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Housing and Land Use—Avoiding Misuse of the Special Exception

AVOIDING MISUSE OF THE SPECIAL EXCEPTION

In *Vogelaar v. Polk County Zoning Board of Adjustment*,[1] defendant Board issued a special use permit to the Des Moines Metropolitan Area Solid Waste Agency for the construction of a sanitary landfill. Plaintiffs, neighboring property owners, objected to the construction of the landfill and petitioned the Polk County District Court for a writ of certiorari, protesting the issuance of the permit and alleging that the Board had acted illegally in granting the permit. The district court sustained the Board's action and plaintiffs appealed to the Iowa Supreme Court. On appeal, granting of the permit was upheld and plaintiffs' arguments that the trial court's decree was contrary to the variance provision of the Iowa zoning enabling act[2] and was not in the public interest, were rejected.[3]

The Iowa zoning enabling act in *Vogelaar* provides the mechanism for county zoning decision-making. The act established a zoning commission to hold hearings and make reports to the county council.[4] The council was given the authority to adopt ordinances describing the various uses of land in the county. The local zoning board of adjustment was established to pass on individual cases to avoid any arbitrary effect of the zoning law and also to provide for a degree of flexibility within the zoning plan. The enabling act gave the board of adjustment the power to hear special exceptions and grant variances.[5]

The *Vogelaar* court sought to distinguish a special exception, for which the waste agency applied, from a variance. Both are administered by the zoning board of adjustment, but neither is adequately distinguished in the enabling act. Many local authorities, parties and even courts have had difficulty distinguishing the terms and their functions.[6]

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1. ——— Iowa ———, 188 N.W.2d 860 (1971).
2. IOWA CODE ANN. § 358A.18 (1949).
3. ——— Iowa at ———, 188 N.W.2d at 863.
4. IOWA CODE ANN. § 358A.8 (1949).
5. *Id.* § 358A.10.
6. *E.g.*, Parsons v. Board of Zoning Appeals, 140 Conn. 290, 99 A.2d 149 (1953); Sipperly v. Board of Appeal on Zoning, 140 Conn. 164, 98 A.2d 907

The special exception is not defined in the Iowa statute. The act merely provides: "the board of adjustment may hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance."[7]

The zoning enabling acts of most states contain a similar special exception or special use provision,[8] and the courts have been called upon to define their function. Most courts agree that a special exception permits a use, not otherwise allowed in a particular district, when certain conditions specifically set out in the ordinance exist.[9] Thus, the local board of adjustment is restricted to special exceptions specifically provided for by the county zoning ordinance. But, the board's power to grant a special exception is not controlled by standards set up in the state enabling act; rather, state legislatures have left it to the discretion of the local legislative body to determine which uses may be permitted in a district.

The Polk County Zoning Ordinance[10] provides for 18 such special exceptions or special uses, including golf courses, mobile homes and office buildings, each permitted only within specified districts. A sanitary landfill is a special use also provided for in the ordinance, and the board of adjustment may grant such special use in an A-1 agricultural district.[11] The ordinance further provides a number of conditions which the board may consider in reviewing an application for a special use permit, including "the most appropriate use of the land, . . . adequate open space for light and air, . . . and the general welfare of the persons residing or working in the neighborhood of such use."[12]

The variance is normally dealt with more fully in zoning enabling acts.[13] The Iowa statute provides that the board of adjustment may

(1953); O'Conner v. Board of Zoning Appeals, 140 Conn. 65, 98 A.2d 515 (1953); Doolings Windy Hill Inc. v. Springfield Twp., 371 Pa. 290, 89 A.2d 505 (1952); Leikins v. Ridley Twp. Zoning Bd., 367 Pa. 608, 80 A.2d 765 (1951).

7. IOWA CODE ANN. 358A.15(2) (1949).

8. *E.g.*, MO. REV. STAT. § 64.120 (1966); TEX. REV. CIV. STAT. art. 1011g (1963); WIS. STAT. § 59.99(11) (1951).

9. *E.g.*, Mitchell Land Co. v. Planning & Zoning Bd., 140 Conn. 527, ———, 102 A.2d 316, 318 (1953); Rosenfeld v. Zoning Bd. of Appeals, 19 Ill. App. 2d 447, 450, 154 N.E.2d 323, 325 (1958); Harrison v. Zoning Bd. of Review, 74 R.I. 135, 139, 59 A.2d 361, 364 (1948).

10. POLK COUNTY, IOWA, ZONING ORDINANCE art. 19 (1970).

11. *Id.*

12. *Id.* amend. 10.

13. *E.g.*, TEX. REV. CIV. STAT. art. 1011g (1963); WIS. STAT. § 59.99 (1957).

"authorize upon appeal, in specific cases, such variances from the terms of the ordinance as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the provisions of the ordinance will result in unnecessary hardship."[14] Under this type of statute, strict adherence to the terms of the zoning ordinance may be eased where literal enforcement would cause "unnecessary hardship." Since the board gets the power to grant variances directly from the enabling act, no action by the local legislative body is needed. The property owner is given the authority to use his property in a manner forbidden by the zoning ordinance. This is contrasted with the special exception, where the property owner puts his property to a use which the ordinance expressly permits.

In *Vogelaar*, the court recognized that the Board of Adjustment was acting in the capacity of deciding a special exception, and that the plaintiff mistakenly argued that the trial court had exceeded its authority under the variance provision of the Iowa statute. The use of a sanitary landfill in an A-1 argicultural district was expressly provided for by a special use or special exception in the Polk County Zoning Ordinance.[15] The Des Moines Metropolitan Area Solid Waste Agency merely had to show that the proposed use was expressly permitted by the ordinance. The Board of Adjustment then made its determination that the proposed use was so permitted, looked to see that the conditions specified in the ordinance were met, and then granted the special use permit.

The trial court found that issuance of the special use permit was proper and necessary to the public good.[16] In answer to plaintiffs' argument that the trial court's holding was contrary to the public interest, the *Vogelaar* court found it necessary to define the scope of its review.

The zoning enabling act defines the method of review for a decision of a board of adjustment. The statute provides that a person aggrieved by a decision of a board of adjustment may petition a court for a writ of certiorari and specify the grounds of alleged illegality of the board's decision.[17] The statute further provides: "If upon the hearing which shall be tried de novo it shall appear to the

14. IOWA CODE ANN. § 358A.18(3) (1949).
15. POLK COUNTY, IOWA, ZONING ORDINANCE art. 19 (1970).
16. ——— Iowa at ———, 188 N.W.2d at 863.
17. IOWA CODE ANN. § 358A.18 (1949).

court that testimony is necessary for the proper disposition of the matter, it may take evidence."[18]

The de novo provision would appear to give the court full power to determine the issues and rights of the parties involved and to try the case as if the suit had been originally filed in that court. However, the Iowa Supreme Court interpreted the statute to mean that the trial court's review is de novo *only* in that additional testimony will be admitted if necessary for the proper disposition of the matter. The court stated that testimony should be limited to any questions of illegality raised by the certiorari petition.[19]

In defining the scope of the de novo provision, the court closely followed, but did not cite, previous Iowa cases. The early case of *Anderson v. Jester*[20] first interpreted the analogous city zoning enabling act[21] and defined its version of what the court's role should be in reviewing a board of adjustment's decision. The court found that it was within the province of the legislature to determine the procedure and practice of judicial review, to make use of the writ of certiorari and to provide for trial de novo if it sees fit.[22] The court stated that if the intention of the legislature had been to give the aggrieved party the right to remove the whole matter from the board to the court, the right of appeal would have been granted.[23] Instead, the legislature provided the writ of certiorari to allow questions of illegality of the decision to be brought. Trial de novo is permitted merely to allow additional testimony to be taken if necessary; and, the admission of such testimony is limited to questions of illegality raised by the petition of certiorari.

Other state legislatures have defined the scope of a court's review of a board of adjustment's decision in different ways. One group of states, including Massachusetts and Connecticut, has given the courts broad power to review the board's findings. These states grant a full right of appeal from the board's decision and give the trial court complete de novo review authority on appeal.[24] Other states provide

18. *Id.* § 358A.21.

19. ——— Iowa at ———, 188 N.W.2d at 862.

20. 206 Iowa 452, 221 N.W. 354 (1928).

21. IOWA CODE ANN. § 414.12 (1949).

22. 206 Iowa at 456, 221 N.W. at 358.

23. *Id.* at 457, 221 N.W. at 359.

24. CONN. GEN. STAT. REV. § 8-8 (1966); MASS. ANN. LAWS ch. 40A., § 414.12 (1966).

that the applicant must apply for a writ of certiorari, but no mention of trial de novo is made.[25] Indiana allows for a writ of certiorari and provides that additional testimony may be taken, but then specifies that "no such review shall be by trial de novo."[26]

Statutes similar to those of Massachusetts and Connecticut, which deal with different types of zoning decisions, but still grant complete de novo review authority to courts on appeal in zoning cases, have recently been questioned under state constitutions. A Kentucky appellate court in *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*[27] held a statute unconstitutional which granted de novo review authority to courts on appeal from a zoning commission decision. The court noted that while the matter in controversy, a proposed adjustment to a master zoning plan, was not the same as a special exception to a zoning regulation, the appellate procedure was identical.[28] Thus, the court said, the decision in the case controls appeals from the board of adjustment.[29] The court held that under the statute it would be substituting its own judgment for that of the administrative agency by hearing the case de novo.[30] The court characterized the zoning agency's power in reviewing zoning decisions as "non-judicial" and stated that under the de novo provision it would be performing an administrative function in reviewing the commission's decision, thus violating the separation of powers doctrine of the Kentucky constitution.[31] This type of discretionary administrative decision is better left to the expertise of the administrative agency, the court stated.[32]

An Alabama case, *Ball v. Jones*,[33] held a statute unconstitutional which prescribed a de novo trial in the circuit court upon appeal from a zoning decision of the local legislative body of a city. The act was held unconstitutional because zoning is a legislative matter, and the legislature could not delegate this function to the courts.[34] The

25. *See, e.g.*, Mo. Rev. Stat. § 64.120 (1966); Wis. Stat. § 59.99 (1951).
26. Ind. Stat. Ann. § 53-788 (1964).
27. 379 S.W.2d 450 (Ky. App. 1964).
28. *Id.* at 454.
29. *Id.* at 458.
30. *Id.* at 458-59.
31. *Id.* at 453.
32. *Id.* at 455.
33. 272 Ala. 305, 132 So. 2d 120 (1964).
34. *Id.* at 308-09, 132 So. 2d at 123-24.

court, in dictum, said that a zoning board of adjustment performs a "quasi-judicial" function, and thus a court may not be overstepping its powers of judicial review by hearing a de novo appeal from the board of adjustment.[35]

In states that provide for writ of certiorari when reviewing board of adjustment decisions, courts have usually not permitted the trial to be de novo. For instance, Missouri courts, in interpreting the state zoning enabling act providing for writ of certiorari to review the legality of the board's decision, have emphasized that review by certiorari is not a trial de novo, even though the statute authorizes the taking of additional testimony.[36]

Whether a zoning decision is "quasi-judicial" or "legislative" and whether a statutory grant of de novo review power is an unconstitutional grant of legislative power to the courts are difficult questions. The presence of judicial and legislative aspects in zoning agency decisions make classification difficult.[37] Courts have sought to avoid these troublesome questions by condemning or limiting de novo provisions.

The Iowa Supreme Court in *Vogelaar* seems to have avoided these problems by limiting the de novo provision in the Iowa statute to mean that the hearing is de novo only in the sense that additional testimony may be taken if necessary. The certiorari provision then limits the court's review to questions of illegality. The court refused to read the de novo provision to mean that it may fully relitigate the case. By so following the *Anderson* precedent, the court avoided the question of the propriety of substituting its judgment for that of the Board. Scope of judicial review questions brought about by de novo provisions, like those in *American Beauty Homes* and *Ball*, were also avoided.

The *Vogelaar* court recognized the distinction between the special exception and the variance, as the terms were used in the Iowa zoning enabling act and as they have been interpreted by other courts. It correctly upheld the granting of a special use permit for a sanitary landfill in an argicultural district since the use was specifi-

35. *Id.* at 310, 132 So. 2d at 125.

36. *See, e.g.*, Cunningham v. Leimkuehler, 276 S.W.2d 633 (Mo. App. 1955); Veal v. Leimkuehler, 249 S.W.2d 491 (Mo. App. 1951).

37. For a detailed discussion of this problem, *see* Note, *Judicial Control Over Zoning Boards of Appeal: Suggestions for Reform*, 12 U.C.L.A.L. REV. 937 (1965). *See also* Note, *Administration of Zoning Flexibility Devices: An Explanation for Recent Judicial Frustration*, 49 MINN. L. REV. 973 (1965).

cally prescribed by the county ordinance. The court saw its role in reviewing the Board of Adjustment's granting of the permit as that provided by the zoning enabling statute and limited by past Iowa decisions. By so construing the Iowa enabling statute and by effectively distinguishing the special exception from the variance, the court avoided misuse of the special exception provision and put the court's role in reviewing the administrative action of the Board of Adjustment in its proper perspective.

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