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Constitutional Law--Zoning Board of Appeals--Dispensing Power

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past record of many associations should commend them for appointment to a list of eligibles. In fact one of the proposed amendments to the Bankruptcy Act would give the credit associations just such recognition.[23]

—BERNARD SCLOVE.

CONSTITUTIONAL LAW — ZONING BOARD OF APPEALS — DISPENSING POWER. — The power of a board of appeals to vary the application of a zoning ordinance was recently upheld by the Ohio Supreme Court as not involving an unconstitutional delegation of legislative powers. The ordinance, as is usual, provided for relaxation of the strict letter of any provision in case of practical difficulty or unnecessary hardship.[1] Defendant was refused a permit to remodel his building to be used as a sanitarium, although it was in existence before the ordinance was adopted. The board of appeals ordered the granting of the permit, finding that the building was of substantial, unique, and special construction, and that the intended use would not cause annoyance to occupants of adjoining buildings. No conforming use of the land would have been remunerative. Plaintiff then obtained an injunction against the issuance of the permit and the remodeling of the building but the court of appeals reversed the decree and dismissed the petition. No bill of exceptions was taken in the appellate court, and no special findings made. Therefore, the Supreme Court in affirming the court of appeals decision had only to pass on the naked legal question of whether the ordinance was an unconstitutional delegation of legislative power. *L. and M. Investment Co. v. Cutler.*[2]

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tutions or corporations organized to specialize in liquidation work, as in Canada. The possibility of credit organizations favoring local creditors could be rendered negligible by licensing associations of high repute and choosing the individuals on the basis of integrity as well as ability. Donovan Report, *supra* n. 3, at 13-14, 26-33, 125-6.

[23] A proposed amendment to § 45 of the Bankruptcy Act would authorize non-profit trade associations to act as trustees in bankruptcy.

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[1] Zoning Ordinance of the City of Cleveland, 1281-23(b):

"Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this subdivision, the board of appeals shall have the power in a specific case to vary the application of any such provision in harmony with the general purpose and intent of the subdivision so that the public health, safety, morals and general welfare may be secured and substantial justice done."

[2] 180 N. E. 379 (Ohio 1932).

The Supreme Court of Illinois, however, recently held a statute similar to the one in the principal case to be an unconstitutional delegation of legislative power because it provided no rule or standard for the guidance of the board.[3] It is to be noted that in the Illinois case the complaining owner of the land acquired it long after it was classified under the zoning ordinance, and the mere fact he could make more money out of it if permitted to disregard the ordinance was not a hardship sufficient to justify the exercise of the dispensing power even in jurisdictions holding such power constitutional. The court could well have struck down the arbitrary exercise of the power instead of holding the power itself constitutionally invalid.

There is a practical need for some flexibility in the application of zoning restrictions. Variation by amendment of the ordinance has been found less desirable than the granting to a board of appeals or adjustment a dispensing power, and such a grant has generally been held constitutional[4] in spite of the contention that it confers legislative power without a sufficient guide for its exercise.[5]

It is interesting to note that the quotation

> "The true distinction is between a delegation of power to make the law, which involves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the

[3] Welton v. Hamilton, 344 Ill. 82, 176 N. E. 333 (1931).

[4] *In re* Dawson, 136 Okla. 113, 277 Pac. 226 (1928); Anderson v. Jester, 206 Iowa 452, 221 N. W. 354 (1928); Sundun v. Rogers, 83 N. H. 253, 141 Atl. 142 (1928); Harden v. Raleigh, 192 N. C. 395, 135 S. E. 151 (1926); Spencer-Sturla Co. v. Memphis, 155 Tenn. 70, 290 S. W. 608 (1927). See also Baker, *Zoning Legislation* (1926) 11 CORN. L. Q. 164; Note (1928) 54 A. L. R. 1030. *Cf.* Weicker Trans. & Storage Co. v. Denver, 75 Col. 475, 226 Pac. 857 (1924) and Continental Oil Co. v. Twin Falls, 286 Pac. 353 (Idaho 1930).

[5] The term "dispensing power" has been applied to such legislation to designate a power to suspend in favor of particular individuals or cases the operation of a general law—to sanction a deviation from a standard. The term was used in English constitutional law with reference to the alleged royal prerogative, the exercise of which by the Crown was declared illegal in the seventeenth century, and which is not claimed in America as an executive power. FREUND—ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY (1928) §§ 67, 68.

The dispensing power is a clear delegation of legislative discretion to an administrative body, but, as expressed by John W. Davis:

> "Constitutional limitations have yielded to the police power under the pressure of real or supposed emergencies, and more and more legislatures have been content virtually to abdicate by announcing a policy in statutory form, and leaving to boards, bureaus and subordinate officers the task of filling out by multitudinous regulations those details which really make the law." PRESENT DAY PROBLEMS (1923) 9 A. B. A. J. 553, 554.

> law. The first cannot be done, to the latter no objection can be made.",[6]

was approved by both the Ohio and Illinois courts as supporting their decisions. The distinction, if a valid one, is certainly so elusive that its judicial application will not be uniform.

The Illinois Court objects most strenuously to the indefiniteness of the terms "practical difficulties" and "unnecessary hardships", and it is impossible to define in advance to what specific circumstances they would apply. The cases, however, suggest considerations which bear upon the matter: That edges of *E* district, in which private residences were erected, were necessarily bounded by *C* and *D* districts, and were in contact with street surface railroads, main thoroughfares, or apartment houses on opposite side of the street, was deemed not a practical difficulty or unnecessary hardship in the way of carrying out the strict letter of the zoning resolution, so as to authorize variance therefrom.[7] Restriction of one corner of an intersection to residential use when the other three corners are devoted to business uses is not sufficient;[8] and this is true even if there are no buildings adjacent to the property in question, and the territory generally in its vicinity is undeveloped and sparsely settled.[9] Nor is failure to enforce against other violators[10] and disadvantage in property value or income, or both, to a single owner of property, resulting from application of zoning restrictions ordinarily sufficient to warrant relaxation in his favor.[11] A pre-existing nonconforming use will not be allowed to increase.[12] A nonconforming use of part of one lot may be allowed where it encourages the appropriate use of other lots, will be for public benefit, and lessen traffic congestion.[13] Where garages are prohibited in a residential district and it is shown that an owner's land is suitable for no other use the requisites for relaxation exist.[14] That is also the case where the value of all the land in a residence district would be increased by zoning all the district for business, and an owner wants to erect a

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[6] SUTHERLAND—STATUTORY CONSTRUCTION, § 68.
[7] Pounds v. Walsh, 129 Misc. Rep. 676, 223 N. Y. Supp 459, 463 (1927).
[8] Smith v. Collinson, 6 Pac. (2d) 277 (Cal. 1931).
[9] State *ex rel.* Nigro v. Kansas City, 27 S. W. (2d) 1030 (Mo. 1930).
[10] Appeal of Valicenti, 298 Pa. 276, 148 Atl. 308 (1929).
[11] Norcross v. Board of Appeals, 255 Mass. 177. 150 N. E. 887 (1926); Zahn v. Board of Public Works, 195 Cal. 497, 234 Pac. 388 (1925).
[12] Thayer v. Board of Appeals, 157 Atl. 273 (Conn. 1931).
[13] Roberge v. Zoning Board of Review, 157 Atl. 304 (R. I. 1931).
[14] McCabe v. Zoning Board, 50 R. I. 449, 148 Atl. 601 (1929).

filling station where no conforming use of the land would be remunerative.[15] Construction begun before the amending of a zoning law is not ordinarily affected thereby[16] but a subsequent ordinance may extinguish a building permit even though expenditures have been made in reliance on it.[17]

The revisers of the West Virginia Code largely adopted the Standard State Zoning Act, and as a consequence the state has a statute similar to the one in question.[18] Its constitutionality has not been adjudicated. The discretion of boards of appeals or adjustment appears to be judicially controllable, and in view of the desirability of the delegation of such a discretion, as an adjunct to modern regulative machinery, it seems that it should not be held invalid.

—DONALD M. HUTTON.

EVIDENCE — ADMISSIBILITY OF EVIDENCE THAT DEFENDANT HAS OR HAS NOT LIABILITY INSURANCE. — In an action for personal injury, it is the general rule that informing the jury of the existence of insurance, when evidence of such is inadmissible on any issue in the case, constitutes grounds for a new trial.[1] It is a matter, within limits, in the discretion of the trial court,[2] and some courts hold the fault is cured by proper instructions to the jury.[3] All hold, however, that without such instructions the admission of such evidence requires a new trial.

The reason assigned is that, in cases of personal injury, it increases the already strong tendency of juries to be influenced, especially where a corporation is defendant, by sympathy and prejudice. Juries confronted by the injuries to the plaintiff are too apt to lose sight of the real issues and true merits of the case

[15] Sundlun v. Zoning Board, 50 R. I. 107, 145 Atl. 451 (1929).
[16] Caponi v. Walsh, 228 App. Div. 86, 238 N. Y. Supp. 438 (1930).
[17] City of Tucson v. Arizona Mortuary, 34 Ariz. 495, 272 Pac. 928 (1928); Matter of Fox Lane Corp., 216 App. Div. 813, 215 N. Y. Supp. 334 (1926); People v. Kleinert, 237 N. Y. 580, 143 N. E. 750 (1924), writ of error dismissed 268 U. S. 646, 45 S. Ct. 618 (1925); Gresnaugh v. Allen Theatre and Realty Co., 33 R. I. 120, 80 Atl. 260 (1911).
[18] W. VA. REV. CODE (1931) c. 8, art. 5, § 8(c).

[1] Hollis v. United States Glass Co., 220 Pa. 49, 69 Atl. 55 (1908); Wilkins v. Schwartz, 101 W. Va. 337, 132 S. E. 887 (1926).
[2] Bradley v. D. E. Cleary Co., 86 N. J. L. 338, 90 Atl. 1015 (1914).
[3] Gortz v. Ravenel, 127 S. C. 505, 121 S. E. 369 (1924); Fuller v. Mazetti, 231 Mich. 213, 203 N. W. 868 (1925).