Republic of the Philippines
Supreme Court
Manila

EN BANC

HON. MA. LOURDES C. FERNANDO, in her capacity as City Mayor of Marikina City, JOSEPHINE C. EVANGELISTA, in her capacity as Chief, Permit Division, Office of the City Engineer, and ALFONSO ESPIRITU, in his capacity as City Engineer of Marikina City, Petitioners,	**G.R. No. 161107**
	Present:
- versus -	SERENO, *CJ.*, CARPIO, VELASCO, JR., LEONARDO-DE CASTRO, BRION, PERALTA, BERSAMIN, DEL CASTILLO, ABAD, VILLARAMA, JR., PEREZ,* MENDOZA, REYES and PERLAS-BERNABE, LEONEN, *JJ.*
ST. SCHOLASTICA'S COLLEGE and ST. SCHOLASTICA'S ACADEMY-MARIKINA, INC., Respondents.	Promulgated: March 12, 2013

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DECISION

MENDOZA, *J.*:

Before this Court is a petition for review on *certiorari* under Rule 45 of the Rules of Court, which seeks to set aside the December 1, 2003 Decision[1] of the Court of Appeals *(CA)* in CA-G.R. SP No. 75691.

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* On official leave.

[1] *Rollo*, pp. 37-52. Penned by Associate Justice Jose L. Sabio, Jr., and concurred in by Associate Justice Delilah Vidallon-Magtolis and Associate Justice Hakim S. Abdulwahid.

The Facts

Respondents St. Scholastica's College *(SSC)* and St. Scholastica's Academy-Marikina, Inc. *(SSA-Marikina)* are educational institutions organized under the laws of the Republic of the Philippines, with principal offices and business addresses at Leon Guinto Street, Malate, Manila, and at West Drive, Marikina Heights, Marikina City, respectively.[2]

Respondent SSC is the owner of four (4) parcels of land measuring a total of 56,306.80 square meters, located in Marikina Heights and covered by Transfer Certificate Title *(TCT)* No. 91537. Located within the property are SSA-Marikina, the residence of the sisters of the Benedictine Order, the formation house of the novices, and the retirement house for the elderly sisters. The property is enclosed by a tall concrete perimeter fence built some thirty (30) years ago. Abutting the fence along the West Drive are buildings, facilities, and other improvements.[3]

The petitioners are the officials of the City Government of Marikina. On September 30, 1994, the *Sangguniang Panlungsod* of Marikina City enacted Ordinance No. 192,[4] entitled "*Regulating the Construction of Fences and Walls in the Municipality of Marikina.*" In 1995 and 1998, Ordinance Nos. 217[5] and 200[6] were enacted to amend Sections 7 and 5, respectively. Ordinance No. 192, as amended, is reproduced hereunder, as follows:

ORDINANCE No. 192
Series of 1994

ORDINANCE REGULATING THE CONSTRUCTION OF FENCES AND WALLS IN THE MUNICIPALITY OF MARIKINA

WHEREAS, under Section 447.2 of Republic Act No. 7160 otherwise known as the Local Government Code of 1991 empowers the *Sangguniang Bayan* as the local legislative body of the municipality to "x x x Prescribe reasonable limits and restraints on the use of property within the jurisdiction of the municipality, x x x";

WHEREAS the effort of the municipality to accelerate its economic and physical development, coupled with urbanization and modernization, makes imperative the adoption of an ordinance which shall embody up-to-date and modern technical design in the construction of fences of residential, commercial and industrial buildings;

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[2] Id. at 37-38.
[3] Id. at 38.
[4] Id. at 74-77.
[5] Id. at 78-79.
[6] Id. at 80.

WHEREAS, Presidential Decree No. 1096, otherwise known as the National Building Code of the Philippines, does not adequately provide technical guidelines for the construction of fences, in terms of design, construction, and criteria;

WHEREAS, the adoption of such technical standards shall provide more efficient and effective enforcement of laws on public safety and security;

WHEREAS, it has occurred in not just a few occasions that high fences or walls did not actually discourage but, in fact, even protected burglars, robbers, and other lawless elements from the view of outsiders once they have gained ingress into these walls, hence, fences not necessarily providing security, but becomes itself a "security problem";

WHEREAS, to discourage, suppress or prevent the concealment of prohibited or unlawful acts earlier enumerated, and as guardian of the people of Marikina, the municipal government seeks to enact and implement rules and ordinances to protect and promote the health, safety and morals of its constituents;

WHEREAS, consistent too, with the "Clean and Green Program" of the government, lowering of fences and walls shall encourage people to plant more trees and ornamental plants in their yards, and when visible, such trees and ornamental plants are expected to create an aura of a clean, green and beautiful environment for Marikeños;

WHEREAS, high fences are unsightly that, in the past, people planted on sidewalks to "beautify" the façade of their residences but, however, become hazards and obstructions to pedestrians;

WHEREAS, high and solid walls as fences are considered "un-neighborly" preventing community members to easily communicate and socialize and deemed to create "boxed-in" mentality among the populace;

WHEREAS, to gather as wide-range of opinions and comments on this proposal, and as a requirement of the Local Government Code of 1991 (R.A. 7160), the *Sangguniang Bayan* of Marikina invited presidents or officers of homeowners associations, and commercial and industrial establishments in Marikina to two public hearings held on July 28, 1994 and August 25, 1994;

WHEREAS, the rationale and mechanics of the proposed ordinance were fully presented to the attendees and no vehement objection was presented to the municipal government;

NOW, THEREFORE, BE IT ORDAINED BY THE SANGGUINANG BAYAN OF MARIKINA IN SESSION DULY ASSEMBLED:

Section 1. Coverage: This Ordinance regulates the construction of all fences, walls and gates on lots classified or used for residential, commercial, industrial, or special purposes.

Section 2. Definition of Terms:

a. Front Yard – refers to the area of the lot fronting a street, alley or public thoroughfare.

b. Back Yard – the part of the lot at the rear of the structure constructed therein.

c. Open fence – type of fence which allows a view of "thru-see" of the inner yard and the improvements therein. (Examples: wrought iron, wooden lattice, cyclone wire)

d. Front gate – refers to the gate which serves as a passage of persons or vehicles fronting a street, alley, or public thoroughfare.

Section 3. The standard height of fences or walls allowed under this ordinance are as follows:

(1) **Fences on the front yard – shall be no more than one (1) meter in height. Fences in excess of one (1) meter shall be of an open fence type, at least eighty percent (80%) see-thru;** and

(2) Fences on the side and back yard – shall be in accordance with the provisions of P.D. 1096 otherwise known as the National Building Code.

Section 4. No fence of any kind shall be allowed in areas specifically reserved or classified as parks.

Section 5. In no case shall walls and fences be built within the five (5) meter parking area allowance located between the front monument line and the building line of commercial and industrial establishments and educational and religious institutions.[7]

Section 6. Exemption.

(1) The Ordinance does not cover perimeter walls of residential subdivisions.

(2) When public safety or public welfare requires, the *Sangguniang Bayan* may allow the construction and/or maintenance of walls higher than as prescribed herein and shall issue a special permit or exemption.

[7] Ordinance No. 200, Series of 1998, id.

> Section 7. Transitory Provision. Real property owners whose existing fences and walls do not conform to the specifications herein are allowed adequate period of time from the passage of this Ordinance within which to conform, as follows:
>
> (1) Residential houses – eight (8) years
> (2) Commercial establishments – five (5) years
> (3) Industrial establishments – three (3) years
> (4) Educational institutions – five (5) years[8]
> (public and privately owned)
>
> Section 8. Penalty. Walls found not conforming to the provisions of this Ordinance shall be demolished by the municipal government at the expense of the owner of the lot or structure.
>
> Section 9. The Municipal Engineering Office is tasked to strictly implement this ordinance, including the issuance of the necessary implementing guidelines, issuance of building and fencing permits, and demolition of non-conforming walls at the lapse of the grace period herein provided.
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> Section 10. Repealing Clause. All existing Ordinances and Resolutions, Rules and Regulations inconsistent with the foregoing provisions are hereby repealed, amended or modified.
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> Section 11. Separability Clause. If for any reason or reasons, local executive orders, rules and regulations or parts thereof in conflict with this Ordinance are hereby repealed and/or modified accordingly.
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> Section 12. Effectivity. This ordinance takes effect after publication.
>
> APPROVED: September 30, 1994
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> (Emphases supplied)

On April 2, 2000, the City Government of Marikina sent a letter to the respondents ordering them to demolish and replace the fence of their Marikina property to make it 80% see-thru, and, at the same time, to move it back about six (6) meters to provide parking space for vehicles to park.[9] On April 26, 2000, the respondents requested for an extension of time to comply with the directive.[10] In response, the petitioners, through then City Mayor Bayani F. Fernando, insisted on the enforcement of the subject ordinance.

Not in conformity, the respondents filed a petition for prohibition with an application for a writ of preliminary injunction and temporary restraining order before the Regional Trial Court, Marikina, Branch 273 *(RTC)*, docketed as SCA Case No. 2000-381-MK.[11]

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[8] Ordinance No. 217, Series of 1995, id. at 78.
[9] Id. at 39.
[10] Id. at 85.
[11] Id. at 39.

The respondents argued that the petitioners were acting in excess of jurisdiction in enforcing Ordinance No. 192, asserting that such contravenes Section 1, Article III of the 1987 Constitution. That demolishing their fence and constructing it six (6) meters back would result in the loss of at least 1,808.34 square meters, worth about ₱9,041,700.00, along West Drive, and at least 1,954.02 square meters, worth roughly ₱9,770,100.00, along East Drive. It would also result in the destruction of the garbage house, covered walk, electric house, storage house, comfort rooms, guards' room, guards' post, waiting area for visitors, waiting area for students, Blessed Virgin Shrine, P.E. area, and the multi-purpose hall, resulting in the permanent loss of their beneficial use. The respondents, thus, asserted that the implementation of the ordinance on their property would be tantamount to an appropriation of property without due process of law; and that the petitioners could only appropriate a portion of their property through eminent domain. They also pointed out that the goal of the provisions to deter lawless elements and criminality did not exist as the solid concrete walls of the school had served as sufficient protection for many years.[12]

The petitioners, on the other hand, countered that the ordinance was a valid exercise of police power, by virtue of which, they could restrain property rights for the protection of public safety, health, morals, or the promotion of public convenience and general prosperity.[13]

On June 30, 2000, the RTC issued a writ of preliminary injunction, enjoining the petitioners from implementing the demolition of the fence at SSC's Marikina property.[14]

Ruling of the RTC

On the merits, the RTC rendered a Decision,[15] dated October 2, 2002, granting the petition and ordering the issuance of a writ of prohibition commanding the petitioners to permanently desist from enforcing or implementing Ordinance No. 192 on the respondents' property.

The RTC agreed with the respondents that the order of the petitioners to demolish the fence at the SSC property in Marikina and to move it back six (6) meters would amount to an appropriation of property which could only be done through the exercise of eminent domain. It held that the petitioners could not take the respondents' property under the guise of police power to evade the payment of just compensation.

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[12] Id. at 56-57.
[13] Id. at 57.
[14] Id. at 39-40.
[15] Id. at 54-68. Penned by Judge Olga Palanca-Enriquez.

It did not give weight to the petitioners' contention that the parking space was for the benefit of the students and patrons of SSA-Marikina, considering that the respondents were already providing for sufficient parking in compliance with the standards under Rule XIX of the National Building Code.

It further found that the 80% see-thru fence requirement could run counter to the respondents' right to privacy, considering that the property also served as a residence of the Benedictine sisters, who were entitled to some sense of privacy in their affairs. It also found that the respondents were able to prove that the danger to security had no basis in their case. Moreover, it held that the purpose of beautification could not be used to justify the exercise of police power.

It also observed that Section 7 of Ordinance No. 192, as amended, provided for retroactive application. It held, however, that such retroactive effect should not impair the respondents' vested substantive rights over the perimeter walls, the six-meter strips of land along the walls, and the building, structures, facilities, and improvements, which would be destroyed by the demolition of the walls and the seizure of the strips of land.

The RTC also found untenable the petitioners' argument that Ordinance No. 192 was a remedial or curative statute intended to correct the defects of buildings and structures, which were brought about by the absence or insufficiency of laws. It ruled that the assailed ordinance was neither remedial nor curative in nature, considering that at the time the respondents' perimeter wall was built, the same was valid and legal, and the ordinance did not refer to any previous legislation that it sought to correct.

The RTC noted that the petitioners could still take action to expropriate the subject property through eminent domain.

The RTC, thus, disposed:

> **WHEREFORE**, the petition is **GRANTED**. The writ of prohibition is hereby issued commanding the respondents to permanently desist from enforcing or implementing Ordinance No. 192, Series of 1994, as amended, on petitioners' property in question located at Marikina Heights, Marikina, Metro Manila.
>
> No pronouncement as to costs.
>
> **SO ORDERED**.[16]

[16] Id. at 68.

Ruling of the CA

In its December 1, 2003 Decision, the CA dismissed the petitioners' appeal and affirmed the RTC decision.

The CA reasoned out that the objectives stated in Ordinance No. 192 did not justify the exercise of police power, as it did not only seek to regulate, but also involved the taking of the respondents' property without due process of law. The respondents were bound to lose an unquantifiable sense of security, the beneficial use of their structures, and a total of 3,762.36 square meters of property. It, thus, ruled that the assailed ordinance could not be upheld as valid as it clearly invaded the personal and property rights of the respondents and "[f]or being unreasonable, and undue restraint of trade."[17]

It noted that although the petitioners complied with procedural due process in enacting Ordinance No. 192, they failed to comply with substantive due process. Hence, the failure of the respondents to attend the public hearings in order to raise objections did not amount to a waiver of their right to question the validity of the ordinance.

The CA also shot down the argument that the five-meter setback provision for parking was a legal easement, the use and ownership of which would remain with, and inure to, the benefit of the respondents for whom the easement was primarily intended. It found that the real intent of the setback provision was to make the parking space free for use by the public, considering that such would cease to be for the exclusive use of the school and its students as it would be situated outside school premises and beyond the school administration's control.

In affirming the RTC ruling that the ordinance was not a curative statute, the CA found that the petitioner failed to point out any irregularity or invalidity in the provisions of the National Building Code that required correction or cure. It noted that any correction in the Code should be properly undertaken by the Congress and not by the City Council of Marikina through an ordinance.

The CA, thus, disposed:

> **WHEREFORE**, all foregoing premises considered, the instant appeal is DENIED. The October 2, 2002 Decision and the January 13, 2003 Order of the Regional Trial Court (RTC) of Marikina City, Branch 273, granting petitioners-appellees' petition

[17] Id. at 49.

for Prohibition in SCA Case No. 2000-381-MK are hereby AFFIRMED.

SO ORDERED.[18]

Aggrieved by the decision of the CA, the petitioners are now before this Court presenting the following

ASSIGNMENT OF ERRORS

1. **WHETHER OR NOT THE HONORABLE COURT OF APPEALS ERRED IN DECLARING THAT CITY ORDINANCE NO. 192, SERIES OF 1994 IS NOT A VALID EXERCISE OF POLICE POWER;**

2. **WHETHER OR NOT THE HONORABLE COURT OF APPEALS ERRED IN RULING THAT THE AFOREMENTIONED ORDINANCE IS AN EXERCISE OF THE CITY OF THE POWER OF EMINENT DOMAIN;**

3. **WHETHER OR NOT THE HONORABLE COURT OF APPEALS ERRED IN DECLARING THAT THE CITY VIOLATED THE DUE PROCESS CLAUSE IN IMPLEMENTING ORDINANCE NO. 192, SERIES OF 1994; AND**

4. **WHETHER OR NOT THE HONORABLE COURT OF APPEALS ERRED IN RULING THAT THE ABOVE-MENTIONED ORDINANCE CANNOT BE GIVEN RETROACTIVE APPLICATION**.[19]

In this case, the petitioners admit that Section 5 of the assailed ordinance, pertaining to the five-meter setback requirement is, as held by the lower courts, invalid. [20] Nonetheless, the petitioners argue that such invalidity was subsequently cured by Zoning Ordinance No. 303, series of 2000. They also contend that Section 3, relating to the 80% see-thru fence requirement, must be complied with, as it remains to be valid.

Ruling of the Court

The ultimate question before the Court is whether Sections 3.1 and 5 of Ordinance No. 192 are valid exercises of police power by the City Government of Marikina.

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[18] Id. at 51-52.
[19] Id. at 17.
[20] Id. at 182-188.

"Police power is the plenary power vested in the legislature to make statutes and ordinances to promote the health, morals, peace, education, good order or safety and general welfare of the people."[21] The State, through the legislature, has delegated the exercise of police power to local government units, as agencies of the State. This delegation of police power is embodied in Section 16[22] of the Local Government Code of 1991 (R.A. No. 7160), known as the General Welfare Clause,[23] which has two branches. "The first, known as the general legislative power, authorizes the municipal council to enact ordinances and make regulations not repugnant to law, as may be necessary to carry into effect and discharge the powers and duties conferred upon the municipal council by law. The second, known as the police power proper, authorizes the municipality to enact ordinances as may be necessary and proper for the health and safety, prosperity, morals, peace, good order, comfort, and convenience of the municipality and its inhabitants, and for the protection of their property."[24]

White Light Corporation v. City of Manila,[25] discusses the test of a valid ordinance:

> The test of a valid ordinance is well established. A long line of decisions including *City of Manila* has held that for an ordinance to be valid, it must not only be within the corporate powers of the local government unit to enact and pass according to the procedure prescribed by law, it must also conform to the following substantive requirements: (1) must not contravene the Constitution or any statute; (2) must not be unfair or oppressive; (3) must not be partial or discriminatory; (4) must not prohibit but may regulate trade; (5) must be general and consistent with public policy; and (6) must not be unreasonable.[26]

Ordinance No. 192 was passed by the City Council of Marikina in the apparent exercise of its police power. To successfully invoke the exercise of police power as the rationale for the enactment of an ordinance and to free it from the imputation of constitutional infirmity, two tests have been used by the Court – the rational relationship test and the strict scrutiny test:

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[21] *Social Justice Society (SJS) v. Atienza, Jr.*, G.R. No. 156052, February 13, 2008, 545 SCRA 92, 136.

[22] Sec. 16. General Welfare. - Every local government unit shall exercise the powers expressly granted, those necessarily implied therefrom, as well as powers necessary, appropriate, or incidental for its efficient and effective governance, and those which are essential to the promotion of the general welfare. Within their respective territorial jurisdictions, local government units shall ensure and support, among other things, the preservation and enrichment of culture, promote health and safety, enhance the right of the people to a balanced ecology, encourage and support the development of appropriate and self-reliant scientific and technological capabilities, improve public morals, enhance economic prosperity and social justice, promote full employment among their residents, maintain peace and order, and preserve the comfort and convenience of their inhabitants.

[23] *Acebedo Optical Company, Inc. v. Court of Appeals*, 385 Phil. 956, 969 (2000).

[24] *Rural Bank of Makati v. Municipality of Makati*, G.R. No. 150763, July 2, 2004, 433 SCRA 362, 371-372.

[25] G.R. No. 122846, January 20, 2009, 576 SCRA 416.

[26] Id. at 433.

> We ourselves have often applied the rational basis test mainly in analysis of equal protection challenges. Using the rational basis examination, laws or ordinances are upheld if they rationally further a legitimate governmental interest. Under intermediate review, governmental interest is extensively examined and the availability of less restrictive measures is considered. Applying strict scrutiny, the focus is on the presence of compelling, rather than substantial, governmental interest and on the absence of less restrictive means for achieving that interest.[27]

Even without going to a discussion of the strict scrutiny test, Ordinance No. 192, series of 1994 must be struck down for not being reasonably necessary to accomplish the City's purpose. More importantly, it is oppressive of private rights.

Under the rational relationship test, an ordinance must pass the following requisites as discussed in *Social Justice Society (SJS) v. Atienza, Jr.*:[28]

> As with the State, local governments may be considered as having properly exercised their police power only if the following requisites are met: (1) the interests of the public generally, as distinguished from those of a particular class, require its exercise and (2) the means employed are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. In short, there must be a concurrence of a lawful subject and lawful method.[29]

Lacking a concurrence of these two requisites, the police power measure shall be struck down as an arbitrary intrusion into private rights and a violation of the due process clause. [30]

Section 3.1 and 5 of the assailed ordinance are pertinent to the issue at hand, to wit:

> Section 3. The standard height of fences of walls allowed under this ordinance are as follows:
>
> (1) Fences on the front yard – shall be no more than one (1) meter in height. Fences in excess of one (1) meter shall be an open fence type, at least eighty percent (80%) see-thru;
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> x x x x x x x x x

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[27] Id. at 437.
[28] Supra note 21.
[29] Id. at 138.
[30] *City of Manila v. Laguio, Jr.*, 495 Phil. 289, 313 (2005).

> Section 5. In no case shall walls and fences be built within the five (5) meter parking area allowance located between the front monument line and the building line of commercial and industrial establishments and educational and religious institutions.

The respondents, thus, sought to prohibit the petitioners from requiring them to (1) demolish their existing concrete wall, (2) build a fence (in excess of one meter) which must be 80% see-thru, and (3) build the said fence six meters back in order to provide a parking area.

Setback Requirement

The Court first turns its attention to Section 5 which requires the five-meter setback of the fence to provide for a parking area. The petitioners initially argued that the ownership of the parking area to be created would remain with the respondents as it would primarily be for the use of its students and faculty, and that its use by the public on non-school days would only be incidental. In their Reply, however, the petitioners admitted that Section 5 was, in fact, invalid for being repugnant to the Constitution.[31]

The Court agrees with the latter position.

The Court joins the CA in finding that the real intent of the setback requirement was to make the parking space free for use by the public, considering that it would no longer be for the exclusive use of the respondents as it would also be available for use by the general public. Section 9 of Article III of the 1987 Constitution, a provision on eminent domain, provides that private property shall not be taken for public use without just compensation.

The petitioners cannot justify the setback by arguing that the ownership of the property will continue to remain with the respondents. It is a settled rule that neither the acquisition of title nor the total destruction of value is essential to taking. In fact, it is usually in cases where the title remains with the private owner that inquiry should be made to determine whether the impairment of a property is merely regulated or amounts to a compensable taking.[32] The Court is of the view that the implementation of the setback requirement would be tantamount to a taking of a total of 3,762.36 square meters of the respondents' private property for public use without just compensation, in contravention to the Constitution.

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[31] *Rollo*, p. 184.

[32] *Office of the Solicitor General v. Ayala Land, Incorporated*, G.R No. 177056, September 18, 2009, 600 SCRA 617, 644-645.

Anent the objectives of prevention of concealment of unlawful acts and "un-neighborliness," it is obvious that providing for a parking area has no logical connection to, and is not reasonably necessary for, the accomplishment of these goals.

Regarding the beautification purpose of the setback requirement, it has long been settled that the State may not, under the guise of police power, permanently divest owners of the beneficial use of their property solely to preserve or enhance the aesthetic appearance of the community.[33] The Court, thus, finds Section 5 to be unreasonable and oppressive as it will substantially divest the respondents of the beneficial use of their property solely for aesthetic purposes. Accordingly, Section 5 of Ordinance No. 192 is invalid.

The petitioners, however, argue that the invalidity of Section 5 was properly cured by Zoning Ordinance No. 303,[34] Series of 2000, which classified the respondents' property to be within an institutional zone, under which a five-meter setback has been required.

The petitioners are mistaken. Ordinance No. 303, Series of 2000, has no bearing to the case at hand.

The Court notes with displeasure that this argument was only raised for the first time on appeal in this Court in the petitioners' Reply. Considering that Ordinance No. 303 was enacted on December 20, 2000, the petitioners could very well have raised it in their defense before the RTC in 2002. The settled rule in this jurisdiction is that a party cannot change the legal theory of this case under which the controversy was heard and decided in the trial court. It should be the same theory under which the review on appeal is conducted. Points of law, theories, issues, and arguments not adequately brought to the attention of the lower court will not be ordinarily considered by a reviewing court, inasmuch as they cannot be raised for the first time on appeal. This will be offensive to the basic rules of fair play, justice, and due process.[35]

Furthermore, the two ordinances have completely different purposes and subjects. Ordinance No. 192 aims to regulate the construction of fences, while Ordinance No. 303 is a zoning ordinance which classifies the city into specific land uses. In fact, the five-meter setback required by Ordinance No. 303 does not even appear to be for the purpose of providing a parking area.

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[33] *People v. Fajardo*, 104 Phil. 443, 447-448 (1958).
[34] *Rollo*, pp. 190-310.
[35] *Peña v. Tolentino*, G.R. No. 155227-28, February 9, 2011, 642 SCRA 310, 324-325.

By no stretch of the imagination, therefore, can Ordinance No. 303, "cure" Section 5 of Ordinance No. 192.

In any case, the clear subject of the petition for prohibition filed by the respondents is Ordinance No. 192 and, as such, the precise issue to be determined is whether the petitioners can be prohibited from enforcing the said ordinance, and no other, against the respondents.

80% See-Thru Fence Requirement

The petitioners argue that while Section 5 of Ordinance No. 192 may be invalid, Section 3.1 limiting the height of fences to one meter and requiring fences in excess of one meter to be at least 80% see-thru, should remain valid and enforceable against the respondents.

The Court cannot accommodate the petitioner.

For Section 3.1 to pass the rational relationship test, the petitioners must show the reasonable relation between the purpose of the police power measure and the means employed for its accomplishment, for even under the guise of protecting the public interest, personal rights and those pertaining to private property will not be permitted to be arbitrarily invaded.[36]

The principal purpose of Section 3.1 is "to discourage, suppress or prevent the concealment of prohibited or unlawful acts." The ultimate goal of this objective is clearly the prevention of crime to ensure public safety and security. The means employed by the petitioners, however, is not reasonably necessary for the accomplishment of this purpose and is unduly oppressive to private rights.

The petitioners have not adequately shown, and it does not appear obvious to this Court, that an 80% see-thru fence would provide better protection and a higher level of security, or serve as a more satisfactory criminal deterrent, than a tall solid concrete wall. It may even be argued that such exposed premises could entice and tempt would-be criminals to the property, and that a see-thru fence would be easier to bypass and breach. It also appears that the respondents' concrete wall has served as more than sufficient protection over the last 40 years. `

As to the beautification purpose of the assailed ordinance, as previously discussed, the State may not, under the guise of police power, infringe on private rights solely for the sake of the aesthetic appearance of the community. Similarly, the Court cannot perceive how a see-thru fence will foster "neighborliness" between members of a community.

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[36] *City of Manila v. Laguio, Jr.*, supra note 30, at 312-313.

Compelling the respondents to construct their fence in accordance with the assailed ordinance is, thus, a clear encroachment on their right to property, which necessarily includes their right to decide how best to protect their property.

It also appears that requiring the exposure of their property via a see-thru fence is violative of their right to privacy, considering that the residence of the Benedictine nuns is also located within the property. The right to privacy has long been considered a fundamental right guaranteed by the Constitution that must be protected from intrusion or constraint. The right to privacy is essentially the right to be let alone,[37] as governmental powers should stop short of certain intrusions into the personal life of its citizens.[38] It is inherent in the concept of liberty, enshrined in the Bill of Rights (Article III) in Sections 1, 2, 3(1), 6, 8, and 17, Article III of the 1987 Constitution.[39]

The enforcement of Section 3.1 would, therefore, result in an undue interference with the respondents' rights to property and privacy. Section 3.1 of Ordinance No. 192 is, thus, also invalid and cannot be enforced against the respondents.

No Retroactivity

Ordinance No. 217 amended Section 7 of Ordinance No. 192 by including the regulation of educational institutions which was unintentionally omitted, and giving said educational institutions five (5) years from the passage of Ordinance No. 192 (and not Ordinance No. 217) to conform to its provisions.[40] The petitioners argued that the amendment

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[37] *Gamboa v. Chan*, G.R. No. 193636, July 24, 2012, 677 SCRA 385, 396, citing *Morfe v. Mutuc*, 130 Phil. 415 (1968).

[38] *White Light Corporation v. City of Manila*, supra note 19, at 441, citing *City of Manila v. Laguio*, 495 Phil. 289 (2005).

[39] *Gamboa v. Chan*, supra note 37, at 397-398, citing *Ople v. Torres*, 354 Phil. 948 (1998).

> Sec. 1. No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.
>
> Sec. 2. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.
>
> Sec. 3. (1) The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law.
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> x x x x x x x x x
>
> Sec. 6. The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except in the interest of national security, public safety, or public health as may be provided by law.
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> x x x x x x x x x
>
> Sec. 8. The right of the people, including those employed in the public and private sectors, to form unions, associations, or societies for purposes not contrary to law shall not be abridged.
>
> x x x x x x x x x
>
> Sec. 17. No person shall be compelled to be a witness against himself.

[40] *Rollo*, pp. 78-79.

could be retroactively applied because the assailed ordinance is a curative statute which is retroactive in nature.

Considering that Sections 3.1 and 5 of Ordinance No. 192 cannot be enforced against the respondents, it is no longer necessary to rule on the issue of retroactivity. The Court shall, nevertheless, pass upon the issue for the sake of clarity.

"Curative statutes are enacted to cure defects in a prior law or to validate legal proceedings which would otherwise be void for want of conformity with certain legal requirements. They are intended to supply defects, abridge superfluities and curb certain evils. They are intended to enable persons to carry into effect that which they have designed or intended, but has failed of expected legal consequence by reason of some statutory disability or irregularity in their own action. They make valid that which, before the enactment of the statute was invalid. Their purpose is to give validity to acts done that would have been invalid under existing laws, as if existing laws have been complied with. Curative statutes, therefore, by their very essence, are retroactive."[41]

The petitioners argue that Ordinance No. 192 is a curative statute as it aims to correct or cure a defect in the National Building Code, namely, its failure to provide for adequate guidelines for the construction of fences. They ultimately seek to remedy an insufficiency in the law. In aiming to cure this insufficiency, the petitioners attempt to add lacking provisions to the National Building Code. This is not what is contemplated by curative statutes, which intend to correct irregularities or invalidity in the law. The petitioners fail to point out any irregular or invalid provision. As such, the assailed ordinance cannot qualify as curative and retroactive in nature.

At any rate, there appears to be no insufficiency in the National Building Code with respect to parking provisions in relation to the issue of the respondents. Paragraph 1.16.1, Rule XIX of the Rules and Regulations of the said code requires an educational institution to provide one parking slot for every ten classrooms. As found by the lower courts, the respondents provide a total of 76 parking slots for their 80 classrooms and, thus, had more than sufficiently complied with the law.

Ordinance No. 192, as amended, is, therefore, not a curative statute which may be applied retroactively.

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[41] *Narzoles v. National Labor Relations Commission*, 395 Phil. 758, 764-765 (2000).

Separability

Sections 3.1 and 5 of Ordinance No. 192, as amended, are, thus, invalid and cannot be enforced against the respondents. Nonetheless, "the general rule is that where part of a statute is void as repugnant to the Constitution, while another part is valid, the valid portion, if susceptible to being separated from the invalid, may stand and be enforced."[42] Thus, the other sections of the assailed ordinance remain valid and enforceable.

Conclusion

Considering the invalidity of Sections 3.1 and 5, it is clear that the petitioners were acting in excess of their jurisdiction in enforcing Ordinance No. 192 against the respondents. The CA was correct in affirming the decision of the RTC in issuing the writ of prohibition. The petitioners must permanently desist from enforcing Sections 3.1 and 5 of the assailed ordinance on the respondents' property in Marikina City.

WHEREFORE, the petition is **DENIED**. The October 2, 2002 Decision of the Regional Trial Court in SCA Case No. 2000-381-MK is **AFFIRMED** but **MODIFIED** to read as follows:

> **WHEREFORE**, the petition is **GRANTED**. The writ of prohibition is hereby issued commanding the respondents to permanently desist from enforcing or implementing Sections 3.1 and 5 of Ordinance No. 192, Series of 1994, as amended, on the petitioners' property in question located in Marikina Heights, Marikina, Metro Manila.
>
> No pronouncement as to costs.

SO ORDERED.

JOSE CATRAL MENDOZA
Associate Justice

[42] *PKSMMN v. Executive Secretary*, G.R. Nos. 147036-37, April 10, 2012, 669 SCRA 49, 74.

WE CONCUR:

MARIA LOURDES P. A. SERENO
Chief Justice

ANTONIO T. CARPIO
Associate Justice

PRESBITERO J. VELASCO, JR.
Associate Justice

TERESITA J. LEONARDO-DE CASTRO
Associate Justice

ARTURO D. BRION
Associate Justice

DIOSDADO M. PERALTA
Associate Justice

LUCAS P. BERSAMIN
Associate Justice

MARIANO C. DEL CASTILLO
Associate Justice

ROBERTO A. ABAD
Associate Justice

MARTIN S. VILLARAMA, JR.
Associate Justice

(On official leave)
JOSE PORTUGAL PEREZ
Associate Justice

BIENVENIDO L. REYES
Associate Justice

ESTELA M. PERLAS-BERNABE
Associate Justice

MARVIC MARIO VICTOR F. LEONEN
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, I hereby certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court.

MARIA LOURDES P. A. SERENO
Chief Justice