Michigan Law Review

Volume 48 | Issue 6

1950

# MUNICIPAL CORPORATIONS-ZONING-RIGHT OF GRANTEE TO ACT ON VARIANCE ISSUED TO HIS GRANTOR

Herbert N. Weingarten
*University of Michigan Law School*

MUNICIPAL CORPORATIONS—ZONING—RIGHT OF GRANTEE TO ACT ON VARIANCE ISSUED TO HIS GRANTOR—A zoning ordinance prohibited the erection of private garages within twenty feet of the street line. Because of the peculiar shape of the lot in question, a variance was granted to the then owner permitting the building of a garage closer to the street line. However, before the garage was built, the land was sold to the present owner who obtained a building permit and began construction. Plaintiffs, owners of the adjoining lot, objected to the granting of the permit and appealed to the zoning board of review which denied their appeal. On certiorari, *held*, present owner might act on the variance granted to his predecessor. *Mastrati v. Strauss*, (R.I. 1949) 67 A. (2d) 29.

The validity of comprehensive zoning ordinances, including the imposition of set-back lines, is no longer open to question.[1] Similarly, the delegation of power to a zoning board of appeals to grant variances from the terms of the ordinance is generally approved.[2] The novel question presented by the instant case is whether or not the benefits of a variance pass with a grant of the land, or whether the variance is merely a personal privilege which expires with non-user. It would seem that a variance is not a personal privilege. For instance, once a variance has been acted upon, a grantee of the land can continue to use it in the manner permitted by the variance.[3] Similarly, where an existing non-conforming use has been excepted from the operation of the zoning ordinance, a grantee of the land is permitted to continue the use.[4] It has even been held that a variance which is restricted to the present owner is invalid for that reason.[5] The zoning restrictions,

[1] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114 (1926). The courts of at least thirty-seven states and the District of Columbia have upheld zoning regulations as a proper exercise of the police power. Specific provisions concerning set-back lines have also been usually upheld. Gorieb v. Fox, 274 U.S. 603, 47 S.Ct. 675 (1927). However, a set-back line based on the location of a percentage of buildings on the block is invalid. Appeal of White, 287 Pa. 259, 134 A. 409 (1926).

[2] Where the authority of the board to grant a variance is denied, it is usually because the provisions of the ordinance did not furnish adequate standards for the board and were therefore an unlawful delegation of legislative power. Welton v. Hamilton, 344 Ill. 82, 176 N.E. 333 (1931); Lewis v. Mayor, 164 Md. 146, 164 A. 220 (1933).

[3] The converse is also true: without a change in other facts, the board can not grant a variance to the present owner after it had previously refused to grant a variance to his predecessor. McGarry v. Walsh, 213 App. Div. 289, 210 N.Y.S. 286 (1925).

[4] BASSETT, ZONING 105 (1940).

[5] Olevson v. Zoning Board of Review of Town of Narragansett, 71 R.I. 303, 44 A. (2d) 720 (1948).

however, do not constitute a "taking" of property for public use so as to violate the due process clause of state or federal constitutions or to require the payment of compensation.[6] Nor does the imposition of a zoning restriction give the public an interest in the nature of an easement which will constitute an encumbrance on the land.[7] Therefore, if the city takes nothing by imposing the restriction, it grants nothing when the board issues a variance. The board merely removes the prior limitation of a property right. The process may be described as follows: when an ordinance is passed restricting the distance from the street line within which a landowner may build a garage, it limits one of his property rights, the right to build a garage on his own land wherever he pleases. When a variance is issued, the effect is to remove the limitation: the owner's rights in the particular land are the same as if the ordinance had never been passed. Under such an analysis, a deed of the land, carrying with it all of the property rights of the grantor, would carry with it the now unlimited right to build a garage closer to the street line than was permitted by the zoning ordinance.[8]

*Herbert N. Weingarten*

[6] Village of Euclid v. Ambler Realty Co., supra, note 1. Zoning ordinances are not an exercise of the power of eminent domain. State ex rel. Carter v. Harper, 182 Wis. 148, 196 N.W. 451 (1923); Ware v. City of Wichita, 113 Kan. 153, 214 P. 99 (1923).

[7] Kend v. Crestwood Realty Co., 210 Wis. 239, 246 N.W. 311 (1933).

[8] The court in the instant case reserves the question as to whether a grantee might act upon a variance given to his predecessor in case there had been a substantial change in the nature of the neighborhood or land between the time the variance was issued and the time the grantee acquired the land. However, if these were the facts, the proper action of the adjoining landowners would be an attempt to have the original variance set aside. See BASSETT, ZONING 115 (1940).