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# Requiring Preservation and Maintenance of Historical District Is Within Zoning Power

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# Requiring Preservation and Maintenance of Historical District Is Within Zoning Power

In *Maher v. New Orleans,*[1] the U.S. Court of Appeals for the Fifth Circuit considered the constitutionality of a municipal zoning ordinance regulating the preservation and maintenance of a historical district.[2] A three-judge panel[3] held that the New Orleans City Council's Vieux Carre Ordinance[4] was constitutional, since it provided enough objective criteria to determine which buildings in the Vieux Carre had historical and architectural value,[5] and that the ordinance did not unconstitutionally take property, either on its face or as applied to Maher.[6]

The plaintiff, Morris Maher, a Vieux Carre landowner, instituted this suit after he was rebuffed by the New Orleans City Council, two Louisiana courts[7] and a federal district court[8] in his attempt to demolish a Victorian Cottage and replace it with a seven-apartment, Spanish-style addition to his home. Maher asserted that the ordinance violated the Constitution's Fifth-Amendment Due Process Clause, since the discretionary power to preserve the "quaint and distinctive character of the Vieux Carre"[9] did not provide the Vieux Carre Commission with enough objective administrative standards to determine which buildings had historical and architectural value. The plaintiff also contended that the ordinance, under the guise of being regulatory, was actually a taking of his property under the city's eminent-domain power, because it imposed an affirmative duty of maintenance upon the property owner[10] and "prohibited any economically reasonable use of the property."[11]

Preserving historical sites and landmarks is a proper use of the eminent-

1. 516 F.2d 1051 (5th Cir. 1975), *cert. denied,* ___ U.S. ___, 96 S. Ct. 2225 (1976).

2. The court said *Maher* was the first reported case in the federal courts of appeals to determine the constitutionality of laws preserving historical districts.

3. One judge from the Third Circuit was sitting by designation.

4. NEW ORLEANS, LA., Code §65-1 through §65-33 (1940). The Vieux Carre Ordinance, authorized by art. XIV, §22 of the Louisiana Constitution, created a nine-member commission charged with preserving "such buildings in the Vieux Carre [French Quarter] section of the city, as in the opinion of the Commission, shall have architectural and historical value and which should be preserved for the benefit of the people of the city and the state." Maher v. New Orleans, 371 F. Supp. 653 at 654-655 (E.D. La. 1974).

5. 516 F.2d at 1067.

6. *Id.*

7. For details on the history of the request for a demolition permit and subsequent actions, see Maher v. New Orleans, 256 La. 131, 135 So. 2d 402 (1970), *aff'g* 222 So. 2d 608 (La. App. 1969).

8. 371 F. Supp. at 653.

9. *Id.* at 663.

10. 516 F.2d at 1065.

11. 371 F. Supp. at 662.

domain power.[12] *United States v. Gettysburg Electric Ry.*[13] firmly established this principle in 1896, when the federal government condemned railroad land to create the Gettysburg National Military Reservation. Since eminent domain requires compensation, however, it is cost-prohibitive for states and municipalities. States and local governments have turned instead to the police powers, most notably zoning restrictions, to protect historical sites without having to pay compensation.[14]

*Village of Euclid v. Ambler Realty Co.*[15] is the landmark zoning case. Ambler Realty argued that Euclid's comprehensive zoning ordinance violated the Fourteenth-Amendment Due Process Clause. The Supreme Court, however, held that zoning plans were proper exercises of the police power, if they were not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."[16] The Court noted that "[p]roblems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities."[17]

The *Euclid* principle was expanded to include aesthetic consideration in *Berman v. Parker*,[18] in which the Supreme Court upheld redevelopment legislation for the District of Columbia. This opening wedge has led some states to sustain the validity of zoning restrictions solely on the basis of aesthetics; yet most states allow aesthetics as only one of several considerations.[19]

Interest in preserving historical sites has gained support in recent years, especially among the states. The Supreme Court of New Mexico in *City of Santa Fe v. Gamble-Skogmo, Inc.*[20] upheld Santa Fe's right to create a historical district without express legislative authority under the general-welfare phrase of the state's zoning enabling act. The court thus affirmed a criminal conviction for violation of the building code for that historical district. Every state now has some form of historic-preservation law.[21] The federal government showed its interest in historic preservation by passing the National Historic Preservation Act of 1966,[22] which provides for the establishment of a National Register of historic sites, districts and structures. (The Vieux Carre district is included in this register.) The Act pro-

12. *See* Note, *Use of Zoning Restrictions to Restrain Property Owners from Altering or Destroying Historical Landmarks*, 1975 DUKE L.J. 999 (1975).
13. 160 U.S. 668 (1896).
14. 1975 DUKE L.J. at 1000. *See also* Annot., 41 A.L.R.3d 1397 (1972).
15. 272 U.S. 365 (1926).
16. *Id.* at 395.
17. *Id.* at 386, 387.
18. 348 U.S. 26 (1954).
19. *See* Annot., 21 A.L.R.3d 1222 (1968).
20. 73 N.M. 410, 389 P.2d 13 (1964).
21. 1975 DUKE L.J. at 999 n. 3.
22. 80 Stat. 915 (1966), 16 U.S.C.A. §§ 470-470n (1974).

vides financial encouragement to protect historical lands and buildings at the state and local level and established an Advisory Council on Historic Preservation to coordinate public and private preservation efforts.

Once a zoning regulation has satisfied the general tests applicable to the scope of the police power, the major question is whether a zoning law requiring preservation and maintenance of historic property is an unconstitutional, uncompensated taking. The Supreme Court established some guidelines in *Mugler v. Kansas,*[23] which arose after the state forbade the sale or manufacture of intoxicating liquors for all but medicinal purposes. The plaintiff's land had lawfully been used as a brewery; he contended the new Kansas law took his property without compensation, since the law destroyed the purpose for which the land had been used and almost completely diminished the value of the property. Justice Harlan, speaking for the Supreme Court, said:

> Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it . . . . The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not . . . burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain.[24]

Since the government was merely restricting the uses to which plaintiff's property could be put and had not actually confiscated the land, there was no "taking" and no need for compensation.

This rationale was expanded by Justice Brandeis in his dissent in *Pennsylvania Coal Co. v. Mahon.*[25] "Every restriction upon the use of property imposed in the exercise of the police power," he wrote, "deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgement by the state of rights in property without making compensation."[26] Restrictions imposed to protect the public health, safety or morals were not confiscatory if they were appropriate means to achieve the public end. Justice Brandeis said the restrictions prevented the property owner from using his land in a way that interfered with the public's rights. If the

23. 123 U.S. 623 (1887). *See also* Sax, Takings and the Police Power, 74 YALE L.J. 36 (1964).

24. 123 U.S. 629. This non-compensation rationale is more popularly referred to as the "obnoxious use" test and is one of three tests currently employed by the courts when considering whether a taking has occurred. *See* 1975 DUKE L.J. at 1003 n. 20.

25. 260 U.S. 393 (1922). Justice Holmes wrote in the majority opinion what has now become the diminution-in-value theory: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. . . . [S]ome values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone." 260 U.S. at 413.

26. *Id.* at 417.

public's rights changed, the offending private use might once again be legal.

The ideas of *Mugler* and *Pennsylvania Coal* were reiterated in *Goldblatt v. Town of Hempstead.*[27] A unanimous Supreme Court upheld Hempstead's right to regulate excavation below the water line, even though the regulation might force a sand-and-gravel company to cease operations on its 38-acre tract. The zoning ordinance was valid because it was related to public safety, the Court said, and the defendant failed to overcome a presumption that the exercise of police power in this manner was proper. This case stands for two propositions: (1) Depriving property of its most beneficial use does not render an otherwise valid exercise of the police power unconstitutional; and (2) while there is not a definitive standard "to determine where regulation ends and taking begins . . . [t]o justify the state in interposing its authority in behalf of the public it must appear — first that the interests of the public . . . require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals."[28]

In deciding *Maher,* the Court began its analysis by determining whether the Vieux Carre Ordinance was a proper exercise of the police power and whether the police-power objective was legitimate. Relying on *Euclid* and *Berman,* the court said the police powers were "rich and flexible" and that "a legislature has the authority to respond to economic and cultural developments cast in a different mold and to essay new solutions to new problems."[29] The judges noted that many states, plus the federal government, considered historical preservation to be a legitimate state concern.[30] The values advanced by use of the police power did not have to be directed especially toward economics, health or safety in their "narrowest sense," they said; instead, police power values were "spiritual as well as physical, aesthetic as well as monetary."[31]

In *Stone v. City of Maitland,*[32] the Fifth Circuit had said a zoning ordinance may be sustained under the police power even though it was designed only to "enhance the aesthetic appeal of a community" and to maintain the "value of scenic surroundings" and "the preservation of the quality of our environment."[33] The Vieux Carre Ordinance was one of the

27. 369 U.S. 590 (1962).

28. *Id.* at 594-595. The Court also said, "Although a comparison of values before and after is relevant, see *Pennsylvania Coal Co. v. Mahon, supra,* it is by no means conclusive, see *Hadacheck v. Sebastian* [239 U.S. 394 (1915)] where a diminution in value from $800,000 to $60,000 was upheld." *Id.* at 594. The Supreme Court has upheld other regulations that diminish the value of property in Walls v. Midland Carbon Co. 354 U.S. 300 (1920) (preservation of natural gas resources), and Lawton v. Steele, 152 U.S. 133 (1894) (fisheries).

29. 516 F.2d at 1059.

30. *Id.* at 1059-1060 n. 44.

31. *Id.* at 1060-1061, *quoting* Berman v. Parker, 348 U.S. at 33.

32. 446 F.2d 83 (5th Cir. 1971).

33. 516 F.2d at 1060, *quoting* Stone v. City of Maitland, 446 F.2d at 89.

first to use aesthetics as a major consideration in improving the value and the appeal of community life. The New Orleans French Quarter was also one of the nation's prime historic districts, registered in the National Register of Historic Places. Thus, nationwide sentiment for preserving the country's historical heritage led the Fifth Circuit to conclude that the objective of the Vieux Carre Ordinance fell within the police power.

To satisfy due process, the application of the objective had to be reasonable and not arbitrary. The court noted that the ordinance applied to a well defined geographic area; that it established a commission with defined methods of selection and defined qualifications; that the commission reviewed all plans for demolition, renovation or construction of the Vieux Carre and reported its recommendations to the Department of Safety and Permits, which either would or would not issue a permit; and that the ordinance provided for appeal to the City Council. The city admitted and the court recognized that no official standards were established to direct the commission in making its recommendations, but "concerns of aesthetics or historical preservation do not admit to precise quantification."[34] Citing *Berman,* the judges said the zoning purposes did not have to be drawn "to prejudge the outcome in each case, precluding reasonable administrative discretion."[35]

There were enough safeguards to provide proper guidelines and limit Commission arbitrariness. First, the Louisiana Supreme Court had considered this regulation in 1941 and interpreted its purpose as being "to preserve the antiquity of the whole French and Spanish quarter, the tout ensemble."[36] The mandate to preserve the distinctiveness of the Vieux Carre "takes clear meaning from the observable character of the district to which it applies."[37] Thus, commission members would be guided by objective standards such as historical records, pictures and studies on the "nature and appearance of the French Quarter at earlier times."[38] These facts, coupled with the requirement of historians, architects and other professionals on the Vieux Carre Commission and the provision for review of decisions by the City Council, limited arbitrariness. Therefore, the Fifth Circuit concluded that the zoning ordinance preserving the historical district did not violate the Due Process Clause, since it did not delegate unreasonable or arbitrary power to the Vieux Carre Commission.

The court also considered whether it was confiscatory to impose an affirmative duty of maintenance on an owner of historical property without

34. 516 F.2d at 1062.

35. *Id.*

36. City of New Orleans v. Pergament, 198 La. 853, ____, 5 So. 2d 129, 131 (1941), *quoted at* 371 F. Supp. at 663.

37. 516 F.2d at 1063. This language was adopted by the court from Town of Deering *ex rel.* Bittenbender v. Tibbets, 105 N.H. 481, 202 A.2d 232 (1964), in which a state court considered the zoning of a historical district.

38. 516 F.2d at 1063.

furnishing economic incentives. The Fifth Circuit said the Supreme Court had repeatedly made clear that an otherwise valid exercise of police power was not rendered unconstitutional simply because its enforcement kept property from achieving its full economic potential. Maher was unable to show the court that he could not receive a reasonable rental income or that he could not sell his property or that other potential uses of the land were foreclosed because of the zoning ordinance. That the owner might have to make out-of-pocket expenditures to remain in compliance with the regulation did not, per se, make the regulation taking. The maintenance requirement was likened to ordinances mandating fire sprinklers for safety and sewage disposal for health purposes.

Relying heavily on *Goldblatt,* the judges observed that a regulation prohibiting property uses "adverse to the public weal [was] not controlled by the doctrine of eminent domain."[39] Adopting reasoning from *Mugler,* the court said the state need not be burdened with compensating individual owners for their pecuniary loss. Refusal to grant the plaintiff a demolition permit and authority to replace the Victorian Cottage with a Spanish-style apartment was not constitutionally distinguishable from ordinances regulating building heights, set back requirements and use limitations, the court said. That owner might expend money in compliance with the ordinance and that his land may have been diminished in value were merely consequences of a rational means of achieving a legitimate state purpose.

Although a state could, of course, aid a landowner effected by the ordinance, it was not required to do so. Thus, the Fifth Circuit found the Vieux Carre Ordinance not to be an unconstitutional taking even though it required landowners to make repairs on their property. Yet the Court said that not "every application of such an ordinance would be beyond constitutional assault."[40]

*Maher v. New Orleans* surely is welcomed by the many cities across the country that have or contemplate zoning ordinances to maintain and preserve historical districts.

The court's reasoning is realistic, well thought out and succinctly developed. This decision can be justified on the more traditional grounds of community economic welfare,[41] although the court properly put greater emphasis on quality of life. Under the Fifth Circuit's rationale, the destruction of historic property can be considered a public harm to be checked by the flexible police power. *Maher's* strength is its balancing of individual and public rights,[42] apparent in the court's rationale. The decision, as it stands, offers a modicum of protection to the landowner, since his prior use of the historical land, if not obnoxious to the public weal, is

39. *Id.* at 1065.

40. *Id.* at 1067.

41. *See* 516 F.2d at 1061, where the court mentions a "legitimate economic and social policy." *See also* 371 F. Supp. at 663.

42. *Cf.* 1975 DUKE L.J. at 1018-1019.

protected. The state merely limits the property's future development, while requiring maintenance by the owner. Yet this strength is also the decision's weakness, since, according to the court, every application of an ordinance requiring maintenance would not be immune from constitutional assault. Unfortunately, the court does not provide guidelines for determining how onerous a maintenance duty could be without being a taking. Reliance on *Goldblatt* further exacerbates this weakness; in that case, the U.S. Supreme Court said that even a present use of property could be destroyed without paying compensation.

A further strength of *Maher's* balancing rationale is that it provides cities an opening wedge to use the police power to protect single buildings of significant historical or architectural importance. *Maher* rested firmly on the fact that a well-defined geographic area was involved; no tax credit or other alleviating device was needed to offset the maintenance duty, although "alleviating devices may be considered wise or fairer by a legislature which contemplates an historic preservation enactment."[43] A single building might be regulated and still avoid the obstacle of "spot" zoning if the maintenance duty were offset by a tax credit or another financial device and if the present use of the building were moderately protected. The zoning ordinance would be a proper means of attaining a legitimate state purpose without being unduly burdensome as applied. This proposition would further enhance the public's goal of preserving historical landmarks without the expense of eminent-domain proceedings.

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43. *Id.* at 1065-1066.