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Zoning—Non-Conforming Uses and Variance

Earlier in the term, in the case *Crossroads Recreation, Inc. v. Broz*,¹⁸ the Court had concerned itself with another phase of non-conforming uses. Zoning ordinances, recognizing that peculiar hardship may result in particular cases, generally provide for variances, special permission to carry on a non-conforming use notwithstanding the zoning qualifications.¹⁹ Unlike pre-existing non-conforming uses (where the owner has obtained a vested right in the property prior to the zoning restrictions and retroactive enforcement would cause "serious financial harm"²⁰), the applicant has no absolute right to ignore the zoning requirements but can only address himself to the sound administrative discretion of the board.²¹

In 1939, the Court of Appeals, in the case *Otto v. Steinbilber*,²² laid down the requisites for the granting of a variance on the basis of hardship as the establishment of the fact that the property cannot be profitably used (that is, so as to give a reasonable return) within the restrictions of the zoning ordinance, that the harm suffered by the applicant under the zoning ordinance is peculiar to himself and not general to the community (resulting, for instance, from general decline of the neighborhood), and that the granting of the variance will not alter the essential nature of the neighborhood. The courts have generally favored the very sparing use of the power of variance. Thus, where an applicant desired to erect a building for business purposes in a residential zone, he was not permitted to have a variance even though it appeared that he could not possibly make a profit by using the property for residential purposes. The fact that an entire area has declined would be aggravated by the granting of variances to certain persons. In such a situation, the proper remedy was for reconsideration of the zoning plan as a whole.²³

In the instant case, a gas station had been established on a piece of property in 1929, the owner obtained the property in 1939, and in 1945, a local ordinance was amended so as to exclude gas stations from the area. Admittedly, the owner had a right to continue the non-conforming use since it pre-existed

18. 4 N.Y.2d 39, 172 N.Y.S.2d 129 (1958).

19. The granting of variances in *hardship* cases is provided for by statute, although the criterion may be relaxed by local ordinance. See N. Y. GEN. CITY LAW §81(4), N. Y. TOWN LAW §267 (5), and N. Y. VILLAGE LAW §179-b.

20. *People v. Miller*, *supra* note 5.

21. *Lincoln Trust Co. v. Williams Building Corp.*, 229 N.Y. 313, 317, 128 N.E. 209, 210 (1920).

22. 282 N.Y. 71, 24 N.E.2d 851 (1939).

23. See *Young Women's Hebrew Ass'n v. Board of Standards and Appeals*, 266 N.Y. 270, 194 N.E. 751 (1935):

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the restriction. However, he had no right to expand or enlarge that use in violation of the zoning requirements.²⁴

In 1955, the owner entered into a contract with a proposed lessee, whereby, if permission were obtained from the local authorities, the lessee was to enter into a twenty-year lease, tear down the old station, and erect a completely new one in its place with increased and modern facilities, rest rooms, etc., and pay the owner a monthly rental greater than that which the owner had been able to obtain previously. On application of the parties for a variance, the board refused the same, holding that the requisite hardship for a variance had not been shown.

The Court of Appeals affirmed. The applicants had not presented proof to sustain the burden which they had to qualify under the *Otto* standards. The Court suggested that this might have been done by showing specific facts such as the current income from the property, the original costs of the property, present value, encumbered indebtedness thereon, etc. In order to determine whether the permitted use of the property would give a reasonable return, it had to be first shown what a reasonable return would be. All that had been shown was that it was difficult to compete with more modern stations in the neighborhood, without any actual showing that the property did not or could not, within the permitted uses (which, of course, included the non-conforming use of the property in its condition prior to the amendment of the local zoning ordinance) show a profit.

The applicants had pointed out that similar variances had been granted others in the neighborhood. However, this did not help their argument, since they did not show that the other cases were exactly similar to their own. And furthermore, the granting of variances to others does not invest them with a right to a variance. The policy of a local zoning ordinance may be to permit a few non-conforming uses for hardship situations, but this does not mean that if there are to be any non-conforming uses, there shall be an unlimited amount permissible.²⁵ Nor is the fact that the improvements would "beautify" the property pertinent.²⁶ The standard is strictly whether a reasonable return can be achieved within the ordinance. The fact that a *more profitable* use could be put to the property outside the zoning restrictions or that other unrelated benefits to the community might result by permitting the variance does not enter into the question.²⁷

24. *Chandler v. Corbett*, 274 App.Div. 1073, 86 N.Y.S.2d 646 (2d Dep't 1949). The privilege to expand may, however, be granted by ordinance. See *440 East 102nd Street Corp. v. Murdock*, 285 N.Y. 298, 34 N.E.2d 329 (1941).

25. *People ex rel. Werner v. Walsh*, 212 App.Div. 635, 209 N.Y. Supp. 454 (1st Dep't 1925), *aff'd* 240 N.Y. 689, 148 N.E. 760 (1925).

26. *Fortuna v. Board of Standards and Appeals*, 257 App.Div. 993, 13 N.Y.S. 2d 712 (2d Dep't 1939), *aff'd* 281 N.Y. 763, 24 N.E.2d 21 (1939).

27. *Cf. Young Women's Hebrew Ass'n. v. Board of Standards and Appeals*, *supra* note 23.

Judge Van Voorhis, the lone dissenter, appeared to be arguing not that a variance should be granted, but that the applicants had an absolute right to build the new station. The applicants had a "vested right in the prior use of the subject property"; since it had been a gas station before the ordinance, it could continue to be one afterwards. And it could be remodeled, reconstructed, and modernized if need be to keep up with modern needs. Otherwise, the owner would be driven out of business by the necessity of maintaining his premises in 1929 style for 1958 requirements. The successful businessman, whose increased business required modernization and expansion would be held back, whereas the failure might continue to operate an obsolete establishment so long as he desired.

The dissent seems to miss the point entirely. The policy of the zoning statutes being to discourage and eventually eliminate non-conforming uses,²⁸ there is no inconsistency in holding that they may continue so long as they can be used in the condition they are in but that they cannot be subsequently enlarged or modernized by a basic structural change. The property interests of the owner demand an exception as to his vested rights prior to the enactment of the ordinance, but do not mean that he should be placed in a unique position of being able to flout the statute in the future; the continuation of prior existing non-conforming uses as of right is not to grant a perpetual monopoly to the landowner, but merely to avoid confiscation of his property before he has received his return from prior vested interests. Actually, the request for a variance is inconsistent with any theory of there being a right arising out of the prior existing use.²⁹ The variance is to be granted where no such right exists; if there is such a right, no variance is necessary or should be granted.

As a matter of practicality, there appears to be no good reason why one who is contemplating the destruction of an existing structure and the erection of a new one should not be required to comply with the zoning ordinances just as would one entering vacant land with initial construction in mind. This is all the more clear after a case such as the *Harbison* decision³⁰ has established that a municipality may reasonably provide for the termination of a prior non-conforming use.

Authority of Town to Establish Park Within Village Limits

In *Village of Lloyd Harbor v. Town of Huntington*,³¹ the town sought a reversal of the Appellate Division's judgment that a 1955 statute authorizing it

28. *Supra* note 7.

29. *National Lumber Products v. Ponzio*, 133 N.J.L. 95, 42 A.2d 753 (1945).

30. *Supra* note 1.

31. 4 N.Y.2d 182, 173 N.Y.S.2d 553 (1958).