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Zoning—Declaratory Judgment on New Zoning Regulation May Be Had Prior to Application for Variance

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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).

question of the constitutionality of a zoning ordinance.[14] The Appellate Division affirmed the dismissal of the action for a declaratory judgment. On appeal, the Court of Appeals reversed and remanded for trial.

The Village of Scarsdale passed an ordinance changing the classification of plaintiff's property from a Business B zone to a Residence B zone. Except for a small tract owned by the Village, the ordinance affected only the plaintiff's property. The plaintiff had operated a supply yard on the property since 1922. The property was zoned Business B until October 11, 1955, at which time it was changed to Residence B, a zone which permitted the following uses: 1) one or two family residences, 2) churches and other related buildings, 3) schools, 4) medical offices buildings, 5) garden type apartment houses.[15]

At the trial, plaintiff offered to prove that the rezoning extinguished the economic value of his property, excepting its present value as a nonconforming use. The non-conforming use is subject to severe restrictions[16] and may be terminated almost at the will of the village.[17] Plaintiff further offered to prove that this ordinance was overburdensome and unreasonable and therefore a confiscation of property without due process of law.

The trial court, on the basis of *Headley v. City of Rochester*,[18] was premature, since the existence of non-conforming use allowed him to use his property as a building supply yard. This use prevented plaintiff from being an aggrieved party; hence, there was no justiciable controversy. Headley can be distinguished on three grounds: 1) it was not a zoning case, 2) it was submitted on an agreed statement of facts which do not indicate that the present value of the land was diminished, 3) no condition could be imposed requiring plaintiff to surrender the right to just compensation if and when the city should condemn the property.

The Court of Appeals, reversing the Appellate Division, held that a zoning ordinance may be constitutionally attacked without first applying for variance. Thus, the offer of proof was not premature and should have been admitted.

It appears to be settled in New York, that where a zoning ordinance is invalid as an invasion of an owner's property rights, he should not be required to ask, as a privilege, for a variance of the restriction in order to be allowed to continue his use of the property.[19] Any confusion which may exist in this area results from a failure to distinguish between a valid zoning law which creates hardship in a particular case, and one which is an invalid exercise of the police power and therefore violative of the Fourteenth Amendment. In *State ex rel. Carter v. Harper*, the court said "that whether a given situation

14. 8 N.Y.2d 325, 206 N.Y.S.2d 773 (1960).
15. Scarsdale, N.Y., Village Code ch. 1, art. 1, § 1-1-2; and ch. 12.
16. See 10 Buffalo L. Rev. 381 (1961).
17. See Harbison v. City of Buffalo, 4 N.Y.2d 553, 176 N.Y.S.2d 598 (1958).
18. 272 N.Y. 197, 5 N.E.2d 198 (1936).
19. Maxwell v. Incorporated Village of Rockville Centre, 84 N.Y.S.2d 544 (Sup. Ct. 1948).

presents a legitimate field for the exercise of the police power placing restraints upon the use of property or upon personal conduct depends upon whether the situation presents a reasonable necessity for the imposition of restraint in order to promote the public welfare, and whether the means adopted bear a reasonable relation to the end sought to be accomplished."[20]

If the public welfare is promoted and the means adopted are reasonable, then the aggrieved party's only remedy is an application for a variance. The granting of a variance is a discretionary act.[21] When the police power has been exercised in an arbitrary manner as suggested by the *Carter* case, application for a variance is not a condition precedent to attacking the constitutionality of a zoning ordinance.[22] As long as the ordinance is outstanding it creates a substantial cloud upon plaintiff's title and the only adequate relief is a decree ascertaining and declaring its invalidity and cancelling the cloud.[23] An action for a declaratory judgment in a zoning case is not premature merely because the person is not presently negotiating for the sale of the property or attempting to use it in a way inconsistent with the ordinance.[24]

It is difficult to prove that a zoning ordinance is an unconstitutional exercise of the police power. The ordinance is a valid exercise of the police power if it is "for the purpose of promoting the health, safety, morals, or the general welfare of the community.[25] The legislative or police power is a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirement of due process. However, if the law is arbitrary, unreasonable and not designed to accomplish a legitimate public purpose, the courts will declare it invalid.[26] In view of the broad and almost unlimited scope of the police power, plaintiff should at least be allowed to attempt to prove an abuse of the power. Otherwise, there will be no check upon its use. This is especially true in the instant case where plaintiff's land is the only property affected. In cases where the ordinance was obviously aimed at plaintiff's property, the courts have upheld the right to attack the validity of the ordinance by an application for declaratory judgment.[27]

In the words of Judge Lehman: "the only substantial difference between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve

20. 182 Wis. 148, 150, 196 N.W. 451, 453 (1923).
21. Boyd v. Walsh, 217 App. Div. 461, 216 N.Y. Supp. 242 (1st Dep't 1926).
22. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
23. Village of Euclid v. Ambler Realty Co., 297 F. 307, 310 (N.D. Ohio 1924).
24. 431 Fifth Ave. Corp. v. City of New York, 184 Misc. 1001, 55 N.Y.S.2d 379 (City Ct. 1945).
25. In re Opinion of the Justices, 103 Me. 506, 69 Atl. 627 (1908).
26. Mutual Loan Co. v. Martell, 22 U.S. 225, 234 (1911).
27. Hyde v. Incorporated Village of Baxter Estates, 140 N.Y.S.2d 890, 895 (Sup. Ct. 1955).

him of that burden."[28] Let us not further burden the plaintiff by requiring that he exhaust useless administrative remedies before he is allowed to prove that the ordinance is unconstitutional.

F. P. M.

INTERPRETATION OF ZONING ORDINANCE HELD QUESTION FOR ZONING BOARD

In *Von Kohorn v. Morrell*, the Court of Appeals decided that whether a proposed Y.W.C.A. building qualified as a "membership club," permissible as a special use in a district zoned residential, was a question of fact for the zoning board.[29] The zoning ordinance in question permitted as special uses in residential districts "Golf clubs, country clubs and other membership clubs not operated for profit." The permit granted to the Y.W.C.A. authorized the construction of a building to be used for club activities and as a dormitory for members only. Taken together with the fact that the Y.W.C.A. is a nonprofit membership corporation, the board was acting within its discretion in granting the building permit.

Under the ordinance there had to be a showing of appropriate location as to transportation, water, police, etc.; of reasonable safeguard of neighborhood character and property values; and of absence of undue traffic congestion or traffic hazard. The Court found that on the record all of these were questions of fact for the board to decide. This decision comports with the practical necessities of zoning procedure as previously viewed by the Court of Appeals.[30] As the Court in this case so aptly stated: "Zoning boards of appeals are made up not of theoreticians or doctrinaire specialists but of representative citizens doing their best to make accommodations between conflicting community pressures."[31] The Court concluded that in the instant case the board had debated and disposed of the problem with the requisite care.

Bd.

28. Arverne Bay Const. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938). See Annot., 117 A.L.R. 1110 (1938).
29. 9 N.Y.2d 27, 210 N.Y.S.2d 525 (1961).
30. People ex rel. Fordham Manor Reformed Church v. Walsh, 244 N.Y. 280, 155 N.E. 575 (1927).
31. Supra note 29 at 34, 210 N.Y.S.2d at 528-529.