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Zoning—Zoning Ordinance—Constitutionality Of Privately Or Publicly Established Set-Back Lines

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> The editorial, signed by Dr. Dana L. Farnsworth, Cambridge, Mass., challenged the claim that these drugs "free" the mind for creative work. Farnsworth said a dangerous situation is developing because public interest in these drugs is on the increase in many sections of the United States. "Many men and women who should not do so, especially college students, are experimenting with these drugs," he said.[14]

A majority report of the Senate subcommittee on Antitrust and Monopoly concluded that, with respect to deleterious side effects, the pharmaceutical houses:

> in their advertisements have tended to handle the matter in either of two ways: Ignore side effects entirely or note and then dismiss the subject with some sort or reassuring phrase.[15]

Testimony elicited shows that side effects of certain drugs may not become apparent until used by "thousands and thousands of patients."[16] In certain instances drugs are rushed on the market with a view to meeting and beating competition rather than to insure the maximum in controlled testing.[17] Although a contrary result in the instant case, *i.e.*, computing the accrual of the cause of action from the time of reasonable discovery of the side effects, may not prevent the release of latently dangerous drugs on an unwary public, it would place the risk upon the drug industry which could then chalk up the misery it has inflicted as an item in the cost of goods sold.

William A. Carnahan

ZONING

ZONING ORDINANCE—CONSTITUTIONALITY OF PRIVATELY OR PUBLICLY ESTABLISHED SET-BACK LINES

A town zoning ordinance passed in 1961 required proposed dwellings to be set back from the road edge an amount equal to a set-back line which was determined by averaging the set-backs of existing homes within 300 feet on either side. This repealed a 1945 ordinance which contained an identical provision. Petitioner-plaintiff, Sierra Construction Company, after having previously laid a foundation for a home with a 61 1/2 foot set-back, was refused a building permit because the home was within 300 feet of four homes built in 1958, each having an eighty-two foot set-back. The Board of Zoning Appeals affirmed this action. In an Article 78 proceeding, Monroe County's Supreme

14. Buffalo Courier Express, Sept. 13, 1963, p.1, col. 5.

15. *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 87th Cong., 1st Sess. Report no. 448, at 198 (1961).

16. *Id.* at 201.

17. *Id.* at 187.

Court Special Term affirmed the Board as did the Appellate Division.[1] Before the Court of Appeals, petitioner argued that the ordinance contravened New York state and federal law by giving an unconstitutional delegation of legislative power to private persons, thereby denying petitioner the use of its property without due process or equal protection of the law. The Court *held*, affirmed; three judges dissented and one concurred in the result only. The majority concluded that a zoning ordinance requiring the set-back lines of new dwellings to match certain existing set-back lines was constitutional. *Sierra Constr. Co., Inc. v. Board of Appeals*, 12 N.Y.2d 79, 187 N.E.2d 123, 236 N.Y.S.2d 53 (1962).

State legislatures give the power to local governments to enact and enforce zoning ordinances. This delegation is derived from the inherent police power of the state.[2] The regulation of land, by districting it for certain uses,[3] to encourage the earliest, permanent, and productive use of all property are the purposes of zoning law.[4] Although the police power is the only justification for zoning ordinances approved to date, eminent domain and nuisance have also been urged. These two ideas were rejected because of their inflexibility and their lack of procedural safeguards.[5] To insure that the police power will provide flexibility and procedural safeguards, zoning laws have traditionally been requierd to be related to the public health, safety, morals, or welfare.[6] The welfare criteria, while at first restricted in application,[7] has apparently gained a more widespread use by the courts. This increased use is probably because the welfare criteria contains the element of aesthetic value as a partial basis for the validation of zoning ordinances and set-back rules. Thus, in some instances, proposed nonconforming structures must first be approved by adjacent owners in order to preserve aesthetic beauty and, as a consequence, realty values.[8] In New York, as in other jurisdictions, the established rule still seems to be that zoning cannot be justified by aesthetic purposes alone, but must be related to some of the other public values mentioned above.[9] How-

1. Sierra Constr. Co. v. Board of Appeals, 33 Misc. 2d 414, 224 N.Y.S.2d 787 (Sup. Ct. 1961), *aff'd*, 15 A.D.2d 859, 227 N.Y.S.2d 213 (4th Dep't 1962).

2. Whittaker v. Village of Franklinville, 265 N.Y. 11, 191 N.E. 716 (1934); Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926).

3. People v. Elkin, 196 Misc. 188, 80 N.Y.S.2d 525 (City Ct. Mt. Vernon sitting as Ct. Spec. Sess. 1948).

4. Whitnall, Abatement of Nonconforming Uses 131 (Institute on Planning and Zoning, Southwestern Legal Foundation Vol. 2, 1962).

5. Note, *Zoning: An Extension of the Police Power*, 13 Iowa L. Rev. 78 (1927).

6. Nectow v. City of Cambridge, 277 U.S. 183 (1928); Concordia Collegiate Institute v. Miller, 301 N.Y. 189, 93 N.E.2d 632 (1950); People v. Olcott, 173 Misc. 87, 16 N.Y.S.2d 256 (Rochester City Ct. 1939). *Cf.* Bacon v. Walker, 204 U.S. 311 (1907) (general prosperity); Sabatini v. Andrews, 243 App. Div. 109, 276 N.Y. Supp. 502 (1st Dep't 1934) (public convenience).

7. Brown, *Due Process of Law, Police Power and the Supreme Court*, 40 Harv. L. Rev. 943 (1927).

8. *In re* Russell, 158 N.Y. Supp. 162 (Sup. Ct. 1916). See also 7 Buffalo L. Rev. 160 (1957).

9. 1 Rathkopf, The Law of Zoning and Planning 11-1 (3d ed. 1962); Baddour v. City of Long Beach, 279 N.Y. 167, 18 N.E.2d 18 (1938).

ever, a United States Supreme Court case has established that the concept of aesthetic value contains monetary and health elements[10] and, specifically, that the legislative power extends to keeping the community beautiful as well as healthy.[11] This principle presumably supports set-back rules.

Zoning legislation, like much other law, requires some measure of delegation of discretionary authority; and it is settled that, like the state legislature, a municipality or town may delegate authority to administer its ordinances.[12] The usual judicial criteria involved in questions of delegation of legislative power apply with equal force to questions of delegation in zoning law. Delegations of power must be neither arbitrary[13] nor discriminatory.[14] Although a delegation of zoning power may also be invalid as confiscatory, limitations on land use or value alone are not confiscatory per se.[15] If the restriction of property is to a use to which it is not reasonably adapted,[16] or if there is an extreme reduction of the property's value, irrespective of the public gain—then the restriction will be held confiscatory.[17] In addition, the legislative body must establish a standard against which the recipient of power may measure and guide its conduct in the exercise of its authority,[18] thereby helping to prevent unauthorized actions beyond the purview of the empowering statute. Without some indication of the restraints intended in the statute, or ordinance itself, the delegation may be unconstitutional because of an uncertainty of standard or inadequate definition of the extent of the delegation of power.[19] In order to make allowances for variances[20] and other grey areas in zoning law, the delegation must provide room for official discretion,[21] in order to give its administrative process a flexible rather than an inflexible quality. Moreover, the public should know the proper function of the administrative agency involved in order to evaluate its services. These judicial guideposts are better

10. Berman v. Parker, 348 U.S. 26 (1954); see Dukeminier, *Zoning Aesthetic Objectives*, 20 Law & Contemp. Prob. 218 (1955); Rodda, *The Accomplishment of Aesthetic Purposes Under the Police Power*, 27 So. Cal. L. Rev. 149 (1954).

11. Berman v. Parker *supra* note 10.

12. Green Point Sav. Bank v. Board of Zoning Appeals, 281 N.Y. 534, 24 N.E.2d 319 (1939), *appeal dismissed*, 309 U.S. 633 (1939); Schmitt v. Plonski, 215 N.Y.S.2d 170 (Sup. Ct. 1961); Annot., 58 A.L.R.2d 1083 (1958).

13. 1 Rathkopf, *op. cit. supra* note 9, at 3-5.

14. Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Wertheimer v. Schwab, 124 Misc. 822, 210 N.Y. Supp. 312 (Sup. Ct. 1925).

15. Plymouth Builders v. Village of Lindenhurst, 284 App. Div. 895, 134 N.Y.S.2d 225 (2d Dep't 1954); see 1 Rathkopf, *op. cit. supra* note 9, at 6-1.

16. Rockdale Constr. Co. v. Village of Cedarhurst, 301 N.Y. 519, 93 N.E.2d 76 (1950).

17. Town of Somers v. Camarco, 126 N.Y.S.2d 154 (Sup. Ct. 1953), *modified and aff'd*, 284 App. Div. 979, 135 N.Y.S.2d 42 (2d Dep't 1954), *aff'd*, 308 N.Y. 537, 127 N.E.2d 327 (1955).

18. Small v. Moss, 279 N.Y. 288, 18 N.E.2d 281 (1938).

19. Bar Harbor Shopping Center, Inc. v. Andrews, 23 Misc. 2d 894, 196 N.Y.S.2d 856 (Sup. Ct. 1959). *Contra*, Green Point Sav. Bank v. Board of Zoning Appeals, 281 N.Y. 534, 24 N.E.2d 319 (1939) (matter dealt with well within police power); Jaffe, *Delegation of Legislative Power* (pt. 2), 47 Colum. L. Rev. 561, 587 (1947).

20. 12 Buffalo L. Rev. 211 (1962).

21. Small v. Moss, 279 N.Y. 288, 18 N.E.2d 281 (1938); Eubank v. Richmond, 226 U.S. 137 (1912).

described as procedural safeguards.[22] In other words, the availability of ready review and appeal to administrators of the zoning law should be emphasized more than the requirement of statutory standards. The necessity for restraint is further shown in another United States Supreme Court decision which held that legislative sanction of set-back lines, privately determined but officially established, was unconstitutional.[23]

In the instant case, the majority opinion avoided the delegation constitutionality issue by concluding that there was simply no delegation of power at all. The majority determined that the 1961 ordinance applied; and since the four houses built in 1958, already existed in 1961, the ordinance merely required conformity to the average of their set-backs. There could be no claim that the set-back requirement was confiscatory and therefore void since if petitioner's house were built on its 150 foot lot, using an eighty-two foot set-back line, there would be "plenty of room" for backyard without any "apparent disadvantage or inconvenience of any kind."[24] Citing section twenty-six of the 1961 ordinance, the petitioner had contended that if a lot map were filed prior to the enactment of the new ordinance, the 1945 ordinance applied. Answering this point, the majority said that the 1945 ordinance contained a similar set-back provision. Secondly, it reasoned that the section twenty-six exemption was intended to apply only where upzoning occurred; that is, redistricting into a more restrictive zone, thus depriving the owner of his previous rights. This reasoning was also used to dispose of petitioner's alternative argument that section 265-a of the N.Y. Town Law gave a similar exemption. Rejecting the majority rationale, the minority held that section twenty-six did exempt petitioner's lot by virtue of the fact that a lot map had been filed before enactment of the 1961 legislation. This analysis raised the delegation issue since, if the 1945 ordinance did apply, the *Eubank v. Richmond* doctrine could be invoked. Basically, the minority agreed with petitioner that *Eubank* was in point. Consequently, they declared as unconstitutional any grant of power to property owners which could be used to limit the property rights of prospective builders wthout a legislative standard to limit arbitrary individual taste in establishing such set-backs. In the *Eubank* case, the parties filed a paper which compelled public officials to set the desired line; while, in the instant case, the actual construction of houses set the desired line. Despite this factual distinction, the minority found no difference in constitutional principle.

The majority opinion fails to establish the connection between the set-back requirement at issue and a valid exercise of the police power. In what way was the privately established, eighty-two foot set-back, or any one like it, related to public health, welfare, or morals? A minimum of sixty feet was legislatively provided for contingencies such as street or widening, as well as to insure adequate room for fire-fighting operations. The only convincing relation-

22. Davis, Administrative Law § 2.09, at 42 (1959).
23. Eubank v. Richmond, 226 U.S. 137 (1912).
24. Instant case at 83, 187 N.E.2d at 125, 236 N.Y.S.2d at 55.

ship between the ordinance and a proper purpose is the retention of property by recognizing the inherent dependence of such values upon the appearance of adjacent buildings. If widespread non-conformity and bizarre set-back variations were allowed, then originally built homes might be, in some measure, depreciated. As far as public health and welfare are concerned, one official source has recommended a backyard minimum of thirty-five feet.[25] It is probable that the depth of an average modern home built on an eighty-two foot line in a 150 foot lot could leave less than thirty-five feet for a backyard. A more persuasive opinion could have resulted if aesthetic and monetary considerations had been used to justify the set-back ordinance. Then it might have been argued that the police power had been validly exercised to preserve these public values. A second weakness arose from the majority's failure to explain why the 1961 ordinance applied, leading to its conclusion that there was no delegation of power. The majority's observation that the 1945 ordinance contained a similar set-back provision was immaterial and only re-enforced petitioner's position on the delegation issue. Inadequate reasons were given for rejecting petitioner's section twenty-six argument. This section's first sentence dealt with upzoning, while the second dealt with prior filing. In the majority's view, such a juxtaposition of sentences meant the legislative intent was that the filing exemption referred only to upzoning situations. This construction seems questionable. It appears more logical that sentence one established only a broad exemption to non-conforming uses already in existence. Lot map filings would serve no purpose here. If sentence one were intended to cover open lots, filing would again be unnecessary. This time because by any upzoning the existence and location of open lots affected would be known anyway. If this were so, two distinct exempt classes would arise—non-conforming uses and prior filings. One of these classes necessarily included petitioner's property,[26] causing the 1945 ordinance to apply and opening to question the delegation of power given by that ordinance. It is interesting to note that although the alleged exemption of N.Y. Town Law, section 265-a, was rejected on the same basis, this section in no way refers to upzoning in the same sense as does ordinance section twenty-six. Since the majority concluded that the ordinance was such that no delegation of power was made, the decision only adds to an already established series of precedents on the subject. However, if an appeal is taken from enforcement of the 1961 set-back provision where conformity to set-back lines privately created after its enactment, is required, then the minority opinion should be more persuasive. It may be still more persuasive where a particular application of the ordinance results in an owner being restricted to an inordinately short backyard, or, virtually none at all. This decision makes possible such a result.

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25. N.Y. Dep't of Commerce, Zoning in New York State 31 (1961).
26. See N.Y. Dep't of Commerce, Local Planning and Zoning 75 (1961).