NONPROFITABILITY AS A DEFENSE FOR NONCOMPLIANCE WITH MINIMUM HOUSING CODES

City of St. Louis v. Brune, 466 S.W.2d 677 (Mo. 1971)

Defendant, an owner of rental property, was convicted and fined for noncompliance with a St. Louis "hot bath" ordinance requiring every dwelling unit to have a tub or shower bath connected to hot and cold water.[1] Conceding a violation, defendant contended that the statutory requirement operated to deprive him of property without due process of law. The trial court excluded evidence that the building involved had been operated at a loss the previous year; that the building's worth after improvements would be less than the cost of installation of improvements; that the property would be unrentable at a price that would compensate the landowner for the expenditure; that the neighborhood was filled with vacant, unrentable property which had been extensively vandalized; that certain property in the same neighborhood had become unrentable after installation of similar improvements and had been subsequently vandalized; that tubs and showers were not absolute necessities, but mere conveniences for the use of the tenants; and that basic cleanliness could be maintained by use of soap and water in a kitchen sink.[2] On appeal, the Supreme Court of Missouri *held*: the evidence was relevant and material to the due process issues involved, and remanded the case.[3]

Minimum housing codes are one tool presently employed by cities in an attempt to insure safe dwellings and to prevent further deterioration of slum areas. Although housing codes date back to the turn of the century,[4] widespread adoption of these codes has occurred only re-

1. ST. LOUIS, MO., REV. CODE § 391.040 (1963), states: "Every dwelling unit shall have a tub or shower in good working condition, properly connected to approved hot and cold water and sewer systems in the toilet room or in a separate room adjacent to such dwelling unit."

2. City of St. Louis v. Brune, 466 S.W.2d 677, 679 (Mo. 1971).

3. *Id.*

4. L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING, chs. 1-3 (1968); Mandelker, HOUSING CODES, BUILDING DEMOLITION AND JUST COMPENSATION: A RATIONALE FOR THE EXERCISE OF THE POLICE POWER OVER SLUM HOUSING, 67 MICH. L. REV. 635, 636 (1967) (hereinafter cited as MANDELKER).

cently, stimulated by federal legislation requiring proof of a "workable program of community improvement"[5] as a condition to receipt of federal funds for urban renewal through slum clearance and development of low income housing.[6] These codes are directed at facilitating improvement in three general areas: 1) installation and upkeep of adequate facilities;[7] 2) density of occupancy;[8] 3) proper levels of maintenance and cleanliness.[9] Courts have upheld these laws as valid exercises of the police power,[10] which are reasonably related to the public health,[11] safety,[12] and welfare.[13]

---

5. Housing Act of 1949, 42 U.S.C. § 1451(c) *as amended* (Supp. 1972).

6. Housing Act of 1949, 42 U.S.C. § 1451(a) (1969) further provides that: "In entering into any contract for advances for surveys, plans, and other preliminary work . . . the secretary shall give consideration to the extent to which appropriate local public bodies have undertaken positive programs (through the adoption, modernizations, administration, and enforcement of housing, zoning, building and other local laws, codes and regulations relating to land use and adequate standards of health, sanitation, and safety for buildings, including the use and occupancy of dwellings) for (1) preventing the spread or recurrence in the community of slums and blighted areas . . ." *See* D. HUGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 385-86 (1971).

7. *See, e.g.*, ST. LOUIS, MO., REV. CODE §§ 391.000, 391.110, 391.130 (1963). *See generally* Note, *Municipal Housing Codes*, 69 HARV. L. REV. 1115, 1116-17 (1956).

8. *See, e.g.*, ST. LOUIS, MO., REV. CODE § 391.120 (1963). *See generally* Note, *Municipal Housing Codes*, 69 HARV. L. REV. 1115, 1116-17 (1956).

9. *See, e.g.*, ST. LOUIS, MO., REV. CODE, § 391.100 (1963). *See generally* Note, *Municipal Housing Codes*, 69 HARV. L. REV. 1115, 1116-17 (1956).

10. Wheat v. Ramsey, 284 Ala. 295, 224 So. 2d 649 (1969); Apple v. Denver, 154 Colo. 166, 390 P.2d 91 (1964); State v. Schaffel, 4 Conn. Cir. Ct. 234, 229 A.2d 552 (Cir. Ct. App. Div. 1966); City of Louisville v. Thompson, 339 S.W.2d 869 (Ky. 1960); Givner v. Commissioner of Health, 297 Md. 104, 113 A.2d 899 (1955); Paquette v. Fall River, 338 Mass. 368, 155 N.E.2d 775 (1959); Richards v. Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955); Boden v. Milwaukee, 8 Wis. 2d 318, 99 N.W.2d 156 (1959). *But see* Safer v. Jacksonville, 237 So. 2d 8 (Fla. Dist. Ct. App. 1970).

11. Courts have shown great deference to public health measures, realizing that a city need not wait until an epidemic strikes to act. *See* See v. City of Seattle, 387 U.S. 541, 548 (1967) (Clark, J., dissenting); Wheat v. Ramsey, 284 Ala. 295, 224 So. 2d 649 (1969); State v. Schaffel, 4 Conn. Cir. Ct. 234, 229 A.2d 559 (Cit. Ct. App. Div. 1966); City of Louisville v. Thompson, 339 S.W.2d 869 (Ky. 1960); Givner v. Comm'r of Health, 297 Md. 184, 113 A.2d 899 (1955); Paquette v. Fall River, 338 Mass. 368, 155 N.E.2d 775 (1969); Richards v. Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955). *But see* Safer v. City of Jacksonville, 237 So. 2d 8 (Fla. Dist. Ct. App. 1970).

12. *See* See v. City of Seattle, 387 U.S. 541, 548 (1967) (Clark, J., dissenting); Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955) (a report paralleling the location of substandard housing and juvenile delinquency accepted into evidence.)

13. Courts, in supporting minimum housing codes, have based their decisions on: a city's power over urban renewal within the concept of general welfare, State v. Schaf-

Application of minimum housing standards to older existing buildings may require a property owner to bear expenses for renovation.[14] Forcing expenditures upon the property owner does not automatically constitute a taking without due process of law, however, because all property is held subject to a valid exercise of the police power.[15] The question is whether the legislation is reasonably related to public health, safety, and welfare. In determining reasonableness, the economic imposition on the landowners must be weighed against the governmental interest sought to be protected and the extent to which the legislation actually effectuates that interest.[16]

When minimum housing codes deal with such areas as fire protection, density of occupancy, and sanitation there is an obvious direct relation to public well-being.[17] Even substantial renovation costs will not cause such code provisions to be found unreasonable.[18] Notwith-

---

fel, 4 Conn. Cir. Ct. 4, 229 A.2d 559 (Cir. Ct. App. Div. 1966); City of Louisville v. Thompson, 339 S.W.2d 869 (Ky. 1960); the good order of the city, Boden v. Milwaukee, 8 Wis. 2d 318, 99 N.W.2d 156 (1959); the general spirit of the inhabitants, City of Louisville v. Thompson, 339 S.W.2d 869 (Ky. 1960); the prevention of depreciation of property values, Boden v. Milwaukee, 8 Wisc. 2d 318, 99 N.W.2d 165 (1959).

14. *See* note 10 *supra*. *See also* St. Louis v. Warren Comm'n & Inv. Co., 226 Mo. 148, 126 S.W.2d 166 (1910); Annot., 109 A.L.R. 1117. These authorities also hold that there is no merit to the argument that the Housing statute should not apply to buildings built before the passage of the statute.

15. *See, e.g.*, note 10 *supra*. *See also* Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962). "If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1945); Home Building and Loan Ass'n v. Blarsdell, 290 U.S. 398 (1934); Hutchinson v. Valdosta, 227 U.S. 303 (1913).

16. *See* cases cited notes 10, 11, 15 *supra*.

17. Courts have traditionally treated ordinances with these aims as paramount exercises of the police power. Kaukas v. City of Chicago, 27 Ill. 2d 197, 188 N.E.2d 700, *appeal dismissed*, 375 U.S. 8 (1963); Abbate Bros., Inc. v. City of Chicago, 11 Ill. 2d 337, 142 N.E.2d 691 (1957); City of Chicago v. Washington Nursing Home, 289 Ill. 206, 124 N.E. 416 (1919); St. Louis v. Hoevel Real Estate & Bldg. Co., 59 S.W.2d 617 (Mo. 1933); St. Louis v. Nash, 260 S.W. 985 (Mo. 1924); St. Louis v. Warren Comm'n & Inv. Co., 227 Mo. 148, 126 S.W. 166 (1910); Vorhof Constr. Co. v. Black Jack, 454 S.W.2d 588 (St. Louis Ct. App. 1970).

18. Kaukas v. City of Chicago, 27 Ill. 2d 197, 188 N.E.2d 700, *appeal dismissed*, 375 U.S. 8 (1963); Abbatte Bros., Inc. v. City of Chicago, 13 Ill. 2d 337, 142 N.E.2d 691 (1957); City of Louisville v. Thompson, 339 S.W.2d 869 (Ky. 1960); Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937); Hinckley v. City of Seattle, 40 Wash. 468, 82 P.2d 747 (1905). *Cf.* Wheat v. Ramsey, 284 Ala. 295, 224 So. 2d 649 (1969). *But see* Safer v. City of Jacksonville, 237 So. 2d 8 (Fla. Dist. Ct. App. 1970); Dente v. Mount Vernon, 50 Misc. 2d 983, 272 N.Y.S.2d 65 (Sup. Ct. 1966).

standing the economic burden to the property owner, courts find it unsafe to live where less than these minimum conditions exist and consequently require compliance.

Not all items in a minimum housing code have a readily foreseeable health and safety justification. Provisions requiring window and door screens,[19] front door peepholes,[20] white washing,[21] minimum ceiling heights,[22] and hot baths or showers[23] have a less obvious relation to public well-being. It is in dealing with these kind of code provisions that evidence of substantial installation costs and evidence of the provision's relationship to public well-being is essential to a due process challenge. In *Brune*, the trial court's exclusion of evidence on these points denied the landowners any defense for non-compliance.[24] On remand, if the trial court determines that installation of a tub or shower in each dwelling unit is essential for the health and safety of the occupants, the ordinance should be held a valid exercise of the police power and compliance required. If, however, installation is found to have only a tenuous relation to the actual health and safety of the occupants the trial court should weigh several factors in determining whether compliance amounts to a taking of property without due process. Not

19. *See, e.g.*, St. Louis, Mo. REV. Code § 391.110 (1963). MANDELKER, *supra* note 4, at 668 n. 145 (1967).

20. *See, e.g.*, MANDELKER, *supra* note 4, at 668 n. 145 (1967).

21. *See, e.g.*, Boden v. City of Milwaukee, 8 Wisc. 2d 318, 99 N.W.2d 156 (1960). ST. LOUIS, MO., REV. CODE § 391.100(E)(F) (1963).

22. *See, e.g.*, DENVER, COLO., MUNICIPAL HOUSING CODE, art. 631; Apple v. City of Denver, 154 Colo. 166, 390 P.2d 91 (1964). ST. LOUIS, MO. REV. CODE § 391.090(A) (1963).

23. Because of the high cost of plumbing and installation, hot bath ordinances have been the single most litigated item in municipal housing codes. The Supreme Courts of Alabama, Kentucky, and Massachusetts have upheld enforcement. Wheat v. Ramsey, 284 Ala. 295, 224 So. 2d 649 (1969); City of Louisville v. Thompson, 339 S.W.2d 869 (Ky. 1960); Paquette v. Fall River, 338 Mass. 368, 155 N.E.2d 775 (1959). Implicit in these decisions is the judicial reluctance to overturn the legislative judgment that the ordinance serves an appreciable benefit to public health. Three courts have held enforcement of a hot bath ordinance does constitute a violation of due process because there is no appreciable public benefit. Personal cleanliness can be adequately maintained with a sponge and cold water. Safer v. City of Jacksonville, 237 So. 2d 8 (Fla. Dist. Ct. App. 1970); Dente v. Mount Vernon, 50 Misc. 2d 983, 272 N.Y.S. 65 (S. Ct. 1966); Early Estates, Inc. v. Housing Bd. of Review, 93 R.I. 227, 174 A.2d 117 (1961).

24. In Missouri, the burden of factual rebuttal of the legislative determination is placed upon the party challenging enforcement of the statute. Bellerive Inv. Co. v. Kansas City, 321 Mo. 969, 13 S.W.2d 628 (1929); Vorhof Const. Co. v. Black Jack, 454 S.W.2d 588 (St. Louis Ct. App. 1970). *See generally* 1 ANTIEAU, MUNICIPAL CORPORATION LAW § 5.17-.18 (1968).

only is evidence of renovation costs relevant, but the court should also consider the landowner's ability to realize a profit if forced to comply.[25]

Courts appear to have avoided a direct discussion of the issue of profitability in determining the reasonableness of muncipal housing ordinances.[26] This avoidance is probably because there is inherent in profitability much more than the actual cost of renovation. Such collateral issues as vacancy rates, vandalism, availability of insurance, probabilities of deprecation or appreciation of the land, the saleability of the building, and the nature of high risk investment also must be considered.[27] It is a much simpler matter to compare renovation costs to the value of the building or observe the cost per unit and determine whether the costs are patently unreasonable.[28] The obvious reality of the profit motive, however, warrants judicial concern with the issue of profitability.[29] Renovation costs alone may not reflect the landowner's actual hardship. If profits are already at a minimal level, renovation costs that do not appear excessive on their face may still cause hardship

25. The Supreme Court of South Carolina in Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683, 694 (1955) did consider evidence relating to profitability in the form of opinions from real estate agents and physicians. In *Brune*, the Supreme Court of Missouri appears to have allowed for a much more exhaustive examination of all factors that might affect profitability.

26. *But cf.* Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683, 694 (1955).

27. In *Brune*, one must consider that the building in question is located in the St. Louis waterfront slums. The area is full of empty buildings. There are currently no buyers for the building if Brune decides, or is forced, to sell. The estimated repair bill for installation of hot baths is $1,200 per unit or $7,200. The six families pay $30-35 a month, and it is unlikely they would be willing or able to pay additional rent.

28. In assessing the reasonableness of housing codes by looking at the cost of renovation, courts have compared costs to a building's market value. Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937) (holding $5000 reasonable when the building and land valued at $13,000); to assessed value, Safer v. City of Jacksonville, 237 So. 2d 8 (Fla. Dist. Ct. App., 1970) (holding expenditures of $20,000 unreasonable when assessed value was $40,000); to cost per unit, City of Louisville v. Thompson, 339 S.W. 2d 869 (Ky. 1960) ($800-$1000 per unit for hot baths held not to violate due process); Dente v. Mount Vernon, 50 Misc. 2d 983, 272 N.Y.S. 65 (Sup. Ct. 1966) (held, indirectly, $1,000 per dwelling unit totalling $11,000 violated due process); Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955) ($575-$750 per dwelling unit held reasonable). *See generally* MANDELKER, *supra* note 4.

29. Because of the many considerations that might effect profitability, and problems in determining what is a reasonable rate, courts probably consider the matter is better left to a legislative determination. Profitability is not an unfamiliar area for the legislature, evidenced, for example, by utility rate making. As long as the legislatures do not act, however, it hardly seems preferable for the courts to adopt a "head in the sand" attitude.

to the point of abandonment. On the other hand, even if renovation costs are substantial, enforcement of an ordinance may not be unreasonable. The actual hardship on the landowner may be slight. There may be an appreciation in land value, tenants willing to pay additional rent, or tax benefits to offset the present high cost of compliance.

Continued enforcement of municipal housing codes, where the codes impose obligations of dubious benefit to public health or safety, without examining profitability may damage rather than benefit the public. Landowners who can no longer operate their rental property at a profit because of the impossibility of recouping the cost of repair will elect an obvious alternative—closing down the building. The effect will be to evict the tenants into a housing market with an inadequate supply of low-income units. Investors and private lending institutions are already avoiding investment in city properties because of strict housing code enforcement.[30] Ignoring the issue of profitability may force the landlord to give up his investment, which also means that the tenant loses his place to live. Certainly this result was not intended by the passage of housing codes. Nor should it be the consequence of narrow judicial decisions.

30. St. Louis Post Dispatch, October 31, 1971, at 1, col. 2.