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## Municipal Corporations - Billboards - Zoning Ordinance Prohibiting Billboards Excepts Those Advertising Business Conducted on the Premises

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MUNICIPAL CORPORATIONS — BILLBOARDS — ZONING ORDINANCE PROHIBITING BILLBOARDS EXCEPTS THOSE ADVERTISING BUSINESS CONDUCTED ON THE PREMISES. — Plaintiff, an outdoor advertising company, leased the roof above a drugstore. The Zoning Division refused him a permit to erect on the leased premises a billboard for general advertising purposes because it was not an accessory use<sup>1</sup> incidental to the business conducted on the premises, and in addition the public health, safety, morals and welfare would be affected. On appeal, the Supreme Court of Pennsylvania, one justice dissenting, reversed the Court of Common Pleas and *held*, that a billboard is not an accessory use unless it advertises the business conducted thereon. *Landau Advertising Co. v. Zoning Board of Adjustment*, 387 Pa. 552, 128 A.2d 559 (1957).

Ordinances and zoning ordinances that prohibit,<sup>2</sup> and regulate the location,<sup>3</sup> safety,<sup>4</sup> height,<sup>5</sup> size,<sup>6</sup> and esthetic aspects<sup>7</sup> of billboards have been held a valid exercise of the police power. But since such regulations and prohibitions of private property are a derogation of common law property rights,<sup>8</sup> the power to regulate billboards is not unlimited;<sup>9</sup> the prohibitions must be reasonable and must have a substantial relation to the public health, safety, morals and welfare.<sup>10</sup> The reasonableness of the regulations is the test of their legality.<sup>11</sup> Each case must be decided on its own facts.<sup>12</sup> Merely because the regulation is said to be salutary to the public health, safety, morals and welfare does not permit meddlesomeness.<sup>13</sup>

The courts make a distinction between billboard ordinances as such and billboard ordinances which are part of a comprehensive

1. (The zoning ordinance sets forth uses allowed in "A" Commercial districts and though billboards are not included accessory uses thereof are permitted).

2. *Murphy Inc. v. Town of Westport*, 131 Conn. 292, 40 A.2d 177 (1944); *General Outdoor Advertising Co. v. Department of Public Works*, 290 Mass. 149, 193 N.E. 799 (1935).

3. *General Outdoor Advertising Co. v. Department of Public Works*, *supra* note 2; *Appeal of Liggett*, 291 Pa. 109, 139 Atl. 619 (1927).

4. *Anderson v. Shackelford*, 74 Fla. 36, 76 So. 343 (1917); *City of Passaic v. Paterson Billposting Co.*, 71 N. J. 75, 58 Atl. 343 (1904).

5. *Murphy Inc. v. Town of Westport*, 131 Conn. 292, 40 A.2d 177 (1944); *City of Rochester v. West*, 164 N. Y. 510, 58 N.E. 673 (1900).

6. *Cusack Co. v. Chicago*, 242 U. S. 526 (1917); *Gunning Advertisement Co. v. St. Louis*, 235 Mo. 99, 137 S.W. 929 (1911).

7. *General Outdoor Advertising Co. v. Department of Public Works*, 289 Mass. 149, 193 N.E. 799 (1935).

8. 8 McQuillin, *Municipal Corporations* § 25.72 (3d ed. 1950).

9. *State v. Whitlock*, 149 N. C. 542, 63 S.E. 123 (1908).

10. *General Outdoor Advertising Co. v. Indianapolis*, 202 Ind.85, 172 N.E. 309 (1930).

11. *Moreland v. Armstrong*, 297 Mich. 32, 297 N.W. 60 (1941).

12. See *Pere Marquette Ry. Co. v. Muskegon Township*, 298 Mich. 31, 298 N.W. 393 (1941).

13. *Appeal of White*, 287 Pa. 259, 134 Atl. 409 (1926).

zoning plan.<sup>14</sup> The tendency is to strike down the former<sup>15</sup> and uphold the latter.<sup>16</sup> In *O'Mealia Outdoor Advertising Co. v. Borough of Rutherford*<sup>17</sup> an ordinance prohibiting billboards except on premises where the business advertised is conducted was held invalid as an unreasonable exercise of the police power. However, in *United Advertising Corp. v. Borough of Raritan* a zoning ordinance with similar provisions to that of the *O'Mealia* case, *supra*, was held reasonable in that it minimizes "the abuses and hazards incident to the use of such signs".<sup>18</sup>

It appears that the general trend of the court's decisions is to liberally construe regulations that restrict the use of private property<sup>19</sup> because of the changing needs of changing times,<sup>20</sup> and to uphold regulations which formerly would have been arbitrary, unreasonable and unconstitutional.<sup>21</sup> But it should be noted that even the courts that construe such regulations liberally recognize that the ordinance must be reasonably related to the public welfare.<sup>22</sup> The public must obtain a benefit at least equal to the onus placed on private property.<sup>23</sup>

It is submitted that the position taken by the dissent in the instant case, that the regulation was unreasonable and arbitrary,<sup>24</sup> is the sounder view. The advertising matter on the billboard was made the test. If billboards are permitted, the advertising thereon

14. See *Murphy Inc. v. Town of Westport*, 131 Conn. 292, 40 A.2d 177 (1944). 2 Yokley, *Zoning* § 217 (2d ed. 1953).

15. See *Varney and Green v. Williams*, 155 Cal. 318, 100 Pac. 867 (1909); *O'Mealia Outdoor Advertising Co. v. Borough of Rutherford*, 128 N. J. L. 587, 27 A.2d 863 (Sup. Ct. 1942); *Mid-State Advertising Corp. v. Bond*, 274 N.Y.82, 8 N.E.2d 286 (1937); *People v. Wolf*, 127 Misc. 382, 216 N.Y.S. 741 (Nassau County Ct. 1926); *cf. People ex rel. Wineburgh Advertising Co. v. Murphy*, 195 N. Y. 126, 88 N.E. 17 (1909); *but see* 1 Hetzenbaum, *Zoning, c. VI-f* (2d ed. 1955), who states that *People ex. rel. Publicity Listing Co. v. Dudwig*, 218 N. Y. 540, 113 N.E. 532 (1916) in an attempt to distinguish between the two cases overruled the Wineburgh case by a judicial courtesy.

16. See *Murphy Inc. v. Town of Westport*, 131 Conn. 292, 40 A.2d 177 (1944); *Criterion Service Inc. v. East Cleveland*, 88 N.E.2d 300 (Ohio 1949); *United Advertising Corp. v. Borough of Raritan*, 11 N. J. 144, 93 A.2d 362 (1952).

17. 128 N. J. L. 587, 27 A.2d 863 (Sup. Ct. 1942).

18. 11 N. J. 144, 93 A.2d 362 (1952).

19. *Murphy Inc. v. Town of Westport*, 131 Conn. 292, 40 A.2d 177 (1944); See *Midgarden v. City of Grand Forks*, 79 N.D.18, 54 N.W.2d 659 (1952) (Zoning ordinance that prohibits trailer homes in a residential zone held valid though plaintiff's premises were subject to floods and were generally not suitable to permanent dwellings.); 8 McQuillin *supra* § 25.73. But some courts adhere to a strict construction. 8 McQuillin *supra* § 25.72 (In Missouri strict construction was abolished in 1917. 8 McQuillin *supra* § 25.72, n. 72).

20. *Murphy Inc. v. Town of Westport*, *supra* note 19; 8 McQuillin, *supra* note 19.

21. *State ex rel. Beery v. Houghton*, 164 Minn. 146, 204 N.W. 569 (1925).

22. 8 McQuillin, *Municipal Corporations* § 25.73 (3d ed. 1950).

23. *West Hartford Methodist Church v. Zoning Board of Appeals*, 143 Conn. 263, 121 A.2d 640 (1956).

24. 128 A.2d at 564 (The dissenting justice indicated that the owner of the drugstore could construct a billboard of the size in question if it advertised the drugstore or any article sold therein. The sign could read, "Buy Old Grandad Below and Live to be Eighty", but it could not read, "Drive Safely and Live Longer").

should not be prohibited unless it is contrary to good morals or against public policy. There is difficulty in discerning the difference between advertising the business of the occupier or the business of another; it may be a distinction without a difference. It is not the letter, word or model that endangers the public; it is the structure upon which it is attached that may be dangerous.<sup>25</sup> The ordinance in the instant case permits one type of advertising and forbids another; it does not promote the public health, safety, morals and welfare and it does not remedy an existing evil.<sup>26</sup>

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PROCESS — SERVICE UPON NONRESIDENT MOTORIST — INTERPRETATION OF APPLICABLE STATUTE. — A filling station attendant brought an action against a nonresident motorist to recover for scalds and burns suffered while servicing the motorist's automobile at a gasoline service station. The Circuit Court of Arkansas entered an order sustaining motion to quash service and the attendant appealed. The Supreme Court of Arkansas *held*, that the nonresident motorist was not amenable to substituted service of process in the state under the Nonresident Motorist Statute<sup>1</sup> since the alleged cause of action arose out of an accident which occurred upon private property and not upon the public highway as the statute expressly requires.<sup>2</sup> *Langley v. Bunn*, 284 S.W.2d 319 (Ark. 1955).

The constitutionality of states' regulation of nonresident motorists as a police power has long been decided and is not an issue in this case.<sup>3</sup> The issue is the interpretation of the wording of the statutes by the courts. Nonresident' service statutes have been interpreted both strictly<sup>4</sup> and liberally.<sup>5</sup> However the majority of courts have

25. *People ex rel. Wineburgh Advertising Co. v. Murphy*, 195 N. Y. 126, 88 N.E. 17 (1909).

26. *People v. Wolf*, 127 Misc. 382, N.Y.S. (Nassau County Ct. 1926) (ordinance that prohibited signboards on vacant lots except to advertise the sale of such lot held invalid.).

1. Ark. Stat. Ann., § 27-342.1 (1955) "The acceptance by a nonresident owner of the rights and privileges to drive or operate a motor vehicle upon the public highway of this State shall be deemed equivalent to the appointment of the Secretary of the State of Arkansas to be the true and lawful attorney and agent of such nonresident upon whom may be served all lawful process in any action growing out of accident or collision in which said nonresident may be involved while operating a motor vehicle on such highway."

2. Ark. Stat. Ann., § 27-341.1 (1953) "Any public highway within the borders of the State of Arkansas including byways, county highways, State highways, roads or highways in national parks and roads or highways in military reservations whether used conditionally or unconditionally by the public."

3. *Wuchter v. Pizzutti*, 276 U.S. 13; *Kelso v. Bush*, 191 Ark. 1044, 89 S.W.2d 594 (1936); *Pawloski v. Hess*, 253 Mass. 478, 144 N.E. 760 (1924).

4. *Kelley v. Koetting*, 164 Kan. 542, 190 P.2d 361 (1948).

5. *Gallagher v. Dist. Court of 6th Judicial Dict.*, 112 Mont. 253, 114 P.2d 1047 (1941).