Buffalo Law Review

Volume 11 | Number 1 Article 119

10-1-1961

Zoning—Regulation of Unsafe Use Upheld

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injunction under New York Civil Practice Act § 876-a was deemed irrelevant in interpreting the Unemployment Insurance Law. As noted above, the law will normally be construed to bring benefits to as many unemployed workers as possible. This was the apparent legislative intent. But it was also the legislative intent that state funds not be used to support strikes. The statute was meant to embody a "reconciliation of the purposes of unemployment insurance with the principle of government neutrality."[34] This is the other side of the scale that must be and has been properly balanced by the Court of Appeals.

R. V. B.

ZONING

REGULATION OF UNSAFE USE UPHELD

In *Town of Hempstead v. Goldblatt*[1] the Court of Appeals upheld an Appellate Division affirmance[2] of a judgment of Special Term[3] against defendants Goldblatt, and the Builders Sand & Gravel Corp. Over constitutional objections, an injunction was granted restraining defendants from operating their sand pit before complying with a new Town Ordinance ostensibly intended to regulate unsafe uses.

The Court of Appeals first recognized the presumption of constitutionality of the Ordinance and properly placed the burden on the defendants to overcome this presumption by proving the unreasonableness of its requirements. Defendants had been operating a sand pit since 1927, when the area was primarily rural. In 1945, a six foot chain link fence topped with barbed wire was erected around the 38 acre site in accordance with an ordinance passed by the town that year. Eleven years later, the town sought unsuccessfully to restrain defendants from dredging operation in a zoned area (practically all of defendants' excavation work is under water). There the trial court allowed the continuation of business because it was a prior non-conforming use in which defendants had a substantial investment.

Town Ordinance No. 16, in question here, was amended in 1958 to require, among other things, that defendants fill in all previous excavation (averaging 25 feet over 20 acres), discontinue excavation below ground water level, place a concrete footing under the 7000 lineal feet of fencing, and not dredge within 20 feet of any property line, as conditions to obtaining a permit and continuing operations. Defendant was denied permission to introduce evidence as to the market value of his property, but there was evidence available to the Court of Appeals that the business grossed about $200,000 per year, which sum was also

34. Supra note 29 at 8, 217 N.Y.S.2d at 15.

1. 9 N.Y.2d 101, 211 N.Y.S.2d 185 (1961).
2. 9 A.D.2d 936, 196 N.Y.S.2d 573 (2d Dep't 1959).
3. 19 Misc. 2d 176, 189 N.Y.S.2d 577 (1959).

close to an estimate of the value of the site and equipment based on assessment for taxes. The ordinance of the town was ostensibly to protect against the dangers of cave-ins, drownings and water pollution. There was no record of any cave-in at the site, and defendants also showed that the excavation was not stagnant. In 1944, there was a drowning in this pit. The following year, however, the 6 foot fence was erected. Since then, there has been no reported incident to demonstrate a continuing danger. But much testimony was given at the trial level of a number of unfenced bodies of water in the area, about which no protest or apprehension has been expressed.

In spite of the above state of facts, the Court of Appeals did not believe the defendants had overcome the presumption of constitutionality. It recognized instead the strength of the town's proof as to the great number of homes and children nearby. From this, it found a danger within "common knowledge" sufficient to warrant this statute as a valid exercise of police power in the interest of the community's welfare and safety. "The hazards of both life and property accompanying the *uncontrolled* operation of these pits are *common knowledge*, and their restraint need not await an event." (Emphasis added.) The Court appears to assume that the pits were unregulated. On the contrary, the 1945 ordinance required set-backs, grading and the 6 foot fence. Also, why are dangers so obvious around a well-fenced, set-back pit and not around the many un-fenced, truly "uncontrolled" bodies of water nearby? To the contention that the ordinance was confiscatory, the Court said that operations were not proscribed, but merely conditional. It very expansively noted that 18 acres (of 38) were still available. But it didn't consider: 1) that excavations could only go to ground water level; 2) the 20 foot set-back would take much of the 18 acres now above ground; 3) defendants' equipment and buildings occupies a good portion of this land. The Court was perhaps a little too willing to bypass the circumstances of the particular case and to fall back on generally acceptable but broad statements of the wide sweep of the police power.

A dissenting opinion by Judge Van Voorhis expressed the belief that the ordinance is an unconstitutional taking of property, and partially an ex post facto law. The dissent recognizes the distinction raised by the town between "an invalid retroactive zoning ordinance attempting to eliminate a non-conforming use" and a valid " 'regulatory' ordinance which regulates the non-conforming use in the interest of public health and safety." But to the minority this distinction is not decisive here, for while the ordinance, unlike the unsuccessful one in 1956, is couched in regulatory terms, the dissent reads it in light of its practical affect. One million cubic yards of fill would be needed at about $1 per yard, to meet but one requirement of continuing business. To continue business without filling in the excavation lawfully made would subject the defendants to criminal sanctions. This, the minority holds, would "render criminal an act 'innocent when done' " in violation of Article I, Section 10 of the United States Constitution.

Judge Van Voorhis sees Ordinance No. 16 to be part of a continued town attempt to put defendants out of business. In addition, he does not find that the fenced pit constitutes any great hazard to human life, but finds it to be "virtually conceded" that the 1945 provisions were sufficient protection.

To place the instant decision in proper perspective, a look at similar cases is necessary. *People v. Miller*, decided in 1952, resulted in the upholding of an ordinance which prohibited the raising of pigeons.[4] Although Miller's was a prior non-conforming use, the Court ruled that his interest (monetary) was so slight that it could be over-balanced by the public welfare. *Trio District Corp. v. City of Albany*,[5] although not dealing with a prior non-conforming use of land, relates to the problem of how police power regulation could extend in New York. There the City of Albany sought to enforce a regulation requiring pedlars of Good Humor ice cream products to be accompanied by an attendant whose sole duty was to protect approaching children from the passing motor vehicles. The Court of Appeals there noted a previous attempt by the City in 1955 to require an additional attendant to sell the pre-packaged ice cream to prevent contamination from the soiled hands of the driver. Considering these two attempts and one in 1950 requiring a six month residency for pedlars, the Court held the regulation unconstitutional as an unreasonable restriction designed to prohibit the corporation's business "under the guise of regulation."

In the same year as the *Trio* case, 1957, the Court of Appeals decided *Harbison v. City of Buffalo*.[6] Although there was a substantial investment present in the form of a business reconditioning used steel drums, it was held that a zoning law prohibiting this business after a three year grace period *would* be constitutional if the grace period was reasonable. That case, however, was clearly a zoning, rather than regulatory law. But there the Court noted that the improvements consisted of a structure, and the same business might have been carried on elsewhere. It did not reach the instance of a business directly related to the particular land.

The United States Supreme Court has upheld an ordinance prohibiting the manufacture of bricks by a prior user within the City of Los Angeles. In *Hadacheck v. Sebastian* appellant had 8 acres of land containing a clay bed and an accompanying brick kiln.[7] The land was worth $800,000 as brick-making property, but no more than $60,000 for residential purposes. Uncontradicted evidence was introduced of the prohibitive cost of removing the clay to another location to be made into bricks. But the Court said it did not reach a prohibition of the removal of the brick clay, but only a prohibition against the manufacture of bricks.

The instant decision reflects a decided move by the Court of Appeals toward

4. 304 N.Y. 105, 106 N.E.2d 34 (1952).
5. 2 N.Y.2d 690, 163 N.Y.S.2d 585 (1957).
6. 4 N.Y.2d 553, 176 N.Y.S.2d 598 (1957).
7. 239 U.S. 394 (1915).

eliminating prior nonconforming uses by means of the police power of regulation. It had been law in New York that prior nonconforming uses could not be prohibited by municipal action. See *City of Buffalo v. Chadeayne*.[8] The *Miller* case introduced the requirement that the right to be protected must be substantial to counter-balance the public welfare.[9] *Trio* looked beyond the words of the ordinance to find an attempt to prohibit under the "guise of regulation."[10] Regulation causing a great financial burden would be upheld only where honest detriment to public good is evidenced.

The Court in *Harbison v. City of Buffalo* relaxed the rule of *Miller* and held even where a structure represents considerable investment, it may be eliminated as a non-conforming use after a reasonable time of notice is given the owner to minimize his loss.[11] There, however, as noted above, the Court did not pass on an ordinance prohibiting a use particular to land in question.

Goldblatt appears to have gone one big step further toward eliminating non-conforming uses. It goes as far and perhaps farther than the United States Supreme Court did in *Hadacheck*.[12] *Hadacheck* may perhaps be distinguished because it involved only the prohibition of a particular use, but in practical effect on a prior non-conforming use it is analogous. In *Hadacheck* the Supreme Court upheld a prohibition of a use although a very substantial investment was jeopardized. *Goldblatt* also prohibits a use—dredging below water level—but also required the filling in. In each case the court rationalized that the individuals did not have the use of their property taken away. Hadacheck could dig his clay and Goldblatt his sand, but this thinking avoids the practical consequences of the respective ordinances.[13] However, from a standpoint of the statutes being constitutional as an exercise of police power necessary for the public welfare, *Goldblatt* does not measure up to the standard of *Hadacheck* as to the amount of proof of public danger or nuisance required. Hadacheck in his proof had to overcome specific instances of illnesses resulting from smoke and fumes from his brickyard. Goldblatt's interest was over-balanced by unproven, general statements of danger of drownings and cave-ins which were at no point linked with his specific pits. To this extent, *Goldblatt* exceeds even *Hadacheck*. Once again relating *Goldblatt* to our New York law, it stands out as the furthest projection to date of the Court's effort to give effect to zoning law principles by regulating non-conforming uses.

R. V. B.

DECLARATORY JUDGMENT ON NEW ZONING REGULATION MAY BE HAD PRIOR TO APPLICATION FOR VARIANCE.

The case of *Scarsdale Supply Co. v. Village of Scarsdale* presents the

8. 134 N.Y. 163 (1892).
9. Trio District Corp. v. City of Albany, supra note 5.
10. Harbison v. City of Buffalo, supra note 6.
11. Hadacheck v. Sebastian, supra note 7.
12. City of Buffalo v. Chadeayne, supra note 8.
13. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).