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# Property—Power to Regulate Use of Property Adjacent to Superhighway Must Be Specifically Conferred

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POWER TO REGULATE USE OF PROPERTY ADJACENT TO SUPERHIGHWAY MUST BE SPECIFICALLY CONFERRED

The development of the New York Thruway and similar limited access state highways has required the courts to construe statutes regulating the use of adjacent private property by private citizens. Two such cases are *New York State Thruway Authority v. Ashley Motor Court, Inc.*[13] and *Schulman v. People*,[14] decided this term.

In the *Ashley* case, the Thruway Authority sued under the Public Authorities Law, Section 361-a,[15] to enjoin the maintenance of, and to require removal of, a billboard advertising a nearby motel, joining as defendants the motel owner, the landowner, and the company which maintained the sign. Defendants contended that enforcement of the provision concerning aesthetic values constituted an unjustifiable application of the police power of the state. The Court was not required to decide whether aesthetic considerations alone would provide sufficient basis for the exercise of the police power inasmuch as it found that the other provisions of the statute upon which plaintiff based its action furnished sufficient justification. "The fact that considerations of an aesthetic nature also exist does not take away [its] authority to act."[16] While noting the existence of some disagreement among the authorities on the question of whether billboard advertising actually interferes with safe driving, the Court stated that where a matter is properly the subject of legislative determination, the results will not be disturbed unless manifestly unreasonable.

In considering defendants' contention that the statute amounts to a deprivation of property without due process of law, the Court noted that the value of the property to the defendants arose from the construction of the highway by the state and, therefore, the defendants cannot complain if it is taken away by the same power.[17] Even if the defendants did have a valid property right, however, "where the protective power of the state is exercised in a manner otherwise appropriate in the regulation of business, it is no objection that the performance of existing contracts be frustrated by the prohibition of injurious practices,"[18] and "no obligation of a contract can extend to the defeat of legitimate government authority."[19]

In the *Schulman* case, the Court of Appeals considered the power of the

13. 10 N.Y.2d 151, 218 N.Y.S.2d 640 (1961).
14. 10 N.Y.2d 249, 219 N.Y.S.2d 241 (1961).
15. The declared intent of N.Y. Public Authorities Law § 361-a is: (a) To provide for maximum system and connecting roads or highways; (b) To prevent unreasonable distraction of operators of motor vehicles; (c) To prevent confusion with regard to traffic lights, signs or signals or otherwise interfere with the effectiveness of traffic regulations; (d) To preserve and enhance the natural scenic beauty or the aesthetic features of the thruway system and adjacent areas; (e) To promote safety, comfort and well-being of the users of the thruway.
16. Perlmutter v. Greene, 259 N.Y. 327, 331, 182 N.E. 5, 6 (1932).
17. But cf. Andrews v. State, 9 N.Y.2d 606, 217 N.Y.S.2d 9 (1961).
18. Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 438 (1934).
19. Legal Tender Cases, 79 U.S. 457, 551 (1870).

Superintendent of Public Works to likewise regulate the use of private property adjacent to a limited access highway constructed under his authority. It refused to extend Section 30(2) of the Highway Law,[20] which gives the Superintendent the authority to condemn property necessary for the construction and improvement of highways including appropriation of property for ditches, drains, etc., and for other purposes to improve safety conditions of the state highway system; to include the power to condemn an easement in property along a state highway for purposes of eliminating the erection of any billboard or other advertising device.

The Superintendent argued that the part of the statute which reads "and for other purposes to improve safety conditions on the state highway system" must be construed to confer upon him the powers granted by other statutes relating to specific portions of state highways.[21] In this contention he was upheld by the Appellate Division[22] which stated:

> The argument for strict construction of every public power to condemn private property, urged by plaintiffs, will be seen on close examination to turn largely on acquisitions by private corporations vested with public uses, such as a railroad . . . or a telephone company. . . .
>
> Where a state officer acts in pursuance of a general statute there is certainly no judicial compulsion to read the statute heavily weighted against the exercise of a right of acquisition for which the state is willing, and must pay, just compensation. The function of the Superintendent of Public Works should not be narrowly construed in this respect, where his purpose may reasonably be seen by the court to move in the direction of improving safety conditions on public roads under an affirmative mandate to do so.[23]

The Court of Appeals, however, applying the rule of *ejusdem generis*, found no similarity between the authority the Superintendent attempted to invoke, and the authority actually granted by the preceeding portions of the statute. As further evidence of the legislature's intention, the Court noted that bills which would have conferred the authority on the Superintendent were introduced but not passed, in the 1952, 1957, 1959, and 1960 sessions.[24] Thus the Court reversed the decision of the Appellate Division and reinstated that of the trial court.

The power of the Thruway Authority and the Superintendent of Public Works to restrict the erection of billboards on private property along state

20. N.Y. Highway Law § 30(2).

21. See N.Y. Public Authorities Law § 361(a), and § 569(b); N.Y. Conservation Law § 675, which prohibit the erection of advertising signs within certain distances of specified highways, parks, etc.

22. 11 A.D.2d 273, 203 N.Y.S.2d 708 (3d Dep't 1960).

23. Id. at 276, 203 N.Y.S.2d at 712.

24. 1952 Assembly Int. Nos. 1308, 1309, Pr. Nos. 1327, 1328; 1957 Assembly Int. No. 4179, Pr. No. 4968; 1959 Senate Int. & Pr. No. 725; 1959 Assembly Int. Nos. 1441, 3815, 3894, Pr. Nos. 1444, 3960, 4039; 1960 Senate Int. No. 1197, Pr. Nos. 1200, 1571.

highways must be fairly specifically conferred by statute. Although in sympathy with the idea of vesting such authority in the Superintendent of Public Works, the Court will not imply it in the absence of a clear legislative intent to do so.

At first glance it would appear that the Court is giving the Public Authorities Law a fairly liberal construction and the Highway Law a very strict one, but it must be noted that in the case of the former there is express provision for the exercise of the Thruway Authority's power, and the defendant is attacking the validity of the Act itself. In the *Schulman* case the question is the interpretation of one clause of the Highway Law. It cannot be said that the Court is being more liberal when it upholds the validity of an act, than when it refuses to construe the provisions of an act as granting powers it feels the legislature never intended.

Granting this distinction, this still is not a proper case for the application of the rule of *ejusdem generis*. The words "and for other purposes" must be read in the context of the entire which reads "and for other purposes to improve safety conditions on the state highway system." The prior clauses of the Law did not refer to improving safety conditions and, therefore, the "and for other purposes" clause does not serve as a catch-all for the preceding clauses, but confers additional power on the Superintendent. As the Appellate Division stated, the determination of whether an action is necessary to improve safety conditions is for the Superintendent to decide and the courts should not interfere with his decision unless it is on its face unreasonable.[25]

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DECONTROL ORDER REQUIRED FOR EMERGENCY RENT

In *In re Sipal Realty Corp.*[26] the landlord sought increased rent under the emergency rent provisions of Section 2 of the Emergency Business Space Rent Control Law.[27] Since under Section 2, emergency rent is available only in rentals of business property, the landlord alleged that it was engaged in the rental of "business space" as defined in Section 2. For the whole premises to qualify as "business space" when only a portion is actually rented for business use, it is necessary that 60 percent of the rentable area and units be "lawfully occupied as business space."[28] Among the units counted as business space to

25. Supra note 22 at 274, 203 N.Y.S.2d at 711. The court then goes on to discuss why it thinks that the exercise of the power was not unreasonable in this case.

26. 8 N.Y.2d 319, 206 N.Y.S.2d 767 (1960).

27. N.Y. Unconsol. Laws § 8552(c) (McKinney 1961) provides:

(c) 'Emergency Rent.' The rent reserved or payable under any lease, agreement, or tenancy of business space in force on June first, nineteen hundred forty-four, plus fifty per centum of such rent . . . ; provided, however, that if the business space was not used or occupied as business space on June first, ninteen hundred forty-four, the emergency rent shall be the reasonable rent therefore as business space on such date, plus fifty per centum thereof, to be fixed by agreement, by arbitration, or by the supreme court upon the basis of the rent charged on such date for the most nearly comparable business space in the same building or other rental area, or other satisfactory evidence; . . . .

28. N.Y. Unconsol. Laws § 8552(a) (McKinney 1961) provides: