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Legal Limitations of Municipal Beatification

T. P. H.

West Virginia University College of Law

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LEGAL LIMITATION ON MUNICIPAL BEAUTIFICATION,*—What are the legal limitations on municipal beautification? Particularly to what extent may a city, under its so-called police power,¹ legally beautify its buildings, streets and open spaces by zoning ordinances or otherwise? If a city's charter or a statute purports to authorize such municipal beautification, may the city legally divide its territory into "residence districts," "business districts" and "unrestricted districts," and prohibit the building of business houses in residence districts, or unsightly houses, or unsightly advertising signs in any district? To illustrate, could a city prohibit the building of a public garage, or a gasoline filling station, or an apartment house in its exclusively residential zone? Or may a city legally establish aesthetic building lines and require all new buildings to be erected in conformity with such aesthetic plan? Or may a city legally limit the height of buildings, or legally require buildings to be of a certain height, or of an approved type in order to carry out some aesthetic purpose?

Of course to the extent that such regulations have the effect of reasonably promoting the public health, morals, order or safety, and, to some extent, the general convenience or general welfare, there is, broadly speaking, no legal limitation on such incidental municipal beautification.² For example a city could legally require all business houses, whose business was so noisome as to be injurious to the health of nearby residents, to locate outside the residential zone,³ thus incidentally enhancing the beauty of the city. Or a city could legally require the use of smoke-destroying apparatus on factory chimneys to prevent the unreasonable emission of smoke,⁴

* Part of a paper read at the West Virginia Cities Conference on City Planning and Zoning, Morgantown, March 19, 1924.

¹ As to the use of the power of eminent domain for aesthetic purposes see *Attorney General v. Williams*, 174 Mass. 476, 55 N. E. 77 (1899), (limiting the height of buildings for aesthetic purposes); LEWIS, *EMINENT DOMAIN*, 3rd. ed., §271 (1909). Compare *State ex rel. Sale v. Stahlman*, 81 W. Va. 335, 337, 94 S. E. 497, 498 (1917), (a police-power case with a *dictum* as to the use of eminent domain). Upon principle it would seem that an aesthetic use is such a public use as, upon paying just compensation, will justify a "taking of property" under the power of eminent domain. See *In re Kansas City Ordinance No. 39946*, 252 S. W. 404 (Mo. 1923). But, since a "regulation of the use of property" under the police power does not involve compensation for the injury, may a city under its police power legally limit the use of intra-city property to aesthetic uses? In the very nature of things aesthetic city planning and zoning ordinarily involves a "regulation of the use of property" rather than a "taking of property." Besides the police power is admittedly the most practical instrumentality for municipal beautification. Hence the present *quatre* is confined to the use of the police power for aesthetic purposes.

² No attempt has been made in these foot notes to cite all cases in point. See, e. g., *Eubank v. City of Richmond*, 226 U. S. 137 (1912); *State ex rel Sale v. Stahlman*, *supra* note 1. Compare *City of Martinsburg v. Miles*, 121 S. E. 285 (W. Va. 1924), (City may prohibit projections over sidewalks whether they interfere with public travel or not, thus incidentally promoting municipal aesthetics).

³ See, e. g., *Reinman v. City of Little Rock*, 237 U. S. 171 (1915), (requiring livery stable to locate outside a certain rather densely populated district).

⁴ *City of Rochester v. Macauley-Fien Milling Co.*, 199 N. Y. 207, 92 N. E. 641 (1910).

thus incidentally promoting municipal beautification, for such smoke, in addition to impairing the beauty of the city, is injurious to both health and property.

But unfortunately where the regulating purpose of such city planning and zoning is purely aesthetic, the courts of last resort in some states, including West Virginia, have unequivocally denied the legality of regulations for municipal beautification. Thus, in a case decided in 1915 the West Virginia Supreme Court of Appeals held that a city could not under the police power establish a building line and prohibit owners from building nearer to the street than that line, as the regulating plan was purely aesthetic.⁵ In another case,⁶ decided in 1917, the only other West Virginia case directly in point,⁷ (although there is a recent *dictum* to the same effect)⁸ the West Virginia court held that a city, under its police power, could not prevent the owner of a lot situated between comparatively high buildings from erecting thereon a one-story building, as the purpose of the city's regulation was merely aesthetic. Perhaps under the peculiar circumstances involved this latter attempt at municipal beautification went to an unreasonable length and was therefore unjustifiable. But the court argued that an aesthetic purpose, apparently because everybody doesn't appreciate an aesthetic purpose, is not protected under the police power, and therefore to limit the use of one's property to aesthetic uses would be to deprive the owner of property without due process of law. However, the latest West Virginia decision squarely so holding is now seven years old.⁹ And while the West Virginia decisions undoubtedly deny the legality of such beautification, it does not necessarily follow that in West Virginia today such aesthetic city planning and zoning, if reasonable, is not legally permissible. For the law of today is what the courts would decide today, not merely what the courts have already decided.¹⁰ As America's greatest living judge, Mr. Justice Holmes, has so well expressed it:¹¹

“The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by the law.”

Other courts, *contra* to prior decisions, have reached conclusions

⁵ *Fruth v. Board of Affairs*, 75 W. Va. 456, 84 S. E. 105 (1915).

⁶ *State ex rel. Sale v. Stahlman*, *supra* note 1.

⁷ *State ex rel. Nunley v. Mayor and City Council of Montgomery*, 117 S. E. 888 (W. Va. 1923), does not directly raise the point, as the city had not taken the proper steps to raise the point, *viz.*, had not passed an ordinance; but the West Virginia court by way of *dictum* adhered to what it had said in its prior decisions.

⁸ See foot note 7.

⁹ See foot note 7.

¹⁰ *Hansen v. Grand Trunk Ry.*, 78 N. H. 518, 102 Atl. 625 (1917).

¹¹ Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

which *in effect* are *contra* to the West Virginia decisions.¹² And as an eminent judge has recently said in a Connecticut case:¹³

“That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fulness of experience, serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled rules of society, and no considerable property rights have become vested in reliance upon the old rule The common law is not and it should not be stationary. Change of this character should not be left to the legislature.”

What, then, will the courts “do in fact” when the question is again raised whether such aesthetic municipal planning and zoning is legally permissible? Again Mr. Justice Holmes has admirably indicated the correct answer. He says:¹⁴

“Every opinion [that is, every opinion of every member of the community] tends to become a law.”

In other words, if you have a sufficiently preponderant public opinion in favor of a given proposition, that proposition, at any rate in the generality of cases, will ultimately become law, embodied in judicial decisions. For law, in the long run, is, or tends to be, an expression of the preponderant settled opinion of society, an expression of community ideals, the *mores* of the times,¹⁵ as understood by the judges of the time being. As Dean Pound, perhaps our greatest American jurist, has well said:¹⁶

“Cases must be decided in the long run so as to accord with the moral sense of the community.”

Many decisions, *e. g.*, the West Virginia decisions, reason that an aesthetic purpose is not protected under the police power. That raises the question: What can a city do under its police power?

¹² It is true that these courts generally, if not always, say that such aesthetic regulations promote the public health, morals, order, safety or the general convenience or general welfare, rather than, or in addition to, the aesthetic. But in law as elsewhere actions speak louder than words. And there is no doubt that *in fact* the reasonable promotion of the aesthetic is a vital factor if not the vital factor which these courts consciously, subconsciously or unconsciously employ to sustain these regulations. See Chandler, “The Attitude of the Law Toward Beauty,” 8 A. B. A. J. 470 (1922); Notes, 19 MICH. L. REV. 191 (1920), (several cases collected).

¹³ Wheeler, J., in *Dwy v. Connecticut Co.*, 89 Conn. 74, 99, 92 Atl. 883 (1915).

¹⁴ *Lochner v. New York*, 198 U. S. 45, 76 (1905).

¹⁵ See Young, *The Law as an Expression of Community Ideals, and the Law Making Function of Courts*, 27 YALE L. J. 1 (1917); Corbin, *The Law and the Judges*, 3 YALE REVIEW (N. S.) 234, 249 (1914); Ehrlich, “The Sociology of Law,” 36 HARV. L. REV. 130 (1922); Duguit, 21 COL. L. REV. 17, 22, 24, 25, 23-34 (1921).

¹⁶ Pound, “Spurious Interpretation,” 7 COL. L. REV. 379,384 (1907).

Again Mr. Justice Holmes has given us the classic answer. He says:¹⁷

“The police power extends to all the great public needs . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.”

Therefore, if we now have or hereafter create a preponderant settled opinion in favor of such aesthetic city planning and zoning, the courts should not, and, I think, will not refuse to permit such municipal beautification. In many states, perhaps including West Virginia, there is a present-day tendency to depart from prior decisions when the prior decisions are so out of harmony with present-day conceptions of justice, so out of harmony with preponderant settled public opinion that departure from prior decisions will secure the greatest good of the greatest number—when, everything considered, the good to be accomplished by departure from precedent outweighs the good to be secured by adherence to precedent.¹⁸ If therefore, there is not as yet a preponderant settled opinion in a given state in favor of such aesthetic city planning and zoning, a court, having once held that such municipal beautification is not legally permissible, would, in all probability, so hold today. If that is so, it behooves us to create in our cities a preponderant settled opinion in favor of municipal beautification. This can be accomplished by municipal organizations and by newspaper articles in favor of aesthetic city planning and zoning. If such preponderant opinion is created it is reasonably certain that courts will sanction such municipal beautification.

Let me briefly attempt to prove that in the main, this, in effect, is how the law has worked out, or is tending to work out, in various states. Until recently it was universally held that, under the police power at any rate, an owner of property could not be lawfully restrained from using his property as he pleased when the objection was that such use merely injured the aesthetic sensibilities of the community.¹⁹ And the courts held so principally for

¹⁷ *Noble State Bank v. Haskell*, 219 U. S. 104, 111 (1911).

¹⁸ See CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 112, 113, and Lecture IV, particularly at pp. 150, 151, 160, 161 (1921). See *Falconer v. Simmons*, 51 W. Va. 172, 179, 41 S. E. 193 (1902); *Jones v. Cook*, 90 W. Va. 710, 111 S. E. 828 (1922). In the first part of its opinion in the latter case the court attempts to base its opinion on the rigid common law rule, but, as the dissenting opinion of the president of the court clearly points out, the majority opinion in fact departs from the common law rule. And in the latter part of the majority opinion we find this significant statement: “We think the practical administration of justice between the parties is more the duty of the court than the preservation of some esoteric theory [of] law.”

¹⁹ *City of Passiac v. Patterson Bill Posting etc. Co.* 72 N. J. L. 285, 62 Atl. 267 (1905).

the reason that until recently the aesthetic sensibilities of the majority of the community were not sufficiently acute to insist upon legal protection. Thus a few years ago an eminent English jurist, comparing the French and English in this respect, could appropriately quote:²⁰

“Nature which gave them the *gout*
Only gave us the *gout*.”

But with the advance of civilization, aesthetic sensibilities of communities became more sensitive, demanding legal protection. The “taste” which nature gave the French we are gradually acquiring. And today unsightly surroundings may in a given community cause as much general and genuine human unhappiness as perturbing sounds²¹ or noisome smells²² against which the law has long since given legal protection under the police power. Therefore the opinion of civilized communities is beginning to preponderate, in some states at any rate, in favor of reasonably securing the aesthetic sensibilities of the community against anti-aesthetic surroundings. Hence, since, as Mr. Justice Holmes has said,²³ “every opinion tends to become a law,” the recent tendency of the law is to secure the community interest in aesthetic surroundings²⁴ by municipal laws designed, in part at least, to beautify municipal communities, for example, by so-called zoning ordinances establishing aesthetic building lines²⁵ or districts for residences only.²⁶ Thus in a rather recent decision, sustaining a zoning ordinance which excluded brick factories from residential districts, the United States Supreme Court said:²⁷

“There must be progress and if in its march private interests are in the way, they must yield to the good of the community.”

Notwithstanding some language of the courts,²⁸ such municipal

²⁰ Sir Frederick Pollock, 13 LAW QUART. REV. 337-338 (1897).

²¹ State v. White, 64 N. H. 48, 5 Atl. 828 (1886).

²² The Manhattan Mfg. etc. Co. v. Van Keuren, 23 N. J. Eq. 251 (1872).

²³ Lochner v. New York, *supra* note 14.

²⁴ See Pound, A Theory of Social Interests, 15 Publications of the American Sociological Society, 16 (1920); Chandler, *op cit.*, *supra* note 12.

²⁵ See *e. g.*, Town of Windsor v. Whitney, 95 Conn. 357, 111 Atl. 354 (1920). But see *contra* Fruth v. Board of Affairs, *supra* note 5 (W. Va. 1915); and see *In re* Kansas City Ordinance No. 39946, 252 S. W. 404 (Mo. 1923) that such aesthetic building lines can be established only under the power of eminent domain, upon payment of just compensation. See Comment, 30 YALE L. J. 171.

²⁶ See *e. g.*, *In re* Opinion of the Justices, 234 Mass 597, 127 N. E. 525 (1920); Lincoln Trust Co. v. Williams Bldg. Corp., 229 N. Y. 313, 128 N. E. 209 (1920); City of Des Moines v. Manhattan Oil Co., 193 Ia. 1096, 184 N. W. 823 (1921); Ware v. City of Wichita, 113 Kan. 153, 214 Pac. 99 (1923); State v. City of New Orleans, 97 So. 440 (La. 1923). Compare Atkinson v. Piper, 195 N. W. 544 (Wis. 1923), (limiting the height of buildings under the police power).

²⁷ Hadacheck v. Sebastian, 239 U. S. 394, 410 (1915).

²⁸ The courts so holding commonly say that such regulations promote the public health, safety, etc., rather than, or in addition to, the aesthetic. But see foot note 12 *supra*.

beautification when reasonable has *in effect* been recently held legally permissible, at least in certain classes of cases, in New York and Massachusetts and some other states²⁹ where aesthetic sensibilities of the majority of the community are rather acute and public opinion probably preponderates in favor of such beautification. It has been recently held not legally permissible in Texas and some other states³⁰ where there is probably not a preponderant settled public opinion in favor of municipal aesthetics. Will a court, *e. g.*, the West Virginia court, when the question arises again, uphold such aesthetic city planning and zoning? It depends largely on whether the preponderant settled public opinion in that jurisdiction is, at the time, in favor of such municipal beautification. For, to repeat, the law is, or tends to be, an expression of community ideals, an expression of the preponderant settled opinion, the *mores* of the times, as understood by the judges of the time being.

—T. P. H.

THE FIRST YEAR'S WORK OF THE AMERICAN LAW INSTITUTE.—The American Law Institute, founded in Washington, D. C., on February 23, 1923, held its second annual meeting on the same date this year, at the same place. The notable progress which the organization has made during the past year may justify a review of its activities. The purpose of the Institute, as formulated at the organization meeting in 1923, was the authoritative restatement of the law. It was evident that a substantial financial backing would be necessary in order to carry on the work, but Elihu Root, the chairman of the first meeting had intimated that, if the interests and support of the legal profession were demonstrated, the necessary funds would be forthcoming.

On April 17, 1923 the secretary of the Carnegie Corporation advised the Institute that the Board of Trustees of that Corporation had appropriated the sum of \$1,075,000 for the general purpose of the Institute, to be paid in annual installments of substantially \$100,000, and that after the completion of the last payment in 1933, the corporation assumed no further obligation for the support or maintenance of the Institute.

Its financial arrangements being thus secured for a considerable period of years, the council of the Institute elected at the first meeting Mr. William Draper Lewis of Philadelphia, Director of the In-

²⁹ See cases cited in foot note 26 *supra*.

³⁰ See *e. g.*, *Spaun v. City of Dallas*, 111 Tex. 350, 235 S. W. 513 (1921); *City of St. Louis v. Ehrhart*, 256 S. W. 489 (Mo. 1923, 3 J. J. dissenting).