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Zoning—Evidence Required to Authorize a Variance

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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).

and not to general neighborhood conditions; (3) if the variance is authorized, the essential character of the locality will not be altered.[22]

In the case of *Forrest v. Evershed*,[23] property owners in an exclusively residential zone petitioned for an order setting aside the determination of the zoning board whereby the intervenors were granted a variance to erect a two story medical building on a vacant lot. The board gave this authorization on the basis of the lot-owner's assertion that they had tried to sell this property but were unable to do so because a synagogue (a permissive use) was located on the adjacent lot, and no one wanted to build a house next to a public building. Both the Supreme Court and the Appellate Division affirmed.[24]

The Court of Appeals reversed, holding that the owners failed to introduce sufficient evidence to support their assertion. In pointing out some of the deficiencies, the Court found that no diligent, bona fide effort to sell the property had been proven. Secondly, the owners did not show that each and every use permitted by the ordinance would fail to produce a reasonable return. In addition, losses must be demonstrated by some "dollars and cents" proof. And fourthly, neither did the evidence sustain the fact that the plight of the owners was due to any unique circumstances. Since the only evidence of the owners was an assertion that they could not dispose of the property for a reasonable return, the Court reversed.

In view of this failure to establish the first two of the elements required for the granting of a variance, the Court found it unnecessary to discuss the third.

MISCELLANEOUS

Deviation by Carrier from Tariffs Filed with Interstate Commerce Commission

An interstate common carrier may not charge or receive a rate different from that specified in its currently effective tariff, filing of which is required under the Interstate Commerce Act.[1] Any agreement between the interstate carrier and a shipper to limit the carrier's liability upon an interstate shipment to a valuation stated in the bill of lading, will not relieve the carrier of its common law obligation to pay the actual value in case of loss by its negligence if its tariff schedules provide but one rate applicable to the shipment.[2] Thus any provision in a bill of lading inconsistent with the tariff classifications or schedules is void. These tariffs have the force of a statute and are absolutely binding upon all persons who are parties to a contract of interstate transporta-

22. Id. at 76, 24 N.E.2d 853.
23. 7 N.Y.2d 256, 196 N.Y.S.2d 958 (1959).
24. 8 A.D.2d 753, 185 N.Y.S.2d 572 (4th Dep't 1959).

1. 49 U.S.C. § 1 et seq.
2. Union Pacific Railroad Co. v. Burke, 226 N.Y. 543, 124 N.E. 122 (1919), aff'd 255 U.S. 317 (1921).