Validity of the Use of Set-Back Lines for Street Widening

Clifford E. Randall
VALIDITY OF USE OF SET-BACK LINES FOR STREET WIDENING*

CLIFFORD E. RANDALL†

THE subject of "setbacks" or "building lines" or "front yard requirements" is comparatively new and is but one phase of zoning and city planning.

A major street plan that will serve adequately the enormously increased needs of the future is a critical problem for most cities. Or to phrase this statement differently, the problem of providing adequate street widths for the ever increasing traffic load on city streets is daily becoming more acute. Obviously after streets are built up solidly with business buildings and apartments, the expense of widening the streets is so great as to become almost prohibitive. Yet we are compelled to conclude that through streets in most cities are inadequate to meet the traffic needs of today, as well as the anticipated needs of twenty to fifty years hence. Unless timely corrective measures are taken, growth and development of cities will be checked and cities may be faced with the alternative of stagnation or back breaking financial burdens that could have been avoided by a little vision in street planning.

There are five methods of providing opportunity to obtain and actually obtaining streets of proper widths. These methods are:

1. Platting.
2. Restricted building lines imposed either voluntarily or in deeds of conveyance, or shown upon the recorded plat.
3. Actual widening of present streets by condemnation proceedings under the power of eminent domain.
4. The establishment of setbacks by legislation under the power of eminent domain.
5. The establishment of setbacks or building lines by legislation under the exercise of the police power.

1. Cities may require as a condition precedent to the approval, acceptance or recording of a plat that the streets in the platted property be of adequate width. Cities have this power only where such power has been granted to the municipality by action of the state legislature. This authority is within the police power of the municipality and does

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†Member of the Kenosha Bar.
not constitute the taking of private property for public use and is not an infringement of the property owner's constitutional rights. The city is not exercising the power of eminent domain since dedication of sufficient land for streets by the property owner is theoretically voluntary in return for the advantage and privilege of having the plat recorded.

It was so decided in *Ridgefield Land Co. v. City of Detroit* (1928), 241 Mich. 468; 217 N.W. 58.

2. Building lines, setbacks, or front yards may be provided by tacit or voluntary action of the abutting owners, or by private restriction building lines imposed by the subdivider and inserted in the deeds of conveyance or shown by the recorded plat. Open spaces or strips between street lines and the alignment of buildings are practical and reasonable.

Voluntary setbacks are never satisfactory. Unless restrained in a legal way there is no assurance that buildings will not be extended beyond the lines of existing buildings or even to the street line. On the other hand, unless strictly drawn and vigilantly enforced by the beneficiaries, restricted building lines, as shown in deeds of conveyances or shown upon the recorded plat, may be and are usually violated.

3. Cities may actually widen streets by the exercise of the power of eminent domain. The actual taking of the property by condemnation proceedings for street widening obligates the city to compensate the owner for the property taken at the time of the taking. Obviously when traffic increases to uneconomic congestion there remains no other way to widen the street except by condemnation with its excessive and burdensome cost unless the necessity for the widening has been forecast by proper city planning and buildings have not been permitted to be erected to the street line.

4. The city may by exercise of the power of eminent domain create building lines. This method may be used where the buildings are built up to the street line by establishing the building and setback line and forbidding, by proper legislation, the erection of new buildings beyond the setback line. It may also be used where only a part of the buildings are built up to the street line, or in residence districts where buildings are set back a considerable distance.

In such cases the city takes an easement or the right to keep the strip between the building line and the street line free from structures and for this easement the city must pay. Ultimately when widening actually takes place the city must pay for the strip of land between the setback and building lines and the street line actually taken for the widening. This method is unsatisfactory for many reasons.

In some states an attempt was made to create building lines under
VALIDITY OF USE OF SET-BACK LINES

the power of eminent domain without providing compensation to the owner of the property. As early as 1893 the Missouri Supreme Court held invalid a statute authorizing the establishment of building lines because no provision was made for compensation to the lot owner. Other courts followed this decision and text writers asserted the same doctrine.

Even when compensation was provided for the property owners, when building or set back lines were attempted to be established under the power of eminent domain, strenuous objection was made to such legislation. The taking in such cases was claimed to be for esthetic purposes. This objection gradually lost its force and courts recognized the doctrine that building or setback lines may be established under the power of eminent domain.

A well considered case so holding, followed by an Annotation on the power to establish building lines along the street, is Kansas City v. Fred Liebi, known as Re Kansas City Ordinance No. 39,946—(1923) — Mo. —, 252 S.W. 404; 28 A.L.R. 295.

A similar decision was reached in Appeal of E. J. White et al v. City of Pittsburgh (1926) 287 Pa. 259; 134 Atl. 409; 53 A.L.R. 1215.

5. A city under the police power may establish building lines or setbacks or front yard requirements. Such building lines may become operative upon the removal or alteration of existing buildings and prevent new buildings from encroaching. This method permits the city to take advantage of the lapse of time and accomplish the widening of streets at a lesser cost. The line between eminent domain and the police power is a hard one to hold with constancy and consistency and it is no surprise that in the beginning these two great powers of government have been confused. However, from the standpoint of the city planner and those cities that adopt city plans it makes little difference whether the establishment of setbacks, building lines or front yard requirements can be sustained under the police power or that of eminent domain. As in zoning the courts have taken different viewpoints and reached different conclusions as to the validity of legislation fixing setbacks and building lines. Some of the state courts have held that the establishing of building lines under the police power cannot be sustained. However, the proponents of legislation establishing building lines, as in the case of zoning, have persevered until now we find a line of authorities, including the United States court, upholding such legislation as a valid exercise of police power, and it may now be safely said that municipal corporations under the police power have the authority to establish setback lines or building lines or provide front yard requirements provided they are reasonable under the circumstances, and have a substantial relation to the public health, safety,
morals or the general welfare. Where such setback lines are provided no money compensation is paid but as was said in Carter v. Harper, 182 Wis. 148; 196 N.W. 451: "He who is limited in the use of his property finds compensation therefor in benefits accruing to him from like limitations upon his neighbors."

The forerunner of this line of decision is that of the Connecticut Supreme Court in the town of Windsor v. Whitney, (1920) 95 Conn. 357; III Atl. 354, where the establishment of a building line was justified as being a valid exercise of the police power and that such legislation did not take private property without compensation.

The Court said inter alia:

Streets properly located and of suitable width help transportation, add to the safety of travel, furnish better protection against fire, and better light and air to those who live upon the street. They afford better opportunities for laying, maintaining and inspecting water, sewer, gas and heating pipes and electric and telephone conduits in the streets. They give opportunity for sidewalks of reasonable width and for shade trees along the highway. Streets of reasonable width add to the value of the land along the street, and enhance the general value of land and buildings in the neighborhood, and greatly increase the beauty of the neighborhood. These are all facts of universal knowledge.

Narrow streets in congested industrial centers breed disease. Too many houses crowded upon a lot without sufficient space for light and air menace health. Such a neighborhood affects the morals of its people. The sordid selfishness which would insist upon making the street a mere alley, upon getting houses upon land without regard to reasonable provision for air and light, must be restrained if the public welfare is to be preserved. The state is vitally interested in the health of its citizens, for upon their strength rests its own well-being. It or its agent, the town, must provide fire and police protection to all settled parts. The state and its agent, the town, cannot preserve and protect the rights committed to it if private owners may lay out streets at will and build at will. Uniformity in plan or relation of one street to others will be absent. The practical loss to the community will be large, and the loss in neighborhood appearance will be immeasurable.

The state may regulate the use of property to the point of forbidding thereon certain businesses in themselves lawful, as in the case of slaughterhouses and cemeteries. It may regulate building in the interest of health and fire safety. It may limit the height of buildings in certain districts or the character of the buildings in these districts. It may prevent the erection of billboards or limit their height. In short, it may regulate any business or the use of any property in the interest of public health, safety or welfare, provided this be done reasonably. To that extent the public interest is supreme and the private interest must yield.

Eminent domain takes property because it is useful to the public. The police power regulates the use of property or impairs the rights in property because the free exercise of these rights is detrimental to public interest. Freund on Police Power, 511. It is upon this principle
VALIDITY OF USE OF SET-BACK LINES

the state has the right to say, if you lay out streets in the development of your land for building purposes you must make them of reasonable width, and you must establish reasonable building lines, for thereby will you protect the public health and safety and the public welfare.

Where the free exercise of one's rights of property is detrimental to the public interest, the state has the right to regulate reasonably such exercise of control under the police power. And that, of course, means without compensation. The regulation of the location and width of streets and the establishment of building lines is by no means as much of an impairment of the right to use property as are the provisions of our statutes regulating tenement and lodging houses. General Statutes 1918, cc. 133, 134. These limit the area of the lot which the tenement house shall occupy. They provide for rear yards. They regulate the air space, light and ventilation of rooms. And in many other ways the state restricts the use of such property by the owner.

Regulation of this character, if reasonable, do not constitute a taking of property. The "due process" clause does not prevent the state from making all needful regulations for the public welfare, and does not require compensation to be made in case these regulations are reasonable, although they do deprive the owner of the use of his property.


Other cases holding that the establishment of setback lines is within the police power may be found in the reports.


In *Pritz v. Messer* (supra) the court said:

This problem [the validity of legislation creating setback lines] must be viewed from the standpoint of coming generations. Regarded from the limited outlook of the immediate present, it is easy to claim with some degree of cogency that there is no relation between these measures and the public health safety or morals. Taking a long view into the future, however, and looking back into the past, to remind ourselves what detriment the unrestricted congestion of city life, both traffic and housing, has already done to the public welfare, we do see a real relation between the substantial material welfare of the community and this effort of the city to plan its physical life.

In *Gorieb v. Fox* (supra) decided by the United States Supreme Court, Mr. Justice Sutherland, who wrote the opinion of the court in
the leading zoning case, *Euclid v. Ambler Realty Company*, 272 U.S. 365, said:

Upon that question (whether compelling the property owner to set his building back from the street line of his lot deprives him of his property without due process of law) the decisions are divided, as they are in respect of the validity of zoning regulations generally. . . . It is hard to see controlling difference between regulations which require the lot owner to leave open areas at the sides and rear of his house and limit the extent of his use of the space above his lot and a regulation which requires him to set his building a reasonable distance back from the street. Each interferes in the same way, if not to the same extent with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have arisen in times as a result of the great increase and compensation of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life.

Mr. Justice Sutherland also said:

State Legislatures and city councils who deal with the situation from a practical standpoint are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable.

In *Bouchard v. Zetley* (supra) The Supreme Court of Wisconsin held valid a setback provision in the Zoning Ordinance of Milwaukee, adopted the reasoning of the Supreme Court in *Gorieb v. Fox* and declared that in determining the validity of provisions in a zoning ordinance, "Much must be left to the discretion of the legislative body, which is best suited to consider local needs and exigencies." The opinion further declares: "This court early took an advanced position in sustaining zoning ordinances in principle [*State ex rel Carter v. Harper* (1923) 182 Wis. 148; 196 N.W. 451; 33 A.L.R. 269], and we are not disposed to be hypercritical in construing ordinances in practical operation."

The establishment of building lines under the police power in business districts is as valid as in residential districts. The Supreme Court of the United States as well as other courts have so held. The establishment of such building lines in business districts bears the same relation to public welfare as in residential districts. The upper floors of many business buildings are used for residential purposes. The dust and noise from the street and the fumes of motor vehicles will be somewhat lessened with the distance from the roadway. The fire hazard will be decreased; in areas of high buildings more sunlight will reach the buildings and the street surface. Keeping buildings back at the intersection of streets prevents the creation of blind corners and promotes traffic safety.
Examination of the authorities shows that many cities have established setback lines as a part of a comprehensive zoning ordinance and that such legislation is valid. Logically setback lines should be a part of the zoning legislation. Zoning should embrace a comprehensive plan and be founded upon a most careful survey before it is adopted. So should the establishment of setback lines receive as careful consideration.

Inclusion of setback lines as a part of the plan of zoning gives opportunity to use the machinery provided by the zoning ordinance, including opportunity to use the Board of Appeals to care for those situations that inevitably arise when it would be unreasonable not to furnish relief from a strict compliance with the established setback line.

Before setback legislation is adopted each street should be studied carefully, both from plans and from actual examination upon the ground. The traffic load and the relation of the street to the major street plan must be considered. The width, depth, and shape of the lots abutting the street must be considered. The present as well as the future use of the abutting property must be determined. Other factors must be taken into account. Narrower streets will probably require greater setbacks. Residential districts will likely require greater setback lines than business districts.

When the survey has been carefully and comprehensively made, if the legislation is adopted by the legislative body with a well-defined policy, after due notice and hearing, to avoid charges of discrimination, arbitrariness and unreasonableness, the courts under the authorities heretofore cited will undoubtedly sustain the legislative enactment as a proper exercise of the police power.

In addition to the benefits accruing to public health, safety, morals, and the general welfare, the intelligent establishment of setback lines with reference to proper street planning as included in a comprehensive zoning plan, preserves the opportunity to widen streets at the proper time at the minimum cost. When the street is actually widened under the power of eminent domain, the municipality must provide only the funds necessary to pay abutting property owners for the land taken and the cost of structural improvements that would otherwise have been erected on the land taken will be saved.

Therefore, from a practical standpoint the establishment of setback lines in the exercise of the police power of the city and as a part of comprehensive zoning is the most feasible plan for preserving the opportunity of widening streets at the minimum cost.
LIST OF AUTHORITIES

"Setbacks or Building Lines by Zoning or Otherwise." Address of Charles P. Fisher, Planning Engineer, Akron, Ohio, given before the National Conference on City Planning at Dallas, Texas, 1928.

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The LAW REVIEW takes great pleasure in announcing the election of the following second year men to the offices named: Lewis A. Stocking, editor-in-chief; J. Stewart Murphy, business manager; Harold J. Billmeyer, advertising manager. These men will assume office commencing with the April issue of the REVIEW.