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Constitutional Law - Due Process - Zoning Restrictions Requiring Land Owners to Provide Off-Street Parking

Eldon Olson
University of Michigan Law School

CONSTITUTIONAL LAW—DUE PROCESS—ZONING RESTRICTIONS REQUIRING LAND OWNERS TO PROVIDE OFF-STREET PARKING—In 1956 the City of Denver passed an ordinance requiring land owners to provide off-street parking if and when they erect new buildings or make structural alterations or change the existing use of the land.[1] The restriction applied to a district adjacent to the traditional downtown district which was in the process of changing

1 City and County of Denver, Ordinance No. 392, art. 614, Series of 1956.

from residential to commercial. The ordinance did not specify whether the property owners retained control over parking areas, but the city argued that parking could be restricted to persons using the property.[2] Plaintiff property owners alleged the ordinance was unconstitutional and were granted a declaratory judgment by the trial court. On appeal, *held,* affirmed, three judges dissenting. A zoning ordinance requiring off-street parking is not a legitimate exercise of the police power and thus violates the state constitution by taking property without due process and without just compensation.[3] *City and County of Denver v. Denver Buick, Inc.,* (Colo. 1960) 347 P. (2d) 919.

The instant case is the first clear test of the principle of compulsory off-street parking,[4] although such ordinances have become common.[5] The result reached by this court seems likely to provoke further attacks, and wide-spread invalidation would have a substantial impact on city planning. It is important to recognize that every restriction upon the use of land imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed and constitutes an abridgment by the state of rights in property without compensation.[6] Whether any given zoning regulation can be upheld under the police power[7] or constitutes a taking of property without just compensation is only a question of degree.[8] In drawing the line courts must weigh the extent of the diminution of the owner's rights

2 Principal case at 934.

3 Three judges stressed that the relation of off-street parking to the objectives of the police power did not appear to be substantial. The concurring judge also argued at 932 that adequate parking would only increase traffic congestion.

4 The principle of compulsory off-street parking has been upheld against the contention that it abridged freedom of assembly and worship where churches were included along with other places of public assembly. Allendale Congr. of Jehovah's Witnesses v. Grosman, 30 N.J. 273, 152 A. (2d) 569 (1959). State ex rel. Killeen Realty Co. v. East Cleveland, 108 Ohio App. 99 at 114, 153 N.E. (2d) 177 (1958) contains dictum that the principle is constitutional by analogy to the recognized use of the power of eminent domain to provide public parking.

5 Of the 900 cities responding to a recent questionnaire circulated by the International City Managers' Association, 656 have off-street parking provisions in their zoning ordinances. Such requirements often apply to all zones in the city; the most common exception is the central business district. The information collected will be published in ICMA, 27 MUNICIPAL YEAR BOOK (1960). See also NAT. RESEARCH COUNCIL, HIGHWAY RESEARCH BULLETIN No. 24 (1950) and No. 99 (1955).

6 See, generally, Kratovil and Harrison, "Eminent Domain — Policy and Concept," 42 CALIF. L. REV. 596 (1954); Parker v. Commonwealth, 178 Mass. 199, 59 N.E. 634 (1901) (opinion by Holmes, C.J.).

7 "The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare." Village of Euclid v. Amber Realty Co., 272 U.S. 365 at 387 (1926) (upholding the concept of comprehensive zoning).

8 "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 at 415 (1922).

against the public interest served by such diminution.[9] The decisions reflect a distinction between restrictions which prevent a use which would be harmful to the public and those which attempt to obtain a public benefit by requiring certain use of the land.[10] Even when it is difficult to find that regulations imposed for the latter purpose have a "substantial relation to the public health, safety, morals, or general welfare"[11] they may be sustained if there is a significant reciprocity of benefit.[12] A zoning ordinance limiting the use of land solely to public parking is invalid when it greatly reduces the value of the property.[13] There is no reciprocal benefit to the land owner and the feasible alternative provided by the power of eminent domain reduces the public interest.[14] But a city may require a subdivider who wishes to record a plat to dedicate land for streets or to dedicate a strip of his land to widen existing streets.[15] In this situation there is little or no diminution in the total value of the tract since adequate streets make the lots more desirable. And zoning regulations imposing building set-back lines are generally held to be within the police power.[16] While set-back regulations may substantially impair the ability of some businessmen to exploit their land fully, such ordinances have at least some relation to police power

[9] "One fact for consideration in determining [when property rights must yield to the police power] is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts." Pennsylvania Coal Co. v. Mahon, note 8 supra, at 413; Nectow v. City of Cambridge, 277 U.S. 183 (1928); San Antonio v. Pigeonhole Parking of Texas, (Tex. 1958) 311 S.W. (2d) 218 (parking garage refused a second driveway onto city streets). See, generally, note, 34 ST. JOHN'S L. REV. 107 (1959).

[10] Dunham, "A Legal and Economic Basis for City Planning," 58 COL. L. REV. 650 at 666 (1958). "However compelling and acute the community traffic problem may be, its solution does not lie in placing an undue and uncompensated burden on the individual owner of a single parcel of land in the guise of regulation, even for a public purpose." Vernon Park Realty, Inc. v. City of Mount Vernon, 307 N.Y. 493 at 498, 121 N.E. (2d) 517 (1954).

[11] This is the "test" laid down in Euclid v. Ambler Realty Co., note 7 supra, and it is used by the majority in the principal case. But see Berman v. Parker, 348 U.S. 26 (1954); Johnson, "Constitutional Law and Community Planning," 20 LAW AND CONTEM. PROB. 199 at 205-207 (1955).

[12] See Pennsylvania Coal Co. v. Mahon, note 8 supra, at 415 and 422.

[13] Vernon Park Realty, Inc. v. City of Mount Vernon, note 10 supra.

[14] Although not discussed in the cases, the feasibility of accomplishing the result by an alternative method should be a relevant factor in evaluating the public interest in using the zoning power for a given purpose. Cf. Miller v. Beaver Falls, 368 Pa. 189 at 198, 82 A. (2d) 34 (1951). The power of eminent domain is not a practical alternative to building set-back lines; but it is frequently used to condemn land for the purpose of public parking. E.g., Brodhead v. City and County of Denver, 126 Colo. 119, 247 P. (2d) 140 (1952); Ridgefield Land Co. v. Detroit, 324 Mich. 527, 37 N.W. (2d) 625 (1949).

[15] Ridgefield Land Co. v. Detroit, 241 Mich. 468, 217 N.W. 58 (1928); Ayres v. City Council of Los Angeles, 34 Cal. (2d) 31, 207 P. (2d) 1 (1949). Cf. Bringle v. Board of Supervisors of County of Orange, (Cal. App. 1959) 345 P. (2d) 983 (dedication of right-of-way needed to widen street cannot be made a condition to the granting of a zoning variance; subdivision not involved).

[16] 7 MCQUILLEN, MUNICIPAL CORPORATIONS, 3d ed., §24.541 (1949); 1 YOKLEY, MUNICIPAL CORPORATIONS §212 (1956). See 28 A.L.R. 314 (1924), 44 A.L.R. 1377 (1926), and 53 A.L.R. 1222 (1928).

objectives[17] and uniform compliance normally results in reciprocal benefits. The decisions validating set-back lines should provide strong support for upholding compulsory off-street parking requirements.[18] Reasonable provisions for off-street parking should not greatly reduce the total value of the property, particularly in a developing commercial district such as that involved in the instant case. It has become common for businessmen voluntarily to provide reasonable parking facilities, apparently on the assumption that parking lots are a sound economic investment. Whatever diminution of the landowner's property does result from requiring space for parking must be weighed against the public interest in avoiding traffic congestion.[19] Adequate off-street parking may enable a city to avoid the necessity of allowing on-street parking, thus "widening" the existing streets and eliminating the temporary obstructions caused by the act of parking on the street.[20] The amount of illegal parking and "driving around the block" should also be substantially reduced. While it may be difficult to demonstrate that off-street parking has a substantial relation to the public safety and welfare, the reciprocal benefit should make reasonable regulations a legitimate exercise of the police power. The entire business district will benefit from a reputation for convenient parking, and each owner can be confident that land he devotes to parking will not be monopolized by the employees and customers of his neighbors. Adequate parking facilities have been held to be of sufficient benefit to the individual merchant to justify a special assessment for the cost of constructing public parking in commercial districts.[21] There should also be enough mutual benefit to justify requiring businessmen to supply the parking facilities directly rather than by assessment.[22] This decision of the Colorado court is in accord with its early invalidation of set-back lines,[23] but seems unfortunate and unlikely to be followed, particularly in jurisdictions which have held set-back lines to be valid exercises of the police power.

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17 Gorieb v. Fox, 274 U.S. 603 (1927); Kratovil and Harrison, "Eminent Domain — Policy and Concept," 42 CALIF. L. REV. 596 at 638 (1954).

18 The presence of a practical alternative to compulsory off-street parking is probably the chief distinction. See note 14 supra.

19 But see note 3 supra. It might also be argued that the community has a real interest in being able to find convenient parking when transacting business.

20 If on-street parking is avoided, pedestrian safety may be an additional reason for allowing this use of the police power, particularly in areas where children are likely to play.

21 City of Whittier v. Dixon, 24 Cal. (2d) 664, 151 P. (2d) 5 (1944).

22 The benefit to the land owner is most obvious if he is allowed to restrict parking to those using the premises. It may be a different question if the ordinance results in a "dedication" to general public use. However, even then the reciprocal benefit must be held to justify the diminution, since if every business provides adequate parking each lot will normally be used only by those on the premises. Compare the concurring opinion in the principal case at 934 where it is argued that it is harder to justify the ordinance if the owner retains control even though he would be deprived of fewer of the rights of ownership, with the view of the dissent at 941.

23 Willison v. Cooke, 54 Colo. 320, 130 P. 828 (1913). But see Di Salle v. Giggal, 128 Colo. 208, 261 P. (2d) 499 (1953).