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Municipal Corporations—Authority of Town to Establish Park Within Village Limits

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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).

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to establish and operate public bathing beaches at any place within its boundaries³² was invalid. The town had acquired lands in the village for the purpose of operating them as public bathing beaches, said land having been zoned by the village for residential purposes only. The village attacked the constitutionality of the 1955 statute contending that it was a local law destroying the uniformity of treatment which the Constitution guarantees.³³ Despite this contention, reversal was granted and the constitutionality of the statute was upheld, based on a finding that the statute merely confirmed and clarified the existence of a power already enjoyed by the town. The statute gave no added authority to the town nor did it infringe on any right of the village and therefore could not be regarded as violative of the Constitution.

Under section 220(4) of the Town Law, every town board throughout the state is given blanket authority to establish public parks³⁴—and bathing beaches are parks.³⁵ Absent any restrictive or qualifying language within this section, it cannot be said that the Legislature intended to prohibit a town from establishing a public park within an incorporated village.³⁶ Nor can it be said that section 198(4) of the Town Law qualifies this authority by requiring the village's consent prior to acquisition of land for "park purposes". That section, as both its text and title make evident, deals solely with a "park district" park, a completely different type of park from the town public park.³⁷ After such an analysis, the Court reasonably concluded that the town long before 1955 was authorized to acquire lands within a village for use as a public beach without the consent of the village.

Notwithstanding the general authority of the town to establish a beach, the question arises whether a village ordinance limiting property to residential uses supersedes this statutory provision. The Court decided that since the practical effect of the ordinance was to exclude public parks and bathing beaches, it bore no substantial relationship to zoning purposes.³⁸ This being so, the ordinance was stricken as void and ineffectual. This, of course, was no innovation in the in-

32. N.Y. Sess. Laws 1955, ch. 840 §1.

33. See N. Y. CONST., Art. III §17, which forbids the adoption of a local bill incorporating villages.

34. See also N. Y. TOWN LAW 81(1) and N.Y. Sess. Laws 1906, ch. 87, later amended N.Y. Sess. Laws 1943, ch. 710, pt. 4, tit. 1, §4, which the Court also cited as similar grants of authority to towns.

35. Cf. *Augustine v. Town of Brant*, 249 N.Y. 198, 163 N.E. 732 (1928).

36. See N. Y. TOWN LAW §§220(5) and 198(3) wherein the Legislature expressly provided that no dumping grounds were to be acquired or water pipes laid within any village without the village's consent.

37. Compare Art. 12 with Art. 14 of N. Y. TOWN LAW.

38. N. Y. VILLAGE LAW §§175, 177. The Court considered this ordinance similar to one forbidding erection of colleges or religious edifices and schools. See *Diocese of Rochester v. Planning Bd. of Town of Brighton*, 1 N.Y.2d 508, 154 N.Y.S.2d 849 (1956).

terpretation and application of section 175 of the Village Law.³⁹ The ordinance being void, the Court could and did assert that the 1955 statute took nothing from the village and effected no change or alteration in the village charter.

While the rationale of the Court is persuasive, the end result is that two municipal corporations exist within the same territory exercising the same powers.⁴⁰ This situation should be avoided for the practical consideration that intolerable confusion instead of good government would attain in a territory in which two corporations endeavor to function concurrently.⁴¹

Home Rule, Public Authorities

Under the Home Rule amendment to the state Constitution, the legislature may not act by special law "in relation to the property, affairs or government of any city" unless requested to do so by the city affected.⁴² In a leading case,⁴³ however, the words "property, affairs or government" were held to have a "special, legal significance"⁴⁴ and to have been adopted with "a Court of Appeals' definition, not that of Webster's Dictionary."⁴⁵ (The direction taken by this case, however, was not a new one.⁴⁶) This definition has been a narrow one, allowing the legislature wide latitude in dealing with local matters. Thus city transit,⁴⁷ health,⁴⁸ water supply⁴⁹ and sewage⁵⁰ problems have been held subject to special legislative action without benefit of a city message. The type of reasoning by which such results have been achieved was shown at its most extreme where it was said: "The statute affects the health and safety not only of the residents of Rochester, but of persons temporarily there. It does not deal solely with the 'property, affairs or government' of Rochester."⁵¹

In the light of this judicial history it could come as no surprise when the

39. *Long Island Univ. v. Tappan*, 305 N.Y. 893, 114 N.E.2d 432 (1953); *Concordia Collegiate Inst. v. Miller*, 301 N.Y. 189, 195-196, 93 N.E.2d 632, 635-636 (1950).

40. Compare N. Y. VILLAGE LAW §89(6) with N. Y. TOWN LAW §220(4).

41. 2 McQUILLIN, MUNICIPAL CORPORATIONS, §7.08 (3d ed. 1949).

42. N. Y. CONST. Art. IX, §11.

43. *Adler v. Deegan*, 251 N.Y. 467, 167 N.E. 705 (1929).

44. *Id.* at 472, 167 N.E. at 706.

45. *Id.* at 473, 167 N.E. at 707.

46. See *City of New York v. Village of Lawrence*, 250 N.Y. 429, 165 N.E. 836 (1929); *McAneny v. Board of Estimate*, 232 N.Y. 377, 134 N.E. 187 (1922); *Admiral Realty Co. v. City of New York*, 206 N.Y. 110, 99 N.E. 241 (1912).

47. *Admiral Realty Co. v. City of New York* *supra* note 46; *Salzman v. Impelliteri*, 203 Misc. 486, 124 N.Y.S.2d 369 (Sup.Ct.), *aff'd* 281 App. Div. 1023, 122 N.Y.S.2d 787 (1st Dep't), *aff'd* 305 N.Y. 414, 113 N.E.2d 543 (1953).

48. *Adler v. Deegan*, *supra* note 43.

49. *Board of Supervisors of Ontario County v. Water Power & Control Comm.*, 227, App.Div. 345, 238 N.Y.Supp. 55 (3d Dep't 1929).

50. *Robertson v. Zimmermann*, 268 N.Y. 52, 196 N.E. 740 (1935).

51. *Board of Supervisors of Ontario County v. Water Power & Control Comm.*, *supra* note 49.