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LOCAL CONTROLS OVER PRIVATE PROPERTY RIGHTS

by

*N. Alex Bickley**

THE changing urban picture in Americas has brought many modifications in the controls that the local government exercises over private property rights. Almost forgotten is the old phrase that "a man's home is his castle." Maybe this is properly so since a great majority of people are no longer living in what was visualized as being a home when that phrase was first uttered. A large portion of the people now live in apartment houses. Their open spaces are common open spaces. They use the same playgrounds and depend upon other individuals to maintain the facilities. Others are residing in condominiums in which there is a joint ownership and joint maintenance of open space and yard areas. The changing pattern of living has brought about new restrictions and new controls necessary for health, welfare and common good of the community.

What any one individual does is so intertwined with the rights of other individuals living in the close community that some controls are necessary. It might even be fair to predict that the law has not yet visualized all of the controls that will be exercised over the individual's rights and property. This is apparent from the new open housing laws, from the recent advent of the urban renewal rights and other controls that are coming from the federal government and the local governments. As a city's dependency upon the federal government for aid and financial support increases, its citizens will feel the impact of new restraints.

I. CONTROLS OVER BUILDINGS AND THE USE OF LAND

One of the police powers affecting the use of private property which is exercised by municipal corporations is that which pertains to fire limits or fire districts of the city. The usual type of regulation is one which forbids the erection of wooden buildings within an area, or prohibits moving wooden buildings, tents or other movable buildings into the area, and requires that the buildings within the fire districts be constructed of fire-proof or non-inflammable materials.¹ These regulations necessarily constitute a limitation upon the free and unrestricted use of private property, and, although he does not like to think of it in this manner, each individual holds his property subject to this power of the local government. The regulations have been recognized by the legislature,² and, if properly exercised, have been declared constitutional by the courts.³ Generally, the regulations

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¹ DALLAS, TEXAS, BUILDING CODE ch. 18 (1965); 7 E. McQUILLAN, MUNICIPAL CORPORATIONS § 24.486 (3d ed. 1949).

² TEX. REV. CIV. STAT. ANN. art. 1175, § 25 (1963).

³ City of Odessa v. Halbrook, 103 S.W.2d 223 (Tex. Civ. App. 1937); Howell v. City of Sweetwater, 161 S.W. 948 (Tex. Civ. App. 1913).

are held to be constitutional exercises of the police power to prevent a public nuisance which threatens to inflict public harm.⁴

Originally the doctrine of nuisance developed from the common law rule of emergency.⁵ For instance, if there was a mad dog at large in the streets which threatened injury or death to individuals, a police officer would have a right under the police powers to do whatever was necessary to restrain the dog, including destroying it.⁶ Likewise, a health officer was entitled to destroy infected clothing or materials which endangered the public health.⁷ Many of these situations resulted in law suits being filed for damages against the officer as an individual, to litigate the propriety of his action. The circumstances under which he acted would be the determining factor.⁸

No longer must an emergency be present in order for the local government to exercise this power. However, the danger must be a present one, although the chances of its occurrence may be remote.⁹ In addition, a nuisance must present a real danger, not merely an illusory threat. In 1931 the Texas Legislature passed a law which made it unlawful for any person to plant during the year 1932 any crop of cotton in excess of thirty per cent of the area of land which was in cultivation in planted crops during the year 1931.¹⁰ The state contended that the planting and raising of cotton on land continuously would have a tendency to destroy the fertility of the soil and cause root rot, thereby destroying the cotton plant. When the record showed that in 1931 the largest cotton crop in the history of the state was produced on land that had been for a half-century consecutively planted in cotton, it became evident that that which was declared to be a nuisance was not a nuisance in fact.¹¹

Moreover, local governments are limited by the police power granted by the state. In the absence of express legislative approval, a city is without authority to declare something a nuisance which is not so per se or at common law.¹² The city of Galveston attempted by an ordinance to declare that all dilapidated buildings were nuisances without a showing that any of the elements necessary to constitute a nuisance actually existed. There was no requirement that the building injure, hurt or harm anyone, nor was the ordinance confined to dilapidated buildings which endangered life or health or obstructed the reasonable and comfortable use of property or which were subversive to public order, decency or morals. The court, pointing out that a building's unsightliness was the usual and natural result of dilapidation, concluded that this alone did not make it a nuisance,

⁴ *City of Houston v. Lurie*, 148 Tex. 391, 224 S.W.2d 871 (1949).

⁵ *Russell v. Mayor of New York*, 2 Denio 461 (N.Y. 1845).

⁶ 3 C.J.S. *Animals* §§ 213-19 (1955).

⁷ *Savannah v. Mulligan*, 95 Ga. 323, 22 S.E. 621 (1895); 7 E. McQUILLAN, MUNICIPAL CORPORATIONS § 24.238 (3d ed. 1949); Annot., 14 A.L.R.2d 73 (1950).

⁸ *City of Garland v. White*, 368 S.W.2d 12 (Tex. Civ. App. 1963) *error ref. n.r.e.*

⁹ *Philadelphia v. Watt*, 162 Pa. Super. 433, 57 A.2d 591 (1948).

¹⁰ TEX. REV. CIV. STAT. ANN. arts. 165a-165m (1959).

¹¹ *State v. Smith*, 47 S.W.2d 642 (Tex. Civ. App. 1932).

¹² *Crossman v. City of Galveston*, 112 Tex. 303, 247 S.W. 810 (1923).

nor did the mere declaration by the city council that it was a nuisance make it a nuisance in fact.¹³

The court did point out, though, that it was not deciding whether a municipality could enact a valid ordinance providing for the summary abatement of a building without the necessity of a judicial hearing. This would pertain only to a public emergency, as for example, a fire, a raging pestilence or other threatening public calamity which required immediate and summary action.¹⁴ Under present day standards, this would also apply in many cases to the situation of riots or uncontrolled mob action.

There is no doubt about the authority of the city to designate a fire district and provide that there the structures shall be of certain non-combustible materials.¹⁵ The test cannot be that the building must be up to present day building standards and legal requirements. This can be only one of the elements considered and not the sole controlling element. For example, the mere fact that a building within the fire district is of wooden construction does not justify an order of demolition.¹⁶ In order to take care of the structures that are presently existing within that fire district, it is common for the municipal authority to provide that the entire building should be made to conform to the standards or be demolished when its deterioration exceeds fifty per cent of the replacement cost, is in danger of collapse, is unfit for the use for which it is intended or when the same has been destroyed or damaged to the extent of fifty per cent of the cost of replacing it.¹⁷ The courts will not order the destruction of the entire building as a nuisance or as a fire hazard if the condition can be corrected by alteration, repair, cleaning or minor reconstruction.¹⁸

Beyond the right to require that the building be constructed of certain material is the further power, vested in the local government, to destroy the property if such destruction is reasonably necessary to accomplish the legitimate purposes of the ordinance. The question is whether or not the building, which is sought to be destroyed, is in fact a nuisance, a condition necessary to the exercise of the power by the government.¹⁹ In the absence of this condition the landowner is protected by the due process provision. If the ordinance provides that certain officers may find a building to be a fire hazard or to endanger the lives of others, and if such officers may order the building either repaired or demolished, the ordinance must be strictly construed. Since the derogation of the rights of private property

¹³ *Id.* at 310, 247 S.W. at 812.

¹⁴ *Id.* at 313, 247 S.W. at 814.

¹⁵ *Goldman & Co. v. North Little Rock*, 220 Ark. 792, 249 S.W.2d 961 (1952); *City of Brenham v. Holle & Seelhorst*, 153 S.W. 345 (Tex. Civ. App. 1913) *error ref.*

¹⁶ *Armistead v. Los Angeles*, 152 Cal. App. 2d 319, 313 P.2d 127 (1957); *City of Houston v. Lurie*, 148 Tex. 391, 224 S.W.2d 871 (1949).

¹⁷ *Perepletchikoff v. Los Angeles*, 174 Cal. App. 2d 697, 345 P.2d 261 (1959); *West Realty Co. v. Ennis*, 147 Conn. 602, 164 A.2d 409 (1960); *City of Forney v. Mounger*, 210 S.W. 240 (Tex. Civ. App. 1919).

¹⁸ *Albert v. City of Mountain Home*, 81 Idaho 74, 337 P.2d 377 (1959); *Newton v. Town of Highland Park*, 282 S.W.2d 266 (Tex. Civ. App. 1955) *error ref. n.r.e.*

¹⁹ *Micks v. Mason*, 145 Mich. 212, 108 N.W. 707 (1906); *Vanderhoven v. City of Rahway*, 120 N.J.L. 610, 1 A.2d 303 (Sup. Ct. 1938); *Hill Military Academy v. Portland*, 152 Ore. 272, 53 P.2d 55 (1936); *City of Houston v. Lurie*, 148 Tex. 391, 224 S.W.2d 871 (1949); *Crossman v. City of Galveston*, 112 Tex. 303, 247 S.W. 810 (1923).

and the exercise of a sound discretion are involved, an order to destroy should issue only as a final resort.²⁰ There have been several situations in which the ordinance requires a building which is unsafe for human habitation to be demolished.²¹ Most of these ordinances require that first it must be determined that the building cannot be repaired, altered or changed in such a manner as to make it fit for human habitation.

The somewhat divisible nature of the demolition ordinances is illustrated by a case involving an ordinance of the city of Houston, Texas.²² The main portion of the building involved was about thirty-six feet wide by seventy feet deep. On the roof of the main building was a penthouse. The city council had concluded that the building was a serious fire hazard but that the condition could be corrected. The council did not specify in detail what measures should be taken to render the building safe and eliminate the fire hazard. It appeared that the penthouse was entirely unsound and could not be repaired. The court pointed out that under the ordinance it was necessary for the city council to specify what repairs would have to be made in order to make the building safe, but it also stated: "If it is found that in order to eliminate the conditions and make the building safe, the penthouse as an excrescence upon the building . . . must be removed and that nothing short of removal will suffice to cure the condition and eliminate the fire hazard, the Council and Court might specify such drastic action as a corrective measure."²³ Certain portions of the building, if they can be separated from the whole can be declared nuisances and ordered demolished; whereas the condition of the remaining portion would not necessarily require demolition of the whole building.

The real problem comes in designating the individuals who are going to make the determination. Some courts have simply held that even though the provision of the ordinance specifying the individual or individuals who are to make the determination of unfitness is unconstitutional or invalid, this unconstitutionality does not affect the remaining provisions of the ordinance if properly applied and if the building is in fact a nuisance.²⁴

Sometimes the nuisance complained of is occasioned by the use to which the building is put and can actually be remedied by the discontinuance of that use. In one case an owner had a barn and stable which abutted on a public sidewalk and constituted an offensive and injurious use to public health.²⁵ In another a high fence was used for unsightly billboards and to shield unlawful acts.²⁶ In a third case a rooming house was used by more people than could adequately be accommodated by the toilet facilities, shower, and heating.²⁷ The use was ordered discontinued in all three cases.

²⁰ *In re Branham's Appeal*, 70 Ohio L. Abs. 491, 128 N.E.2d 671 (Ct. App. 1953).

²¹ DALLAS, TEXAS, REV. CIV. & CRIM. CODE ch. 27 (1961).

²² *City of Houston v. Schlueter*, 340 S.W.2d 539 (Tex. Civ. App. 1960).

²³ *Id.*; *Newton v. Town of Highland Park*, 282 S.W.2d 266 (Tex. Civ. App. 1955) *error ref.*

n.t.e.

²⁴ *Stoetzner v. Los Angeles*, 170 Cal. App. 2d 394, 338 P.2d 971 (1959); *Richards v. City of Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1955).

²⁵ *Forney v. Mounger*, 210 S.W. 240 (Tex. Civ. App. 1919).

²⁶ *Verder v. Ellsworth*, 59 Vt. 354, 10 A. 89 (1887).

²⁷ *Keiner v. City of Anchorage*, 378 P.2d 406 (Alas. 1963).

II. POLICE POWER AND EMINENT DOMAIN

Quite often the exercise of the police power approaches so close to the exercise of eminent domain that it is hard to tell the difference between the two. Some courts are not particularly adept in distinguishing between these two powers, and the courts are not always of one mind. This problem arises in determining whether or not the abutter on a street has the absolute right to cross the sidewalk with his driveway irrespective of other facts and considerations; or whether or not the city has the right to regulate the uses across the sidewalk and ingress and egress to the street.²⁸

One Texas court has adopted the view that the regulation of this access is a valid exercise of the police power of the city.²⁹ The case involved a ten-story parking garage on a corner lot which had an eighty-nine-foot driveway across the sidewalk on one side, but was not permitted to cross the sidewalk on the other street. The court reasoned that actually the prohibiting ordinance was more in the nature of a zoning regulation, and if a city could invoke its police power to regulate the kind and character of business that may be conducted within a certain district, it could also exercise that power to zone a street in the center of the business district against vehicular traffic which interfered with the sidewalks.

Perhaps the question in Texas is settled by this case; however, a difference of opinion still exists. One case has held that if there is a finding that the driveway would not interfere with the use of the sidewalk by pedestrians nor create a traffic hazard, it is unreasonable to prohibit its use.³⁰

Although the courts concede that a reasonable exercise of this power is within the authority of the municipal government, they have also held that the power does not extend to a complete deprivation to the abutter of all access to the street or highway without first paying some compensation.³¹ Sometimes the existence of an alley or alternate method of ingress and egress is very important. In one case the city attempted to prohibit the use of a driveway running between two buildings for loading and unloading purposes in the rear of one.³² There was access to the rear of the building by an alley. The court held that the regulation was reasonable, taking into consideration the fact that there was an alternate access.

Likewise the alternate route was the deciding factor in the case of an owner who desired to provide parking space for his customers on a vacant lot.³³ The lot was some seven to ten feet below the street level and extended back to an alley, which provided access. The heavy pedestrian and vehicular traffic on the street, the highly congested area and the necessity for

²⁸ Sauer v. City of New York, 206 U.S. 536 (1907).

²⁹ City of San Antonio v. Pigeonhole Parking, 158 Tex. 318, 311 S.W.2d 218 (1958).

³⁰ City of Norman v. Safeway Stores, 193 Okla. 534, 145 P.2d 765 (1944).

³¹ Howell v. Board of Comm'rs, 169 Ga. 74, 149 S.E. 779 (1929); Hughes v. State, 80 Idaho 286, 328 P.2d 397 (1958); City of San Antonio v. Pigeonhole Parking, 158 Tex. 318, 311 S.W.2d 218 (1958); Gulf Ref. Co. v. Dallas, 10 S.W.2d 151 (Tex. Civ. App. 1928) *error dismissed*.

³² Fowler v. City of Nelson, 213 Mo. App. 82, 246 S.W. 638 (1923).

³³ Bowling v. City of Somerset, 333 S.W.2d 769 (Ky. Ct. App. 1960).

a steep ramp would have created a substantial safety hazard and would have materially impeded the flow of traffic.

Another variation of the problem came to light in the situation of a retaining wall being erected to support an overpass.³⁴ This resulted in the reduction in width of the street on which the owner's property faced from forty-nine feet to twenty-six feet and the conversion of a two-way street into a one-way street. As a result only smaller trucks could back up in front of his property for the receiving and delivering of merchandise. The court stated that, "No case has been cited, and we have found none, which holds the inability of certain types or sizes of vehicles to go and return from the abutting property constitutes a denial of access."³⁵ Access is merely a matter of degree, and so long as there is reasonable access, the police power will be sustained.

III. ZONING ORDINANCES AND AESTHETIC CONSIDERATIONS

There has been a continual changing of view and attitude by the courts in the regulation of property in the urban area. This has been necessitated by the changes in the uses of properties. Mainly, the congregation and intense use of property require that the public interest protect individuals against each other and themselves. Many of these changes have been reflected in zoning ordinances.

Aesthetic considerations alone are normally not sufficient to allow the city to regulate the use of property, because what is aesthetic and appealing to one is a disgrace or a thing of ugliness to another. The New York Court of Appeals in a recent decision was faced with a zoning ordinance which explicitly prohibited "non-accessory" signs throughout the township, but allowed an accessory sign (a sign which was related to the business on the same lot with the sign).³⁶ The ordinance was attacked as arbitrary and unreasonable and therefore an unconstitutional deprivation of private property. The court, in overruling a previous decision,³⁷ upheld the ordinance in question and pointed out that although the Constitution does not change with the times, whether or not an ordinance is constitutional may depend upon the reasonableness of the legislation. Circumstances, surrounding conditions, changed social attitudes and newly-acquired knowledge do not alter the Constitution, but they do alter one's view of what is reasonable. Those restrictions upon the use of property which were deemed unreasonable in 1909 may today be regarded as entirely reasonable and natural. The court accepted the fact that aesthetic enhancement of a particular area, if in some manner related to the economic and cultural setting of the community, may be the primary or moving force behind such an ordinance. A previous case relied on was one in which the city ordinance prohibited the erection of clothes lines in certain areas of the residential

³⁴ *Moorlane Co. v. State*, 360 S.W.2d 918 (Tex. Civ. App. 1962) *error ref.*

³⁵ *Id.* at 920.

³⁶ *Cromwell v. Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967).

³⁷ *Mid-State Advertising Corp. v. Bond*, 274 N.Y. 82, 8 N.E.2d 286 (Ct. App. 1937).

districts.³⁸ The court had held that the ordinance was valid even though its obvious purpose was almost exclusively aesthetic.

Aesthetics have now come to be considered a valid subject of legislative concern, although many courts do not uphold ordinances in which it is the only concern.³⁹ Reasonable regulations, with aesthetics as their basis, will certainly be valid and held to be a permissible use of the police power of the city. More and different types of legislation will develop. With the advent of the new Federal Highway Act,⁴⁰ it appears that the federal government, as well as the local government, is coming into the field of aesthetics.

IV. OTHER CONTROLS

A. *Plumbing Codes*

Plumbing codes, enacted by the city council, have been held a proper exercise of the police power.⁴¹ These codes are upheld on the ground that they preserve and protect the public safety, health, comfort or morals. As one court has stated:

A local legislative body may, in the exercise of its police power, make and enforce ordinances to regulate or prohibit a thing or act which is of such a nature that it may become a nuisance or may be injurious to the public health if not suppressed or regulated. The exercise of the police power is not limited to the regulation of such things as have already become nuisances or have been declared to be such by the judgment of a court.⁴²

Plumbing codes are particularly applicable to the methods and devices for the conveyance of sewage from private dwellings in municipalities. Courts have held that plumbing includes the pipes, the fittings and the fixtures for the conveyance of sewage, and therefore gives the city the right to designate the type, kind and manner of construction.⁴³ The city may also require the residents to discontinue the use of a septic tank which has become unsanitary, and may require the residents to tie onto the municipal or private utility sewer line.⁴⁴ All proper measures reasonable to effectuate sanitation are within the police power of the city.⁴⁵

B. *Removal of Gravel, Sand or Top Soil*

One of the problems which often faces a city is the removal of large

³⁸ *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963) (the court traces the complete history of the treatment of ordinances designed to satisfy aesthetic objectives).

³⁹ *General Outdoor Advertising Co. v. Department of Public Works*, 289 Mass. 149, 193 N.E. 799 (1935); *Dowsey v. Village of Kensington*, 245 N.Y.S. 819 (App. Div. 1930), *aff'd*, 257 N.Y. 221, 177 N.E. 427 (Ct. App. 1931); *State v. Brown*, 250 N.C. 54, 108 S.E.2d 74 (1959); *Lombardo v. City of Dallas*, 124 Tex. 1, 73 S.W.2d 475 (1934).

⁴⁰ 23 U.S.C. § 131 (1966).

⁴¹ *Shropshire v. Peery*, 60 Ariz. 530, 141 P.2d 852 (1943); *McGowen v. Shaffer*, 111 N.E.2d 615 (Ohio C.P. 1953).

⁴² *Sullivan v. City of Los Angeles Dept. of Bldg. & Safety*, 116 Cal. App. 2d 807, 254 P.2d 590, 592 (1953).

⁴³ *Thrift Hardware & Supply Co. v. City of Phoenix*, 71 Ariz. 21, 222 P.2d 994 (1950); *City of Spokane v. Latham*, 181 Wash. 161, 42 P.2d 427 (1935).

⁴⁴ *Spear v. Ward*, 199 Ala. 105, 74 So. 27 (1917); *Nourse v. City of Russellville*, 257 Ky. 525, 78 S.W.2d 761 (Ct. App. 1935).

⁴⁵ *Collins v. City of Eldorado*, 122 S.W.2d 690 (Tex. Civ. App. 1938) *error ref.*

deposits of gravel, sand or top soil, leaving unsightly, sometimes dangerous, and sometimes unhealthy, conditions. An individual cannot be deprived of the use of his property, *i.e.*, not only the ownership and possession, but also the unrestricted right of the use, enjoyment and disposal thereof, except by a proper exercise of the police power.⁴⁶ This exercise must be for the protection of the health, safety, comfort and general welfare of the public, since it must be founded upon public necessity.⁴⁷

The city of Waco passed an ordinance which made it unlawful for any person to make an excavation or cause to be made any excavation upon any premises within the city for the purpose of "removing from such premises, dirt, gravel or any other natural substance in the soil of any premises."⁴⁸ When the ordinance was attacked, the court pointed out that there were only certain circumstances under which an ordinance such as this could be validly passed as an adjunct of the police power.⁴⁹ The court used such examples as:

- (a) being too near the public streets, alleys or passageways of the city so as to endanger the traveling public; or
- (b) the using of explosives so as to endanger the persons or property in the vicinity of the operation; or
- (c) allowing water to accumulate to endanger the persons or property in the vicinity of the operation; or
- (d) allowing water to accumulate in the hole actually being dug.

None of these appeared to be present in the application of the Waco ordinance; it simply attempted to make a nuisance of the mining operation itself. The court stated that, "We do not see how said gravel pit, properly operated, can be held a nuisance in itself or likely to injuriously affect the public in any manner within the authority of the city in the exercise of its police power to regulate or prohibit. It is true it might be so operated as to render it a nuisance."⁵⁰ The court re-emphasized the general proposition that what is not a nuisance in fact cannot be declared a nuisance. Of course, it is possible for the city to enact a proper ordinance prohibiting mining operations under certain conditions or making certain requirements of the owner of the property to properly protect the public.

A United States Supreme Court case presents an example of the type of ordinance that has been upheld.⁵¹ The owner of a thirty-eight-acre tract of land in the town of Hempstead, New York, had been mining his lot for sand and gravel since 1927. He had deepened it to the extent that it constituted a twenty-acre lake with an average depth of twenty-five feet. During the time that his mining operations had continued, the town had expanded around his excavation so that within a radius of 3,500 feet, there were, at the time of the trial, four public schools with a combined enrollment of 4,500 pupils, and more than 2,200 homes. The ordi-

⁴⁶ *Stone v. Kendall*, 268 S.W. 759 (Tex. Civ. App. 1925).

⁴⁷ *Id.* at 761.

⁴⁸ *Id.* at 760.

⁴⁹ *Id.* at 761.

⁵⁰ *Id.*

⁵¹ *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

nance of the city prohibited any excavation below two feet above the maximum ground water level at the place of excavation. The purpose of the ordinance was to prohibit mining into ground water, with a resultant standing of water and lowering of the water table and the danger to the public resulting therefrom. The Supreme Court, conceding that the ordinance completely prohibited a beneficial use to which the property had been previously devoted, upheld the regulation. Nor was it of controlling significance that the prohibition in this particular case was of a use of the soil itself as opposed to a use upon the soil.

The fact that the property value may be diminished is not the deciding factor. The test is whether or not the legislative body is exercising reasonable measures in the passage of the legislation. If there is a debatable question, it is not one for the courts, but for the legislature to determine.⁵²

C. *Drilling of Oil and Gas Wells*

The same principle has been applied to the drilling of oil and gas wells within the city limits. In Texas this is controlled by a statute which prohibits the drilling of oil or gas wells in a thickly settled portion of a city or within 200 feet of any private residence.⁵³ In other states it has been handled by cases which hold that a city has a right to either regulate the drilling of the wells within its corporate limits or to prohibit them from being drilled in specified territories or zones.⁵⁴

D. *Contamination of the Atmosphere*

The aesthetic interest and the health of the community are commingled in those ordinances which deal with the contamination of the atmosphere by smoke, dust, soot, grime, ashes and other gases and vapors. Contamination has become a substantial problem in the urban areas, and the city is attempting to regulate and deal with it daily. Even most of the earlier cases held that regulation of the supply or use of smoke-producing fuels and the emission of smoke was a proper exercise of the police power.⁵⁵ More often than not these powers were within the charter power of the municipal corporation. If not, they might come under some of the health powers—or certainly under the police power. The municipal corporation must look to the general statute or its charter for this power, either in specific or general terms. It might also be included in the authority to abate nuisances.⁵⁶

From necessity, this type of regulation must be delegated to some type of administrative agency or to the building inspector or to some such individual. The reasonableness of this delegated power is, of course, subject to

⁵² *Sproles v. Binford*, 286 U.S. 374 (1932).

⁵³ TEX. REV. CIV. STAT. ANN. art. 1267 (1963).

⁵⁴ *Marblehead Land Co. v. City of Los Angeles*, 47 F.2d 528 (9th Cir.), cert. denied, 284 U.S. 634 (1931); *Van Meter v. Westgate Oil Co.*, 168 Okla. 200, 32 P.2d 719 (1934).

⁵⁵ *Martin Bldg. Co. v. Imperial Laundry Co.*, 220 Ala. 90, 124 So. 82 (1929); *State v. Luce*, 14 Del. (9 Houst.) 396, 32 A. 1076 (1885); *Department of Health v. Ebling Brewing Co.*, 38 Misc. 537, 78 N.Y.S. 13 (N.Y. Mun. Ct. 1902).

⁵⁶ *Penn-Dixie Cement Corp. v. City of Kingsport*, 189 Tenn. 450, 225 S.W.2d 270 (1949).

judicial review. Since some discretion is vested in the public official or public body,⁵⁷ the terms and conditions under which the discretion is to be exercised should be particular in nature. Otherwise there might be an unlawful discretion vested in him.⁵⁸

Smoke control regulations which prohibit the operation of a train by a steam locomotive engine, or which prohibit other power-producing machines or devices emitting smoke or steam have been found to be unreasonable.⁵⁹ A regulation such as this disturbs the full enjoyment of a personal right without providing compensation therefor. However, it does not necessarily violate the due process clause of the federal or of the state constitutions. The ordinance will be held to be unconstitutional if there is no known appliance or practicable method of doing what is required by the ordinance.⁶⁰

More of these ordinances might be expected in the future since the states are already looking to the control of hazardous smoke and automobile exhaust.

E. Minimum Housing Standards

It has been a common practice for the cities throughout the United States to adopt what are often referred to as "minimum housing standards."⁶¹ These are standards that are set forth as minimums for inhabited buildings and particularly for dwelling units.

The city of Louisville has such an ordinance which requires that each dwelling unit be equipped with an inside bathroom and that each sink, lavatory basin, bathtub and shower be connected to hot and cold water lines, with water heating facilities.⁶² When the statute was tested, the court stated that, "A valid exercise of the police power resulting in expense or loss of property is not a taking of property without due process of law or without just compensation, nor does it abridge the equal protection clause of the 14th amendment."⁶³ The Kentucky court based its decision upon the theory set forth in the Supreme Court case of *Berman v. Parker*.⁶⁴ The Supreme Court stated in *Berman* that miserable and disreputable housing conditions may spread disease, crime and immorality and may even reduce the "people who live there to the status of cattle."⁶⁵ The Supreme Court appears to have laid at rest the question as to whether or not minimum housing ordinances are enforceable.

A real problem is presented when a minimum housing ordinance is made retroactive. Generally these laws do not have that effect if there is

⁵⁷ Board of Health v. New York Cent. R.R., 4 N.J. 293, 72 A.2d 511 (1950).

⁵⁸ City of Kankakee v. New York Cent. R.R., 387 Ill. 109, 55 N.E.2d 87 (1944).

⁵⁹ City of Buffalo v. New York Cent. R.R., 125 Misc. 801, 212 N.Y.S. 1 (Sup. Ct. 1925), 218 App. Div. 810, 218 N.Y.S. 713 (1926), *aff'd without opinion*, 271 N.Y. 658, 3 N.E.2d 471 (1936).

⁶⁰ Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

⁶¹ AUSTIN, TEXAS, CODE § 14.17 (1954); DALLAS, TEXAS, REV. CIV. & CRIM. CODE ch. 27 (1961).

⁶² Louisville, Ky., Minimum Standards for Habitable Buildings (1954 as amended).

⁶³ City of Louisville v. Thompson, 339 S.W.2d 869, 872 (Ky. Ct. App. 1960).

⁶⁴ 348 U.S. 26 (1954).

⁶⁵ *Id.* at 32.

a reasonable time or a grace period in which the affected parties are allowed to comply, ordinarily a reasonable time after notice of the violation is actually given. Most ordinances contain similar provisions.

F. Regulation of Doors

Of the many cases that involve statutes and ordinances regarding doors and the kinds of doors to be installed, there have been very few which have actually attacked the validity of the ordinance itself. However, there are two cases that are worthy of note. In one the statute required factory doors to be constructed so as to open outward where practicable and to be kept unlocked during working hours.⁶⁶ The contention was made that the statute deprived the factory owner of his property without due process of law in violation of the state and federal constitutions, and that it was harsh and unreasonable. However, the court held that the statute was a valid exercise of the police power of the state. In a more noted case,⁶⁷ the question involved a portion of the building code which provided that rolling, double-acting, sliding or revolving doors should not be used as a means of egress from workshops, factories or mercantile establishments. The portion of a six-story building to be occupied by a five-and-ten-cent store provided for double-acting doors at the street entrance. Plans showed the doors as swinging outward only and appeared to comply. When the actual doors were discovered, the building permit was vacated. The court applied the familiar rule that the judiciary will interfere with the action of the legislative body only when it is plain and palpable that there is no real or substantial relation to the public health, safety, morals or to the general welfare. The evident purpose of the rule was to provide a door that opened only outward in the event of fire. Many cities have a similar ordinance.

V. CONCLUSION

It is not likely that there will be a lessening of the power of the municipal corporation insofar as the controls of private property rights for the benefit of the common good are concerned. It is far more likely that the powers will be increased. This places a responsibility upon the local government to exercise with caution and discretion those controls that are within its power. It behooves the individual property owner to buy with knowledge and to understand that his participation in local government is no longer a privilege but becomes a duty that devolves upon him. New cities are not necessarily the answer to our urban problem, but new and refreshing ideas and approaches can be of extreme benefit to the individual and his society.

⁶⁶ *People v. Harris*, 74 Misc. 353, 134 N.Y.S. 409 (Ct. Gen. Sess. 1911).

⁶⁷ *City of Dayton v. S.S. Kresge Co.*, 114 Ohio St. 624, 151 N.E. 775 (1926).

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