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THE LEGAL STATUS OF A BOARD OF ZONING APPEALS

By GEORGE A. WARF*

The powers and duties of boards of zoning appeals in the several states do not vary significantly.¹ They are set up to see that "the public health, safety, morals and general welfare may be secured and substantial justice done".² Their function is that of providing a measure of flexibility in the application of a general rule imposed for the good of all.³ Their powers are limited to those cases where legislative action is impracticable and where the ordinance if literally applied would work an unnecessary hardship, remediable without damage to neighboring property.⁴ They cannot act until a property owner appeals for an exception to the general provisions of the ordinance, alleging in his appeal that, due to some exceptional conditions, it is necessary that his parcel of land be dealt with in a manner different from that set up for the district in which the land is located, in order that he be allowed to enjoy a substantial property right in the land in question. Then, upon a showing of "unnecessary hardship",⁵ general rules are suspended for the benefit of individual owners, and special privileges established.⁶ Should the property owner's petition be denied by the board of appeals, he may throw the matter into the courts.

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¹ W. L. Pollard, "Analysis of Zoning Ordinances", *The Annals*, Vol. 155, p. 65 (May, 1931).

² *L. & M. Investment Co. v. Cutler*, 125 Ohio St. 12, 180 N. E. 379 (1932).

³ *Dowsey v. Village of Kensington*, 257 N. Y. 221, 177 N. E. 427 (1931); *People, ex rel., Fordham Manor Reformed Church v. Walsh*, 244 N. Y. 280, 155 N. E. 575 (1927); *Provo City v. Claudin*, 91 Utah 60, 63 P. (2d) 571 (1936).

⁴ J. L. Crane, Jr., "Progress in the Science of Zoning", *The Annals*, Vol. 155, p. 199 (May, 1931). See *Provo City v. Claudin*, 91 Utah 60, 63 P. (2d) 571 (1936).

⁵ The courts have held that there must be some general principle, such as that of "unnecessary hardship", to direct the board as to the exercise of its judgment and discretion in issuing or denying the permit. *Kilgour v. Gratto*, 224 Mass. 78, 112 N. E. 489 (1916); *L. & M. Investment Co. v. Cutler*, 125 Ohio St. 12, 180 N. E. 379 (1932).

⁶ W. L. Pollard, *op. cit.*; *L. & M. Investment Co. v. Cutler*, 125 Ohio St. 12, 180 N. E. 379 (1932).

It is for the courts to determine whether the general rule laid down in the zoning ordinance is a sufficient measure or guide for the action of the administrative board,⁷ whether the action of the board of appeals is justified under the general rule laid down,⁸ and whether the facts disclosed really represent a condition which calls for special attention or merely relate to conditions applicable to all property in the district subject to the disputed restrictions.⁹ The courts, to be sure, do not absolutely deny the exercise of discretionary powers to the boards of appeals. They generally recognize the fact that "a limited discretion is plainly essential to the practical application of the prescribed plan".¹⁰ They point out that their power to modify or revise does not include the power to substitute their own discretion for that of the board.¹¹ Before arriving at a judgment either reversing or modifying the decision appealed from, the court must find that the board either acted illegally or abused its discretion.¹²

In dealing with these general rules of guidance the courts in their decisions have shown a surprisingly liberal trend. Of the more recent cases, only that of *Welton v. Hamilton*,¹³ an Illinois case, is based upon the old notion of strictly separated powers. The highest court in the state declared: "The board of appeals is not a court but an administrative board which has no judicial powers and the hearing before it is not a judicial proceeding." The court pointed out that the board was exercising improperly delegated authority and was violating the principles of separation of powers; consequently, boards of zoning appeals were held unconstitutional. Thus, in Illinois, sub-

⁷ *People, ex rel., Schimpff v. Norwell* 368 Ill. 325 13 N. E. (2d) 960 (1938); *Spencer-Sturla v. Memphis*, 155 Tenn. 70, 290 S. W. 608 (1927).

⁸ *Neithamer v. Heyer*, 39 Ohio App. 532, 177 N. E. 925 (1931).

⁹ *In re Levy v. Board of Standards and Appeals of the City of New York*, 267 N. Y. 347, 196 N. E. 284 (1935).

¹⁰ *R. B. Construction Co. v. Jackson*, 152 Md. 671, 137 A. 278 (1927).

¹¹ *Piccolo v. Town of West Haven*, 120 Conn. 449, 181 A. 615 (1935).

¹² *Ibid.*, at 618; *Smith v. Sellingman*, 270 Ky. 69, 109 S. W. (2d) 14 (1937); *People, ex rel., Novick Holding Corp. v. Murdock*, 246 App. Div. 745, 233 N. Y. S. 762 (1935); *Burr v. Rago*, 120 Conn. 287, 18 A. (2d) 444 (1935).

¹³ 344 Ill. 82, 176 N. E. 333 (1931).

stantial variations must be secured by amendment.¹⁴ In cases arising in the other states, however, courts take the view that the old principles must be applied to the changed facts of modern life. Decisions handed down in the days of the horse and buggy "would be incongruous now if not considered in the light of modern industrial and civic development".¹⁵ The case of *Tighe v. Osborne*¹⁶ best represents this changed view. Here, it was admitted that the language of some of the earlier decisions was in conflict with the new notion of delegation of legislative power, but certainly the more modern decisions amply and specifically sustain it. The change, if there has been any, is due to the constantly increasing complexity of modern society and the consequent multiplicity of matters which require the state's attention. The field has become so vast, and the things to be considered so enlarged in number and so interrelated with one another, that it has been found practically impossible to provide in laws and ordinances specific rules and standards by which every conceivable situation can be measured and determined. The result has been that we have turned more and more to the plan of providing in our laws and ordinances general rules and standards, and leaving to administrative boards and agencies the task of acquiring information, working out the details, and applying these rules and standards to specific cases. . . . Such ordinances represent no change in principle; they merely indicate that the courts, faced by at least an apparent necessity, have relaxed to some extent the particularity with which they formerly required the laws and ordinances to set out the rules and standards by which the delegated power was to be limited, and whatever may be said of the wisdom of this relaxation, no doubt can now be entertained as to its sanction by the great weight of authority in this country.

This matter of hearing cases and making exceptions, involving as it does the exercise of the police power, is judicial in nature. Consequently most jurisdictions are inclined to hold that the action of the board in making or recommending a special exception, must be made to rest upon legal evidence tending to

¹⁴ It is interesting to note that an amendment by a city council may be as arbitrary as an exception by a board of appeals. In the former instance equity grants relief by declaring the exercise of the power illegal, not by declaring it unconstitutional.

¹⁵ *Colby v. Board*, 81 Colo. 344, 255 P. 443 (1927).

¹⁶ 150 Md. 452, 133 A. 465 (1926).

establish facts justifying the action.¹⁷ The weight to be given to the various types of evidence is primarily for the board to determine. Unless there is clear indications to the contrary, it is assumed that the preponderance of the evidence is in accordance with the final decision of the board.¹⁸ New York courts go so far as to refuse to bind the board to follow the ordinary rules of evidence applicable to actions in the courts.¹⁹ Indeed, some cases actually hold that the board may arrive at a determination on the basis of its own independent investigation.²⁰ The great weight of New York decisions, however, seems at present to be in the minority.

The boards are bound to execute the provisions of the zoning ordinances, regardless of validity. They cannot pass upon the constitutionality of city ordinances.²¹ While the construction given by a board in carrying out its duty of execution is always entitled to the most respectful consideration and ought not be overruled without cogent reasons,²² such construction is in no way binding on the courts.²³

In brief, the exercise of the powers which are essentially judicial in character has been upheld with few exceptions by courts in the various states. Yet certain qualities of a judicial tribunal, such as that of refusing to enforce an unconstitutional law or ordinance, have been denied to these "administrative agencies". Furthermore, boards of zoning appeals have no power to enforce their decisions. They make decrees, but they must rely on the courts to inject teeth into them. Then, too, they have no more power of final determination in their field than an administrative official has in his field.

¹⁷ *Schnell v. Township Committee of Ocean Twp.*, — N. J. L. —, 198 A. 759 (1938); *Somers v. Bradley Beach*, 115 N. J. L. 135, 178 A. 755 (1935); *Hendey v. Ackerman*, 103 N. J. L. 305, 136 A. 733 (1927).

¹⁸ *Roberts v. Zoning Board of Review of City of Pawtucket*, — R. I. —, 197 A. 461 (1938).

¹⁹ *People, ex rel., Fordham Manor Reformed Church v. Walsh*, 244 N. Y. 280, 155 N. E. 575 (1927); *Socony Vacuum Oil Co. v. Murdock*, 165 Misc. Rep. 713, 1 N. Y. S. (2d) 574 (1937); *People, ex rel., Broadway and 96th St. Realty Co. v. Walsh*, 203 App. Div. 468, 196 N. Y. S. 672 (1922).

²⁰ *Socony Vacuum Oil Co. v. Murdock*, 165 Misc. Rep. 713, 1 N. Y. S. (2d) 574 (1937).

²¹ *Municipal Gas Co. of City of Albany v. Nolon*, 121 Misc. Rep. 606, 201 N. Y. S. 582 (1923).

²² *Boyer-Campbell Co. v. Fry*, 271 Mich. 282, 260 N. W. 165 (1935).

²³ *Paye v. City of Grosse Pointe*, 279 Mich. 254, 271 N. W. 826 (1937).

The legal status of a board of zoning appeals is brought out more clearly when similar boards operating under general rules are considered. As the Supreme Court of Ohio pointed out recently:

We see no distinction in principle between the use of a fact-finding body to determine whether or not "unusual hardships" have resulted in specific cases and the use of a similar administrative agency to ascertain the fact whether a picture film is of a moral, educational, or harmless character.²⁴ Manifestly, since unusual hardships would affect some and not other owners in a zoning district, the determination whether the restriction imposes unusual hardships upon an individual's property must be left, in specific instances, to the discretion of administrative agencies.²⁵

The Board of Tax Appeals is a Federal agency exercising functions similar to those performed by a board of zoning appeals. It was established by the Revenue Act of 1924 to hear, consider, and decide whether specific deficiencies reported by the Commissioner of Internal Revenue were correct. Its purpose was to give taxpayers an opportunity to secure an independent review of the Commissioner's determination of additional income and estate taxes by the Board in advance of their paying the tax found by the Commissioner to be due.²⁶ While the Board is not a court, it exercises appellate powers judicial in character. Its decision presents a case or controversy between the taxpayer and the Government so as to authorize review by the court upon the Commissioner's petition. The Board exercises functions similar to those exercised by a trial court in a law case without a jury.²⁷ It is said that the Board is an executive or administrative agency, upon the decision of which the parties are given opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided.²⁸

Another illustration is furnished by the various laws pertaining to employers' liability and workmen's compensation, in which common law rules have been altered, or even abolished,

²⁴ *L. & M. Investment Co. v. Cutler*, 125 Ohio St. 23, 180 N. E. 379 (1932), citing *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U. S. 230, 59 L. Ed. 552, 35 S. C. 387 (1915).

²⁵ *Ibid.*

²⁶ *Garden City Feeder Co. v. Commissioner of Internal Revenue*, 27 B. T. A. 1132 (1933).

²⁷ *Commissioner of Internal Revenue v. Liberty Bank & Trust Co.*, 59 F. (2d) 320 (1932); *Blair v. Oesterlein Machine Co.*, 275 U. S. 220, 72 L. Ed. 249, 48 S. C. 87 (1927).

²⁸ *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U. S. 716, 73 L. Ed. 918, 49 S. C. 499 (1929).

and administrative remedies substituted for them. The effect, of course, is to take whole classes of cases out of the courts and hand them over to administrative agencies to deal with in a prescribed manner.

The United States Supreme Court has held that a railroad commission empowered to hold hearings at which evidence was presented and arguments put forth and, then, to determine what regulations should issue was not performing a function essentially judicial in character. The Court maintained that the ascertainment of facts, or the reaching of conclusions upon evidence taken in the course of a hearing of interested parties, might be entirely proper in the exercise of executive or legislative, as distinguished from judicial powers.²⁹

From these instances, it may be observed that in the exercise of their discretionary powers administrative bodies issue commands to individuals in cases coming before them as well as formulate regulations possessing the force of law. Such hearings or investigations quite obviously are judicial insofar as they are similar to the function of a court of law in securing evidence in specific cases. However, they are not judicial in the full sense of the term inasmuch as they are not proceedings for the determination of rights between litigants who must abide by the decisions rendered. It is when administrative proceedings lead to the issuance of decrees directed to individuals and directly affecting their personal rights or their property rights that the judicial field is more nearly approached. Even in such cases the courts have found it expedient to declare that administrative bodies may hold such proceedings if the courts are permitted the right to see (1) that the requirements of due process of law have been met, (2) that the administrative agencies have not exceeded their statutory powers, and (3) that their proceedings have otherwise been free from legal error.

With these considerations firmly in mind, precisely what is the legal status of a board of zoning appeals? The answer is simple: it has no precise status. For convenience, it may be called a *quasi*-judicial body (and that term is about as accurate and ambiguous as any). It is a *quasi*-judicial body, for it lacks the power to issue a judgment in the sense of a final adjudication.

²⁹ *Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 298, 58 L. Ed. 229, 34 S. C. 48 (1913).

In other words, after the board acts, the individual affected is not concluded by the decision. He has the right to apply for and obtain appropriate relief in a court of equity, in cases of arbitrary exercise of statutory power, or a ruling in excess of the jurisdiction conferred.³⁰

³⁰ *Degge v. Hitchcock*, 229 U. S. 162, 57 L. Ed. 1135, 33 S. C. 639 (1913).

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