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Municipal Corporations—Zoning—Constitutionality of Ordinance Discontinuing Non-Conforming Uses

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authorization in cases involving internal union disputes than in cases where a union is sued by an outside party. This distinction would seem to rest on sheer and transparent policy, however, and, it is to be hoped, will not be relied upon.

The Court's decision is a welcome stride forward from the position that a union is not liable except as all of its members are. Even if provisions in the General Associations Law are purely procedural, there is no reason why the substantive law of associations cannot develop in pace with changing societal conditions, rather than continue to sustain a rule of law ". . . for no better reason . . . than that so it was laid down in the time of Henry IV."³⁸

Application of Statute to Employer and Domestic

Section 240 of the Labor Law imposes a duty upon employers of persons employed to, inter alia, clean buildings and structures, to furnish safe equipment for such work, including scaffolding, ladders, etc. A domestic who, while cleaning windows on a private dwelling, fell from a ladder and injured herself, attempted to hold the householder liable for the injuries because of an alleged violation of this section. The Court rejected the claim, however, holding that section 240 was not intended by the legislature to apply to such a situation but only to circumstances where cleaning is incidental to "building construction, demolition and repair work." The section is an integral part of the article of the Labor Law dealing with that subject and obviously was not meant to reach the controversy at issue.³⁹

MUNICIPAL CORPORATIONS

Zoning—Constitutionality of Ordinance Discontinuing Non-Conforming Uses

The petitioner in *Harbison v. City of Buffalo*¹ operated a drum reconditioning plant on his own property in the city of Buffalo. He erected the building thereon shortly after purchasing the property in 1924. At that time there were located nearby a glue factory and a city owned dump. The area was unzoned at the time, but in 1926 it was zoned for residential use and has remained so zoned, with the exception of one short period, to the present time. From 1936 to 1956, Harbison applied for and received licenses to conduct business as a junk dealer, a classification which embraced drum reconditioners. In 1956, the petitioner was refused a junk dealer's license and a drum reconditioning license pursuant to a city ordinance passed in 1953, which provided for a cessation of certain nonconforming uses, including "any junk-yard", within two years of the date of

38. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

39. *Connors v. Boorstein*, 4 N.Y.2d 172, 173 N.Y.S.2d 288 (1958).

1. 4 N.Y.2d 553, 176 N.Y.S.2d 598 (1958).

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the ordinance.² Upon the refusal of the director of licenses for the city of Buffalo to issue a license, petitioner instituted a mandamus proceeding³ for the purpose of acquiring a license.

The majority reversed the Appellate Division,⁴ which had approved with modification the order of Special Term directing the issuance of a license, and remanded the matter to Special Term to determine whether the ordinance as imposed in this particular situation would cause a harm so substantial as to be unconstitutional. Two judges concurred in this opinion, and two concurred in the result upon the principle of *People v. Miller*⁵ which held that a zoning regulation could be enforced against a prior non-conforming use where the resulting loss was slight and unsubstantial.⁶ The regulation upheld in the *Miller* Case forced the defendant to cease harboring pigeons which he kept as a hobby, an inconsequential use in the eyes of the Court of Appeals.

There is a considerable lack of unanimity on the question of termination of nonconforming uses existing before the enactment of the ordinance. The policy of zoning laws is the gradual elimination of nonconforming uses, including the elimination of nonconforming pre-existing uses by specifying a reasonable time within which they must conform.⁷ Based on the cases discussed below it is the opinion of one text writer that such ordinances are valid and constitutional.⁸ A plumbing establishment was forced to move after the five years maximum time allowed for conforming by ordinance, despite an estimated cost of \$5,000.⁹ The court in that case felt it only a matter of degree between the valid exercise of police power in restricting future use and termination of existing uses within a reasonable time period. A gas station has succumbed to the same type of ordinance with a ten year limitation.¹⁰ Two Louisiana cases represent the most extreme position taken by the courts, allowing the removal of a grocery store and a drug store within one year,¹¹ These cases are based on the assumption that there will be no loss to property owners if the time allotted for discontinuing the use is reasonable. This is, in essence, the theory of amortization, which can be stated simply as a termination of the nonconforming use at the end of the

2. BUFFALO, N. Y. ORDINANCES ch. LXX, ch. 18 §1, July 30, 1953.

3. N. Y. CIV. PRAC. ACT §78.

4. *Harbison v. City of Buffalo*, 4 A.D.2d 999, 169 N.Y.S.2d 598 (4th Dep't 1957).

5. 304 N.Y. 105, 106 N.E.2d 34 (1952).

6. *Id.* at 108, 35.

7. 2 RATHKOPF, THE LAW OF ZONING AND PLANNING 80 (3d ed. 1956).

8. *Ibid.*

9. *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 274 P.2d 34 (1954).

10. *Standard Oil Co v. City of Tallahassee*, 183 F.2d 410 (5th Cir. 1950), *cert. denied* 340 U.S. 892 (1950).

11. *State ex rel. Dema Realty Co. v. Jacoby*, 168 La. 752, 173 S. 314 (1929); *State ex rel. Dema Realty Co. v. McDonald*, 168 La. 172, 121 S. 613 (1929), *cert. denied* 280 U.S. 556 (1929). These cases held violation of a zoning ordinance to be a nuisance.

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useful life of the pre-existing nonconforming use. Losses, if any, are spread out over a period of years and the property owner has the benefit of a limited monopoly until that time.¹² Although the theory that the value of the property can be amortized over a reasonable period may seem a desirable basis for the elimination of nonconforming pre-existing uses, its use has been infrequent.¹³ The difficulty of applying the theory is evidenced by the variation in results as noted above. The most serious problem is yet to be solved, that is how to get a workable, fair, and consistent measure of useful life.

New York has held that where zoning ordinances are passed during any period of construction of a building the property owner has a right to complete the building,¹⁴ and if the building be already complete when the ordinance is passed, he need not cease his nonconforming use.¹⁵ The court has sanctioned ordinances which prohibit enlarging a nonconforming use.¹⁶ The next step was the concept developed in the *Miller* case that reasonable termination of nonconforming uses is allowable if the loss to the property owner is slight and unsubstantial. The court is applying the test laid down in the *Miller* case held that an ordinance requiring the cessation of a sand and gravel business was unconstitutional.¹⁷

The opinion in the case is based on a balancing of the public good against the loss to the property owner; a zoning ordinance that requires the termination of prior non-conforming structures or uses is not unconstitutional, if the period allowed for termination is a reasonable time during which the owner may amortize his investment and adjust his plans for the future. Whether or not the time allowed for amortization is reasonable depends upon the facts in each case.

The dissent takes the view, in an elaborate and persuasive opinion, that there is no justification for the substitution of zoning regulations for the law of nuisance and eminent domain on the ground that the loss suffered by the property owner is slight. The opinion of the dissent can be deemed a caveat to be considered carefully by any court applying the law established by this case.

12. Comment, 1951 Wis. L. Rev. 685, 692; Comment, 35 Va. L. Rev. 348, 357 (1949).

13. Comment, 102 U.Pa. L. Rev. 91, 101 (1953).

14. *City of Buffalo v. Chadeayne*, 134 N.Y. 163, 41 N.E. 443 (1892).

15. *440 East 102d Street Corporation v. Murdock*, 285 N.Y. 298, 34 N.E. 2d 329 (1941).

16. *Koeber v. Bedell*, 280 N.Y. 692, 21 N.E.2d 200 (1939); *Marcus v. Village of Mamaroneck*, 283 N.Y. 325, 28 N.E.2d 856 (1940).

17. *Town of Somers v. Camarco*, 308 N.Y. 537, 127 N.E.2d 327 (1955).