AESTHETIC PURPOSES AS JUSTIFYING SETBACK AND SCREENING REGULATIONS FOR JUNK YARDS

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The screening of unsightly junk yards may no longer present difficult constitutional questions for those concerned with urban and highway beautification. Heretofore, a major stumbling block to effective regulation has been an insistence by the courts that the use of the police power to enforce screening and setback provisions must be justified primarily upon considerations of health, safety or the general welfare. The Kentucky Court of Appeals, significantly paralleling recent decisions accepting the propriety of aesthetic considerations in zoning,(1) has indicated in Jasper v. Commonwealth(2) that aesthetic considerations alone are sufficient to sustain the use of the police power to implement screening requirements. Taking judicial notice of the aesthetic value of Kentucky's roadways, the court held that a statute which prohibited the operation of junk yards within 2000 feet of any road unless screened from view was a reasonable regulation in furtherance of a substantial public purpose, and therefore not a violation of the defendant's constitutional rights.

While Kentucky is the first state to hold unequivocally that aesthetic considerations alone are sufficient to support state-enacted screening and setback requirements for junk yards, it has been obvious for some time that the precedents which hold that aesthetics can only be a secondary consideration do not accurately describe the results being achieved by the courts. This may be illustrated by the experience of Louisiana. In 1939 the Supreme Court of Louisiana held that an attempt by the City of New Orleans to require junk yards to be enclosed by a seven foot feather-edged board fence was an unreasonable exercise of the police power as a safety measure, and therefore that a discussion of aesthetic considerations had no application.(3) In 1956, the court restated the general rule that the city could not restrict the use of property on purely aesthetic grounds. It then held that an ordinance requiring a substantial fence not less than seven feet high, and screening the enclosed area from public view, was adopted primarily as a safety measure to protect

passersby from the dangers of the junk business and only secondarily for aesthetic reasons.(4) While undoubtedly the arguments presented to the court were somewhat different in the two cases, the fact remains that a solid fence was now reasonable, while a feather-edged board fence seventeen years before had been an unreasonable requirement.

In a subsequent case(5) the Supreme Court of Wisconsin upheld an ordinance provision which required that salvage automobiles or automobile parts must be kept back at least 210 feet from the center line of an arterial highway except when screened by a building on the premises. Although explicitly refusing to say that a police power ordinance might not be grounded on aesthetic considerations, the court noted that aesthetic reasons were not the sole ground, and that setting junk piles back from the highway would combat crime and hazards to traffic. Similarly, the Washington Supreme Court, while nominally adhering to the traditional rule, recently has held that an eight foot solid fence requirement was not an unreasonable measure for minimizing crime, and held that it could be enforced against local junk dealers.(6) While the public safety reasons in these cases may seem tenuous, the courts' unwillingness to question the legislative judgment is significant.

These results in cases involving the screening of junk yards have paralleled a similar evolution in constitutional doctrine relating to use of the police power to implement aesthetic objectives in other settings.(7) Upholding the constitutionality of an ordinance which prohibited the hanging of clothes in the front yards, the Court of Appeals of New York stated in 1963:

> Once it be conceded that aesthetics is a valid subject of legislative concern, the conclusion seems inescapable that reasonable legislation designed to promote that end is a valid and permissible exercise of the police power,(8)

and held therefore that the ordinance was "validly grounded on a proper exercise of the police power."(9) Not surprisingly, this decision was cited by the Kentucky court. As the Stover decision deals with offensive articles open to public view, its interpretation of the role of aesthetics in police power controls has obvious relevance to the general question posed by screening and setback regulation.(10)

In holding that aesthetic objectives were sufficient to support the exercise of the police power in the regulation of junk yard screening, the Kentucky Court of Appeals said:

> The obvious purpose of the Act is to enhance the scenic beauty of our roadways . . . While there may be a public safety interest promoted the principle objective is based upon aesthetic considerations. Though it has been held that such considerations are not sufficient to warrant the invocation of the police power, in our opinion the public welfare is not so limited.
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> . . . The real question is whether in the light of current conditions the Act constitutes a reasonable regulation of appellants' business in the furtherance of a substantial public purpose.(11)

Taking judicial notice of the "developing importance and extensive improvements of Kentucky's highway system, of the actual commercial as well as aesthetic value of our scenic beauty, and of the patently offensive character of vehicle graveyards in close proximity to such highways,"(12) the court held that there was a "real and substantial justification for adoption of some regulative policy" with respect to junk yards.(13) Since the screening requirement did no more than implement a proper public purpose, it was not arbitrary or unreasonable.

Since the Jasper decision the Oregon supreme court has indicated that aesthetic considerations are a sufficient ground to support the exercise of the police power in a municipal ordinance applied to junk yards.(14) Relying extensively on the Stover case, the court upheld an Oregon City zoning provision which was interpreted as entirely excluding junk yards from the city. Although the Oregon City case does not concern screening or setback limitations, it gives support for an even more restrictive junk yard regulation involving the total exclusion of junk yards from a small town. It appears to add further impetus to "a growing recognition of the power of a city to impose zoning restrictions which can be justified solely upon the ground that they will tend to prevent or minimize discordant and unsightly surroundings."(15)

The Stover and Oregon City cases are not completely analogous to the cases dealing with screening and setback regulation. They are concerned with partial and complete restrictions upon land use, not

the mere regulation of use. However, the basic problem is the same in all three situations: can the police power be used to implement primarily aesthetic objectives? In view of their response to this general question, it seems safe to conclude that these courts too would uphold the constitutionality of reasonable screening and setback provisions.

Settling the question of aesthetics as a justification for the police power is not the end of the problem for the highway lawyer concerned with the screening of junk yards. Notice should be taken of two recent cases indicating that careful attention needs to be paid to the formation of reasonable standards used in junk yard regulation.(16) After stating that it did not wish to limit the "tendency to broaden the scope of states' police power," the Arkansas supreme court nevertheless was forced to hold a setback requirement "arbitrary and unreasonable in attempting to effect its intended purpose, which could only be to protect the traveling public from unsightly views," because it did not provide a screening alternative.(17) Similarly, the West Virginia supreme court held that a statute which required junk yards to be set back 100 feet from state highways was constitutional but was unreasonable as applied to the plaintiff.(18) The plaintiff's property, situated between two highways, would have been rendered unuseable as a junk yard had he been forced to comply with the setback requirements because the statute left him no room in which to operate. These cases indicate that setback and screening regulations can be found unconstitutional as applied, though courts are willing to uphold the general principle on which they are predicated. Regulations must be drawn so that they leave the junkyard owner a reasonable scope for the operation of his business.

Although examples such as those just given are obviously rare cases, it is possible to imagine other situations that require special consideration to avoid unreasonable restrictions on use. Would the courts enforce statutes such as that enacted in Kentucky if screening is not a practical alternative? Suppose that the roadbed is elevated, as it might be at an interchange, or that the road is carved out of a hillside and the junk yard is located at a lower elevation. Would courts force a junk dealer to move his business if his only alternative under the statute is to erect screening fifty feet high?

Difficult cases such as these may be handled as exceptions under junk yard regulations. The test generally applied seems to be: is the legislation a reasonable measure designed to promote a legitimate end. Regulations which effectively deprive a junk dealer of the use

of his property without compensation will not meet this test. On the other hand, the courts seem willing to permit a great deal of latitude in setting standards to apply to the usual circumstances of operation. Draftsmen of future legislation might consider adherence to the general regulatory standard unless exceptions are "dictated by necessity," the phrase upheld in the Stover case. Necessity may be defined to include cases in which compliance with screening or setback requirements would be physically or financially unreasonable. In any event, regardless of the wording, it should be recognized that exceptions need to be considered in the formation of reasonable standards.

Although the older precedents accept aesthetics only as a secondary consideration, courts which have ruled on screening and setback provisions in recent years have clearly indicated that such regulations can be enforced where they are strongly, if not primarily, motivated by aesthetic considerations. Wisconsin, Louisiana, Washington, Oregon, Arkansas and West Virginia have all indicated a willingness to support the use of the police power in situations in which the obvious purpose was to obscure an unsightly view. Where legislation recognizes an exception when compliance with the general standard would be physically or financially unreasonable, recent decisions indicate that legislation of this kind will be sustained by the courts.

Footnotes

(1) People v. Stover, 12 N.Y.2d 462, 191 N.E. 2d 272, appeal dismissed, 375 U.S. 42 (1963); Oregon City v. Hartke, 400 P.2d 255 (Ore. 1965).

(2) Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. 1964).

(3) City of New Orleans v. Southern Auto Wreckers, 193 La. 895, 192 So. 523 (1939).

(4) City of Shreveport v. Brock, 230 La. 651, 89 So. 2d 156 (1956).

(5) Highway 100 Auto Wreckers, Inc. v. City of West Allis, 6 Wis. 2d 637, 96 N.W.2d 85 (1959).

(6) Lenci v. City of Seattle, 63 Wash.2d 664, 388 P. 2d 926 (1964). But cf. City of Defiance v. Killion, 116 Ohio App. 60, 186 N.E.2d 634 (1962).

(7) Comment, 6 St. Louis Univ. L. Rev. 534 (1960).

(8) People v. Stover, 12 N.Y. 2d 462, 467, 191 N.E 2d 272, 275 (1963).

(9) Id. at 469, 191 N.E. 2d at 276.

(10) See: Anderson, R.M., "Regulation of Land For Aesthetic Purposes: People v. Stover", 15 Syracuse L. Rev. 33 (1964).

(11) Jasper v. Commonwealth, 375 S.W.2d 709, 711 (Ky., 1964).

(12) Ibid.

(13) Id. at 712.

(14) Oregon City v. Hartke, 400 P. 2d 255 (Ore. 1965).

(15) Id. at 261.

(16) Likewise, the reasonableness of ordinances regulating the use of land for junk yard purposes must also pass a reasonableness test. Quite possibly, for example, the total exclusion of junk yards from an entire city might be unreasonable if there were areas in which such uses could operate without being offensive.

(17) Bachman v. State, 235 Ark. 339, 342, 359 S.W.2d 815, 817 (1962).

(18) Farley v. Graney, 146 W. Va. 22, 199 S.E. 2d 833 (1960).