

# Municipal Corporations - Regulation of Billboards and Advertising Structures for Esthetic Purposes

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## MUNICIPAL CORPORATIONS — REGULATION OF BILLBOARDS AND ADVERTISING STRUCTURES FOR ESTHETIC PURPOSES

To what extent may a municipality regulate the erection of billboards? The answer to the problem raised by this question should be of special interest to all municipal residents whose cities have embarked on post-war construction programs. The ends sought are not only convenient and useful, but beautiful cities. Billboards and the type of advertising methods associated with them, while they will not necessarily affect the use of proposed improvements, will certainly prevent full appreciation of their beauty. Masses of billboards along each expressway, surrounding each new building; all vying for the passerby's attention and seeking to attract it through the use of gaudy colors, tricky limericks and suggestive photographs could quickly render the most carefully designed of these projects unsightly.

The regulation of billboards and other structures for advertising purposes or their absolute prohibition in designated areas by a municipal corporation has generally been upheld as a valid exercise of the police power delegated to a municipality by the state government. The courts have usually found the municipality is protecting the safety, health, morals or promoting the general welfare of its citizens and based their decisions on removal of traffic hazards, prevention of accumulations of combustible and unsanitary matter, removal of shields for criminal or immoral acts, prevention of injury to passers-by through collapse of billboards, or prevention of indecent or immoral advertising.<sup>1</sup> The power to regulate is limited only by state and federal constitutional requirements that the municipality's regulation be neither arbitrary or unreasonable.<sup>2</sup> In construing the reasonableness of any particular regulation the courts have usually required a substantial relation between it and the maintenance of health, morals, safety and welfare of the community.<sup>3</sup>

Since the majority of the courts have allowed a municipality to regulate billboards, signs and other structures for advertising purposes under the police power in order to preserve the public health, safety, morals, or general welfare it would be well to consider this power as

<sup>1</sup> Thomas Cusack Co. v. Chicago, 242 U.S. 526, 37 S. Ct. 190, 61 L. Ed. 472, L.R.A. 1918A, Ann. Cas. 1917C, 594 (1917), affirming 267 Ill. 344, 108 N.E. 340, Ann. Cas. 1916C, 488 (1915); Cream City Bill Posting Co. v. Milwaukee, 158 Wis. 86, 147 N.W. 25 (1914); Thomas Cusack Co. v. Milwaukee, 158 Wis. 100, 147 N.W. 30 (1914); General Outdoor Advertising Co. v. City of Indianapolis, 202 Ind. 85, 172 N.E. 309, 72 A.L.R. 453 (1930); State v. Staples 157 N.C. 637, 73 S.E. 112, 37 L.R.A. (NS) 696 (1911).

<sup>2</sup> Stierle v. Rohmeyer, 218 Wis. 149, 260 N.W. 647 (1935); U.S. CONST., Amend. 14.

<sup>3</sup> See 72 A.L.R. 453, 466 (Regulations Held Reasonable). See 72 A.L.R. 453, 469 (Regulations Held Unreasonable).

it applies to our problem.<sup>4</sup> Is it confined to definite subjects? Is it flexible enough to allow regulation for purely esthetic considerations?

The exercise of the police power is not confined to set standards or objectives, but changes as do the needs of the public. Objects within its scope change as social, industrial or political development indicates their inclusion is necessary.<sup>5</sup> Since there is no broad definition of its scope its limits are determined in regard to the particular subject of its exercise.<sup>6</sup>

The majority of our American courts have refused to allow the police power to be exercised for esthetic purposes. They have, as a general rule, held such a regulation to be contrary to the Federal Constitution in that it involves a taking of property without compensation and, hence, violates the due process clause.<sup>7</sup>

"Aesthetic considerations are a matter of luxury and indulgence rather than necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation."<sup>8</sup>

Some courts which have refused to allow regulation on esthetic grounds alone have gone on to say such considerations may be part of the reason for imposing the regulation.<sup>9</sup> The Indiana Supreme Court while saying billboards could not be prohibited along a boulevard merely because they were unsightly added:

"But esthetic considerations enter into a great extent, as an auxiliary consideration, where regulation has a real or reasonable relation to safety, health, morals, or general welfare."

The court, in that decision, then proceeded to find that although the billboards were of safe and sound construction and not nuisances per se, a regulation prohibiting a sign within 500 feet of any park, parkway or boulevard was valid. It would seem that esthetic considerations were more than an auxiliary consideration in the decision.<sup>10</sup> The Indiana court's position is illustrative of that group of courts who although they are unwilling to recognize that the police power is elastic enough to allow a regulation on esthetic principles alone, have actually based their decisions on those principles while stating that the regulation protects

<sup>4</sup> *Supra*, note 1.

<sup>5</sup> *State v. Pitney*, 79 Wash. 608, 140 P. 918; 11 AM. JUR. CONSTITUTIONAL LAW §270 and cases there cited.

<sup>6</sup> *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931); 11 AM. JUR. CONSTITUTIONAL LAW §253.

<sup>7</sup> *Varney v. Williams*, 155 Cal. 318, 100 P. 867, 21 L.R.A. (NS) 741; *Curran Bill Posting and Distributing Co. v. Denver*, 47 Colo. 221, 107 P. 261, 27 L.R.A. 544 (1910); *Anderson v. Shackelford*, 74 Fla. 36, 76 So. 343 (1917); *Passaic v. Paterson Bill Posting, Advertising and Sign Printing Co.*, 72 N.J.R. 285, 62 Atl. 267, Ill. Am. St. Rep. 676, 5 Am. & Eng. Ann. Cas. 995 (1905).

<sup>8</sup> *Passaic v. Paterson Bill Posting*, *supra*, note 7.

<sup>9</sup> *McQUILLAN*, MUN. CORP. Sec. 24.382. (3rd. Ed.)

<sup>10</sup> *General Outdoor Advertising Co. v. Indianapolis*, *supra*, note 1.

safety, health or morals, no matter how remotely these are related to the regulation's purpose.<sup>11</sup>

Other courts, although reluctant to rule it is a valid exercise of the police power to regulate on esthetic considerations alone, have said that if no other point were present upon which they could base their decisions such considerations would be sufficient.<sup>12</sup> Since there is nothing in the Federal constitution which guarantees a landowner the right to maintain a sign designed to force itself upon public attention and the Supreme Court has carefully refrained from deciding the police power cannot be exercised to protect beauty, it is difficult to understand this reluctance to state the true basis of their decisions.<sup>13</sup>

A few courts have taken what would seem to be the better approach to the problem and recognize that regulations to improve or maintain the beauty of a city are within the city's power. In a dissent to a 1937 New York decision Judge Finch expressed his view that the attitude of the courts on this problem seems to be changing.<sup>14</sup> Some of the later cases seem to sustain his views.<sup>15</sup> A 1940 New York decision upheld an ordinance which in effect prohibited any and all types of vertical signs on any building, over any street, highway or alley in the village, and the court based its decision upon esthetic considerations. The court declared:

"For years the courts have strained to sustain the validity of regulatory or prohibitory ordinances of this character upon the basis of the public safety. They decided that aesthetic considerations could afford no basis for sustaining such legislation. Such considerations were deemed to render an ordinance of this character unconstitutional. But the views of the public change in the passing of years. What was deemed wrong in the past is looked upon very often as eminently proper. What was considered unreasonable in the past is very often considered perfectly reasonable today. Among the changes which have come in the viewpoint of the public is the idea that our cities and villages should be beautiful and that the creation of such beauty tends to

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<sup>11</sup> *Supra*, Note 10, see also *Murphy Inc. et. al. v. Town of Westport* 131 Conn. 292, 40 A 2nd 177, 156 A.L.R. 568 (1944); *Perlmutter et. al. v. Greene*, 259 N.Y. 327, 182 N.E. 5 (1932).

<sup>12</sup> *General Outdoor Advertising Co. v. Dept. of Public Works*, 289 Mass. 149, 193 N.E. 799 (1935) *McQUILLEN, supra*, note 9, intimates that this conclusion is supported by *Nebbia v. People*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469 (1934), and cases cited and summarized in that decision.

<sup>13</sup> *Gardner, Mass. Billboard Decision*, 49 HARV. L. REV. 869 (1936).

<sup>14</sup> *Mid-State Advertising Corporation v. Bond*, 247 N.Y. 82, 8 N.E. (2d) 286, (1937) (Dissenting Opinion).

<sup>15</sup> *New Orleans v. Pergament*, 198 La. 852, 5 S. (2d) 129 (1941) (in which the court sustained validity of ordinance forbidding display of advertising in French and Spanish Quarter of New Orleans and said the preventing or prohibiting of eyesores in such a locality was within the police power); *Preferred Tires v. Hempstead*, 173 Misc. 1017, 19 N.Y.S. (2d) 374 (1940); *Com. v. Trimmer*, 53 Dauph. Co. Rep. (Pa., 1942).

the happiness, contentment, comfort, prosperity and general welfare of our citizens."<sup>16</sup>

Another point to consider in determining a municipality's ability to regulate billboards for esthetic considerations is the power of eminent domain. When a city exercises the power of eminent domain it is taking private property for public use, as compared to restricting the use of property retained by the owner when it exercises the police power. Judge Shaw very aptly pointed out this distinction between acting under the police power and exercising the power of eminent domain in an early Massachusetts case:

"This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing reasonable compensation therefor . . . (The owner) is restrained, not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it; but because it would be a noxious use, contrary to the maxim, *sic utere tuo, ut alienum non laedas*. It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefor not within the principle of property taken under right of eminent domain."<sup>17</sup>

A major requirement for exercising the power of eminent domain is that the contemplated use be for the public's benefit; however, it has been determined that it is not necessary that the entire community be benefited by the use or contemplated improvement, nor must the proposed improvement be a business necessity or convenience, but may extend to matters of public health and enjoyment for purely esthetic considerations.<sup>18</sup> The eminent domain power, however, can not afford a practical solution to the problem because the cost would be prohibitive.

It has been suggested that the whole problem of esthetic considerations can be by-passed if courts would decide that the billboard operators are making a private use of a public thoroughfare and therefor subject to regulation.<sup>19</sup> A 1915 decision raises that possibility:

"The success of billboard advertising depends not so much upon the use of private property as it does upon the use of the channels of travel used by the general public. Suppose that the owner of

<sup>16</sup> Preferred Tires v. Hempstead, *supra*, note 15.

<sup>17</sup> Commonwealth v. Alger, 7 Cush. (Mass.) 53, 85 et. seq. (1851).

<sup>18</sup> In Re Kansas City Ordinance No. 39946, 298 Mo. 569, 252 S.W. 404, 28 A.L.R. 295 (1923); Fruth v. Board of Affairs, 75 W.Va. 456, 84 S.E. 105, L.R.A. 1915C, 981, (1914) (While holding couldn't establish a building line for esthetic reasons under police power, the court discussed the possibility of upholding such a statute under power of eminent domain and seemed to intimate that such was possible, although it didn't actually decide it was.)

<sup>19</sup> Wilson, *Billboards and Right to be Seen From the Highway*, 30 GEO. LAW J. 743.

private property, who so vigorously objects to the restriction of his form of advertising, should require the advertiser to post his posters upon the billboards so that they would face the interior of the property instead of the exterior. Billboard advertising would die a natural death if this were done, and its real dependency not upon the unrestricted use of private property but upon the unrestricted use of the public highways is at once apparent. Ostensibly located on private property, the real and sole value of the billboard is its proximity to the public thoroughfares. Hence, we conceive the regulation of billboards is not so much a regulation of private property as it is a regulation of the use of streets and other public thoroughfares."<sup>20</sup>

*Conclusion:* The courts should recognize that a municipality may impose regulations based on esthetic considerations and acknowledge that maintaining the beauty of a municipality is sufficient justification for the regulation. Such a frank recognition would not open the door to a mass of restrictions concerning individual property nor prevent individual enjoyment of property. The courts could consider the general neighborhood in which the municipality seeks to prohibit billboards and whether their prohibition in that area would add to the municipality's beauty so as to increase "the happiness, contentment, comfort, prosperity, and general welfare of its citizens." As the size of our cities increase and more of our population concentrates in them, our courts should recognize that their citizens have a right to beautiful surroundings and should not be forced to look at advertising in every leisure moment. As our civilization progresses our courts' idea of what is a luxury and what is a right should change. Regulations of this type would be limited as are all other exertions of the police power, in that they could not be arbitrary nor unreasonable in relation to the end sought.

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<sup>20</sup> Churchill v. Rafferty, 32 P.I. 586, 600, 609 (1915).