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Spot Zoning Approved In New York

rules of law. Futhermore, the tort approach to liability for breach of warranty is as logically sound as the contract approach.

It would appear that the preoccupation with contract in connection with warranty has no sound basis. The action for breach of warranty was for hundreds of years a tort action. It seems that the change from tort to contract was due only to the fact that most of the cases which arose involved contracts.[34] There is still substantial recognition of the original tort theory, and a return to it is still possible when the courts are willing to decide that the manufacturer has a duty toward all those who use his products.[35]

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SPOT ZONING APPROVED IN NEW YORK

With the rising population and the growth of cities that is so characteristic of present society, zoning boards and city officials are faced with difficult problems. When the character of an area changes because of population growth, location of a new superhighway, or a similar reason, this necessitates a revision in the zoning plan for that area.

Traditionally city planners have zoned by dividing a city into separate areas, each zoned for a particular use.[1] Once an area has been zoned, buildings designed for a different purpose cannot be constructed in the area, nor can existing property be converted to a different use than the type specified.[2] Any change in the use of a piece of property within a zoned area requires an amendment to the zoning ordinance,[3] which may be difficult to justify because of the likelihood that such a change will be illegal "spot zoning."[4]

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[34]Prosser, Torts 507 (2d ed. 1955).

[35]Ibid.

[1]Devaney v. Board of Zoning Appeals, 132 Conn. 537, 45 A.2d 828 (1946); Elizabeth City v. Avdlett, 201 N.C. 602, 161 S.E. 78 (1931); Blankenship v. City of Richmond, 188 Va. 97, 49 S.E.2d 321 (1948). For a collection of cases see 101 C.J.S. Zoning § 1 (1958).

[2]Heath v. Mayor and City Council, 188 Md. 296, 49 A.2d 799 (1946); Collins v. Board of Adjustment, 3 N.J. 200, 69 A.2d 708 (1949); Schleck v. Zoning Bd. of Appeals, 354 Wis. 42, 35 N.W.2d 312 (1948). For a collection of cases see 101 C.J.S. Zoning § 1 (1958).

[3]8 McQuillin, Municipal Corporations § 25.06 (1949).

[4]1 Yokley, Zoning Law and Practice §§ 90-95 (1953). The term "spot zoning" describes an amendment to a zoning ordinance that reclassifies a small area for a use prohibited by the original zoning ordinance and out of harmony therewith. Id. at § 90.

A new approach to zoning was ruled upon by the New York Court of Appeals in *Church v. Town of Islip*.[5] The town of Islip was in an area of rapidly increasing population. An application was made to the town board for a zoning change of a lot from a residential to a business classification. Indications were that the area in which the zoning change was requested eventually would be zoned for business. The town board had three alternatives: (1) to reject the application; (2) to rezone the entire area; (3) to grant the application and rezone the single lot.

The town board chose the third alternative and rezoned the one lot for business. As conditions to the zoning change the town board required that the building cover no more than 25 per cent of the area of the lot and that an anchor fence with shrubbery be constructed and maintained within the boundary line of the lot.[6] The plaintiffs, residents of the affected area, sought to have the zoning change ruled unconstitutional on the ground that this change was illegal either as "contract zoning"[7] or "spot zoning." These contentions were rejected by the trial court, and the decision was affirmed by the New York Court of Appeals.[8]

The contention that the zoning change was invalid as "contract zoning" was based upon the proposition that such a change requiring the acceptance of restrictions is a bargaining away of the town's police power. The police power is not subject to limitation by private contract;[9] thus any contract based on a limitation of the town's police power would be invalid.[10] In *Baylis v. City of Baltimore*,[11] for example, the Maryland Court of Appeals ruled a zoning ordinance invalid, stating that "the resulting contract is nugatory because a municipality is not able to make agreements which inhibit its police powers . . . ."[12]

Although New York accepts the rule that a government body can-

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[5]8 N.Y.2d 254, 168 N.E.2d 680 (1960).

[6]Id. at 681.

[7]"Contract zoning" is the term applied when a consideration is given for the zoning change. Baylis v. City of Baltimore, 219 Md. 164, 148 A.2d 429 (1959).

[8]8 N.Y.2d 254, 168 N.E.2d 680, 683 (1960).

[9]Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908); Northern Pac. Ry. v. Duluth, 208 U.S. 583 (1908); 6 McQuillin, Municipal Corporations § 24.20 (1949).

[10]Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956); Baylis v. City of Baltimore, 219 Md. 164, 148 A.2d 429 (1959); Houston Petroleum Co. v. Automotive Prod. Credit Ass'n, 9 N.J. 122, 87 A.2d 319 (1952).

[11]219 Md. 164, 148 A.2d 429 (1959).

[12]Id. at 433.

not bargain away its police powers,[13] the Court of Appeals refused to draw the analogy between zoning with special restrictions and contracting away police power.[14] The town board presumably could have zoned the corner for business or any other use.[15] Also the town board could have imposed reasonable restrictions in the different zone classifications.[16] Thus, it seems to follow that the board can create a new classification embodying the particular restrictions placed on the property in the *Church* case. Therefore the Court of Appeals properly rejected the argument that there was a contracting away of the town's police power and examined the more serious question of whether the zoning ordinance was illegal "spot zoning."[17]

It is generally agreed that "spot zoning" is an undesirable practice.[18] However, there is a distinction between illegal "spot zoning" and a valid zoning change that is limited to a small area.[19] The Court of Appeals of Maryland drew the distinction in this way:

> "If it is an arbitrary and unreasonable devotion of the small area to a use inconsistent with the uses to which the rest of the district is restricted and made for the sole benefit of the private interests of the owner, it is invalid.... On the other hand, if the zoning of the small parcel is in accord and in harmony with the *comprehensive zoning plan* and is done for the public good... it is valid."[20]

The test set forth by the Maryland court has been widely accepted,[21] but the cases that apply the test are difficult to reconcile. In recent decisions the courts have held invalid the rezoning of a residential lot for a post office,[22] a seaside residential area for commercial fishing,[23] and a small area on one side of an expressway for business

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[13]Atlantic Beach Property Owners' Ass'n v. Town of Hempstead, 3 N.Y.2d 434, 144 N.E.2d 409, 165 N.Y.S.2d 737 (1957); Wells v. Village of E. Aurora, 236 App. Div. 474, 259 N.Y.S. 598 (4th Dep't 1932); Schwab v. Graves, 221 App. Div. 357, 223 N.Y.S. 160 (4th Dep't 1927).

[14]8 N.Y.2d 254, 168 N.E.2d 680, 683 (1960).

[15]N.Y. Town Law §§ 261-62 (1957).

[16]Ibid.

[17]Two judges dissented on this point. 8 N.Y.2d 254, 168 N.E.2d 680, 683 (1960).

[18]1 Yokley, Zoning Law and Practice § 90 (1953).

[19]101 C.J.S. Zoning § 33 (1958); 1 Yokley, Zoning Law and Practice § 91 (1953).

[20]Huff v. Board of Zoning Appeals, 214 Md. 48, 133 A.2d 83, 88 (1957). (Emphasis added.)

[21]Zachring v. Township of Long Beach, 56 N.J. Super. 26, 151 A.2d 425 (Super. Ct. 1959); Rogers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951); D'Angelo v. Knights of Columbus Bldg. Ass'n, 151 A.2d 495 (R.I. 1959); 8 McQuillin, Municipal Corporations § 25.84 (1957).

[22]D'Angelo v. Knights of Columbus Bldg. Ass'n, 151 A.2d 495 (R.I. 1959).

[23]Zachring v. Township of Long Beach, 56 N.J. Super. 26, 151 A.2d 425 (Super. Ct. 1959).

even though the other side had already been zoned for business.[24] In these cases the courts have stressed the fact that a comprehensive zoning plan contemplates fixed areas within defined boundaries. Other courts have upheld zoning changes in the classification of a small area, when an expressway changed the nature of the property,[25] and when an area's population had increased rapidly, thereby changing the surrounding neighborhood or creating a need for business property.[26] In these cases the courts have pointed out that it is only necessary for a comprehensive plan to be a general one and not a detailed plan to control development of property, and that a change may be in accordance with a comprehensive plan, even though there is not exact compliance with every detail of the plan. Basically, the requirement of a comprehensive plan is that it be something more than a piecemeal approach.[27] Zoning looks to a stable, not a static, community.[28]

The real problem in the *Church* case was whether the zoning change was in accordance with a comprehensive plan. Prior to the *Church* decision, the leading case in New York was *Rogers v. Village of Tarrytown,*[29] which upheld an ordinance giving a village planning board the power to reclassify any ten acre tract within a one and two-family dwelling zone into a multiple-family dwelling zone.[30] Under this ordinance the planning board was authorized to accept or reject applications for reclassification upon the merits of the particular situation. This resulted in small areas being zoned for multiple-family dwellings within a larger area of one or two-family dwellings, but the court held that the ordinance met the requirements of a comprehensive plan.[31]

The principal case goes beyond the *Rogers* decision since the town of Tarrytown had an ordinance to serve as a guide in making zoning changes, but the town of Islip had no such ordinance. The result of the *Church* case is that it is only necessary for the plan to ex-

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[24]Hewitt v. County Comm'r, 220 Md. 82, 151 A.2d 144 (1959).

[25]Ball v. Town Plan & Zoning Comm'n, 146 Conn. 397, 151 A.2d 327 (1959).

[26]Clark v. Town Council, 145 Conn. 476, 144 A.2d 327 (1958); Fifteen Fifty No. State Bldg. Corp. v. City of Chicago, 15 Ill. 2d 408, 155 N.E.2d 97 (1959); Bartlett v. Township of Middletown, 51 N.J Super. 239, 143 A.2d 778 (Super. Ct. App. Div. 1958).

[27]Pecora v. Zoning Comm'n, 145 Conn. 435, 144 A.2d 48, 52 (1958); Clark v. Town Council, 145 Conn. 476, 144 A.2d 327, 333 (1958).

[28]Bartlett v. Township of Middletown, 51 N.J. Super, 239, 143 A.2d 778, 791 (Super Ct. App. Div. 1958).

[29]302 N.Y. 115, 96 N.E.2d 731 (1951).

[30]Id. at 736.

[31]Id. at 735.

ist in the minds of the zoning board. The test of the validity of a zoning change would now seem to be whether the zoning board sought to achieve a legitimate end by reasonable means.

The greatest danger involved in zoning is that "spot zoning" will be used to favor a particular individual at the expense of neighboring property owners.[32] It was the recognition of this danger by the courts that led to imposing the requirement of a comprehensive zoning plan to guide the zoning board, and the requirement of uniformity of regulations throughout each district. These safeguards have been seriously weakened, if not abolished, by the instant case.

Under the doctrine of the *Church* case, however, zoning boards are better prepared to solve the more complicated problems of rapid urbanization. In *Islip* a reclassification of the entire area would have met the tests of older zoning authorities but it would have brought disorder and hardship to many property owners. A refusal to make any zoning change in an area subject to forces calling for a change hinders normal development and brings economic loss to property owners. Under the circumstances the most practical approach is the one which the court adopted—piecemeal zoning based on individual situations with restrictions protecting the neighboring property owners. In this way the problems involved in rezoning can be held to a minimum. The practical advantages of the *Islip* approach outweigh the theoretical dangers inherent in the increased power given the town board.

While no other decision has gone as far as the principal case, recent decisions in Connecticut indicate that strict compliance with a comprehensive plan is not necessary.[33] The Supreme Court of Illinois sustained a single lot zoning change in order to permit a twenty-five story building to be built.[34] The chief argument used by the Supreme Court of Illinois to justify this change was that the area was in a state of transition.[35] In light of these developments there is reason to believe that other courts will give serious consideration to the New York approach.

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[32]8 McQuillin, Municipal Corporations § 25.42 (1949).

[33]Pecora v. Zoning Comm'n, 145 Conn. 435, 144 A.2d 48 (1958); Wade v. Town Plan & Zoning Comm'n, 145 Conn. 592, 145 A.2d 597 (1958).

[34]Fifteen Fifty No. State Bldg. Corp. v. City of Chicago, 15 Ill. 2d 408, 155 N.E.2d 97 (1959).

[35]Id. at 102.