

NOTES

Constitutional Law—Municipal Corporations—Police Power*

A municipal corporation is the creature of the legislature and possesses only such rights and powers (a) as have been granted in express terms; (b) as arise by necessary or fair implications, or are incidental to the powers expressly conferred, and (c) as are essential to the declared objects and purposes of the municipality—not merely convenient but indispensable.¹

The purpose of this note is to examine decisions testing the validity of municipal ordinances enacted as essential to the declared objects and purposes of the municipality and to determine from the examination where, in three specific types of cases, the courts have drawn the line of indispensability in ascertaining what is or is not essential to the declared objects and purposes.

The rights and purposes indicated as (c) above are generally classified under the heading police power; and the commonly excepted limitation on the use of police power is that it can be exercised only to protect the public health, safety or morals.² New Jersey has embodied this limitation in its statutory law without extending the power of the municipal corporation.³

The courts in determining the validity or invalidity of a municipal ordinance must of necessity first examine it to determine if its ends are within the confines of the allotted police power; and, then ascertain if its means are reasonably dedicated to that purpose without providing for the violation of individual rights in excess of those necessary to accomplish the desired ends.

In recent years the pressure of economic competition has given rise to a type of municipal ordinance the dominant purpose of which is to restrict one group of merchants for the benefit of another. The courts

1. N. J. *Good Humor v Board of Commissioners of Bradley Beach*, 124 N.J.L. 162, 11 Atl. (2d) 113 (E & A. 1940); *Carron v. Martin*, 26 N.J.L. 594, 69 Am. Dec. 584 (E. & A. 1857).

2. *Commonwealth v. Campbell*, 133 Ky. 50, 1175 W. 383 (1909); *Perepte ex rel Wineburgh Adv. Co. v. Murphy*, 113 N.Y.S. 855, 88 N.E. 17 (1909); *State v. Walker*, 48 Wash. 8, 92 P. 775 (1907).

3. R. S. 40.48-2, N.J.S.A. 40.48-2

have zealously condemned them wherever they have been tested as "serving private interests under the cloak of the general good." Bradley Beach, New Jersey, attempted to prohibit vending for the purpose of aiding shopkeepers but was halted by the Court of Errors and Appeals.⁴ An ordinance empowering the mayor of a municipality to prohibit sale by auction (which he did at the instigation of the town retailers) was declared to be invalid for the reason that the sale of ordinary commodities of the trade are not affected with public interests sufficient to justify regulations beyond the usual police power to protect public health, morals and welfare.⁵ An ordinance requiring transient retail dealers selling bankrupt stock to pay an excessive license fee was declared to be unreasonable and an unconstitutional attempt to limit competition.⁶ An Atlantic City ordinance restricting the sale of ice cream in boardwalk establishments to be consumed on the premises where sold was declared to be invalid as legislation for the benefit of retailers in the town proper.⁷

Peckham J., in declaring an act of the New York State Legislature prohibiting prizes to be given with purchases to be unconstitutional, summed up this particular class of ordinances perfectly as follows: "It [the act in question] is evidently of that kind which is so frequent of late, a kind which is meant to protect some class of the community against the fair, free and full competition of some other class, the members of the former class thinking it impossible to hold their own against such competition."⁸

Another type of ordinance declared to be invalid as an attempted transgression of the confines of police power is that class which is predicated on aesthetic considerations under the guise of public safety. The unsightliness of large billboards used as advertising devices have made them the constant target of crusading groups attempting to beautify the community. In many instances municipal legislative bodies

4. *N. J. Good Humor v. Board of Commissioners*, *supra*, note 1.

5. *Empire Home Furnishers, Inc. v. White*, 235 App. Div. 522, 258 N.Y.S. 3 (1932).

6. *People ex rel Moskowitz v. Chief of Police of Glen Falls*, 202 N.Y. 53, 94 N.E. 1065 (1911).

7. *Kohr Bros. Inc. v. Atlantic City*, 104 N.J.L. 468, 142 Atl. 34, (S. Ct. 1928).

8. *People v. Gillson*, 109 N.Y. 389, 17 N.E. 343 (1888).

as the result of such pressure have adopted ordinances supposedly aimed at restricting the height of billboards and their proximity to the sidewalk in the pursuit of public safety; but, actually, restricting their use to a point where they would be unprofitable as advertising displays. The common ordinance directed at this manner of advertising provides that billboards should be set back a certain distance greater than their height from the sidewalk. In 1905 Justice Swayze, while dealing with a Passaic ordinance which fits within this category stated: "The universal custom of building upon the street line is cogent evidence that the public safety does not require that structures like billboards should be set back from the street. . . Aesthetic considerations are a matter of luxury and indulgence rather than necessity, and it is necessity alone which justifies the exercise of police power to take private property without consideration."⁹

The theory which the courts of the various states adhere to in invalidating ordinances based on aesthetic considerations is that they violate the Constitutional provision that property shall not be taken for public use without compensation, and should not be upheld unless the use to which the property was put would justify the interference under what is called police power.¹⁰

Apparently the recent New Jersey case of *Vassallo v. Board of Commissioners of Orange*¹¹ comes under the classification of aesthetically stimulated ordinances. In that instance an ordinance applying only to automobile junk yards imposed regulations making it impossible for this particular type of junk yard to function properly. The Court of Errors and Appeals found the ordinance to be "arbitrary and capricious" and to exceed the police power of the municipality. All cases cited in the opinion were decided on the basis of aesthetic consideration.

The third type of ordinance to be dealt with herein is that which

9. *City of Passaic v. Paterson Bill Posting etc. Co.*, 72 N.J.L. 285, 62 Atl. 267 (S. Ct. 1905).

10. *Commonwealth v. Boston Adv. Co.*, 188 Mass. 348, 74 N.E. 601 (1905); *People v. Green*, 83 N.Y.S. 460 (1903); *Bostoch v. Sams*, 95 Md. 400, 52 Atl. 665 (1902); *St. Louis v. Hill*, 116 Mo. 527, 22 S.W. 861 (1893); *Matter of Jacobs*, 98 N.Y. 98, 50 Am. Rep. 636 (1884).

11. *Vassallo v. Board of Commissioners of Orange, N. J.*, 15 Atl. 2d 603 (E. & A. 1940).

tends to restrict individual liberty. An excellent example of ordinances falling within this classification is a recent Jersey City ordinance requiring the obtaining of a permit as a prerequisite to a public meeting. The Supreme Court held this ordinance to be arbitrary and void because it permitted arbitrary and discriminatory enforcement.¹² This ordinance had been upheld by the New Jersey courts¹³ which decision was in line with earlier New Jersey decisions.¹⁴ In fact ordinances requiring permits to assemble, parade or to distribute circulars have been numerous throughout the United States and have been upheld in most instances.¹⁵ The term "liberty" as guaranteed by the fourteenth amendment was formerly thought to include only liberty of the person and of occupation; however, today it is held to include freedom of speech, assembly and press.¹⁶ The case of *Lovell v. Griffin*¹⁷ altered this concept holding that municipal ordinances are state action and are subject as such to the requirements of the Fourteenth Amendment; all future ordinances of this nature will have to meet the test laid down therein.

It appears from these three types of cases that, although the police power of a municipal corporation cannot be affirmatively defined as to its limits and the ability of the courts to expand its meaning, we may

12. *Hague v. C. I. O.*, 59 S. Ct. 954 (U.S. 1939), modifying and affirming 101 F. Supp. 127 (C.C.A. 3d 1939); See 37 MICH. L. REV. 609 (1939); 52 HARV. L. REV. 320 (1938); 7 GEO. WASH. L. REV. 1026 (1939); and Williams, *Civil Liberty In Jersey City*, NAT. LAWY. GUILD Q. 369 (1938); 6 U.S. Law Week 701.

13. *Thomas v. Casey*, 121 N.J.L. 183, 1 Atl. (2d) 866 (E. & A. 1938).

14. *Harwood v. Trembly*, 97 N.J.L. 173, 116 Atl. 430 (E. & A. 1921), dissent by Minturn J.; *Burkett v. Beggans*, 103 N.J.Eq. 7, 142 Atl. 181 (E. & A. 1928). Refused to enjoin officer acting under ordinance enabling him to refuse permits to assembly. *Accord*: *People ex rel Boyle v. Atwell*, 233 N.Y. 96, 133 N.E. 364 (1921).

15. *Fitts v. Atlanta*, 121 Ga. 567; 49 S.E. 793 (1904); *Commonwealth v. Abrahams*, 156 Mass. 57, 30 N.E. 79 (1892).

16. *Davis v. Mass.*, 162 Mass. 510, 39 N.E. 113 (1894); *Love v. Judge of Recorder Ct.*, 128 Mich. 545, 87 N.W. 785 (1901); *In re Flaherty*, 105 Cal. 558, 27 L.R.A. 529 (1895); *Almassi v. Newark, N. J.*, 8 N.J.Misc. 420, 150 Atl. 217 (Com. Pl. 1930); *Dziatkiewicz v. Maplewood*, 115 N.J.L. 37, 178 Atl. 205 (E. & A. 1935).

17. 303 U.S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938).

be able to define it negatively by setting boundaries in some directions at least beyond which the courts have definitely stated it shall not transgress.

In the first class of cases the court has set a definite standard for the benefit of the consuming public. Since 1893 the legislature has opposed the tendency toward monopoly in our economic system and the courts have followed this reflection of social thought even to the point of deciding the National Recovery Act of 1933 to be unconstitutional after the legislature had in adopting it reversed forty years of anti-monopolistic procedure. It follows that this principle of social thought as reflected by our judiciary would necessitate the overthrow of any act which would, by eliminating competition, place the consumer in the power of a smaller group than the economic law of supply and demand would ordinarily dictate.

The second group of cases herein discussed is a judicial re-expression of the importance of property rights in relation to the desires of the civic group to which no property rights attaches.

The third group of which little had been said in this article is the most confused and most difficult to encompass within a definite border. The cases of *Lovell v. Griffin*¹⁸ and *Hague v. C. I. O.*¹⁹ however, have cast some light into the murkiness which had heretofore surrounded so-called "civil liberties" and are the basis for assuming that any arbitrary restriction of freedom of speech, assembly, or press imposed by any legislative group within the United States will be put to the test of the Fourteenth Amendment by the Supreme Court of the United States.

18. *Ibid.*

19. *Supra*, note 12.