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Statute Prohibiting Maintenance of Billboards Adjacent to Interstate Highway Is Valid as Applied to Existing Billboards— *Ghaster Properties, Inc. v. Preston**

In order to qualify for additional aid under the 1958 Federal-Aid Highway Program, the Ohio legislature prohibited the erection or maintenance of billboards for advertising purposes within 660 feet of an interstate highway and declared billboards in violation of the statute to be public nuisances subject to abatement.[1] As the owner of seven signs which violated the statute, plaintiff sought an injunction against the enforcement of the statute on the ground that it bore no substantial relation to the public health, safety, morals, or general welfare. The trial court granted the injunction and the court of appeals affirmed, holding the statute unconstitutional as a taking of property without due process of law.[2] On appeal to the Ohio Supreme Court, *held,* reversed. Since the legislative determination that there is a relationship between traffic safety and billboard regulation along interstate highways is not clearly erroneous, the statute is a valid exercise of the police power. As applied to existing billboards, the statute is a general police regulation, not a zoning ordinance, and thus need not provide for nonconforming uses.

The 1958 Federal-Aid Highway Program provides for an increase in the federal portion of the cost of interstate highways in any state which undertakes measures for the regulation of billboards adjacent to such highways.[3] Although certain qualifying standards have been specified,[4] each state is free to develop its own method of control. Each of the state regulations tested in the courts has been upheld as a valid assertion of the police power.[5] The police

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* 176 Ohio St. 425, 200 N.E.2d 328 (1964).

1. OHIO REV. CODE ANN. §§ 5516.01.05, 5516.99 (Baldwin 1964).

2. The trial court found no substantial relation between the public health, safety, morals, or welfare and the statute, either in its enactment or in its application. Ghaster Properties, Inc. v. Preston, 20 Ohio Op. 2d 51, 184 N.E.2d 552 (1962). The court of appeals, however, expressly confined its finding of "no substantial relation" to the application of the statute to the specific billboards involved in this case. Ghaster Properties, Inc. v. Preston, 194 N.E.2d 158 (Ohio Ct. App. 1963).

3. 72 Stat. 904 (1958), as amended, 23 U.S.C. § 131(c) (Supp. V, 1964). For discussion of the 1958 Act and other highway billboard regulations, see generally NATIONAL RESEARCH COUNCIL, HIGHWAY RESEARCH BD., OUTDOOR ADVERTISING ALONG HIGHWAYS (1958); Powers, *Control of Outdoor Advertising,* 38 NEB. L. REV. 541 (1959); Price, *Billboard Regulation Along the Interstate Highway System,* 8 KAN. L. REV. 81 (1959).

4. See 23 C.F.R. §§ 20.1-.10 (Supp. 1964).

5. See Moore v. Ward, 377 S.W.2d 881 (Ky. Ct. App. 1964); Opinion of the Justices, 103 N.H. 268, 169 A.2d 762 (1961); New York State Thruway Authority v. Ashley Motor Court, Inc., 10 N.Y.2d 151, 218 N.Y.S.2d 640, 176 N.E.2d 566 (1961). The Wisconsin statute was sustained by a lower court, but its holding was not appealed. See Fuller v. Fiedler, 19 Wis. 2d 422, 120 N.W.2d 700 (1963).

power, however, forms the basis both for general police regulations and for zoning statutes, and although the two are similar in their prospective application, they must be distinguished for purposes of their retroactive effect.

Whether an enactment is to be characterized as a general police regulation or a zoning statute has been said to depend upon its nature, purpose, terms, and provisions.[6] The Ohio billboard statute would seem to have some of the attributes of each. The statute is by its terms an isolated attempt to regulate only billboards, rather than all land use along the interstate highways, and thus is suggestive of a police regulation. However, the purpose to preserve natural beauty is more often a characteristic of zoning statutes.[7] Furthermore, the provisions of the statute are similar to other state statutes which speak of "zone of regulation" and "nonconforming use" and allow an amortization period for the termination of existing uses,[8] all of which are common to zoning statutes.

Whether the Ohio statute is treated as a police regulation or a zoning statute, an analysis of the constitutionality of its prospective application would not seem to differ materially since the purpose and effect of the statute is the same however characterized.[9] In holding the statute a valid exercise of the police power, the court was unwilling to upset the legislative determination that there is some relation between the regulation of billboards and traffic safety. Although the evidence was inconclusive,[10] the court noted that any distraction is at least of potential danger to a car traveling at high speeds on an interstate highway. The "highway hypnosis" theory that occasional momentary diversions such as reading a bill-

6. State *ex rel.* Spiros v. Payne, 131 Conn. 647, 41 A.2d 908 (1945). In a number of cases, courts have considered regulations sufficiently similar to both zoning ordinances and police statutes that when the enactment has been found invalid on one basis, an attempt has been made to sustain it on the other. See, *e.g.*, O'Connor v. City of Moscow, 202 P.2d 401 (Idaho 1949); Town of Jaffrey v. Heffernan, 104 N.H. 249, 183 A.2d 246 (1962); Federal Advertising Corp. v. Recorder of Borough of Fairlawn, 8 N.J. Misc. 619, 151 Atl. 285 (1930).

7. Principal case at 436, 437, 200 N.E.2d at 336, 337.

8. See, *e.g.*, WIS. STAT. § 80.30 (1963). N.H. REV. STAT. ANN. § 249-A:1-12 (1964) declares existing signs to be nonconforming uses and nuisances and requires their removal within six months. In an advisory opinion the New Hampshire Supreme Court seemed to recognize the "zoning" nature of its statute when it said that if in a specific situation the statute forbids the maintenance of a sign which was not a nuisance in fact, compensation would have to be paid for its removal. Opinion of the Justices, 103 N.H. 268, 169 A.2d 762 (1961).

9. This is indicated by the court's citation of zoning cases while treating the statute as a general police regulation. Principal case at 433, 200 N.E.2d at 334-35. See 29 FORDHAM L. REV. 749 (1961).

10. Even the "scientific" studies have produced contradictory results. The Driving Research Laboratory of Iowa State College and the Michigan State Highway Dept. found no significant correlation between billboards and traffic accidents, while the Minnesota Highway Dept. did find a definite relationship. For a discussion of these and other pertinent authorities, see Price, *supra* note 3, at 88.

board advertisement are beneficial to the long distance traveler was not considered significant.[11] Because of the great weight given to the presumption of constitutionality of a police regulation, the safety factor was permitted to stand as "not clearly erroneous," thus enabling the court to validate what concededly must be essentially a regulation for aesthetic purposes. This is the technique used by many courts that recognize the growing legal acceptance of aesthetic considerations justifying police power supervision under an expanded concept of the general welfare where there is additionally some element of one of the more conventional bases of the police power.[12] The technique is particularly appropriate in the regulation of billboards where aesthetic considerations have long been significant.[13]

Although the court had little difficulty upholding the statute in its prospective application, the question of whether the statute could validly be applied to require the abatement of certain existing billboards had not previously been decided.[14] Had the statute been treated as a zoning statute, it is questionable whether it would have been sustained since retroactive application of zoning ordinances has consistently been held invalid absent a showing of nuisance,[15] and a mere legislative declaration of nuisance has been held an insufficient showing by itself since it too easily may lead to confiscation and destruction of property by legislative fiat.[16] The bur-

11. *But see* Ghaster Properties, Inc. v. Preston, 20 Ohio Op. 2d 51, 184 N.E.2d 552 (1962); United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 198 A.2d 447 (1964).

12. See, *e.g.*, Murphy, Inc. v. Town of Westport, 131 Conn. 292, 40 A.2d 177 (1944); New Orleans v. Pergament, 198 La. 852, 5 So. 2d 129 (1941); Preferred Tires v. Hempstead, 173 Misc. 1017, 19 N.Y.S.2d 374 (Sup. Ct. 1940). The greatest stimulus that aesthetic considerations have received recently came from Mr. Justice Douglas' dictum referring to the police power in Berman v. Parker, 348 U.S. 26, 33 (1954): "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 the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

13. Billboards were at first regulated on the basis of health, safety, and morals. See, *e.g.*, Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); St. Louis Gunning Advertising Co. v. St. Louis, 235 Mo. 99, 137 S.W. 929 (1911). However, aesthetic considerations were soon recognized. See, *e.g.*, St. Louis Poster Advertising Co. v. St. Louis, 249 U.S. 269 (1919). And in 1935 aesthetic considerations were heavily relied on in General Outdoor Advertising Co. v. Department of Pub. Works, 289 Mass. 149, 193 N.E. 799 (1935). For detailed historical accounts, see generally Gilliam, *The Case for Billboard Control—Precedent and Prediction*, 36 DICTA 461 (1959); Comment, *Outdoor Advertising—Aesthetics and the "Public Right,"* 33 TUL. L. REV. 852 (1959).

14. *Cf.* Opinion of the Justices, 103 N.H. 268, 169 A.2d 762 (1961).

15. See, *e.g.*, Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930); Stoner McCray Sys. v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843 (1956); City of Corpus Christi v. Allen, 152 Tex. 137, 254 S.W.2d 759 (1953); 1 YOKLEY, ZONING LAW & PRACTICE § 150 (2d ed. 1953).

16. See Bane v. Township of Pontiac, 343 Mich. 481, 72 N.W.2d 134 (1955); Keenly v. McCarty, 137 Misc. 524, 244 N.Y.S. 63 (1930). Although a valid police regulation may reasonably declare certain things to be nuisances, mere legislative declaration

den of proof, as regards the existence of a nuisance, seems to be placed in each instance on the party attempting to show that the object in question is a nuisance in fact.[17] This is not an easy burden to shoulder, and there is no presumption of the validity of the classification of a particular object as a nuisance to assist the state in sustaining its statutory designation. In the past a public nuisance was generally thought to be some noxious or harmful interference with the public health, safety, or morals, or some substantial annoyance, inconvenience, or injury to the public.[18] While these considerations remain central, the expanding role of the states' police power has effected an enlargement of the nuisance concept, as particularly evidenced in the increasing acceptance of aesthetic considerations.[19] Since aesthetic zoning has gained much of its recognition in cases involving billboards,[20] it would seem that an expanded nuisance concept might be used to require removal of nonconforming billboards.[21] Even so, most courts recognize the harsh effects of a finding of nuisance on existing property rights, and thus they continue to require some substantial interference with another's rights before

does not make something a nuisance which is not one in fact. See, *e.g.*, Lawton v. Steele, 152 U.S. 133 (1894); Yates v. Milwaukee, 77 U.S. (10 Wall.) 497 (1870); Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930); Crawford v. City of Topeka, 51 Kan. 756, 33 Pac. 476 (1893); City of Houston v. Lurie, 148 Tex. 391, 113 S.W.2d 371 (1949).

17. See, *e.g.*, Bane v. Township of Pontiac, 343 Mich. 481, 72 N.W.2d 134 (1955); Keenly v. McCarty, 137 Misc. 524, 244 N.Y.S. 63 (Sup. Ct. 1930). *Cf.* Adams v. Kalamazoo Ice & Fuel Co., 245 Mich. 261, 222 N.W. 86 (1928).

18. Jones v. City of Los Angeles, 211 Cal. 304, 316, 295 Pac. 14, 20 (1930); Commonwealth v. South Covington & C. St. Ry., 181 Ky. 459, 463, 205 S.W. 581, 583 (1918); JOYCE, NUISANCES § 5 (1906).

19. See, *e.g.*, Martin v. Williams, 141 W. Va. 595, 93 S.E.2d 835 (1956); Oscar P. Gustafson Co. v. City of Minneapolis, 231 Minn. 271, 42 N.W.2d 809 (1950); Commonwealth v. Trimmer, 53 Dauph. Co. 91, 34 Munic. L.R. 36 (Pa. 1942); Parkersburg Builders Material Co. v. Barrack, 118 W. Va. 608, 191 S.E. 368 (1937); People v. Sterling, 128 Misc. 650, 220 N.Y.S. 315 (Sup. Ct. 1927); Churchill v. Rafferty, 32 Phil. 580 (1915), *appeal dismissed*, 248 U.S. 591 (1918). See generally Noel, *Retroactive Zoning and Nuisances*, 41 COLUM. L. REV. 457 (1941); Noel, *Unaesthetic Sights as Nuisances*, 25 CORNELL L.Q. 1 (1939); Rodda, *The Accomplishment of Aesthetic Purposes Under the Police Power*, 27 SO. CAL. L. REV. 149 (1954); Comment, 33 TUL. L. REV. 852 (1959).

20. It has been suggested that while aesthetics has received greater direct approval in billboard cases involving specific billboard legislation, "actual accomplishment of aesthetic purposes seems to be much greater and of much broader scope in the comprehensive zoning field." Rodda, *supra* note 19, at 177-78.

21. Indeed, the court in the classic case of General Outdoor Advertising Co. v. Department of Pub. Works, 289 Mass. 149, 193 N.E. 799 (1935), thought that offensive sights could be deemed nuisances. While the decision did not technically abate existing billboards as nuisances since the signs involved had been erected after the statute had been passed and pursuant to permits which had since expired, it has been noted that the enforcement of the statute resulted in the removal of an estimated ninety-six per cent of all billboards in the state, including one erected near the Boston Common at a cost of $35,000 and maintained at an expense of $1,000 per month. Rhyne & Rhyne, *Municipal Regulation of Signs, Billboards, Marquees, Canopies, Awnings and Street Clocks*, in NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, REPORT No. 137, at 10-11 (1952).

deeming an existing use a nuisance.[22] It is doubtful, therefore, whether the billboards in the principal case could be proved to be nuisances in fact.[23]

However, the court treated the statute as a general police regulation. Under this characterization the court did not need to find the billboards to be nuisances; rather, it was sufficient to find simply a reasonable relation between the removal of these billboards and the promotion of the public safety and general welfare in order to terminate the existing use.[24] Once such a reasonable relationship was found to exist, the billboard owner then had the heavy burden of proof of demonstrating, against a presumption of the constitutionality of the statute, that the private interest outweighed the public interest. The court stressed that the billboards in question were located near an expressway interchange and took judicial notice of the difficulty in negotiating an unfamiliar interchange. Therefore, it was thought that the "distraction, annoyance, inconvenience and even danger" that could be caused by these billboards was at least as great as by billboards on the open highway.[25] Consequently, the court found a reasonable relationship between the removal of billboards and the state police power. The court then noted that the billboard owner had made no showing that its billboards could not be used in some other location where they would be lawful or that any loss would be incurred in removing or relocating the billboards.[26] Therefore, even under a balancing test the billboard owner had offered no reason sufficient to prevent the abatement of its billboards.

Since the protection of private property from arbitrary legislative interference seems to be sufficient reason to deny a presumption of constitutionality to a legislative declaration of nuisance in a zoning statute, it is difficult to justify allowing such a presumption where the legislature has attempted to effect the same result through a simple prohibition of an existing use by a police regulation. This is particularly anomalous in the principal case where the billboard statute has many of the attributes of a zoning statute.[27] Private

22. See, *e.g.*, City of Passaic v. H. B. Reed & Co., 70 N.J. Super. 542, 176 A.2d 27 (1961); Central Outdoor Advertising Co. v. Village of Evendale, 54 Ohio Op. 354, 124 N.E.2d 189 (1954); *cf.* Incorporated Village of Brockline v. Paulgene Realty Corp., 24 Misc. 2d 790, 200 N.Y.S.2d 126 (Sup. Ct. 1960); Hartung v. County of Milwaukee, 2 Wis. 2d 269, 86 N.W.2d 475 (1957).

23. Indeed, the trial court specifically found that these billboards were not nuisances. Ghaster Properties, Inc. v. Preston, 20 Ohio Op. 2d 51, 184 N.E.2d 552 (1962).

24. See Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinman v. City of Little Rock, 237 U.S. 171 (1915).

25. Principal case at 440, 200 N.E.2d at 339.

26. *Ibid.*

27. See notes 6-8 *supra* and accompanying text. In Des Jardin v. Town of Greenfield, 262 Wis. 43, 53 N.W.2d 784 (1952), an ordinance requiring all occupied house trailers to be kept in licensed camp grounds was considered sufficiently similar to a

property rights would seem to warrant greater protection than that accorded in the principal case where the court permitted the destruction of a property interest by its allocation of the burden of proof.

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zoning ordinance to require application of zoning rules and allowance for a nonconforming use.