August 18, 2011

Dear City Attorney:

 You have the following question: Can the city require a preexisting nonconforming use to build a fence around its property?

 Probably not, if the attempt is made based on the city’s zoning ordinance. But if the city is careful enough to base the fence on the police powers of the city, the answer is probably yes.

 That precise question arose, in a case of “first impression,” in unreported Metropolitan Government of Nashville and Davidson County v. Buchanan, 2006 WL249512 (Tenn. Ct. App. 2006). There Metro charged a property owner for “using the premises … for the open storage of abandoned, unlicensed and inoperable vehicles, scrap metal, building rubbish, trainer and other scraped materials and debris,” in violation of Metro Code § 16.24.330(B), which prohibited the open storage of any such material. The trial court ordered the defendant to remove certain of those materials from the property, and to enclose the property. On appeal, the defendant argued that his use of the property was a preexisting nonconforming use protected under Tennessee Code Annotated, § 13-7-208, and Metro argued that even if that were so, Metro had the police power to regulate the condition of the property in the interest of the public health, safety and welfare.

 Part of the court’s holding was that the defendant was protected by Tennessee’s preexisting nonconforming use law, and framed the question this way: “In a matter of first impression, our Supreme Court recently discussed an issue regarding whether a metropolitan ordinance was a zoning ordinance or one concerned instead with public health, safety and welfare, stating:

Notwithstanding the mandatory provisions on zoning, a municipality has the authority to enact regulations concerning the health, safety, and welfare of the community pursuant to its police powers without providing notice or hearings. See 1 Edward H. Ziegler, Jr. et al., Rathkopf’s The Law of Zoning and Planning § 1.02 (4th ed. 2003) (“Ziegler”). A municipality may not, however, “evade the protections thrown about the citizen’s use of his property by the legislative limitations imposed on the zoning power by the device of labeling a zoning act a mere exercise of police power.” Ellision v. Fort Lauderdale, 183 So.2d 193, 195 (Fla. 1966)….

In resolving this issue of first impression, we believe that the determination of whether a regulation or an ordinance “substantially affects” the property owner’s use of land is a well-reasoned and persuasive approach. This analysis avoids the difficulty of definitions found in those decisions by focusing on both the terms and the effect of an ordinance, as well as its “relation to the general plan of zoning.” McQuillin § 25.53. The analysis is also more comprehensive and more precise than simply attempting to distinguish whether the terms of an ordinance regulate the use of land or how the land is used. Finally, the analysis eliminates the risk that a municipality may avoid statutory zoning requirements by attempting to label what is in reality a zoning ordinance as a building regulation. [At 4]

 Using that Tennessee Supreme Court framework, the court spent a lot of time determining whether Metro’s “Property Standards Code” regulated the *condition* of property or the *use* of property. The court concluded that notwithstanding Metro’s claim that nonconforming uses are subject to police power regulations of the city, “Metro did not cite Defendant for the condition of the Property. Rather it cited Defendant for utilizing [the Property] for the open storage of [the various materials at issue]. Additionally; Metro Gov. did not produce evidence showing that the Property posed a risk to public health, safety or welfare.” [4]The court noted that “Defendant concedes in his appellate brief that if the Property constitutes a health hazard, and Metro Gov is able to prove this, he would be subject to an enforcement action relative to the health issues. However, Defendant was not charged with any public safety or health related violation.” [At 5]

 For those reasons, concluded the court, “Metro Code § 16.24.330(B), as here applied to Defendant, constitutes a zoning regulation” to which Tennessee Code Annotated, § 13-7-208 applies.

 But that case suggests that a fence around that property could have been supported as a police power regulation. It was held in City of Norris v. Bradford, 321 S.W.2d 543 (1959), that aesthetic considerations alone would not support the exercise of a city’s police powers (in striking down an ordinance prohibiting fences in the front years of residences). However, in State v. Smith, 618 S.W.2d 474 (1981), it was said that:

We believe that the views expressed in City of Norris v. Bradford, supra, must be considered in the light of the facts of that case and that they cannot be literally applied to all of the myriad concerns and problems facing state and local government at this time....As appellee further points out, there has been a strong trend toward upholding state and local regulation of land use in other areas than junkyard control, even though aesthetic considerations constitute the sole or primary reason for the legislation. The rule stated in City of Norris v. Bradford, supra, no longer represents the prevailing view on that subject... [At 477]

State v. Smith goes on to point to a wide variety of cases under which the exercise of police powers for purely aesthetic purposes was upheld, and declares that, “We therefore are of the opinion that in modern society aesthetic considerations may well constitute a legitimate basis for the exercise of police power, *depending upon the facts and circumstances*...” [At 477] That case appears to support the proposition that fences around junkyards would be supported as police power regulations, even around preexisting nonconforming uses; even no physical health problems would potentially afflict the public in the absence of a fence. But a city could need to be careful about the basis of its case, making sure that it ties it to its police powers and not to the property owner’s use of the land.

 Sincerely,

 Sidney D. Hemsley

 Senior Legal Consultant