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Zoning—Milk Vending Machine in Apartment House a Valid Subsidiary Use

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ject to limitation by private contract. In *Bartholmew v. Village of Endicott*,[11] the Court held that the exercise of any legislative power by a village for public benefit cannot be limited by contract and any attempt to do so would constitute an illegal act.

Section 262 of the Town Law authorizes the Town Board to create districts subject to the condition, among others, that, "All such regulations (within a district) shall be uniform for each class or kind of building, throughout such district." The Town Board, although it has the power to set up different use districts, must treat all property within the zone uniformally. When, however, the Board, as in this case, resorts to individual covenants and restrictions with the property owners in question, the Board in effect is destroying the scheme of uniformity required by the statute. It would seem that the property involved in this case takes on a characteristic of a "zone within a zone," with its own requirements over and above those applicable to Business Zone properties in general. This point is strongly urged by the dissenters, although it went unmentioned by the majority of the Court.

Population increases and economic changes are posing difficult problems to local legislative bodies in regard to zoning changes. This is a real problem and a solution should be reached. Whether or not the more appropriate remedy would be to grant variances is not in issue here. While the Court is anxious to affect a satisfactory solution to a pressing problem, it seems questionable to disregard the means used to achieve that end.

Milk Vending Machine in Apartment House a Valid Subsidiary Use

In *Dellwood Dairy Co. v. City of New Rochelle*,[12] the Court of Appeals reversed the Appellate Division[13] and sustained the trial court decision. The sole issue the case presented was whether the presence of a coin-operated milk vending machine, installed in the basement of an apartment building located in a restricted residential zone, violated the Zoning Law of the City of New Rochelle. These laws prohibit any business in the R-5 District except "Accessory uses customarily incident to the above uses" (the above use in this case is an apartment house). An "accessory use" is defined as "a use customarily incidental and subordinate to the main use conducted on the lot, whether such accessory use is to be conducted in a main or accessory building."[14] The Court of Appeals held that there was no violation. It found that the use of a milk vending machine is but a different method of doing a traditional service for a householder. Little, if any, adverse effect to the character of the residential neighborhood can result from the presence of the machine. It's not the

11. — Misc. —, 59 N.Y.S.2d (Sup. Ct. 1945).
12. 7 N.Y.2d 374, 197 N.Y.S.2d 719 (1960).
13. 7 A.D.2d 1026, 184 N.Y.S.2d 656 (2d Dep't 1959).
14. New Rochelle Zoning Law Art. VII, § 1(e).

nuisance type commercialism, but rather a convenient substitute for the route man.

A use "customarily incidental and subordinate" to the main use is a vague standard to apply at best. Certainly its application depends on the circumstances and it is best defined by the cases to which it has been applied.[15] In the instant case, the Appellate Division[16] found that the existence of coin-operated milk vending machines are not customarily incidental and subordinate to residential apartment houses. It reasoned that such operation is a commercial enterprise for profit and as such it is itself strictly a business use. It seems that if such were to be the rule, then, if a use is itself strictly a business use, it is disqualified from being considered an accessory use. This has not been the rule. The Appellate Division itself had decided in an earlier case that a use in and of itself may be considered to be a separate business yet under certain circumstances it may be an accessory use.[17] In that case, the court considered a candy, tobacco and newspaper counter and discussed its existence in both a hotel and a residential apartment house. The case held that such type of counter is not an accessory use in a residential apartment house, but would be so in a hotel. Such a counter is necessary to operate a hotel in an accepted and customary manner.

It has been decided in New York that the inclusion of a milk dispensing machine in an apartment house is for the convenience of its tenants; that it is merely a change in the method of an accepted and customary service, namely, the milk man.[18] The case further held that such a use in an apartment house is not a violation of the zoning regulations affecting residential areas.

The instant case, therefore, is not a novel or startling decision, but is an affirmance of a line of reasoning already taken by the lower courts.[19]

EVIDENCE REQUIRED TO AUTHORIZE A VARIANCE

When a zoning ordinance is otherwise reasonable, but "practical difficulties or unnecessary hardships" arise in carrying out such ordinance, the zoning board of appeals has the authority to "vary or modify" its application.[20] This creates a "safety valve . . . against 'unnecessary hardship' in particular instances."[21] Before such a variance will be granted, however, the Court of Appeals has required that the following elements be established: (1) that the land in question cannot yield a reasonable return if its use is restricted to that of the zone; (2) that the plight of the owner is due to unique circumstances

15. In re Presnell v. Leslie, 3 N.Y.2d 384, 165 N.Y.S.2d 488 (1957).
16. Supra note 13.
17. In re 140 Riverside Drive v. Murdock, 276 App. Div. 550, 95 N.Y.S.2d 860 (1st Dep't 1950).
18. Tarr v. City of New York et al., 12 Misc. 2d 796, 177 N.Y.S.2d 466 (Sup. Ct. 1957).
19. Ibid.
20. N.Y. Town Law § 267(5).
21. Matter of Otto v. Steinhilber, 282 N.Y. 71, 75, 24 N.E.2d 851, 852 (1939).