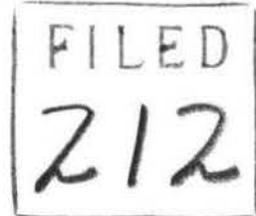


CITIES: The City of St. Charles has the power under
PLANNING: Chapter 89, RSMo 1959, to enact a zoning
ZONING: ordinance providing for an historical area.
HISTORICAL AREA:

OPINION NO. 212

September 14, 1965



Honorable Omer J. Dames ✓
State Representative
St. Charles County
RR 3, Box 76
O'Fallon, Missouri

Dear Representative Dames:

On April 28, 1965, you requested an opinion of this office as follows:

"Whether or not the City of St. Charles, a city of the third class, under the general statutes of the State of Missouri can under the law of the State of Missouri create a district under the zoning ordinances of the City of St. Charles wherein the architectural design of the present structures cannot be changed without prior approval of a named commission and wherein no new structures can be erected without prior approval of a named commission?"

We understand your inquiry to arise because of the desire to both restore and protect an historical area in the immediate vicinity of the First State Capitol of Missouri. This inquiry undoubtedly arises because of the recommendation of the State Park Board and the architect in charge of the restoration project for the First State Capitol of Missouri in which they made the following recommendations:

"Following the initial publication of this Restoration Plan, the Architect and the Missouri State Park Board recommended that the St. Charles City government enact a city ordinance which would establish a historic district in the area of the First Capitol buildings.

"This district would protect the state's investment in the First Capitol Restoration as well as preserve the original appearance

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of other nearby old buildings, which also will interest visitors to the Restoration.

" * * * Under the Historic District ordinance, specialized zoning regulations would preserve the historical integrity of the area around the First Capitol.

"The area proposed for the St. Charles Historic District would include the eight blocks on South Main Street from Madison Street to Boonslick Road. In addition to the First Capitol structures, this area contains many early 19th century buildings in a relatively good state of preservation."

Chapter 89, RSMo 1959, as amended, vests in all cities, towns and villages authority to provide for planning and zoning. Section 89.020, RSMo 1959, provides as follows:

"For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of all cities, towns, and villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, the preservation of features of historical significance, and the location and use of buildings, structures and land for trade, industry, residence or other purposes."

Chapter 89.040, RSMo 1959, provides as follows:

"Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to preserve features of historical significance; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other

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things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the values of buildings and encouraging the most appropriate use of land throughout such municipality."

It is to be observed that the state has delegated to cities a portion of its police power "for the purpose of promoting health, safety, morals or the general welfare of the community * * *". A number of cases in Missouri and many cases in other states have discussed the foregoing clause. In *Landau v. Levin*, 213 S.W.2d 483, 485, Division I of the Supreme Court in referring to the power of the city to enact zoning ordinances under the foregoing enabling act said:

"All use restrictions and legislative enactments of the city of this character must be not only reasonable, they must not discriminate. They must further fairly tend to be of value and have substantial relationship to some purpose for which the city may exercise its police power. *Glencoe Lime & Cement Co. V. City of St. Louis*, 341 Mo. 689, 108 S.W.2d 143."

Division II of the Supreme Court in *Downing vs. City of Joplin*, 312 S.W.2d 81, 85, said:

"It is obvious, without further elaboration, that the exercise of the police power, as evidenced by the zoning of the area here involved to the uses prescribed in the ordinance and under the circumstances shown by the record, was reasonably calculated to promote the health, safety, morals or the general welfare of the community. As stated in *Flora Realty & Investment Co. v. City of Ladue*, supra, 'the police power, as evidenced by the zoning ordinance, is not limited to the mere suppression of offensive uses of property, but may act constructively for the promotion of the general welfare.'"

And in *Kellog v. Joint Council of Women's Auxiliaries Welfare Ass'n.*, Mo., 265 S.W.2d 374, 377, the Supreme Court stated the proposition in the following language:

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"A court will not disturb legislative or administrative action in zoning unless beyond reasonable doubt the action is an abuse of discretion or an excess of power, having no substantial relation to the evils to be remedied or to the public health, safety, and welfare or other proper object of the police power."

Many cases have been examined from this and other states but it is clear that the well-settled rule is that if the purpose of the zoning restrictions have a legitimate relation to public health, safety, morals or general welfare of the community the zoning restrictions of the city will be upheld as valid.

There is a theme, however, that runs through a few cases to the effect that where the zoning restriction is based solely upon aesthetic considerations then the zoning law will be declared invalid by the courts. See for example *City of St. Louis v. Friedman*, 216 S.W.2d 475, 478, and *State ex rel Magidson v. Henze*, 342 S.W.2d 261, 265.

As we view the matter, however, the problem presented should be decided on broader grounds than whether aesthetic considerations alone are involved. A number of cases in other states have upheld zoning regulations in order to preserve and carry on the historical character of the neighborhood. These cases have been largely predicated upon the general welfare of the community doctrine. See Opinion of the Justices to the Senate of Massachusetts, 128 N.E.2d 557, upholding the establishment of a historic district in the town of Nantucket, Massachusetts, *City of New Orleans v. Impastato*, 3 So. 2d 559 (La.), *City of New Orleans v. Levy*, 64 So. 2d 679 (La.), *Civello v. City of New Orleans*, 97 So. 440 (La.), *State ex rel Saveland Park Holding Corporation*, 69 N.W.2d 217 (Wisc.), *Santa Fe v. Gamble-Skogmo, Inc.*, Pac.2d 13 (N.M.), and *In Re Opinion of the Justices (Mass.)*, 169 A.2d 762.

A number of cities have enacted ordinances which undertake to preserve intrinsic value of the historic monuments, places, and structures. Examples of such ordinances are New Orleans, Louisiana (Ordinance 14538), Williamsburg, Virginia (Ordinance No. 21, Section 23-45), Charleston, South Carolina (Zoning Ordinance Section 42-47, 1924) and Washington, D.C. (Title 40, U.S.C.A. Section 121).

In *City of Santa Fe v. Gamble-Skogmo, Inc.*, 389 Pac.2d 13, 1964, the question for determination was whether the historical zoning ordinances of the City of Santa Fe, New Mexico, was ultra vires

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of the city's power and whether the ordinance was valid and constitutional.

The defendant applied for a permit to remodel the exterior of a building within the historical zoning in Santa Fe. One requirement dealt with the size of the window panes to be used in the building. The defendant in remodeling the building failed to comply with this requirement and he was convicted of violating the city ordinance.

Since the above case involves many of the questions that may be raised concerning the power and authority to enact zoning ordinances which may be common to the question submitted herein, we quote at length from the opinion of the court.

The court stated, l.c. 15:

"[2,3] A municipality has no inherent right to exercise police power. Its powers are derived solely from the state. *Town of Mesilla v. Mesilla Design Center & Book Store*, 71 N.M. 124, 376 P.2d 183; *Munro v. City of Albuquerque*, 48 N.M. 306, 150 P.2d 733. We, therefore, examine the statutes in force at the time the ordinance was adopted directing our inquiry to whether the grant of zoning power authorized preservation of a historical area. It is agreed that the authority, if it is to be found, must be contained in §§14-28-9 to 11, N.M.S.A. 1953. §14-28-10 contains a specific grant of power to regulate or restrict the erection, construction, re-construction, alteration, repair or use of buildings, structures or lands, and §14-28-11 provides that 'such regulations and restrictions' shall be 'in accordance with a comprehensive plan * * * to promote the health and the general welfare * * *.' We note in passing that specific legislative authority was subsequently granted by the 'Historic District Act.' Ch. 92, Laws 1961.

"[4] Defendants assert that the enabling legislation limited a municipality's zoning power to enactment of regulations restricting the height, number of stories, and size of buildings; the size of lots and percentage thereof that may be occupied; the density of population, and the location and use of buildings for trade, industry, residence or other uses. We find no such restriction in the statute. Sec. 14-28-11, N.M.S.A. 1953, grants the authority to regulate and restrict 'in

accordance with a comprehensive plan * * *; to promote health and the general welfare; * * *.' The legislature, then, granted municipalities authority, by zoning ordinances, to restrict and regulate buildings and structures in accordance with a comprehensive plan for the general welfare of the city and its people. To be within the authorized purposes of the zoning ordinance must bear some reasonable relationship to the general welfare.

"The term 'general welfare' has not been exactly defined, we think, by reason of the same definitive problem expressed in *Arnold v. Board of Barber Examiners*, 45 N.M. 57, 70, 109 P.2d 779, 787, regarding the phrase 'affected with a public interest,' where it was said:

' * * * The phrase "affected with a public interest" probably can never be given an exact definition. This is probably desirable when we reflect upon the constant and ever changing conditions of our social and economic structure. This condition clearly implies the necessity for some degree of latitude allowable for obviously necessary judicial interpretation.'

"See, also, *Barwin v. Reidy*, 62 N.M. 183, 192, 307 P.2d 175, which described the public policy as a 'wide domain of shifting sands.'

"No decisions discussing the precise question of enabling legislation have been pointed out to us nor have we found any. However, analogous questions were before the Massachusetts Supreme Court on at least two occasions. The question there was the constitutionality of proposed legislation establishing and preserving historical areas in that state. In each case the right to exercise the police power depended upon whether preservation of such an historical area and style of architecture was comprehended within the public welfare. If it was, the police power could be constitutionally exercised to preserve and protect such areas.

"In the opinion of the Justices to the Senate, 333 Mass. 783, 128 N.E.2d 563, 566, it was said:

'The announced purpose of the act is to preserve this historic section for the educational, cultural, and economic advantage of the public. If the General Court believes that this object would be attained by the

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restrictions which the act would place upon the introduction into the district of inappropriate forms of construction that would destroy its unique value and associations, a court can hardly take the view that such legislative determination is so arbitrary or unreasonable that it cannot be comprehended within the public welfare.'

"In a second opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557, 559, 561, the same question was presented regarding an act establishing historic districts known as '(1) Old and Historic Nantucket District, and (2) Old and Historic Siasconset District.' The purpose of the act was to promote the general welfare of the inhabitants of the town through "the preservation and protection of historic buildings, places and districts of historic interest; through the development of an appropriate setting for these buildings, places and districts; and through the benefits resulting to the economy of Nantucket in developing and maintaining its vacation-travel industry through the promotion of these historic associations." * * *. The purpose was held to be for the promotion of the public welfare. We quote at some length from the Massachusetts court because of its special application to the situation presented by the instant case. In 128 N.E.2d at 561, 562, it was said:

' * * * Can it rest upon the less definite and more inclusive ground that it serves the public welfare? The term public welfare has never been and cannot be precisely defined. * * *'

"The court after discussing other decisions went on to say:

' * * * We may also take judicial notice that Nantucket is one of the very old towns of the Commonwealth; that for perhaps a century it was a famous seat of the whaling industry and accumulated wealth and culture which made itself manifest in some fine examples of early American architecture; and that the sedate and quaint appearance of the old island town has to a large extent still remained unspoiled and in all probability constitutes a substantial part of the appeal which has enabled it to build up its summer vacation business to take the

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place of its former means of livelihood. * * *
There has been substantial recognition by the courts of the public interest in the preservation of historic buildings, places, and districts. (citing authorities)

'It is not difficult to imagine how the erection of a few wholly incongruous structures might destroy one of the principal assets of the town, * * *.

'We are of opinion that in a general sense the proposed act would be an act for the promotion of the public welfare * * *.'

"For other persuasive decisions, because they involved the question whether the taking, under eminent domain, for preservation of sites of historical interest was for a public purpose; in the public interest; or for the general welfare, see: United States v. Gettysburg Electric Ry., 160 U.S. 668, 681, 16 S.Ct. 427, 40 L.Ed. 576, (Site of the Gettysburg Address); Flacomio v. Mayor & City Council of Baltimore, 194 Md. 275, 71 A.2d 12, 14, (property where the 'Star Spangled Banner' which flew over Fort McHenry was made); State v. Kemp, 124 Kan. 716, 261 P. 556, 59 A.L.R. 940, (the Shawnee Mission property, an early Indian mission).

"[5-7] State courts generally have held that the police power may be exercised only to protect and promote the safety, health, morals and general welfare. 29 Fordham L.R. 729. Since the legislature can preserve such historical areas by direct legislation as a measure for the general welfare, it follows that municipal ordinances protecting such areas are authorized under enabling legislation granting power to zone for the public welfare. We, therefore, hold that the purpose of the Santa Fe historical zoning ordinance is within the term 'general welfare,' as used in the municipal zoning enabling legislation."

The court further stated, l.c. 17:

"[9] Under the restricted attack made upon the ordinance, it seems unnecessary to decide here whether aesthetic considerations, denied under earlier decisions, furnish ground for the exercise of the police power as is increasingly held by modern authorities. Berman v. Parker, supra; Opinion of the Justices, 103 N.H. 268, 169 A.2d 762; and see discussion

35 Boston U.L.R. 615; 32 U. of Cincinnati L.R. 367; 2 Wayne L.R. 63. In any event, without deciding the question, such considerations cannot be entirely ignored. People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272. New Mexico is particularly dependent upon its scenic beauty to attract the host of visitors, the income from whose visits is a vital factor in our economy. Santa Fe is known throughout the whole country for its historic features and culture. Many of our laws have their origin in that early culture. It must be obvious that the general welfare of the community and of the State is enhanced thereby. Bearing in mind all these factors, we hold that regulation of the size of window panes in the construction or alteration of buildings within the historic area of Santa Fe, as a part of the preservation of the 'Old Santa Fe Style' of architecture, is a valid exercise of the police power granted to the city. Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557; Opinion of the Justices to the Senate, 333 Mass. 783, 128 N.E.2d 563; Opinion of the Justices, 103 N.H. 268, 169 A.2d 762; City of New Orleans v. Impastato, 198 La. 206, 3 So.2d 559; City of New Orleans v. Pergament, 198 La. 852, 5 So.2d 129; City of New Orleans v. Levy, 223 La. 14, 64 So.2d 798; and see State v. Wieland, 269 Wis. 262, 69 N.W. 2d 217. In Best v. Zoning Bd. of Adjustment of the City of Pittsburg, 393 Pa. 106, 141 A.2d 606, 612, the court said:

'Not only is the preservation of the attractive characteristics of a community a proper element of the general welfare, but also the preservation of property values is a legitimate consideration * * *'.

While the power of the City of St. Charles to enact a zoning regulation preserving a specifically defined area and requiring that area to conform to certain architectural specifications in order to preserve the historical effect of the area can probably be predicated upon "health, safety, morals or the general welfare of the community" authorization of the statute we find that the Legislature has emphasized and buttressed and pinpointed that wide authority by an amendment of Section 89.020 and 89.040 in 1959 by inserting in Section 89.020 the words "the preservation of features of historical significance" and inserting in Section 89.040 the

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words "to preserve features of historical significance".

The preservation of features of historical significance we conclude are within the general welfare of the community authorization. The amendment of these statutes by the Legislature was for the purpose of saying in express language so that it would not be misinterpreted or misunderstood that cities have the power to preserve an area which has historical significance. The use, however, of this phrase should not be narrowly construed. This does not mean that only ancient or historical buildings themselves should be preserved but rather an entire area may be incorporated into and made a part of a plan to preserve a historic flavor to the area. Obviously as the Courts have frequently stated, the area so designated by the city council or board of aldermen cannot be unreasonable or discriminatory but must have some reasonable basis and fit into the entire general plan for preserving the designated historic area.

You have further inquired as to whether the proposed zoning ordinance for the City of St. Charles could contain a provision which would require prior approval of the architectural design of a named commission before present structures could be changed. This problem can only be answered upon an examination of a specific ordinance. That question is therefore reserved.

CONCLUSION

The City of St. Charles has the power under Chapter 89, RSMo 1959, to enact a zoning ordinance providing for an historical area.

The foregoing opinion which I hereby approve was prepared by my Assistant J. Gordon Siddens.

Yours very truly,


NORMAN H. ANDERSON
Attorney General