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Zoning—Refusal of Special Zoning Exception Where Similar Exceptions Were Granted Was Not Arbitrary

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ZONING

REFUSAL OF SPECIAL ZONING EXCEPTION WHERE SIMILAR EXCEPTIONS WERE GRANTED WAS NOT ARBITRARY

Petitioner applied to a town board for a special exception to install gasoline storage tanks and conduct a service station. The board refused his application stating the grounds that the proposed location was too near to a shopping center and a school and that it fronted on a heavily trafficked street. The lower court reversed the board's determination and granted the application.[1] Appellate Division reversed. On appeal, *held*, affirmed, two judges dissenting. The board's refusal was not arbitrary, illegal, or an abuse of discretion. *Lemir Realty Corp. v. Larkin*, 11 N.Y.2d 20, 181 N.E.2d 407, 226 N.Y.S.2d 374 (1962).

The discretion of a town board in granting or refusing zoning variances and exceptions is grounded in statute.[2] Review of the board's discretionary action merely tests that action against a standard of reasonableness,[3] the definition of which provides the problem. In *Larkin v. Schwab*,[4] a leading case in the area, the Court of Appeals took the position that where the board's action concerns a subject affecting the public safety, specific standards need not be formulated by the board as a guide to its action. Moreover, the mere fact that the board previously granted a variance in circumstances similar to those at hand does not make their present refusal arbitrary. Presumably, the board's refusal may have been guided by slight differences which might sway discretion and which are not readily apparent to the removed forum of a court. In short the board need not bind itself by legislating narrow or particular guides nor by making prior discretionary choices. Their action must simply comport with the broad contours of public safety. A number of lower courts in this state have for some time inclined to a more stringent definition of reasonableness. This test demands that the facts recounted by the board for its decision be arguable. The causal relation between the object of public safety and the factual matter at the base of that object must be drawn out. This test approaches the usual standard established for the review of administrative action, the substantial evidence test.

To decide whether the Board's determination is reasonable, the Court requires it to set forth, in its record of the hearing, the facts which led to its conclusions.[5] Due Process requires this, especially when the Board acts upon its personal knowledge, so that a court will be able to determine whether the

1. 195 N.Y.S.2d 232 (Sup. Ct. 1959); rev'd, 10 A.D.2d 1005, 204 N.Y.S.2d 584 (2d Dep't 1960).

2. Town of Hempstead, N.Y., Zoning Ordinance §§ X-1.0, X-1.9.

3. See Rothstein v. County Operating Corp., 6 N.Y.2d 728, 729, 185 N.Y.S.2d 813, 158 N.E.2d 507 (1959).

4. 242 N.Y. 330, 151 N.E. 637 (1926).

5. See People ex rel. Fordham Manor Ref. Church v. Walsh, 244 N.Y. 280, 155 N.E. 575 (1927).

reasons given are substantial.[6] However, the courts do not have original jurisdiction over zoning ordinances, nor may they invalidate them so long as they are within the provisions of section 262 of the Town Law and are not by their terms discriminatory.[7] The United States Supreme Court has held that ordinances granting wide discretion to administrative officials are not prima facie deprivations of due process or of equal protection of the law, but rather they are a valid exercise of the police power of a state through its municipalities.[8]

Unlike courts, administrative tribunals are not bound by strict evidentiary rules, nor by their prior decisions. This latter point was one of contention in the instant case, since the board refused to grant the present application, although it had done so in similar situations. The Court refused to look to this precedent, stating that the question was whether this petitioner had been oppressed, not whether someone else had been favored. The majority reasoned that the stated facts went to the reasonableness of the Board's decision whereas the dissenters believed that these facts amounted to a physical description of the area and did not support the board's conclusions, since the Board had submitted no evidence to support these facts, the facts upon which it apparently based its denial. The dissent demands more explicit reasons for the board's disregard of its decisions in similar situations and also stressed the fact that petitioner sought a "special exception" and not a "variance." The former, when granted by a board, allows the person seeking it to use his property in a way expressly *permitted* by ordinance, in harmony with other uses permitted in a district, whereas a variance is a permit to use property in a manner expressly *forbidden* by ordinance and depends on practical difficulty and unnecessary hardship. Thus the special exception is the more favored, and when refused, the board should have clear and obvious grounds. The majority believes that each case of discretion stands alone and if a petitioner desires to overturn a determination, the burden is heavily upon him to show some obvious evidence of arbitrary, unfair misuse of discretion. The minority asks extrinsic evidence, such as traffic counts, to support stated reasons, and clear, causal relation between those reasons and the determination. These dissenters require the logic of the conclusion demonstrated by the town board; they conclude that to follow the majority rule means a granting of virtual tyranny to boards over the economic affairs of the communities they represent.

This case illustrates the divergence between lower and upper court decisions on this point. One writer, discussing the Appellate Division decision which the present decision has affirmed, states that it goes against many Special Term decisions in the same department "which had held that the town board must effectively show the manner in which such physical facts created a

6. See Wehr v. Crowley, 6 A.D.2d 214, 175 N.Y.S.2d 981 (4th Dep't 1958).

7. Green Point Sav. Bank v. Board of Zoning Appeals, 281 N.Y. 534, 540, 24 N.E.2d 319, 322 (1939).

8. Fischer v. St. Louis, 194 U.S. 361, 370-72 (1904).

reasonable apprehension of danger or were otherwise justified by relation to the public health, safety, morals, or general welfare."[9] To show the manner means to demonstrate the causal relation between facts and conclusions. Another writer states that New York's standard is the "substantial evidence" test[10] and in an earlier work defines this as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[11] The majority in the instant case, stressing unfairness, searched for evidence that the decision was arbitrary. If the Board's conclusion can be substantiated by evidence presented on the record, it will not be struck down as arbitrary nor as an abuse of discretion, notwithstanding the fact that an opposite conclusion could be drawn. The minority, stressing causality, thought that the evidence must be substantial in the sense that it caused the Board to reach that conclusion which formed its determination. By implication, the dissenters require the Board to demonstrate its line of reasoning. Thus, town board rulings are to all intents and purposes final, unless the petitioner has positive evidence to prove the determinations arbitrary, or unless the town fails to support its rulings with any reasons at all. The Court will not infer unfairness. As here, opposite conclusions may be drawn from almost identical fact situations, as indicated in the dissent, but the town board ruling stands. The town must explain, but its explanation need not be too explicit. The town may not be arbitrary, but if a petitioner thinks it is, he must have strong proof. In short, if one is to challenge a town board ruling, the weight of his evidence must be clear and overwhelming. For now, town boards need not think out and spell out every determination where it is clearly based on a discretionary provision in an ordinance. The Court of Appeals has reaffirmed its stand that town boards must be given the greatest latitude in the determination of controversies arising under ordinances which grant to the boards "discretion" in the licensing of businesses.

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9. 1 Rathkopf, The Law of Zoning and Planning ch. 54, p. 43, n.16 (3rd ed. 1960).
10. Jaffe and Nathanson, Administrative Law 215-218 (1961).
11. Jaffe, Judicial Review; Question of Fact, 69 Harv. L. Rev. 1020, 1021 (1956), quoting Chief Justice Hughes in Consolidated Edison v. NLRB, 305 U.S. 197, 229 (1938).