

1-1-1956

Municipal Corporations—Zoning, Non-Conforming Use

Leon Schulgasser

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Recommended Citation

Leon Schulgasser, *Municipal Corporations—Zoning, Non-Conforming Use*, 5 Buff. L. Rev. 215 (1956).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol5/iss2/48>

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law of England, the place of her performance. In other New York cases in which the grouping of contacts theory has been used, the more conventional approaches were also shown to lead to the same result. Judge Shientag, in *Jones v. Metropolitan Life Insurance Co.*⁶⁴ performed a judicial tour de force by showing that by any theory—place of contracting, place of performance, place intended, and grouping of contacts—an insurance policy was a New York contract. The *Jones case* illustrates more clearly than the instant case the dangers involved in the application of the grouping of contacts theory, that the judge will select as the significant contacts those which point to the result which he desires.⁶⁵ But it also shows that the more conventional approaches of place of making and place of performance are easily amenable to "interpretation" in the interests of justice.

It has been suggested⁶⁶ that the decided cases really apply the contacts theory, and use place of making, place of performance and intention of the parties as the significant contacts. As the New York Annotations to the Restatement of Conflicts states,⁶⁷ the law of New York is unsettled in this area. It probably will not be settled until the Court of Appeals is forced to decide which law governs when the place of significant contacts is found to be different from the place of making or performance. Whatever the center of gravity, it is, like the quest of the "proper" law, an approach which does not lead to absolute predictability; but does such an absolute predictability exist at all? May not an industrious lawyer's predictions as to facts to which the courts will look in finding the center of gravity be more than a mere guess? Will not such an approach be more reliable, even from the standpoint of predictability, than the old conceptualistic factors such as place of making or performance? Who knows whether the conceptualistic construction of choice of law will induce a court to prefer a connection of the case with the place of performance to that of the place of contact, or vice versa? The confusion dominant in New York under the sway of those old concepts has certainly not been increased by the approval shown by the Court of Appeals to the grouping of contacts test, and this alone points to some progress in the conflict law of New York.

MUNICIPAL CORPORATIONS

Zoning, Non-Conforming Use

A non-conforming use of real property will be permitted to continue, notwithstanding the contrary provisions of an otherwise valid zoning ordinance

64. 158 Misc. 466, 286 N. Y. Supp. 4 (1936).

65. Cf. *Rubin v. Irving Trust Co.*, 305 N. Y. 288, 113 N. E. 2d 424 (1953).

66. NUSSBAUM, *op. cit. supra* note 61.

67. RESTATEMENT, CONFLICT OF LAWS, N. Y. Annotations §332 (1935).

enacted after the non-conforming use has commenced, where the enforcement of such ordinance would render valueless substantial improvements or businesses, and cause serious financial harm to the owner of the real property.¹ This past term the Court was asked by a municipality to enjoin the owners of a sand and gravel pit from continuing to operate that business until they complied with a zoning ordinance. The owners argued that the ordinance should be declared invalid as to them.² The realty involved was split by a road; a 27 acre tract on one side was substantially improved and constantly used as a gravel pit, a 28 acre tract on the other being used with less frequency. A zoning ordinance placed both tracts in a residential area but made provisions for prior non-conforming use.³ The ordinance was later amended to repeal the protection for non-conforming uses of the nature involved here as to a major portion of the premises.

The Court of Appeals held the zoning ordinance invalid as to these property owners in that it deprived them of a "vested right," but specifically refrained from passing on the question of what the municipality might do in the proper exercise of its police power so as to prevent the creation or maintenance of a nuisance on the premises.

A strong and apparently valid dissent was registered on the grounds that only a small portion of the acreage involved here was actually being excavated at the time of the enactment of the ordinance, and the extension of the protection of a non-conforming use to the entire tract was improper⁴ and made a mockery of adequate municipal planning.

Once a non-conforming use has been discontinued or permitted to lapse, any future use of the premises must be in conformity with the provisions of the then existing zoning ordinance.⁵ Furthermore, an existing non-conforming use can not be changed into some other kind of a non-conforming use⁶ under the guise of the continuance of a non-conforming use.⁷ A change of ownership of the premises is not deemed to be change in or a discontinuance of a non-conforming use; rather it is to be construed as a continuation of the previous use.⁸

In an action to enjoin owners of property in a residential district from using

1. *People v. Miller*, 304 N. Y. 105, 106 N. E. 2d 34 (1952).

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

3. TOWN OF SOMERS ORDINANCES, art. II, §5, subd. B.

4. *Cordes v. Moore*, 308 N. Y. 761, 125 N. E. 2d 112 (1955); *People v. Gerus*, 69 N. Y. S. 2d 283 (1942).

5. MCQUILLEN, MUNICIPAL CORPORATIONS, §§ 25, 189 et seq. (3rd ed. 1950).

6. *Coppersmith v. Murdock*, 262 App. Div. 1032, 30 N. Y. S. 2d 317 (1941).

7. *Bowen v. Hiden*, 37 N. Y. S. 2d 76 (1942).

8. See Pelham Manor Zoning Ordinance.

those premises for a school for mentally retarded children,⁹ in violation of a zoning ordinance,¹⁰ the defense was that the existing use as a school for mentally retarded children was a mere continuation, although by a different owner, of a previous non-conforming use, such continuation being specifically permitted by ordinance. The Court, in denying an injunction, held that the previous use as a convalescent home for cardiac children, an incident of which use was the schooling and instruction of the children who were there confined, was the same as the present use. In support of its decision the Court relied on the public policy of the state to enforce the education of children,¹² and concluded that since education of the children in the convalescent home was favored, the present use of the property as a school for mentally retarded children is merely a continuation of the con-conforming use in a limited and restricted fashion.

Judge Conway, dissenting, questioned the previous non-conforming use, it being ultra vires for the previous owner to conduct a school. As its charter provided only for the operation of a convalescent home, there could be no legal non-conforming use as a school, and consequently the present use was illegal. Conceding however that previous use of the premises was partly for school purposes, the difference in the character of the students would make maintenance of an "identical" non-conforming use, as required by ordinance, impossible.¹³

Sale of Schoolhouse

The New York State Education Law provides three methods for the disposition of unused school houses or sites.¹⁴ In *Ross v. Wilson*¹⁵ a majority of the Court held that where a central school district had taken over an existing common school district and a meeting was called to consider the disposition of an old schoolhouse of the former district, the voters had no right to approve a sale at a price lower than the highest offer. The meeting, which had before it the high bid of a Grange, had no power to sell to a church which had made a lower offer, the former not being an objectionable use. This was held despite the language of the statute¹⁶

9. *Rogers v. Ass'n for Help of Retarded Children*, 308 N. Y. 126, 123 N. E. 2d 806 (1954).

10. Pelham Manor Zoning Ordinance.

11. *Ibid.*

12. N. Y. CONST, art VI, § 7; N. Y. EDUCATION LAW art. 65.

13. Pelham Manor Zoning Ordinance.

14. N. Y. EDUCATION LAW § 402 provides that when the site of a school house has been changed, the voters of the school district involved may by majority vote at a meeting sell the old property at such price and upon such terms as they shall deem proper. N. Y. EDUCATION LAW § 1804 provides that when a central school district is formed, the property of the former common school district may be sold upon the majority vote of the qualified voters of the former district and the proceeds apportioned among the taxpayers of that district.

15. 308 N. Y. 605, 127 N. E. 2d 697 (1955).

16. N. Y. EDUCATION LAW § 402.