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Municipal Corporations -- Control over Public Utilities Through Zoning Ordinances

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NOTES AND COMMENTS

Municipal Corporations—Control over Public Utilities Through Zoning Ordinances

As the United States becomes increasingly an urban nation, it finds itself beset with new and complex problems, one of which is the conflict between the municipal power to adopt zoning ordinances, and the power of eminent domain possessed by public utility companies. It is to be expected that as the consumer demand for electricity grows, this conflict will present itself with increasing frequency, as it did in Chapel Hill, North Carolina in the fall of 1961.[1] Duke Power Company had contracted with the University of North Carolina to supply the University, Chapel Hill, and the surrounding area with increased electrical power. It was necessary for the power company to erect additional high tension transmission facilities, some of which would be within Chapel Hill. After the power company had purchased most of the needed right of way and had instituted condemnation proceedings for the remainder,[2] the Chapel Hill Planning Board proposed an amendment to the local zoning ordinance which would have required that a Special Use Permit be obtained by the power company prior to the erection of the proposed facilities. The net effect of such an ordinance would be to place the municipal zoning authorities in a controlling position over the utility inasmuch as denial of the required Use Permits by the zoning body would frustrate attempts by the utility company to expand its service.

The problem may be stated as a conflict between the basic interests of two state created entities. The Legislature has placed upon the public utility companies an absolute mandate to provide efficient electrical service on a state or area wide basis.[3] In order to facilitate the execution of this duty, the legislature has vested the

[1] See Durham Sun, Sept. 7, 1961, p. 9, col 1; Durham Morning Herald, Sept. 8, 1961, § A, p. 7, col. 1.

[2] N.C. GEN. STAT. § 62-183 (Supp. 1963), grants the power to condemn lands for lines, poles, towers, reservoirs, powerhouses and dams; N.C. GEN. STAT. § 62-184 (Supp. 1963), grants the power to condemn residences and burial grounds when authorized to do so by the utilities commission.

[3] N.C. GEN. STAT. § 62-2 (Supp. 1963).

public utilities with the power of eminent domain;[4] control of public utilities is placed in the hands of an administrative agency.[5] Whereas the concern of the public utility must of necessity be focused on a statewide consumer group, the basic interest of a municipality is in the more local problem presented by the welfare of the individual town and its citizens. Recognizing the very real need of municipal authorities to adopt zoning requirements, the legislature has granted to them the power to adopt reasonable zoning regulations designed to promote the health, safety and general welfare of the community.[6]

Municipalities see a twofold question presented in this situation. First, if a municipality has restricted an area to a particular use, may a utility, through the use of its power of eminent domain, override and disregard such regulation, putting the area to a forbidden use? Second, may a municipality set apart certain areas through which a utility will be allowed to erect its facilities, and successfully restrict the utility to that area?[7]

When faced with this conflict the majority of American courts have held that the power company is not subject to the zoning regulation.[8] In a case closely analogous to the Chapel Hill situa-

[4] N.C. GEN. STAT. § 62-183 to -184 (Supp. 1963).

[5] The state has delegated virtually all control over public utilities to the Public Utilities Commission. N.C. GEN. STAT. § 62-32 (Supp. 1963), gives the commission the power to regulate rates, require such service as is necessary, and general power and control over public utilities and public service corporations.

[6] N.C. GEN. STAT. § 160-172 (1952) (Zoning Enabling Act); N.C. GEN. STAT. § 160-176 (Supp. 1963) (changes in zoning ordinances). It is interesting to note that North Carolina has recently subjected the construction of state owned buildings to local zoning ordinances. N.C. GEN. STAT. § 160-181.1 (1962). The statutes are silent as to the effect of zoning ordinances on public utilities.

[7] In letters from Jack L. Legrand, Attorney for the Town of Chapel Hill, to the Attorney General of North Carolina, September 11 and 12, 1961, the position of the municipalities was stated thusly: "1. If property has been so zoned under a properly enacted municipal zoning ordinance as to preclude the use thereof for transmission line purposes by public utilities, may a public utility nevertheless, under the right of eminent domain, proceed to condemn such property and use it for the erection of power transmission lines? 2. May the town of Chapel Hill, through the reasonable use of its zoning powers, regulate the location of major electrical transmission lines and towers within the area of its zoning jurisdiction? Is the answer to this question affected by the fact that the public utility company being regulated has been granted the power of eminent domain?"

[8] See, *e.g.*, Jennings v. Connecticut Light & Power Co., 140 Conn. 650,

tion New York was of the opinion that the power of a local zoning board to deny a special use permit would be equivalent to the power to completely bar the utility from passing through the town.[9] The obvious result would be to permit every political subdivision to exclude utilities, resulting in frustration of the state policy to encourage the extension of such services.[10] Connecticut ruled that where there is such a clash of interests, the interests of the municipality should be subordinated to state authority as vested in the public utilities commission.[11] Another view expressed the fear that if local zoning boards could regulate the utility, they would do so with the needs of the community foremost in their considerations, to the possible detriment of the statewide consumer group.[12] Having

103 A.2d 535 (1954); Consolidated Edison Co. v. Village of Briarcliff Manor, 208 Misc. 295, 144 N.Y.S.2d 379 (Sup. Ct. 1955); State *ex rel.* Helsel v. Board of Comm'rs, 149 Ohio St. 583, 79 N.E.2d 698, *aff'd on appeal,* 83 Ohio App. 388, 78 N.E.2d 694, *appeal dismissed,* 149 Ohio St. 583 79 N.E.2d 911 (1948); Duquesnes Light Co. v. Upper St. Clair Township, 377 Pa. 323, 105 A.2d 287 (1954).

[9] Consolidated Edison Co. v. Village of Briarcliff Manor, 208 Misc. 295, 144 N.Y.S.2d 379 (Sup. Ct. 1955). There the power company wanted to erect high tension towers in a residential section. The town had an ordinance limiting such structures to "business zones." Although the local Board of Zoning Appeals had authority to permit a deviation in favor of the utility, the court ruled that the company did not have to comply with the ordinance. New York is no stranger to this problem; see, *e.g.,* Long Island Lighting Co. v. Old Brookville, 72 N.Y.S.2d 718 (Sup. Ct. 1947), *aff'd* 77 N.Y.S.2d 143 (App. Div. 1948), dealing with the right to erect power lines contrary to zoning ordinance. Long Island Lighting Co. v. Griffin, 297 N.Y. 897, 79 N.E.2d 738 (1948) (dealing with erection of gas manufacturing plant).

[10] In upholding the right of the utility to disregard the zoning ordinance, the court said, "The question is, does this village have the right to absolutely bar the passing through it of a high tension electric line required in the interest of the public.... [I]t is to be noted that public utility corporations ... are created and regulated by state law. There is the absolute mandate by state law that the petitioner shall 'furnish and provide such service, instrumentalities, and facilities as shall be safe and adequate and in all respects just and reasonable.' ... The petitioner has ... the right ... and ... the duty ... to erect and maintain the proposed transmission line, and no local governmental unit shall interfere with that right and duty.... The general grant of power to a municipality to adopt zoning laws in the interest of public welfare does not have the effect of permitting the local legislative body to override such state law and policy." Consolidated Edison Co. v. Village of Briarcliff Manor, 208 Misc. 295, 300, 144 N.Y.S.2d 379, 384 (Sup. Ct. 1955).

[11] Jennings v. Connecticut Light & Power Co., 140 Conn. 650, 103 A.2d 535 (1954). The court stated the majority position in this manner. "[A]s between state control and local control of a public utility furnishing a statewide service, the local municipal authorities should play a secondary role where a clash of authority appears to exist." *Id* at 663, 103 A.2d at 542-43.

[12] Duquesnes Light Co. v. Upper St. Clair Township, 377 Pa. 323, 105

no workable statutory solution, the majority has found that the legislative mandate to provide quality service on a statewide basis far outweighs the possible consequences to any individual community.

Not all courts have concurred with the opinions discussed above. The minority view would hold that compliance with the local zoning ordinance is a condition precedent to any condemnation proceeding.[13] Although authority is sparse, the minority view seems to be predicated upon the idea that a public utility like any other citizen[14] is bound to follow the local zoning ordinance regardless of its purpose.[15]

The majority view leaves the utility with virtually unhampered freedom; the minority goes to the other extreme. Absent any statutory method of resolution, the courts feel that they have only two alternatives: either to allow the utility to do as it pleases, subject only to control by the Public Utilities Commission, public opinion, and the cost of the right of way desired; or allow the municipality to zone as it sees fit. Neither alternative is desirable.

There is a solution which will give effect to all interests involved. If it be conceded that a municipality has a legitimate interest in formulation of long range municipal development plans, as expressed by comprehensive zoning regulations,[16] or in the protection of prop-

A.2d 287 (1954). "Any other conclusion... would render the Public Utility Commission powerless to regulate the functioning of an electric service company if in so doing the Commission contravened any regulation... of a local zoning authority." *Id.* at 336, 105 A.2d at 298.

[13] See, *e.g.*, State *ex rel* Cleveland Illuminating Co. v. Euclid, 169 Ohio St. 476, 159 N.E.2d 756 (1959); New York State Elec. & Gas Co. v. Statler, 204 Misc. 7, 122 N.Y.S.2d 190 (Sup. Ct. 1953) (now overruled).

[14] Taber v. Benton Harbor, 280 Mich. 522, 274 N.W. 324 (1937). The court said, "[A]n individual or private corporation... attempting... the same project would be bound by the zoning ordinance." *Id.* at 526, 274 N.W. at 325.

[15] Sunny Slope Water Co. v. Pasadena, 1 Cal. 2d 87, 33 P.2d 672 (1934). This decision will be of interest to the student of municipal politics. For many years the plaintiff had been pumping water from a particular area and selling it to residents of the town. The city changed the zoning classification so as to exclude his business. The court ruled that the plaintiff had no vested right in any zoning classification. He contended that the only reason the city changed the zoning ordinance was to put him out of competition with them. The court said that the city's motive had no bearing on the issue, as the plaintiff's operation was unsightly and offensive to the neighborhood, which was composed of orange groves. The city did, in fact, take over distribution from that area and did use wells in the same general locality.

[16] "It is obvious that if some utility engineer, concerned only with first costs, operating expenses, and the efficient use to his employer, is allowed a

erty values in the community,[17] it should be possible to regulate the type of structure erected. The validity of any municipal ordinance is determined by using a two-fold test: (1) is the ordinance a proper exercise of the police power; (2) is the ordinance reasonable in the particular situation.[18] The solution here proposed would be to weigh any zoning ordinance called into question under the common law rules governing the police power.

The regulation of an unsightly structure can be justified upon either aesthetic considerations or on protection of property values within the community. The question is then presented as to whether these motives fall within the power of a community to make reasonable rules concerning the public health, safety, morals and general welfare.[19] Historically courts have been reluctant to extend the scope of the police power, particularly with respect to aesthetics.[20]

'free and unhampered' discretion, 'in *his* best judgment' as to the choice of type of structure and its location, and if his sole standard of judgment is strictly utilitarian ('the adequate service of its customers'), that it will follow that any civic plan of good order, as expressed in zoning regulations, can readily be reduced to a shambles." Haller, *Zoning and the Utilities,* 56 PUB. UTIL. FORT. 231, 235 (1955). This impassioned language was the answer to an article by Avery, *Zoning and Public Utilities,* 55 PUB. UTIL. FORT. 252 (1955) espousing a position quite favorable to public utilities. The third article in this series, and quite possibly the only one with constructive suggestions to make is Kadane, *Zoning, Utilities, and Sweet Reason,* 56 PUB. UTIL. FORT. 792 (1955).

[17] According to a leading appraiser, Worth Lutz of Durham Realty, electrical towers of the type proposed in Chapel Hill will cause approximately a ten percent to twenty percent depreciation to undeveloped property, and from twenty-five percent to fifty percent in areas which are already built up as residential. Unfortunately, the Real Estate Appraisal Books and periodicals have very little to say on this subject. According to Mr. Lutz, the above figures are a "horseback opinion," and not final authority. Interview with Worth Lutz, Appraiser with Durham Realty Co., Spring 1963.

[18] State v. McGee, 237 N.C. 633, 75 S.E.2d 783 (1953). See generally 6 MCQUILLIN, MUNICIPAL CORPORATIONS § 24.09 (3d ed. 1949).

[19] 3 MCQUILLIN, *op. cit. supra* note 18, § 1034; N.C. GEN. STAT. § 160-172 (1953) (Enabling Act). It is arguable that a municipality may, within the language of N.C. GEN. STAT. § 160-174 (1953), enact zoning regulations such as those here proposed. That section provides, "such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality." See State v. Brown, 250 N.C. 54, 108 S.E.2d 74 (1959); Turner v. New Bern, 187 N.C. 541, 122 S.E. 469 (1924); N.C. GEN. STAT. § 160-172 to -174.

[20] For a general discussion of aesthetic zoning and its historical development, see Dukeminier, *Zoning for Aesthetic Objectives; A Reappraisal,* 20 LAW & CONTEMP. PROB. 218 (1955). The traditional rule in regard to

An excellent example of such reluctance is provided by the "billboard cases." The early attempts to regulate billboards were held invalid on the ground that their primary objective was aesthetic.[21] In 1911 a billboard ordinance was upheld on the ground that billboards endangered the public health, safety, morals and general welfare.[22] If one could believe that billboards were actually responsible for all that was attributed to them, then one would find the decision rested on firm ground. Obviously such reasoning was specious and avoided the question of aesthetics.[23] The attempt to fit the regulation of unsightly structures into the traditional limits of the police power was echoed in a recent Ohio decision.[24] In that case the court upheld an ordinance regulating high tension towers on the ground that they presented a grave danger to public safety. The court gave a clue as to the underlying rationale of the decision in dictum. The court stated that it was not *primarily* concerned with aesthetics when it rejected the utility's contention that there was no reason to require underground installation of wires.[25]

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aesthetic zoning was that it could not be used as the sole criteria, but that it could bear some weight in considering the validity of an ordinance based on other grounds. Many courts have in the past applied what one writer has termed "the Blindman Test"; that is, if the object regulated would not be offensive or injurious to a blind man, then the regulation is based solely on aesthetics and is unacceptable. *Id.* at 223.

[21] The early "billboard" ordinances were based strictly on aesthetics, and because of this, they quickly fell. See, *e.g.*, Crawford v. Topeka, 51 Kan. 756, 33 Pac. 476 (1893); People v. Green, 85 App. Div. 400, 83 N.Y. Supp. 460 (1903).

[22] St. Louis Gunning Advertising Co. v. St. Louis, 235 Mo. 99, 137 S.W. 929 (1911), *appeal dismissed,* 231 U.S. 761 (1913). The court said that the billboards led to prostitution of the lowest sort; gambling; dope addiction; drunkenness; the spread of disease and filth; and various and assorted other crimes.

[23] Statistics introduced in another case indicate that the Missouri court was struggling to fit the regulations within the traditional concepts of the police power. A survey conducted by a master appointed by a Massachusetts court established that while there were scattered instances of billboards being conducive to crime, it was by no means as bad as the Missouri court indicated. General Outdoor Advertising Co. v. Department of Pub. Works, 289 Mass. 149, 193 N.E. 799 (1935), *appeal dismissed,* 297 U.S. 725 (1936).

[24] State *ex rel* Cleveland Illuminating Co. v. Euclid, 169 Ohio St. 476, 159 N.E.2d 756 (1959). Ohio has reserved to municipalities the right to regulate the utilities. OHIO REV. CODE §§ 715.27, 4933.13, 4933.16, 4933.99 (1953).

[25] State *ex rel* Cleveland Illuminating Co. v. Euclid, *supra* note 24, at 485, 159 N.E.2d at 760 (dictum). The Power Company contended that such towers had an accident-free record going back many years. Their evidence was accepted by the special master appointed in the case.

Since those early cases there has been a growth of support behind the idea that zoning on aesthetic grounds is permissible.[26] The Supreme Court implied that zoning on aesthetic grounds would be permissible under the police power in *Berman v. Parker*.[27] In so doing the Court expressed disfavor with the idea of an historically limited interpretation of the scope of the police power, saying:

> Public safety, public health, morality are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.... The concept of the public welfare is broad and inclusive.[28]

Thus, the Supreme Court has placed the premium on the broad category of "public welfare."

Some writers have contended that the "city beautiful" is of itself so desirable as to warrant zoning on purely aesthetic grounds.[29] Another writer has attempted to draw a correlation between aesthetics and public morality.[30] The most powerful rebuttal to such arguments, the Supreme Court notwithstanding, is that beauty is a subjective thing and it would be undesirable to allow a group of

[26] The court said in Turner v. New Bern, 187 N.C. 541, 543, 122 S.E. 469, 471 (1924), that "the uniform trend of legislation in regard to municipalities which are coming to be viewed not only as instrumentalities for the enforcement of law and order, but for the abolition of unsightly places and sounds and for the enforcement not only of the physical conveniences such as lights, water and sewerage, but for the preservation and improvement of the surroundings that will be pleasing to the eye and make the city more desirable as a place of residence." 8 McQUILLIN, *op. cit. supra* note 18, § 25.31; 2 METZENBAUM, LAW OF ZONING, 1579 (2d ed. 1955); RHYNE, MUNICIPAL LAW, §§ 26-4, 32-24 (1953); YOKLEY, ZONING LAW & PRACTICE § 17.1 (Supp. 1963); 1960 DUKE L.J. 299.

[27] 348 U.S. 26 (1954) (dealing with an urban renewal action). Said the Court, "It is within the power of the legislature to determine that the community should be beautiful as well as healthy...." *Id.* at 33.

[28] *Id.* at 32.

[29] Dukeminier, *supra* note 20, at 218. As a general discussion of the history and objectives of aesthetic zoning, that is the best article in print. Unfortunately, Mr. Dukeminier believes that zoning commissioners and the courts should become the conditioning agents through which the masses' appreciation of the beautiful is elevated. He seems to be totally obsessed with the idea of beauty, per se.

[30] Sayre, *Aesthetics and Property Values: Does Zoning Promote the Public welfare?*, 35 A.B.A.J. 471 (1949). Mr. Sayre argues that aesthetics are so intrically intermingled with the creation of a healthy moral climate that they should stand on equal footing. Once he leaves his philosophical discussion behind, and relates aesthetics to property values, he makes a convincing argument.

municipal officials to force upon the public their personal view of what is aesthetically pleasing. There should be a more objective standard which would work toward implementing the underlying motives for allowing such regulation.

While the tendency may be toward recognition of aesthetics as a proper basis for zoning,[31] there is no doubt that North Carolina is still firmly aligned with the traditional view in this matter. In *State v. Brown*,[32] the North Carolina Court declared unconstitutional a statute regulating junk yards[33] on the ground that the statute was based solely on aesthetics. There is little doubt that the court was correct in its conclusion as to the basis of the statute. However, the court left room for speculation that it would uphold an ordinance dealing indirectly with aesthetics, saying: "[W]e know of no authority that vests our courts with the power to uphold a statute or regulation based *purely* on aesthetic grounds without any real or substantial relation to the public health, safety or morals, or the general welfare."[34] The court went on to cite the time-honored rule[35] that while aesthetic considerations alone are not enough to bring a regulation within the police power, if the regulation is posited on another factor, the fact that aesthetics played a part in the adoption of the law will not invalidate it.

The criteria set forth by North Carolina in the above case may be met when a regulation such as that under consideration is bottomed on protection of property values. A fundamental purpose of zoning is to preserve and enhance property values, and to encourage the best possible use of land.[36] Recently Wisconsin upheld an ordi-

[31] See 2 METZENBAUM, *op. cit. supra* note 26, at 1579; YOKELY, *op. cit. supra* note 26, § 17.1.

[32] 250 N.C. 54, 108 S.E.2d 74 (1959). For a critical appraisal of this case, see 1960 DUKE L.J. 299. It is interesting to note that twenty-five years earlier, North Carolina appeared to have taken the lead in aesthetic zoning. Turner v. New Bern, 187 N.C. 541, 122 S.E. 469 (1924).

[33] N.C. GEN. STAT. § 14-399 (1953).

[34] State v. Brown, 250 N.C. 54, 59, 108 S.E.2d 74, 78 (1959). (Emphasis added.)

[35] Dukeminier, *supra* note 20, at 218.

[36] See generally 8 MCQUILLIN, *op. cit. supra* note 18, § 25.25, 39 MARQ. L. REV. 135 (1955), discusses the growing trend of courts to regard protection of market values of property as a proper objective of the police power. New Jersey has said that a proper objective of zoning is to encourage the best possible use of land, and to protect property values, saying, "The proper purpose of zoning is 'Conserving the value of the property and encouraging the most appropriate use of the land.'" Griggs v.

nance empowering a zoning board to deny a building permit to any proposed structure so out of harmony with the neighborhood as to cause a decline in property values.[37] The court reasoned that this was within the police power in that the general welfare of the public is affected by anything tending to destroy property values and thus reduce the tax base. The court felt that the traditional limitations on the police power were not completely restrictive, and that the court could interpret the general welfare provisions in accord with changing conditions. The Wisconsin view seems to be in harmony with the position adopted by the Supreme Court.[38]

It is apparent that the location of high tension towers in a residential neighborhood would substantially lessen the property values of the area.[39] Admittedly, the condemnation awards granted for the acquisition of right of way will compensate the present owners to some degree, but the brunt of the damage will be felt when the then owners attempt to sell their property. At that time the true extent of the permanent injury to the property values will become apparent.

Perhaps the most realistic view yet taken on this matter was enunciated in a 1923 Louisiana decision.[40] That court recognized the inescapable interaction of aesthetics and property values and said that if a city could use its police power to suppress that which was bothersome to the nose and ear, then that power should extend to the control of that which is offensive to the eye, and concomitantly, to the value of property in the neighborhood.[41] The court expressly

City of Patterson, 132 N.J.L. 145, 147, 39 A.2d 231, 232 (1944). *Accord,* Gabrielson v. Borough of Glen Ridge, 13 N.J. Misc. 142, 176 A. 676 (Sup. Ct. 1935). New York agrees with this view. Wulfson v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925).

[37] State *ex rel* Saveland Park Holding Co. v. Weiland, 269 Wis. 262, 69 N.W.2d 217 (1955). It is interesting that even this court felt constrained to stay within the traditional terms.

[38] Berman v. Parker, 348 U.S. 26 (1954).

[39] Interview with Worth Lutz, Appraiser with Durham Realty Co., Spring 1963.

[40] State *ex rel* Civello v. New Orleans, 154 La. 271, 97 So. 440 (1923).

[41] "The beauty of a fashionable residence neighborhood in a city is for the comfort and happiness of the residents, and it sustains in a general way the value of the property in the neighborhood. It is therefore as much a matter of general welfare as is any other condition that fosters comfort or happiness, and consequent values generally of the property in the neighborhood. Why should not the police power avail, as well to suppress or prevent a nuisance committed by offending the sense of sight, as to suppress or

recognized the effect which aesthetics plays in the valuation of property. There can be but little doubt as to the opinion of that court in regard to an ordinance regulating high tension towers.

A similar result based on protection of property values was reached in Massachusetts.[42] The court found that the plaintiff's activities would leave the property involved almost valueless, saying, "The effect of such an unsightly waste in a residential community can hardly be otherwise than to permanently depress values of other lands in the neighborhood and to render them less desirable for homes."[43] The court concluded by stating that they would give weight to aesthetic considerations in passing on the ordinance involved.

In view of the language used by the Supreme Court in *Berman* and by the Supreme Court of North Carolina in the *Brown* decision, it is entirely possible that if an ordinance such as that which Chapel Hill proposed were grounded not on aesthetics, but on the protection of property values, and met the test of reasonableness, it would be upheld. In such a case, the fact that aesthetic considerations played a part in the adoption of the ordinance would not be sufficient reason for declaring it to be invalid if another reason, recognized to be within the concept of public welfare, could be shown to be the prime reason.

Assuming that an ordinance designed to regulate the erection and location of high tension towers is within the police power, a question remains as to the reasonableness of its application. In the situation under consideration, any workable solution must successfully balance the needs and interests of the municipality concerned with those of the public utility seeking to effectively perform its statutory duty. This necessarily entails a detailed consideration of the effect of such an ordinance on the statewide consumer group involved.

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prevent a nuisance committed by offending the sense of hearing, or the olfactory nerves? An eyesore in a neighborhood of residences might be as much a public nuisance, and as ruinous to property values in the neighborhood generally, as a disagreeable noise, or odor, or menace to safety or health." *Id.* at 283, 97 So. at 444.

[42] Burlington v. Dunn, 318 Mass. 216, 61 N.E.2d 243, *cert. denied* 326 U.S. 739 (1945). Massachusetts has long allowed some regulation to protect property values. See, *e.g.*, General Outdoor Advertising v. Department of Pub. Works, 289 Mass. 149, 193 N.E. 799 (1935), *appeal dismissed*, 297 U.S. 725 (1936); Lexington v. Govenar, 295 Mass. 31, 3 N.E.2d 19 (1936).

[43] 318 Mass. at 221, 61 N.E.2d at 246 (1945).

The factors which determine the reasonableness of a purely local ordinance were best articulated by New Jersey.[44] The criteria set out by that court effectively balance the interests of all concerned. The court ruled that the public utilities commission must find that the particular site proposed by the utility is reasonably necessary to the public on a statewide basis. In determining this question of reasonableness, the court directed the commission to consider the overall community zoning plan, the particular ordinances involved, the general character of the neighborhood, and the effect of the proposed use thereon. The board was also instructed to take into consideration alternative sites and methods of installation available to the utility, taking into account the competitive advantages and disadvantages of each, giving special note to the differences in cost to the utility and the damage to the property at or along the proposed site. These standards, while intended for the use of an administrative body, furnish excellent guidelines for a court in determining the reasonableness of a zoning ordinance in the same situation, and make it apparent that a court applying these criteria could reach an equitable solution within the accepted concepts of the "police power."[45]

Several states have enacted statutes specifically designed to deal

[44] New Jersey has adopted a statute dealing specifically with a problem of municipal zoning powers and public utilities. N.J. STAT. ANN. § 40:55-50 (1940), quoted in note 47, *infra*. One of the early cases decided under this statute set forth criteria to be applied in determining the reasonableness of a zoning ordinance as applied to a public utility. *In re* Hackensack Water Co., 41 N.J. Super. 408, 125 A.2d 281 (App. Div. 1956) (dealing with a proposed water tower with the town objecting on aesthetic grounds).

[45] The criteria set out above were applied in a New Jersey case similar to the Chapel Hill situation. *In re* Public Service Elec. & Gas Co. v. Borough of Roselle, 35 N.J. 358, 173 A.2d 233 (1961). The municipality had adopted two ordinances relating to the erection of power lines by public utilities. One required that anyone wishing to erect transmission lines through the community obtain a Special Use Permit. The other required that all electric lines carrying more than 33,000 volts be installed underground. The electric company proposed to erect "H" type towers along an existing railroad right of way. The municipality objected on the ground that such installation would be unsightly, dangerous, and would wreck property values in the locale. The court agreed with the commission's finding that in that particular situation, the town's contentions were groundless. The board found that it would cost much more to use an alternative method of installation. The municipality was obviously in a weak position in regard to damage to property values, inasmuch as the property was bordering an existing railway.

with this conflict.[46] While it is possible, as demonstrated above, to reach a solution to this problem through the extant common law, it is suggested that statutory solution is the most appropriate method for settling the conflict. The New Jersey statute is typical of the group.[47] It provides that the public utility is subject to reasonable zoning ordinances, but vests in the Public Utility Commission the power to review the application of the ordinance on petition of the utility concerned. If the commission determines that the ordinance is unreasonable as applied to the particular situation, then it may exempt the utility from compliance therewith. There is a further appeal to the courts from the commission decision. This method leaves the public utility commission in primary control, while providing for a balancing of all the interests affected by the ordinance.[48] If the commission finds that the property damage outweighs the benefit to be gained from the particular site or route, taking into consideration the alternates available to the utility, then it will refuse to exempt the utility from the ordinance.[49] The converse is naturally true.

[46] See, *e.g.*, CONN. GEN. STATS. ANN. 16-235 (1958); MASS. ANN. LAWS, ch. 40A, § 10 (1961); ME. REV. STAT. ANN., ch. 91 § 93 (1954); N.H. REV. STAT. ANN. 31:62 (1955). Kadane, *Zoning, Utilities and Sweet Reason*, 56 PUB. UTIL. FORT. 792 (1955), provides an excellent discussion of these statutes and the minor differences in them. It should be noted that Mr. Kadane is General Counsel for Long Island Lighting Co. There have not been many cases brought under the statutes. *But see* Jennings v. Connecticut Light & Power Co., 140 Conn. 650, 130 A.2d 535 (1954) (in favor of utility); but *cf.*, Greenwich Gas Co. v. Tuthill, 113 Conn. 684, 155 A. 850 (1931) (upholding an ordinance when substantial property damages otherwise).

[47] N.J. STAT. ANN. 40:55-50 (1940) provides: "This article or any ordinance or regulation made under authority thereof, shall not apply to existing property or to buildings or to structures used or to be used by public utilities in furnishing service, if upon petition of the public utility, the board of public utility commissioners shall after a hearing, of which the municipality affected shall have notice, decide that the present or proposed situation of the building or structure in question is reasonably necessary for the service, convenience or welfare of the public."

[48] In *In re* Hackensack Water Co., 41 N.J. Super. 408, 424, 125 A.2d 281, 289 (App. Div. 1956), the court said: "[I]ntent is... clear that the Legislature did not intend the local regulation to be overridden willy-nilly in all cases." By way of illustration, the court posed the case of a power company selecting a site in the middle of a residential area when there are equally suitable sites available in other localities. In this case, said the court, the zoning ordinance should stand.

[49] It must be remembered that it was a New Jersey court which so strongly stated the idea that one of the main functions of zoning is to protect property values. Griggs v. City of Patterson, 132 N.J.L. 145, 39 A.2d 231 (1944).

It is to be expected that as the consumer demand for electricity and other services furnished by public utility companies increases, the conflict discussed above will recur with increasing frequency. As pointed out above, a workable solution to the problem can be reached within the framework of the common law by positing zoning ordinances on protection of property values. However, it is submitted that the statutory solution adopted in several jurisdictions provides a more workable solution consistent with the best interests of all parties involved.

C. A. POWELL III

It should also be remembered that any added cost to the utility because of a municipal zoning ordinance, will eventually be passed on to the consumer. In regard to requiring underground installation of power lines, it should be noted that the high cost of right of way through highly valued property would be reduced to a minimum.