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Traffic - A Moving Problem

It is submitted that experienced appraisers are essential to an effective condemnation procedure. The advantages accruing therefrom seem obvious. Who are better equipped to analyze the extreme opinions of the contesting expert witnesses and ascertain the bases of such opinions? Because of their experience, the awards would be uniform, eliminating the inducement to gamble. The long-range effect of such a tribunal best illustrates its necessity. If, in practice, compensation approximated the condemner's offer, and there is no reason why this should not be so, the incentive to contest this issue will be further removed.

The report of the commissioners to the court appointing them should be conclusive on all parties, and the court's inquiry should be directed only to the question of whether the rules of damages were applied. If a party feels the award is arbitrary or that a commissioner is biased, that issue should be raised by motion. The only issues appealable would be those of authority to take and the theory of damages applied. As a practical matter disposition of the former would have long since been accomplished.

The procedure as it now stands within New York is redundant and almost arbitrary. Its sheer volume is, in itself, a strong argument for reform. That New York must revise its procedure is clear. Revision can result only in improvement.

TRAFFIC—A MOVING PROBLEM

Traffic congestion,[1] among the many municipal problems pressing for solution,[2] is not confined to our century. In *Rex v. Cross*,[3] Lord Ellenborough made the timeless remark, "no one can make a stable-yard of the King's highway."[4] With the advent of the automobile, however, the problem has greatly changed from the daily routine that was witnessed in London a century ago. At that time, the early morning brought "the streams of walkers, two, three and four miles long, converging on the city."[5] As it was then, it is today, a constant struggle to maintain highways and streets at their optimum and to establish and maintain proper communities.

The term "traffic generators" is used to describe certain land uses and their relative capacity to precipitate traffic congestion. A failure to recognize the relationship between traffic congestion and the related use of contiguous lands

1. Traffic congestion implies all the nuisances, inconveniences, overcrowding and hazards to which the public generally may be exposed. "The incidents of traffic congestion include, among other things, noise, fumes, the intrusion of automobile lights, the blocking of private driveways by parked cars, and delays in normal travel for those using the highways. But most important are the increased dangers to injury of persons and property." Milwaukee Co. of Jehovah's Witnesses v. Mullen, 214 Ore. 281, 310, 330 P.2d 5, 18-19 (1958), cert. denied, 359 U.S. 436 (1959).

2. 1 Yokley, Zoning Law and Practice § 208 (2d ed. 1953).

3. 3 Camp. 224, 170 Eng. Rep. 1362 (1812).

4. Id. at 227, 170 Eng. Rep. at 1363.

5. Holden, The City of London, A Record of Destruction and Survival 166 (1951).

has led to statements such as "in essence the problem (traffic congestion) begins in the street and ends there."[6]

The first comprehensive zoning ordinance[7] in the United States was adopted by New York City in 1916.[8] The problems of traffic generation and congestion were very much on the mind of the New York Commission.[9] The commission realized that the great bulk and density of urban buildings produced a concomitant concentration of employment in the downtown area resulting in traffic conditions that necessitated separation of factories and shopping centers. "Traffic conditions are the crux of the situation. It is vital to the existence of the city," the commission reported, "that it maintain such conditions of street traffic that . . . will protect the entire Fifth Avenue and Broadway section. . . ."[10] While it cannot be said that traffic generation and congestion were the sole forces that motivated the 1916 resolution, it can be said with certitude that traffic was a motivating factor.[11]

Traffic Considered in Enacting Zoning Ordinances

The power of the state to enact zoning ordinances[12] may be delegated to

6. City & County of Denver v. Denver Buick, Inc., 141 Colo. 121, 145, 347 P.2d 919, 933 (1960).

7. The term first used was "districting." "However, the word 'zoning' soon caught the popular fancy, and by common consent the older term has been dropped in ordinary parlance, the word 'zoning' taking its place throughout the country." Bassett, Zoning 21 (1940).

8. The zoning resolution was passed July 25, 1916, pursuant to N.Y. Sess. Laws 1901, ch. 466, as amended, N.Y. Sess. Laws 1916, ch. 497, §§ 242-a, 242-b, which amended the New York City Charter. See Lincoln Trust Co. v. Williams Bldg. Corp., 229 N.Y. 313, 128 N.E. 209 (1920) (upholding resolution as a proper exercise of the police power).

The constitutionality of comprehensive zoning, however, has gone virtually unquestioned since the Supreme Court decision in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

9. See N.Y.C. Comm'n on Building Districts and Restrictions, Final Report (June 2, 1916).

10. Id. at 19.

11. The emphasis of the comment will be upon developing communities rather than the existing urban communities. In the latter, the height, bulk and density of buildings are the causes of traffic congestion. Municipalities such as New York, Chicago, Detroit and Cleveland are among a few faced with this seemingly insurmountable problem. In areas such as these the problem is much more complex and it has been suggested that automobiles must be kept off the urban streets, since that "is the practical, realistic, and only course to effective relief from street traffic congestion." Bauer & Constello, Transit Modernization and Street Traffic Control 18 (1950). It would appear that effective city planning coupled with positive zoning and mass transportation is the answer. See Owen, The Metropolitan Transportation Problem (1956). See also Mitchell & Rapkin, Urban Traffic; A Function of Land Use (1954).

12. The power to enact zoning ordinances is an exercise of the police power and is exclusively within the jurisdiction of the state. Kass v. Hedgpeth, 226 N.C. 405, 38 S.E.2d 164 (1946). See generally Rhyne, Municipal Law § 32-3 (1957). The constitutionality of any zoning ordinance, therefore, depends upon its relationship to public health, safety and general welfare. See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Traffic may be considered, therefore, only to the extent that it falls within the ambit of

municipalities, counties, villages and townships by statute or home rule amendments.[13] Generally, however, the delegation is effectuated by enabling acts,[14] whereby the town, village and county boards are limited to the purpose set forth therein.[15] A typical purpose is "to lessen congestion in the streets."[16]

In order to effectuate this purpose, zoning ordinances have been passed excluding from residential districts gasoline stations,[17] apartment houses,[18] boarding houses,[19] factories[20] and other uses having a common tendency to generate traffic. Zoning ordinances providing for off-street parking[21] have also been upheld by the courts as a valid exercise of the police power.[22] Though churches

this relationship. In the report submitted by the New York Commission in 1916, traffic was catalogued under general welfare. N.Y.C. Comm'n on Building Districts and Restrictions, Final Report § 53 (June 2, 1916).

13. Valley View Village, Inc. v. Proffett, 221 F.2d 412 (6th Cir. 1955). "Municipalities have no inherent police power." Turner v. Kansas City, 354 Mo. 857, 865, 191 S.W.2d 612, 616 (1945). Therefore, they have no inherent zoning power, and to enact zoning ordinances a grant of power must come from the state. A grant to counties, villages and townships is upheld as a valid delegation of authority. See, e.g., Di Salle v. Giggal, 128 Colo. 208, 261 P.2d 499 (1953); Wakefield v. Kraft, 202 Md. 136, 96 A.2d 27 (1953); Lionshead Lake, Inc. v. Wayne Township, 10 N.J. 165, 89 A.2d 695 (1952), appeal dismissed, 344 U.S. 919 (1953); Jefferson County v. Timmel, 261 Wis. 39, 51 N.W.2d 518 (1952).

14. See, e.g., N.J. Stat. Ann. § 40:55-32 (1940); N.Y. Village Law § 175.

15. See, e.g., N.J. Stat. Ann. § 40:55-32 (1940); N.Y. Town Law § 263; N.Y. Village Law § 177.

16. Ibid.

17. E.g., Suburban Tire & Battery Co. v. Village of Mamaroneck, 304 N.Y. 971, 110 N.E.2d 894 (1953) (gasoline station prohibited in residential district). See also Socony Mobile Oil Co. v. Township of Ocean, 56 N.J. Super. 310, 153 A.2d 67 (Super. Ct. 1959) (gasoline filling stations prohibited within 1500 feet of each other).

18. Miller v. Board of Pub. Works, 195 Cal. 477, 234 Pac. 381 (1925); Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925). Both cases were decided before the Supreme Court decision in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

19. E.g., Baddour v. City of Long Beach, 279 N.Y. 167, 18 N.E.2d 18 (1938), rehearing denied, 279 N.Y. 794, 19 N.E.2d 90, appeal dismissed, 308 U.S. 503 (1939). See also Philadelphia, Pa., Zoning and Planning Code §§ 14-201 to -216 (1959).

20. E.g., Ware v. City of Wichita, 113 Kan. 153, 214 Pac 99 (1923). See also Philadelphia, Pa., Zoning and Planning Code §§ 14-201 to -216 (1959).

21. Off-street parking has been defined as follows: "parking space, off-street - An off-street parking space shall comprise not less than 180 square feet of parking stall plus necessary maneuvering space. Space for maneuvering incidental to parking or unparking shall not encroach upon any public way. Every off-street parking space shall be accessible from a public way." Bair & Bartley, The Text of a Model Zoning Ordinance, With Commentary § 18 (Public Administration Clearing Service of the Univ. of Florida 1958, No. 16).

22. See, e.g., Allendale Congregation of Jehovah's Witnesses v. Grossman, 30 N.J. 273, 152 A.2d 569 (1959) (church refused a building permit because its plans did not provide for off-street parking as required by ordinance); State ex rel. Associated Land & Inv. Corp. v. City of Lyndhurst, 168 Ohio St. 289, 154 N.E.2d 435 (1958) (dictum); State ex rel. Gordon v. Rhodes, 156 Ohio St. 81, 100 N.E.2d 225 (1951); Appeal of Jehovah's Witnesses, 183 Pa. Super. 219, 130 A.2d 240, appeal dismissed sub nom. Swift v. Borough of Bethel, 355 U.S. 40 (1957) (zoning ordinance requiring one parking space for every five seats upheld). But see Board of Zoning Appeals v. Decatur, Ind. Co. of Jehovah's Witnesses,

are traffic generators and subject to reasonable restrictions,[23] they may not, by the weight of authority, be excluded from residential districts.[24]

In reviewing these cases, the majority of the courts have recognized traffic problems only implicitly, since the "courts do not inquire into the facts or reasons which motivate the passage of a zoning ordinance, and all questions relative to the wisdom or desirability of particular restrictions in the ordinance rest with the legislative body creating it."[25] They have made it clear, however, that regulations affecting traffic, when reasonable, will not be invalidated.[26]

233 Ind. 83, 117 N.E.2d 115 (1954) (ordinance requiring one parking space for every six seats restricted freedom of worship and unconstitutional). Contra, City & County of Denver v. Denver Buick, Inc., 141 Colo. 122, 347 P.2d 919 (1960) (off-street parking requirements are unconstitutional).

While off-street parking requirements are valid to alleviate the traffic problem, a zoning classification in which only parking and storage of automobiles were permitted has been held invalid. This is so notwithstanding the desirability of such a classification. Vernon Park Realty v. City of Mt. Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954).

23. See, e.g., O'Brien v. City of Chicago, 347 Ill. App. 45, 105 N.E.2d 917 (1952) (restriction related to traffic requirement). But see Board of Zoning Appeals v. Decatur, Ind. Co. of Jehovah's Witnesses, supra note 22 (set back restrictions valid but off-street parking as applied to the property unconstitutional).

24. Pentecostal Holiness Church v. Dunn, 248 Ala. 314, 27 So. 2d 561 (1946); Ellsworth v. Gercke, 62 Ariz. 198, 156 P.2d 242 (1945); O'Brien v. City of Chicago, supra note 23; Board of Zoning Appeals v. Decatur, Ind. Co. of Jehovah's Witnesses, supra note 22; Congregation Temple Israel v. City of Creve Couer, 320 S.W.2d 451 (Mo. 1959); State ex rel. Roman Catholic Bishop v. Hill, 59 Nev. 231, 90 P.2d 217 (1939); Community Synagogue v. Bates, 1 N.Y.2d 445, 136 N.E.2d 488, 154 N.Y.S.2d 15 (1956); Pelham Jewish Center v. Marsh, 10 App. Div. 2d 645, 197 N.Y.S.2d 253 (2d Dep't 1960) (memorandum decision); Milwaukee Co. of Jehovah's Witnesses v. Mullen, 214 Ore. 281, 330 P.2d 5 (1958), cert. denied, 359 U.S. 436 (1959); State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee, 50 Wash. 2d 378, 312 P.2d 195 (1957). Contra, Corporation of Presiding Bishop v. City of Porterville, 90 Cal. App. 2d 656, 203 P.2d 823 (Dist. Ct. App.), appeal dismissed, 338 U.S. 939 (1950) (court alluded to traffic congestion as one of the reasons for the ordinance); Miami Beach United Lutheran Church v. City of Miami Beach, 82 So. 2d 880 (Fla. 1955) (court alluded to traffic problem caused by wedding ceremonies and funeral services).

25. Sinclair Ref. Co. v. City of Chicago, 178 F.2d 214, 217 (7th Cir. 1949). The power of the judiciary to review zoning ordinances is limited because it is a governmental and legislative act. For this reason "if the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926). See also Dennis v. Village of Tonka Bay, 156 F.2d 672, 674 (8th Cir. 1946).

26. That traffic factors should be relevant in enacting zoning ordinances for new communities is pointed out in the remark: "Transportation has contributed in other ways to the diminishing desirability of urban livng. The hazards and congestion of the highways, the noise and fumes of the motor vehicle, and the unsightliness of the gas station and used car lot have all added to the run-down character of the urban region. Transportation has created many of the conditions that people strive to escape, but it has also provided the means of escaping them and therefore the means of avoiding solutions. And it has transplanted slums to the suburbs." Owen, The Metropolitan Transportation Problem 24-25 (1956).

TRAFFIC CONSIDERED IN REZONING AND RECLASSIFICATION

The influence of traffic is more discernible in those cases involving an application for rezoning and reclassification.[27] In such a case, it is incumbent upon the one seeking a reclassification to show either a mistake in the original zoning or that conditions in the area have changed so as to warrant a rezoning.[28]

In *Hardesty v. Board of Zoning Appeals*,[29] a zoning board reclassified a tract of land from a residential to a business zone wherein a shopping center could be erected. The court, in reversing the decision of the board, stated: "[T]o so reclassify the property would be a plain violation of the statutory requirement against congestion in the streets."[30] The *Hardesty* rule has been followed in numerous cases involving shopping centers, but the courts have been careful to point out that it is not every traffic problem which must be given "material consideration."[31]

In *Pecora v. Zoning Comm'n*,[32] a Connecticut court permitted a reclassification of an area and thereby legalized erection of a shopping center. The court

27. Where the rezoning or reclassification is made by the governing body, the courts will assume a state of facts justifying the rezoning or reclassification. Goddard v. Stowers, 272 S.W.2d 400 (Tex. Civ. App. 1954). However, it must be pointed out that on application for rezoning or reclassification, there is a presumption that the original zoning districts were part of a comprehensive plan and, therefore, are valid. Zinn v. Board of Zoning Appeals, 207 Md. 355, 114 A.2d 614 (1955) (not the governing body).

Unlike a determination by the governing body where the scope of judicial review is restricted, see note 25 supra and accompanying text, a court in reviewing a decision of a board of zoning appeals, in granting or denying the application for reclassification or rezoning, looks to the evidence upon which its decision was predicated. Spencer v. Board of Zoning Appeals, 141 Conn. 155, 104 A.2d 373 (1954) (application for variance). The distinction is found in that the former is acting in a legislative capacity and the latter in an administrative capacity.

28. Hardesty v. Board of Zoning Appeals, 211 Md. 172, 126 A.2d 621 (1956); Zinn v. Board of Zoning Appeals, supra note 27.

29. Note 28 supra.

30. 211 Md. at 18, 126 A.2d at 625. While the court pointed out that there was other land in the immediate area on which the shopping center could be erected, it was more concerned with the hazard that would be inflicted on the children in the area owing to the additional traffic. Though such hazard could be remedied by a widening of the public highways, the court concluded that such widening was not contemplated. Ibid. But see Nelson v. County Council, 214 Md. 587, 136 A.2d 373 (1957) (per curiam), where a rezoning of property from residential to commercial was upheld since street congestion would be remedied due to the immediate prospect of a widening of the street. See also Temmink v. Board of Zoning Appeals, 212 Md. 6, 128 A.2d 256 (1957) (citing Hardesty with approval).

It is noteworthy that the court in Hardesty cited to the state enabling act which required a comprehensive plan "to lessen congestion in the streets." Md. Ann. Code art. 66B, § 21(c) (1957).

31. See, e.g., Price v. Cohen, 213 Md. 457, 132 A.2d 125 (1957). The court stated that "traffic conditions should be given material consideration, and as this was not done by the Board, its rezoning was arbitrary and an abuse of discretion. . . ." Id. at 465, 132 A.2d at 129. The court, however, approved the lower court's dictum that if the widening of the streets took place within a reasonable time a different decision would have resulted.

32. 145 Conn. 435, 144 A.2d 48 (1958).

rejected the contention that traffic congestion would follow and stated that "it is not the over-all volume of daily traffic, but 'congestion in the streets,' that is, density of traffic, which is referred to in the statute."[33] In 1959, the Court of Appeals of Maryland, in upholding the validity of a reclassification from residential to business-local,[34] declared "that appellants have confused volume with congestion."[35] The court went on to say that the congestion that existed in the area resulted from disorderly flow and poor control. This type of congestion is within the province of the police department and not the zoning authorities.[36]

Traffic generation and congestion are, therefore, elements to be considered in rezoning and reclassification. If the generating effect can be solved by the proper position of traffic lights, stop signs, and other police regulations, the rezoning or reclassification is proper. If, however, the generating effect will adversely affect the community, rezoning is improper.[37]

Traffic Considered in Granting Special Exceptions

At the outset, a distinction must be made between a "variance" and an "exception" or "special permit." A "variance" is a departure from the terms of a zoning ordinance and is authorized where a literal enforcement of its provisions would result in unnecessary hardships.[38] Traffic does not to any degree enter into the granting of a "variance." It is only necessary here to show "that 'there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of . . . [the] resolution' which justify a variance. . . ."[39] An "exception" in a zoning ordinance is a use permitted in a zoning district where certain facts and conditions detailed in the

33. Id. at 440, 144 A.2d at 51. But see Gordon v. Zoning Bd., 145 Conn. 597, 145 A.2d 746 (1958) (reclassification held illegal where increased traffic congestion resulted).

34. Vestry of St. Mark's Church v. Doub, 219 Md. 387, 149 A.2d 779 (1959).

35. Id. at 394, 149 A.2d at 783.

36. See also Bogert v. Township of Washington, 25 N.J. 57, 135 A.2d 1 (1957) (minor traffic problems for police; major aspects affecting the community for the zoning authorities).

37. See Clesi v. Northwest Dallas Import Ass'n, 263 S.W. 2d 320 (Tex. Civ App. 1953) (tremendous increase of traffic furnishes a reasonable basis for rezoning). Cf. Deligtisch v. Town of Greenburgh, 135 N.Y.S.2d 220 (Sup. Ct. 1954) (improper to rezone property lot by lot merely because of traffic conditions). But see Linn v. Town of Hempstead, 10 Misc. 2d 774, 170 N.Y.S.2d 217 (Sup. Ct. 1957) (dictum) (traffic problems are for police and not zoning authorities).

38. Montgomery County v. Merlands Club, 202 Md. 279, 96 A.2d 261 (1953); Reed v. Board of Standards & Appeals, 255 N.Y. 126, 174 N.E. 301 (1931).

39. Reed v. Board of Standards & Appeals, supra note 38, at 134, 174 N.E. at 303. This standard has been criticized as poor and confusing. "The words 'practical difficulties or unnecessary hardship' are an inheritance from one or two of the very early zoning ordinances. They were not well chosen then, and their continued use has . . . been very unfortunate. They almost defy critical analysis." Maltbie, The Legal Background of Zoning, 22 Conn. B.J. 6-7 (1948). Cf. Kairis v. Board of Appeal, 337 Mass. 528, 150 N.E.2d 278 (1958) (court considered the elimination of a traffic hazard).

The requirement in a statute providing for a "variance" has been wisely called a "safety valve." Buckminster v. Zoning Bd., 69 R.I. 396, 401, 33 A.2d 199, 202 (1943).

ordinance are found to exist.[40] In the field of "exceptions" traffic has an indefinite if not ambiguous place.

Traffic, "Exceptions," and the Board of Zoning Appeals

The local legislative body (town or village boards) may delegate to a board of zoning appeals[41] the power to grant "exceptions." When delegating this power they must prescribe certain standards or rules to govern the board's action. A failure to set such standards will invalidate the ordinance as an unconstitutional delegation of a legislative power to an administrative body.[42] The sufficiency of the standards required varies from jurisdiction to jurisdiction.[43] As a result, the role of traffic in granting or denying "exceptions" is in a precarious position.

In *Small v. Moss*,[44] an application was presented to the New York Commissioner of Licenses for a permit to operate a theatre. While this was not an application to the board for an "exception," the decision in this case has great bearing on the power of the board in New York. The license was refused because of the traffic conditions that would result. The court of appeals held that the commissioner had no power to deny the license on that ground. It reasoned that the commissioner was purely an administrative agent whose authority rests upon the authorizing ordinance. The court stated that he

> may only apply the policy declared and the rules and standards laid down in statute and ordinance, and we search there in vain for a rule or standard which would justify refusal of a license for the erection of a theatre at a point where street traffic, and especially traffic increased by a new theatre, would subject travelers upon the street to danger.[45]

The appellate division further stated that the commissioner may not refuse to grant a license on the ground that it would be detrimental to the general welfare.[46] The effect of this and other like decisions has been that a New York board of zoning appeals, when passing on an application for an "exception," may not consider traffic congestion unless the power to do so has been specifically delegated to it.[47]

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40. See note 38 supra.

41. It is also called Board of Adjustment (N.C.) or Board of Review (R.I.).

42. E.g., Keating v. Patterson, 132 Conn. 210, 43 A.2d 659 (1945); Concordia Collegiate Institute v. Miller, 301 N.Y. 189, 93 N.E.2d 632 (1950); Little v. Young, 299 N.Y. 299, 87 N.E.2d 74 (1949) (memorandum decision). See Osius v. City of St. Clair Shores, 344 Mich. 693, 75 N.W.2d 25 (1956).

43. For a discussion of the delegation of authority and the sufficiency of the standards required in zoning ordinances, see Annot., 58 A.L.R.2d 1083-1126 (1958).

44. 279 N.Y. 288, 18 N.E.2d 281 (1938).

45. Id. at 297, 18 N.E.2d at 284.

46. See Goelet v. Moss, 248 App. Div. 499, 290 N.Y. Supp. 573 (1st Dep't 1936), aff'd, 273 N.Y. 503, 6 N.E.2d 425 (1937), where the Commissioner of Licenses refused to grant a license to operate a theatre and the court stated "that the duty of the licensor is to consider the question from the standpoint of public health, safety, and morals only and not as a problem in city planning." Id. at 501, 290 N.Y.Supp. at 575.

47. Bar Harbour Shopping Center, Inc. v. Andrews, 23 Misc. 2d 894, 196 N.Y.S.2d 856 (Sup. Ct. 1959) (dictum); Plander v. Koehler, 150 N.Y.S.2d 879 (Sup. Ct. 1956). Here,

Other jurisdictions, however, have held that traffic congestion may be considered. In *In the Matter of O'Hara*,[48] an "exception" was sought under an ordinance which stated that the board should provide for the public health, safety, morals and general welfare. The court held that this standard was sufficient and did not constitute an unconstitutional delegation of power.[49] The court went on to consider the problem of traffic under safety and general welfare, stating:

> It is not *any* anticipated increase in traffic which will justify the refusal of a "special exception" in a zoning case. The anticipated increase in traffic must be of such character that it bears a *substantial* relation to the health and safety of the community.[50]

This rule, when examined in the light of decisions involving an application for an "exception" to a town or village board, would seem the more reasonable and practical approach.

Traffic, "Exceptions" and the Town or Village Board

The legislative body (town or village board) may retain the power to pass on the application for an "exception."[51] In cases granting or denying the application, the status of the board, at times, has become confused.[52] In *109 Main St. Corp. v. Burns*,[53] a board refused to grant an application for an "exception" to build a gasoline filling station. It did so on the grounds that if the "exception" were granted, certain traffic problems would ensue. This determination was found to be arbitrary and capricious. The court, in reversing the board's decision, stated that consideration of traffic congestion was not within the province of the board, and went on to make the astute observation that traffic problems are for the police and not the zoning authorities. No distinction was drawn between minor traffic conditions and conditions affecting the

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the board considered the traffic burden in the area and the court stated that "we are faced . . . with a decision based on considerations not to be found within the four corners of the ordinance." Id. at 882. Some New York courts have gone further and have held that traffic congestion is for the police and not the zoning authorities. Ibid., and cases cited therein.

The Plander case even put the burden on the board to show that the provisions in the ordinance were not being complied with, and thereby cancelled the applicant's duty to show that he has met the requirements of the ordinance.

48. 389 Pa. 35, 131 A.2d 587 (1957).

49. See also Schmidt v. Board of Adjustment, 9 N.J. 405, 88 A.2d 607 (1952); Holy Sepulchre Cemetery v. Town of Greece, 191 Misc. 241, 79 N.Y.S.2d 683 (Sup. Ct. 1947), aff'd, 273 App. Div. 942, 79 N.Y.S.2d 863 (4th Dep't 1948).

50. 389 Pa. at 54, 131 A.2d at 596.

51. The legislative bodies may delegate this function. See notes 41 & 42 supra and accompanying text. They may, however, refuse to delegate this power and grant the "exceptions" themselves. See Gorieb v. Fox, 274 U.S. 603 (1927); Green Point Sav. Bank v. Board of Zoning Appeals, 281 N.Y. 534, 24 N.E.2d 319 (1939), appeal dismissed, 309 U.S. 633 (1940).

52. See text accompanying notes 14 & 15 supra for board's source of authority and purposes within which it must operate.

53. 14 Misc. 2d 1037, 179 N.Y.S.2d 60 (Sup. Ct. 1958).

whole community. This reasoning was also advanced in another decision[54] wherein the court stated: "[A]pparently, considerations of traffic burdens and hazards are for the police and not zoning boards."[55] The courts, in neither case, considered the statutory requirement "to lessen congestion in the streets."[56]

In 1959, a novel view was presented in *Bar Harbour Shopping Center, Inc. v. Andrews*,[57] a New York case which again involved an application to erect a gasoline filling station. The application was rejected by a village board. In passing upon this determination, the court reviewed the existing status of the law. In an effort to reconcile the prior cases, the court reasoned that the decisions must have turned on a finding that, when boards reserve to themselves the power to pass on an "exception," they act administratively.[58] The only other alternative was to conclude that previous courts had completely disregarded the provision in the enabling statutes.[59] The court rejected this conclusion and put forth its own theory, *i.e.*, that a village or town board which reserves to itself the power to grant "exceptions" acts in a "hybrid" manner. Under this theory, the board, when passing on an "exception," acts as a legislative body in that it may consider traffic congestion engendered by the use sought in the "exception." However, in so far as judicial review is concerned, the board will be governed by the rules applied to administrative bodies.[60]

New York is not alone in making such a distinction. The Virginia courts have gone even further. In *City of Winchester v. Glover*,[61] a zoning ordinance, which permitted gasoline filling stations only after a "special permit" was granted by the town council, was declared unconstitutional. The ordinances under attack provided that a permit shall be refused if the use would endanger the public safety. The absence of specific standards to guide the board was fatal since the court held "that a city council is empowered both to legislate and administrate, and in passing upon the permit here in question it was acting solely in an administrative capacity."[62]

Conclusion

There seems to be no reason why an administrative body should not consider the problem of traffic congestion resulting from a use permitted under

54. Edelman v. Town Bd., 14 Misc. 2d 953, 179 N.Y.S.2d 58 (Sup. Ct. 1958).

55. Id. at 954, 179 N.Y.S.2d at 59.

56. N.Y. Town Law § 263; N.Y. Village Law § 177.

57. 23 Misc. 2d 894, 196 N.Y.S.2d 856 (Sup. Ct. 1959).

58. Id. at 903-04, 196 N.Y.S.2d at 868-69. In effect, the court is saying that the board acting in this fashion has undertaken to act as its own board of appeals and is thereby bound by the limitations imposed on an administrative body. See also Young Men's Christian Ass'n v. Burns, 207 N.Y.S.2d 631 (Sup. Ct. 1960).

59. See note 56 supra. The result of this determination is that traffic cannot be considered since the board is limited to the "four corners of the ordinance." See note 47 supra.

60. Bar Harbour Shopping Center, Inc. v. Andrews, 23 Misc. 2d at 910, 196 N.Y.S.2d at 874. The findings of the board must be based on "substantial evidence." Ibid.

61. 199 Va. 70, 97 S.E.2d 661 (1957).

62. Id. at 72, 97 S.E.2d at 663. See also North Bay Village v. Blackwell, 88 So. 2d 524 (Fla. 1956).