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# Constitutional Law--Police Power

CONSTITUTIONAL LAW—POLICE POWER—Action to enjoin board of park commissioners from enforcing an ordinance, purporting to have been authorized by Section 1, ch. 32, Acts 1920 (Sp. Sess.), Section 10625, Burns' 1926, regulating and prohibiting billboards located within 500 feet of any boulevard. Defendant demurred, demurrer was sustained and plaintiff appealed. *Held.* Reversed, that part of ordinance abating signs that stood before Sec. 1, Ch. 32, Acts 1920 was passed is unlawful as not providing compensation as ordered by act but the rest of the ordinance regulating billboards on aesthetic grounds was legal and the act itself was constitutional. *General Outdoor Advertising Co. v. City of Indianapolis, Department of Public Parks*, Supreme Court of Indiana, June 27, 1930, 172 N. E. 309.

Ch. 32, Acts 1920, is, as the court remarks, very obscure in meaning. It contains, first, a provision empowering boards of park commissioners to condemn land on each side of parks, parkways or boulevards, in order to establish a building line, between which and the boulevard or park, no buildings may be erected though owner may otherwise have free use of the land; and provides for compensation for owners of land so condemned. Then in the sentence in second line, p. 107, Acts 1920, boards are empowered in order "to promote public health, safety, morals or general welfare," by general order to "abate, restrict, forbid or regulate" "offensive or dangerous business or amusement" and to "regulate, restrict and forbid the location of trades, industries commercial enterprises and buildings and devices designed for uses" which are specified in the order "to be injurious to the public health, safety, morals or general welfare," within 500 feet of any such park, parkway or boulevard. Then following on line 17, p. 107, "But no lawful business being conducted upon such *adjacent* lands at the time of acquiring same shall be prohibited or abated without . . . due and full compensation."

The court in the principal case construed sentence beginning second line, p. 106, to be a grant of police power under which the first part of the Board of Park Commissioners' ordinance in the principal case, which provided that no billboard sign or advertising device should be located, erected or placed, *maintained, used* or *operated* within 500 feet of any park parkway and owners and lessees prohibited from leasing for such purpose, was legal and constitutional. But the sentence beginning on line 17, p. 107, was held to require that any business which was not a nuisance *per se* must be compensated for when the power granted in line 2 was exercised and in consequence the court invalidated the second part of the ordinance which ordered all billboards then located within 500 feet of boulevards removed, abated and abolished, and awarded judgment to appellants who alleged their leases were made before passage of the Act of 1920, and that they had not been compensated for their billboards ordered removed.

Appellees' contention was that sentence beginning line 17 referred back to the clause providing for a building line since it used the words adjacent lands, "at time of acquiring same" and carried no mention of the 500 foot line specified in the preceding sentence. The court, however, on the ground that compensation had already been provided for in the building line clause, read in the words "(acquiring) prohibiting or abating the same" and made the compensation clause in line 17 a restriction on the police power granted in the preceding sentence.

Just what power was given in the sentence beginning line 17 is a moot point. The condemnation of the building line was clearly enough a taking for a public use with compensation and exercise of the power of eminent domain. Burdick, *Law of the American Constitution* (New York, 1922), p. 561. The power granted in line 2 by using the phraseology inseparably identified with the "Police Power" leaves no doubt that this was what was granted, the court so construing it. The police power is exercised for a social interest and carries no duty to compensate for property taken. *State v. Rushcreek,* 167 Ind. 217, 77 N. E. 1085; *State v. Roly,* 142 Ind. 168, 141 N. E. 145. The court thus construed the statute to create a hybrid power, a police power limited to the *regulation* of billboards, with an additional provision of eminent domain if the physical removal was necessary. This construction, though at variance with the actual wording of the statute, is in accord with what is probably the majority view—that actual destruction, under the police power, of property existing before the passing of the legislation must be paid for, unless a nuisance *per se, Ley v. Cash,* 12 Ohio N. P. (N. S.) 523—and probably properly construed the intent of the legislature. Certainly it was in accord with the general rule of construction that all doubtful language in statutes delegating authority will be construed in favor of the retention of such authority by the legislature. *Central Union Telephone Co. v. Indianapolis Telephone Co.,* 189 Ind. 210, 126 N. E. 628. Whether the legislature could have authorized the city to destroy such billboards, the court does not say.

An interesting question arises here, as to whether the cities' tax money would be spent for a "public purpose" in paying for these billboards.

The practical effect of the limitation of line 17 upon the police power was virtually nullified, however, by the declaration of the court upholding the first part of the city ordinance which prohibited locating, erecting,

placing, *maintaining, using* or *operating* billboards and preventing such property from being leased for purposes of billboards. Certainly billboards not being used, maintained or operated would be useless and the distinction drawn by the court between actually destroying property and making it worthless seems rather a fine one. In permitting this regulation of established billboards the case is contra to *Ill. Life Ins. Co. v. City of Chicago*, 244 Ill. App. 185, cited with approval in the principal case, where the court refused to restrict the use of a sign erected before the zoning statute was passed.

The most interesting point of the principal case arises from the reasons, or rather lack of them, given by the court in sustaining the constitutionality of Ch. 32, Acts 1920 (Sp. Sess.). United States Courts, as the judge in the principal case remarks, have always been unwilling to permit the exercise of the police power on purely aesthetic grounds, *City of Dallas v. Mitchell* (Tex.), 245 S. W. 944; *People v. Wolf*, 127 Misc. 382, 215 N. Y. S. 74. Although most courts admit that aesthetic reasons may be considered incidental to other causes. *Thomas Cusack Co. v. Chicago* (1917), 242 U. S. 526. The sham grounds of health, safety, and morality were used to regulate in *Thomas Cusack Co. v. Chicago, supra*, and the charge that billboards reflected sun's rays was held sufficient in *Kansas City Gunning Adv. Co. v. Kansas City*, 240 Mo. 659; also obscuring crossings. *Kansas Laws*, 1927, Ch. 263, Sec. 11, p. 463. Indiana has never passed on the point although the Supreme Court felt constrained to base its support of Sunday Blue Laws on grounds of sanitation. *Carr v. State*, 175 Ind. 248, 93 N. E. 1071. And aesthetic reasons were not enough to restrict cemeteries when enforced by a municipal ordinance unsupported by state law. *Park Hill Development Co. v. City of Evansville*, 190 Ind. 432, 130 N. E. 645.

The court in the principal case advanced no such shams as the reason for its decision. It did mention the excuses given in the *Cusack* and other cases, but no such reason was possible here for appellants' complaint alleging that the billboards were safe and clean gave no grounds, for immorality was demurred to by the city and apparently no other reasons were advanced. The court allowed this lack of excuse to affect its decision only so far as to prevent the actual destruction of the billboards without compensation, but as mentioned *supra*, the same result was attained by indirect methods.

The court in the principal case discussed the expansion of the police power to meet the growing needs of an advancing civilization, in which argument it is supported by dicta in *Chicago, T. H. & S. R. R. v. Anderson*, 182 Ind. 140, 105 N. E. 49, and *R. R. Commission of Indiana v. Grand Trunk Western R. R.*, 179 Ind. 255, 100 N. E. 852. The court also dwelt briefly on the relation of public parks and boulevards to the public pleasure, health, comfort and amusement, and stressed the necessity for their special respect at the hands of the law, but did not show how billboards injured parks in any other way than by marring their beauty, and the right of the legislature to determine what billboards are unsightly was upheld.

So it may be concluded with a reasonable degree of certainty that the court by a very ingenious construction of the statute has in its dictum definitely committed Indiana to the doctrine that aesthetic reasons alone are sufficient grounds to uphold the police power. Indiana is the pioneer in taking this forward step. J. S. G.