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Jurisdiction of Municipal Zoning Questions

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NOTES AND COMMENTS

ADMINISTRATIVE LAW

JURISDICTION OF MUNICIPAL ZONING QUESTIONS

The appellant secured a building permit for a nonconforming use. Appellees, adjacent property owners, applied directly to the court and secured an injunction¹ to enjoin the building of the nonconforming structure. The appellants contended the court erred in granting the injunction since the appellees had not exhausted their administrative remedies before resorting to the court.² Held: judgment affirmed. The appellees were not "persons aggrieved"³ within the meaning of the statute who could appeal to the Board of Appeals.⁴ They therefore had no administrative remedies to exhaust and might properly apply for injunctive relief.⁵ *Fidelity Trust Co. v. Downing*, 68 N.E. (2d) 789 (Ind. 1946).

1. The court found the appellees would suffer "special damages" if the construction were not enjoined. In the following cases injunction was granted adjacent property owners on a showing of "special damages." *Fitzgerald v. Merard Holding Co.*, 106 Conn. 475, 183 Atl. 483 (1927); *Cohen v. Rosedale Realty Co.*, 120 N.Y. Misc. 416, 199 N.Y. Supp. 4; (Sup. Ct. 1923), *Pritz v. Messer*, 112 Ohio St. 628, 149 N.E. 20 (1925); *De Blasiis v. Bartel*, 143 Pa. Super. 485, 18 A. (2d) 478 (1941).
2. Where successive administrative appeals are provided by statute, one is not ordinarily entitled to judicial relief until the prescribed administrative remedies have been exhausted. *Myers v. Bethlehem Corp.*, 303 U.S. 41 (1938); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908); *Red River Broadcasting Co. v. F.C.C.*, 98 F.(2d) 282 (App. D.C. 1938); *Abelleira v. District Court of Appeal*, 17 Cal. (2d) 280, 109 P. (2d) 942 (1942); *Bassett*, "Zoning" (1936) 160.
3. The common council of any city is empowered by statute to create a board of zoning appeals to authorize variances and to hear and determine appeals from any order, requirement, decision, or determination made by an administrative official or board charged with the enforcement of the zoning ordinance. Ind. Stat. Ann. (Burns, 1933) § 48-2304. The court's interpretation in the main case is not compelled by this enabling act. The statute is silent as to who may appeal to the board. The phrase "persons aggrieved" appears only in the portion of the statute providing certiorari from the board to the court.
4. A more liberal interpretation including adjacent property owners was adopted in the following cases: *Michigan-Lake Bldg. Corp. v. Hamilton*, 340 Ill. 284, 171 N.E. 710 (1930); *Standard Oil Co. v. Commr. of Public Safety*, 274 Mass. 155, 174 N.E. 213 (1931); *Breese v. Hutchins*, 11 N.J. Misc. 74, 165 Atl. 94 (1933); *Junge's Appeal*, 89 Pa. 543, 548 (1926). Adjacent property owners in New York City may take appeals to the Board of Standards and Appeals. *McGoldrick, Grauband and Horowitz*, "Building Regulation in New York City" (1944) 258. The necessity of interpretation most commonly arises when adjacent property owners voluntarily seek administrative appeals and their right to do so is questioned by the permit seeker. The main case poses but does not answer this question.
5. § 28 of the Indianapolis zoning ordinance provides that buildings erected in violation of the ordinance are nuisances and may be abated by injunction.

The effect of the decision is to create a divided authority in the determination of municipal zoning questions. Although elimination of the present divided authority appears desirable,⁶ it is clear that the court does not believe that adjacent property owners have sufficient notice of the issuance of building permits. The court is therefore reluctant to hold them "persons aggrieved" and so compel them to seek administrative redress.⁷ While a provision for more adequate notice⁸ would remedy this objection, the present statutory provisions for injunction⁹ would remain a bar to effective administrative procedure.¹⁰ The elimination of the right to injunctive relief¹¹ as well as the inclusion of adjacent property owners within the phrase "persons aggrieved" appears necessary to secure finality in the administrative procedure.

CONSTITUTIONAL LAW

LEGISLATIVE ABOLITION OF REMEDIES

P sued for malicious alienation of the affections of his wife. Action dismissed: statute¹ made the filing of such actions unlawful. Held:

6. The establishment of an area of exclusive jurisdiction of the Board of Appeals would not only secure a uniformity of administrative action and purpose, but would also remove a burden from the courts to the extent that administrative appeals were successful in removing causes of grievance.
7. Administrative redress must be sought within 30 days from the date of the Building Commissioner's determination. Rules of Procedure of Board of Zoning Appeals of the City of Indianapolis, Art. I, ¶ 6.
8. If constructive notice by publication is not sufficient, actual notice might be secured by requiring applicants for building permits to send a form notice to adjacent property owners within an area of notice fixed by the Building Commissioner. McGoldrick, Grauband and Horowitz, "Building in New York City" (1944) 258.
9. Common councils pursuant to statute may declare that buildings erected in violation of the zoning ordinance are common nuisances and may be abated by injunction. Ind. Stat. Ann. (Burns, 1933) § 48-2306. See n. 5 supra.
10. Judicial review by certiorari from the board to the court is provided by statute. Ind. Stat. Ann. (Burns, 1933) § 48-2305. This provision which expressly prohibits trial de novo on certiorari, would become a dead letter if adjacent property owners, having been adversely ruled against by the board, could secure a trial de novo by applying to the court for injunction.
11. The elimination of injunctive relief would not prejudice the rights of adjacent property owners since the statute provides that on appeal to the board all work on the premises concerned shall be stayed. Ind. Stat. Ann. (Burns, 1933) § 48-2304. Also, the statute providing certiorari to the court from the board allows the court on application to stay all work until final determination of the cases is made. Ind. Stat. Ann. (Burns, 1933) § 48-2305.
1. Ill. Laws 1935, p. 716, §1: "It shall be unlawful for any person . . . to file (or) threaten to file . . . any pleading . . . seeking to recover upon any civil cause of action based upon alienation of affections, criminal conversation, or breach of contract to marry . . ."