1924).

ing was for the sole purpose of beautifying the city. The court, in considering the defendant city's demurrer to the bill, held that those allegations were not sufficient to warrant an injunction restraining the proper municipal authorities from proceeding with the paving.

At first glance, it looks as if this decision were *contra* to the former West Virginia cases on this question of aesthetic interest.[13] In *Fruth* v. *Board of Affairs,* the court refused to allow a city to be beautified by a building line ordinance under the police power, the opinion stating that the ordinance deprived the owners of property without due process. In the principal case, upon the allegations in the bill, municipal authorities have been allowed to beautify a city by assessments levied against abutting property owners. There would seem to be no difference in principle between the two cases.

The case under discussion had been before the court before,[14] without the allegation that the sole purpose of the repaving was to beautify the city. Judge Meredith, who wrote the second opinion says concerning this "new issue," as he terms it:

> "Plaintiff's averments that the present paving answers the needs as well as the repaving proposed and that the repaving is but to beautify the streets and the city, can be no more than their own opinions, opinions at variance with the views of the members of the board of commissioners, in whom the ultimate authority was vested."

But the actual decision in the case is strong argument that if the plaintiff could prove that this ordinance was solely for the purpose of beautifying the city, it would yet be valid. This leads to the query: Has the West Virginia court taken the "advanced ground" mentioned in the prior decisions?[15] If it has, the law of West Virginia has recognized that the interest of society in beautifying the city outweighs the individual interest in opposing expenditures for aesthetic considerations.

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[13] Notes 9 and 10, *supra.*
[14] Holswade *v.* City of Huntington, 122 S. E. 449 W. Va. (1924).
[15] *Supra* note 9.