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Constitutional Law -- Use of the Police Power for the Attainment of Aesthetic Considerations

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It is submitted that the necessity of having the anticipated testimony in the record in order to determine whether the exclusion was prejudicial outweighs the reasons advanced for allowing an exception to the general rule where a question is asked on cross-examination or examination of a hostile witness. The *Poolos* case is in accord with the accepted practice in this jurisdiction as it prevailed prior to 1936 and to this writer represents the sounder view.

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Constitutional Law—Use of the Police Power for the Attainment of Aesthetic Considerations

In the recent case of *Berman v. Parker*[1] the Supreme Court decided that the appellant was not deprived of his rights under the Fifth Amendment to the United States Constitution by the condemnation of his private property for aesthetic considerations by the exercise of the police power of Congress delegated to the District of Columbia Redevelopment Land Agency. The condemnation was made under the authority of the District of Columbia Redevelopment Act of 1945, D. C. Code §§ 5-701 to 5-719 (1951), hereinafter referred to by section number.

The general purpose of the statute as set out in § 5-701 is "to eliminate the substandard housing conditions and the communities in the inhabited alleys and blighted areas" in the District of Columbia by acquiring the property through gift, purchase, or the use of eminent domain.

This act empowers the District of Columbia Redevelopment Land Agency, hereinafter called the Agency, to acquire and assemble real property in order to "further the redevelopment of *blighted territory* in the District of Columbia by the prevention, reduction, or elimination of *blighting* factors or causes of *blight*."[2] (Emphasis added) The Agency, once such property is assembled, then has the power, in accordance with the plan of the District of Columbia Planning Commission, to transfer to the District or to the United States all property to be devoted to public uses, and to lease or sell the remainder to private individuals or corporations to redevelop in accordance with the plan of the commission.

Under the definition of "redevelopment" given in § 5-702 (n) of the Act, the redeveloper would have the power to replan, clear, redesign, and rebuild the project area. This would seem to include totally

close what the witness would have said, we cannot assume that his answer would have been favorable to the defendant. It would be vain to grant a new trial upon the hazard of an uncertain answer by the witness."); STANSBURY, NORTH CAROLINA EVIDENCE § 29 (b) (1946).

[1] 75 Sup. Ct. 98 (1954).
[2] D. C. CODE § 5-703 (1951).

changing the area, including street layouts, to suit the needs and purposes of the redevelopment.[3]

Although § 5-702 of the Act is devoted to defining terms used in the Act, it is alarming to note that the term "blighted area," which is used so freely in the Act to describe the type areas the Agency is to take over and cause to be redeveloped, is not defined. The term "substandard housing conditions" is the only defined term which in anyway describes the type of condition which the Agency is to eliminate. This term is defined as "conditions obtaining in connection with the existence of any dwelling, or dwellings, or housing accommodations for human beings, which because of lack of sanitary facilities, ventilation, or light, or because of dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors, is in the opinion of the commissioners detrimental to the safety, health, morals, or welfare of the inhabitants of the District of Columbia."[4] This would seem to refer exclusively to dwellings of one type or another.

The particular area in which the appellant's property is located is a fifteen-block-square area in the city of Washington in which slum[5] conditions are said to exist. The western boundary is an irregular line which includes some establishments along a street and excludes others on the same side of the same street. It is on this boundary that the appellant's property lies.[6]

No acute housing shortage is to be met; no more residents than presently reside in the area are to be provided for, according to the commission's plan; and no rearrangement of the streets is planned. The plan provides that certain streets be widened somewhat and that an expressway and a greenway be built. This would, of course, be a legitimate exercise of eminent domain, and such property would be conveyed to the District.[7] However, the plan does not call for the appellant's property to be used for the greenway or expressway. His property is to

[3] D. C. CODE § 5-702 (n) (1951): "'Redevelopment' means replanning, clearance, redesign, and rebuilding of project areas, including open-space types of uses, such as streets, recreation and other public grounds, and spaces around buildings, as well as buildings, structures, and improvements, but not excluding the continuance of some of the existing buildings or uses in a project area. For the purposes of sections 5-701 to 5-719, 'redevelopment' also includes the replanning, redesign, and original development of undeveloped areas which, by reason of street lay-out, lot lay-out, or other causes, are backward and stagnant and therefore blighted and for which replanning and land assembly are deemed necessary as a condition of sound development."

[4] D. C. CODE § 5-702 (r) (1951).

[5] The word "slum" meaning conditions injurious to public health, safety, morals, and welfare. Schneider v. District of Columbia, 117 F. Supp. 705, 723 (D. D. C. 1953).

[6] These facts were gleaned from the District Court opinion, Schneider v. District of Columbia, 117 F. Supp. 705, 723, *et seq.* (D. D. C. 1953).

[7] D. C. CODE § 5-706 (a) (1951).

be sold to private individuals for redevelopment and private use in accordance with the plan.

The question arises as to why the appellant's property should be taken at all. The Court admits that this is not a taking of private property for slum clearance, an accepted public use in eminent domain, but is taking "a man's property merely to develop a better balanced, more attractive community."[8] The Court then concludes that the latter is a proper "public use," justified on the grounds that if the purpose of the legislation is within the police power, it may also be a public purpose in eminent domain. However, it is not claimed that the building is dilapidated or unsafe or in any way detrimental to the public health, safety, or morals. The inference is that the appellant's property, with its department store, constitutes a "blighted area." What factor concerning the appellant's building causes it to be a blight is uncertain since the term is nowhere defined in D. C. Code §§ 5-701 to 5-719. The only hint as to the meaning to this word is found in § 5-702 (n): "'[R]e-development' also includes the replanning, redesign, and original development of *undeveloped* areas which, by reason of street layout, lot layout, or *other causes,* are backward and stagnant and therefore blighted. . . ." (Emphasis added) It would seem, therefore, that a blighted area could be almost anything the Agency wanted to designate as such, or could extend as far beyond a substandard housing condition as the Agency should wish to extend it.

The real purpose for taking the property appears to be for aesthetic considerations; that is, though the appellant's property cannot be classified as unsafe, unhealthy, or immoral, the public welfare seems to demand that buildings be pleasing to the eye as well as safe and sanitary and that they fit in with the latest architectural whim of the city fathers. This appears to be the Court's concept as it says: "The concept of the public welfare is broad and inclusive. * * * The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that a community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[9] This raises the question: Should the police power be used for aesthetic purposes?

This question has been raised before in connection with the regulation of outdoor advertising and in the case of the zoning laws. Massachusetts decided in 1935 that neither the Massachusetts nor the Federal Constitution guarantees a land owner the right to maintain a sign on his land in such a manner as to impair the beauty of public buildings, or

[8] Berman v. Parker, 75 Sup. Ct. 98, 102 (1954).
[9] *Id.* at 102, 103.

grounds, or natural scenery.[10] It has been pointed out that the issue raised by the restriction of billboard advertising is that of the right to accost citizens by visual solicitation and is a refinement of the law of assault; while the issue raised by the attempted regulation of the sightliness of buildings stems from the conception of nuisance at the common law.[11] The Massachusetts court in *General Outdoor Advertising Co. v. Dept. of Public Works*[12] reaffirmed what had been said in *Opinion of the Justices:* "It has been decided quite generally, if not universally in the courts in which the question has been raised, that aesthetic considerations alone or as the main end do not afford sufficient foundation for imposing limitations upon the use of property under the police power,"[13] and went further to say that if the primary and substantive purpose of the act was such as to justify it, aesthetic considerations might enter as an auxiliary factor.

With the decision of *Village of Euclid v. Ambler Realty Co.*[14] and the holding by the Court that general zoning ordinances are constitutional, there has been an upsurge in zoning litigation, and the question of aesthetic considerations as a basis for zoning regulations has been considered a number of times.

Massachusetts and Virginia seem to follow the principle suggested in the *Outdoor Advertising* case,[15] and while not allowing aesthetic considerations to be a basis for zoning regulation of private property, they are regarded as a factor which may not be disregarded.[16] Other jurisdictions in which the question has been raised have not laid much emphasis on the necessity of consideration of the aesthetic side of the matter. However, all seem to agree that aesthetic considerations alone may not be the basis for zoning regulations.[17]

This question of the taking of private property by the state for aesthetic considerations has been raised in North Carolina only on three

[10] General Outdoor Advertising Co. v. Dept. of Public Works, 289 Mass. 149, 193 N. E. 799 (1935).

[11] Gardner, The Massachusetts Billboard Decision, 49 HARV. L. REV. 869, 882 (1936).

[12] 289 Mass. 149, 184, 185, 193 N. E. 799, 815 (1935).

[13] 234 Mass. 597, 604, 127 N. E. 525, 528 (1920).

[14] 272 U. S. 365, 47 S. Ct. 114 (1926); noted in 5 N. C. L. REV. 237 (1927).

[15] General Outdoor Advertising Co. v. Dept. of Public Works, 289 Mass. 149, 184, 185, 193 N.E. 799, 815 (1935).

[16] Barney and Casey Co. v. Town of Milton, 324 Mass. 440, 87 N. E. 2d 9 (1950); West Bros. Brick Co. v. Alexandria, 169 Va. 271, 192 S. E. 881 (1937).

[17] Women's Kansas City St. Andrew Society v. Kansas City, 58 F. 2d 593 (8th Cir. 1932); Papaioanu v. Commissioners of Reholoth, 25 Del. Ch. 327, 20 A. 2d 447 (1941); Trust Co. of Chicago v. City of Chicago, 408 Ill. 91, 96 N. E. 2d 499 (1951); Neef v. City of Springfield, 380 Ill. 275, 43 N. E. 2d 947 (1942); Hichman v. Oakland Township, 329 Mich. 331, 45 N. W. 2d 306 (1951); City of Scotsbluff v. Winters Creek Canal Co., 155 Neb. 723, 53 N. W. 2d 543 (1952); Cleveland Trust Co. v. Village of Brooklyn, 92 Ohio App. 351, 110 N. E. 2d 440 (1952), *appeal dismissed* 158 Ohio St. 258, 108 N. E. 2d 679 (1952); Niday v. City of Belaire, 251 S. W. 2d 747 (Tex. Civ. App. 1953).

occasions. In *Yarborough v. The North Carolina Park Commission*[18] it was decided that private property might be taken by *eminent domain* even for aesthetic purposes if for a public use. The court here is referring to the taking of land to create state parks, thereby preserving the scenic beauty of the state. It is doubtful that this case would support the taking of property on which there was a building which did not constitute a hazard to the public safety, health, morals or welfare, and selling that property to a third party for his private use. In *MacRae v. Fayetteville,*[19] an attempt was made to enforce an ordinance prohibiting building a service station within 250 feet of a residence within the corporate limits of Fayetteville. The court held that "the law does not allow aesthetic taste to control private property, under the guise of police power."[20] The court in a later case, deciding that an ordinance restricting the height of walls in the city of Greensboro was valid, said: "[W]hile esthetic considerations are by no means controlling, it is not inappropriate to give some weight to them in determining the reasonableness of the law under consideration."[21]

The Court in allowing the police power to be used for aesthetic considerations seems to be leaving the door open to many abuses. This decision will undoubtedly lead to a great deal more litigation before it is finally determined, if ever, just what aesthetic considerations will be allowed.

PAUL B. GUTHERY, JR.

Constitutional Law—Validity of Adoption Statute—Requirements Concerning Religion of Child and Adoptive Parents

A recent Massachusetts case, *Petitions of Goldman,*[1] upheld the constitutional validity of a statute[2] which said that whenever practicable, the judge in making orders for adoption, "must give custody only to persons of the same religious faith as that of the child." In the prin-

[18] 196 N. C. 284, 145 S. E. 563 (1928).
[19] 198 N. C. 51, 150 S. E. 810 (1929).
[20] *Id.* at 54, 150 S. E. at 812.
[21] *In re* Appeal of Parker, 214 N. C. 51, 57, 197 S. E. 706, 710 (1938); *appeal dismissed,* Parker v. City of Greensboro, N. C., 305 U. S. 568, 59 S. Ct. 150 (1938).

[1] — Mass. —, 121 N. E. 2d 843 (1954); *cert: denied,* 348 U. S. 942 (1955). This case might have been appealed to the Supreme Court pursuant to 62 STAT. 929 (1948), 28 U. S. C. § 1257 (1953).

[2] MASS. ANN. LAWS c. 210, § 5B (Supp. 1953): "In making orders for adoption, the judge when practicable must give custody only to persons of the same religious faith as that of the child. In the event that there is a dispute as to the religion of said child, its religion shall be deemed to be that of its mother.

"If the court, with due regard for the religion of the child, shall nevertheless grant the petition for adoption of a child proffered by a person or persons of a religious faith or persuasion other than that of the child, the court shall state the facts which impelled it to make such a disposition and such statement shall be made part of the minutes of the proceedings."