

**IN THE MUNICIPAL COURT OF APPEALS
OF THE CITY OF EL PASO, TEXAS**

JAMES R. BENNETT,)	
)	
Appellant,)	
vs.)	No. 96-MCA-2395
)	
STATE OF TEXAS,)	
)	
Appellee.)	

OPINION

Appellant appeals his conviction in Municipal Court for a violation of El Paso’s Historic Landmark Preservation Zoning Ordinance.¹ The complaint alleges that he unlawfully altered or changed the exterior of a building, by enclosing his porch in wrought iron without obtaining a Certificate of Appropriateness approved by the Historic Landmark Commission.

The law requires that a person obtain a Certificate of Appropriateness from the Historic Landmark Commission before making any alteration or change to their property if it is located in a Historic Landmark Zone. Appellant’s property is located in such a zone, known as the Manhattan Heights area of El Paso, Texas.

The evidence reflects that Appellant enclosed the porch of his home with wrought iron without obtaining a Certificate of Appropriateness from the Historic Landmark Commission.

Section 20.67.010 of the El Paso Municipal Code defines “alteration” to mean any construction or change of the exterior of a building . . . designated as a landmark. For buildings . . . alteration shall include, but is not limited to, the changing of . . . porches. Alteration shall not include ordinary repair and maintenance.

¹ Title 20, Chapter 20.67 et seq. Specifically Section 20.67.100A2.

Appellant was convicted in a bench trial and assessed a fine of \$1,000.00.

Appellant principally challenges the constitutionality of the Ordinance as being vague, non-specific and without guidelines thus depriving Appellant of Due Process and the Equal Protection of the Law.

In Maier v. City of New Orleans, 516 F.2d 1051 (1975), in addressing issues involving a similar Ordinance, the Court held as follows:

“The Supreme Court has erected wayposts to guide our consideration whether an enactment such as the Vieux Carré² Ordinance violates Due Process. A legislative determination is generally accorded a presumption of constitutionality, but it is nevertheless subjected to several tests before its validity is established. To be sound, the enactment must be within the perimeter of the police power, an authority residing in the law-making body to secure, preserve and promote the general health, welfare and safety. A regulatory Ordinance, to be sustained as a suitable exercise of the police power, must bear a real and substantial relation to a legitimate state purpose. The means selected must be reasonable and of general application, and the law must not trench impermissibly on other constitutionally protected interests.”

Appellant contends here, as Maier did in that case, that although the legislative purpose underlying the preservation of historic districts may be unobjectionable, the method of effectuating that purpose does not provide adequate standards, and results in arbitrary enforcement that violates Due Process.

The law clearly requires a balancing of interests where an Ordinance diminishes the freedom of an individual owner to use his property as he sees fit as contrasted with what the lawmaker deems to be in the greater public interest. It is generally accepted that legislative bodies, as here either the Historic Landmark Commission or the City Council, are entrusted with the task of defining the public interest and purpose, and of enacting laws in furtherance of the

² Popularly known as the French Quarter in New Orleans.

general good. That power is known as the police power, and authorizes legislative bodies to enact laws which they determine to provide for the general health, welfare, morals and security of their communities.

Although the police power is not unlimited, it is broad and flexible, and no fixed constraints may be placed on the police power because legislative enactments must address a fluid and ever changing economic and cultural situation which require new solutions and present new problems. Therefore, each case must be evaluated on its own facts and in light of the prevailing circumstances.

There is substantial support that exists for a legislative determination to preserve historic landmarks and districts. Maier v. City of New Orleans supra. Clearly, a municipality has the constitutional power to regulate the use of private property in the interest of historic preservation. Penn Central Transportation Company v. City of New York, 438 U.S. 104 98 S.Ct. 2646; L.Ed. 2d 631 (1978); Mayes v. City of Dallas, 747 F.2d 323 (1984).

Clearly, the Ordinance in question is designed to effect a legitimate economic and social policy and the means chosen are reasonable and not arbitrary, Appellant's Due Process challenge is unfounded. The Ordinance in this case clearly furthers the object of preservation of the character of the district in which the property is located in a meaningful fashion.

El Paso's Municipal Historic Preservation Ordinance satisfies the requisite Due Process criteria as being of general application to well defined geographic areas, supervised by a regulatory body of professional qualifications, with governing legislative criteria provided, and an administrative procedure adequate to assure that the regulatory powers be exercised in accord with the legislative criteria. Maier v. City of New Orleans, supra, Mayes v. City of Dallas, supra. See also annotation, Validity and Construction of Statute or Ordinance Protecting

Historical Landmarks, 18 ALR4th 991 (1982). Consequently, Appellant's challenge to the constitutionality of this Ordinance is hereby overruled.

Appellant further contends, that even if the Ordinance is constitutional, that it fails to provide objective, articulated standards sufficient to prevent the arbitrary application of the Ordinance to his situation. The same argument was asserted in Mayes v. City of Dallas, supra, where the Appellant in that case was denied a Certificate of Appropriateness to paint his house.

The Court in Mayes rejected his attack upon the Historic Preservation Regulation, and found that the Ordinance did, in fact, provide adequate legislative direction to the Commission to enable it to perform its functions coincident with Due Process. The Court held that although the regulations did not specifically prohibit the painting of a brick house, they did provide guidelines that were sufficiently adequate to provide structure and guidelines to the administrative body charged with enforcing them, as well as to prevent unreviewable "unfettered authority" to be exercised by that agency with regard to the rulings made by the Commission.

Guidelines which aid a Commission charged with implementing a public zoning purpose need not be so rigidly drawn as to prejudge the outcome in each case, thus precluding reasonable administrative discretion, which is exactly the reason why the Commission is appointed to serve. Although Appellant was very effective in cross-examining the Commission witnesses, they were unanimous in their opinion that the enclosure of this porch with wrought iron was in violation of both the spirit and letter of the Ordinance.

As in Mayes, supra, El Paso's City Ordinance is precise where possible, it delineates the district, defines the nature of the alterations that require approval, including the principles and often specific criteria by which alterations are to be determined as appropriate, all of which is accomplished in the regulatory process through personnel with proper professional qualifications

and an elaborate decisionmaking and appeal process provided for by ultimate review by the City Council. Maier, supra.

El Paso's Historic Landmark Preservation Ordinance provides criteria for the Commission to follow and specifically adopts Federal guidelines when the other ones are inadequate or not applicable. See Chapter 20.67 et seq., specifically 20.67.100B.

In applying the criteria above, it is critical that the Commission be able to consider the facts and circumstances of individual cases. In City of Santa Fe v. Gamble, Skogmo, Inc., 73 NM 410, 389 P.2d 13 (N.M.1964), the Court recognized that "it would be impossible to rigidly and literally set forth every detail without impairing the underlying public purpose" of the preservation ordinance:

"Experience has shown that any attempt to limit the administrative decisions to matters of detail as to which precise standards can be laid down result only in creating an inflexible and unworkable zoning plan with resultant pressures on the legislative body for frequent amendments leading to the evils of spot zoning."

Section 20.67.050 of the El Paso Municipal Code creates the Historic Landmark Commission and the qualifications of its membership, which include: 1) two architects, registered and licensed to practice in Texas; 2) one archaeologist; 3) one historian, and further, all members shall have demonstrated special interests, knowledge and experience in the architectural, archaeological, cultural, social, economic, ethnic, or political history of El Paso.

Further, Section 20.67.180 of the El Paso Municipal Code provides that a person who is aggrieved by a ruling of the Commission has a right of appeal to the City Council of El Paso.

Therefore, this Court holds that El Paso's Historic Preservation Ordinance is constitutional, provides reviewable articulated standards for their enforcement, and that those standards were not arbitrarily applied against Appellant.

Appellant next contends that the enforcement of this Ordinance constitutes an impermissible taking of his property without just compensation. The Courts have repeatedly made it clear that an Ordinance within the police power does not become an unconstitutional taking merely because, as a result of its operation, property does not achieve its maximum economic potential. Maier, supra, and cases cited therein. Clearly the denial of the permit to Appellant in this case does not rise to the level of taking of Appellant's property in the classic sense of eminent domain, nor has the Appellant been able to demonstrate that a taking occurred because the enforcement of Ordinance reduced the value of his property to, in effect, leave him with nothing. This Court holds that there was no taking of his property by the enforcement of this Ordinance.

Appellant contends that the enforcement of this Ordinance against him violates the Equal Protection Clause of the 14th Amendment to the United States Constitution, because its application constitutes selective and discriminatory prosecution of Appellant. In support of this contention, Appellant complains that this Ordinance was enforced against him and not others. The Courts have held that it is insufficient to show only that the law is enforced against some and not others in order to establish a violation of the Equal Protection Clause. There must be a showing of actual and purposeful discrimination against the individual himself or against the suspect classification in which he falls, with no proper justifying governmental purpose in such classification. Super-X Drugs, Inc. v. State, 505 S.W.2d 333 (Tex.App. - Houston (14th Dist.) 1974); Snowden v. Hughes, 321 U.S.1, 64 S.Ct., 397, 88 L.Ed. 497, (1944); Moss v. Hornig, 314 F.2d. 89 (2d Cir. 1963).

As footnoted by the El Paso Court of Appeals in City of El Paso v. Alvarez, 931 S.W.2d 370 (Tex.App. - El Paso -1996), the Court stated as follows:

“To prevail on a selective prosecution challenge, a defendant must first make a prima facie showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not. If a defendant crosses this threshold, he must then demonstrate that the government's discriminatory selection of him for prosecution has been invidious or in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of Constitutional Rights. Covalt v. State, 877 S.W.2d 445 (Tex.App.-Houston (1st Dist.) 1994 no pet.) quoting United States v. Green, 697 F.2d 1229 (5th Cir. 1983).

The Court went on to note that the State has broad discretion to determine the extent of prosecution, and can prosecute under any Statute violated as long as it does not discriminate against any class of defendants. A purposeful discrimination will not be presumed, and a showing of clear discrimination in the enforcement of the Statute must be made by the defendant. Covalt, supra; Satterwhite v. State, 726 S.W.2d 81 (Tex.Crim.App. 1986).

Appellant has failed to show, even though others may be in violation of this Ordinance, that he was singled out for prosecution.

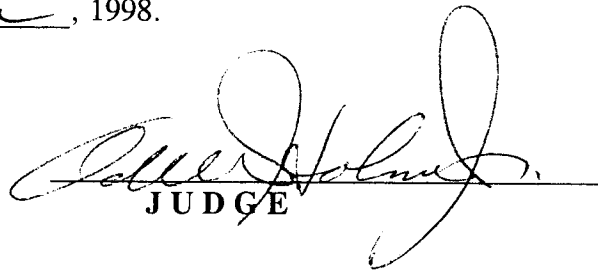
Appellant contends that the enforcement of this Ordinance violates his right to Due Process because it deprives himself of the right to protect himself and his family. The record reflects that Appellant could have obtained a Certificate of Appropriateness permitting wrought iron coverings for the windows and doors of his home rather than enclosing his entire porch in wrought iron, and therefore, he could have achieved his desired objective of protecting his family in a lawful manner rather than violating the Ordinance.

Lastly, Appellant contends that there was reasonable doubt apparent in the facts of this case. His argument in support of that contention appears to this Court to be a reiteration of some of the other issues that have already been addressed by this Court, but if the point is that there is insufficient evidence to support the record, this Court disagrees with Appellant. The evidence

clearly reflects that no Certificate of Appropriateness was obtained before the wrought iron was installed on his home in a Historic Preservation District, and therefore, factually, the allegations of the complaint have been met. Clearly, the Trial Judge, as the fact finder, was the exclusive judge of the facts proven, the credibility of the witnesses, and the weight to be given to their testimony. This Court holds that the evidence was legally sufficient to support the conviction.

Therefore, having found that the Ordinance in question is constitutional, was constitutionally applied as to Appellant, did not constitute a taking of his property nor selective prosecution of him, and that the evidence was sufficient to support the conviction, the Judgment of the Trial Court is hereby affirmed.

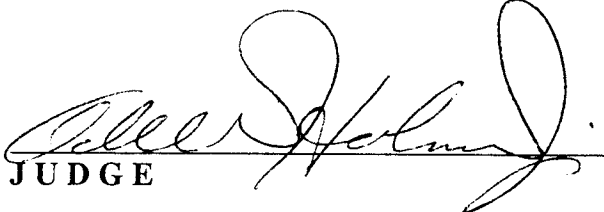
SIGNED this 19 day of Feb, 1998.


JUDGE

JUDGMENT

This case came on to be heard on the Transcript of the Record of the Court below, the same being considered, it is ORDERED, ADJUDGED and DECREED by the Court that the Judgment be in all things affirmed, and that the Appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

SIGNED this 19 day of Feb, 1998.


JUDGE