Fordham Law Review

Volume 44 | Issue 6 Article 9

1976

Recent Developments

RECENT DEVELOPMENTS

Constitutional Law—Free Exercise Clause of First Amendment Protects Houses of Worship from Restrictive Zoning Ordinances.—In 1970, the Jewish Reconstructionist Synagogue of the North Shore, Inc., purchased property in the Village of Roslyn Harbor, New York for the purpose of using the estate house located on the property as a house of worship. The estate house was located twenty-nine feet back from the property line. This was in conflict with an ordinance of the Village of Roslyn Harbor which required that all religious uses be set back at least one hundred feet.[1]

The synagogue applied to the village zoning board for a variance of the one hundred foot setback requirement. This was denied by the board on the ground that it lacked authority to grant the variance.[2] The zoning board further asserted that, even if it had the power to grant the variance, it would have denied a special permit to convert the estate to a house of worship.[3] The present action was a challenge by the synagogue to the constitutionality of the village's ordinances which provided for the one hundred foot setback[4] and empowered the zoning board to deny the special use permit upon a determination that the religious use would have detrimental effects.[5] The New York Court of Appeals found these ordinances to be an unconstitutional exercise of the police power in that they "restrict[ed] religious uses without recognizing their special, protected status under the First Amendment."[6] *Jewish Recon-*

1. The ordinance refers to permits for "any district churches, public and parochial primary and secondary schools and clubs not operated for a profit. . . . No such building shall be erected or be used for such purposes within one hundred and fifty (150) feet of any street line nor within one hundred (100) feet of any property line." Roslyn Harbor, N.Y., Zoning Ordinance § 11-2.14, May 14, 1958.

2. In re Jewish Reconstructionist Soc'y, (Roslyn Harbor Zoning Bd. of Appeals, Nov. 3, 1971).

3. Id. at 13. The board would have denied the permit "because of the synagogue's potential effect on traffic and because there was insufficient water pressure in nearby fire hydrants." Jewish Reconstructionist Synagogue v. Incorporated Village of Roslyn Harbor, 38 N.Y.2d 283, 286, — N.E.2d —, —, — N.Y.S.2d —, — (1975).

4. See note 1 supra.

5. "The Board shall not authorize the issuance of any permit . . . unless it finds in each case that the proposed use of the property or the erection, alteration or maintenance of the proposed building or structure:

a. Will not depreciate or tend to depreciate the value of property in the village.

b. Will not create a hazard to health, safety, morals and general welfare, and will not be detrimental to the neighborhood or to the residents thereof.

c. Will not alter the essential character of the neighborhood.

d. Will not otherwise be detrimental to public convenience and welfare.

. . . Said Board shall also give consideration to the following: Accessibility of the premises for fire and police protection; . . . traffic problems, transportation requirements and facilities, hazards from fire . . . ." Roslyn Harbor, N.Y., Zoning Ordinance § 11-2.30, May 14, 1958.

6. 38 N.Y.2d at 288, — N.E.2d at —, — N.Y.S.2d at —. But see 26 Mo. L. Rev. 45, 50, 53 (1961); 4 Vill. L. Rev. 605, 608 (1959).

structionist Synagogue v. Incorporated Village of Roslyn Harbor, 38 N.Y.2d 283, — N.E.2d —, — N.Y.S.2d — (1975).

The decision in *Roslyn Harbor* was grounded on three New York Court of Appeals cases.[7] In *Community Synagogue v. Bates,*[8] a religious organization sought to acquire a one family dwelling in a residential area for the purpose of converting it into a house of worship. The Board of Appeals for the Village of Sands Point found, *inter alia,* that the proposed house of worship "would not conserve values [and] would not promote health, safety, convenience and welfare . . . ."[9] The court of appeals, after examining the record of the board, found no evidence supporting this proposition and, consequently, overturned the board's decision.[10] The village had also contended that it could prohibit a house of worship from locating on a "precise spot." The court considered this to be the equivalent of allowing a village to designate the "precise spot" on which a house of worship could be located and held that such a power would unconstitutionally interfere with free exercise of religion.[11]

In *Diocese of Rochester v. Planning Board,*[12] a companion case to *Bates,* the planning board's reasons for opposing the construction of a house of worship were that: the area in which the church wanted to build was a highly

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7. For lower court New York cases dealing with the conflict between zoning power and free exercise of religion see Pelham Jewish Center v. Marsh, 10 App. Div. 2d 645, 197 N.Y.S.2d 258 (2d Dep't 1960) (mem.) (village zoning ordinance prohibiting houses of worship in residential districts held unconstitutional); Garden City Jewish Center v. Incorporated Village of Garden City, 2 Misc. 2d 1009, 155 N.Y.S.2d 523 (Sup. Ct. 1956) (zoning board decision to deny a use permit to house of worship on grounds that it would depreciate surrounding property and would be more appropriate on other sites, reversed); North Shore Unitarian Soc'y, Inc. v. Plandome, 200 Misc. 524, 109 N.Y.S.2d 803 (Sup. Ct. 1951) (ordinance which allows public buildings in an area and excludes houses of worship from the same area is void as it does not promote public health, safety, morals, or general welfare).

8. 1 N.Y.2d 445, 136 N.E.2d 488, 154 N.Y.S.2d 15 (1956).

9. Id. at 454, 136 N.E.2d at 493, 154 N.Y.S.2d at 22. The Board of Appeals also found that the proposed house of worship would not conform to the general purpose and intent of the applicable village law. Id.

10. Id. at 454-55, 136 N.E.2d at 493-94, 154 N.Y.S.2d at 22-23. Even though there was no extrinsic evidence supporting the board's finding, the court would have accepted the board members' personal knowledge of facts which would render the construction of the house of worship undesirable. The record, however, did not disclose any such information. Id.

11. Id. at 458, 136 N.E.2d at 496, 154 N.Y.S.2d at 26. "We think that we should accept the fact that we are the successors of 'We, the people' of the Preamble to the United States Constitution and that a court may not permit a municipal ordinance to be so construed that it would appear in any manner to interfere with the 'free exercise and enjoyment of religious profession and worship'." Id., citing N.Y. Const. art I, § 3: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state . . . ."

Although the state constitution is cited, the court in Roslyn Harbor implied that Bates was also decided on first amendment federal constitutional grounds. 38 N.Y.2d at 287, — N.E.2d at —, — N.Y.S.2d at —.

12. 1 N.Y.2d 508, 136 N.E.2d 827, 154 N.Y.S.2d 849 (1956).

developed residential area the character of which would be changed by the church; the surrounding property values would be adversely affected; the tax base would be decreased; and traffic problems would be created.[13] The planning board concluded that the church should be built in a developing, rather than a developed, area.[14] In rejecting these contentions the court of appeals established firm rules with respect to the zoning of houses of worship.

The court began with the premise that

> a zoning ordinance may not *wholly exclude* a church or synagogue from any residential district. Such a provision . . . bears no substantial relation to the public health, safety, morals, peace or general welfare of the community.[15]

Moreover, a municipality cannot require churches to be built in sparsely populated areas.[16]

The court stated, that in light of the high moral purpose of houses of worship, potential property value depreciation and tax revenue loss should not be considered in determining whether to allow a house of worship to locate in a particular area.[17] In addition, the issue of traffic hazards was found to be unpersuasive. It must be noted, however, that this was probably based on the court's feeling that this issue was raised as an afterthought.[18] Thus no clear rule emerges as to traffic hazards.

Finally, *Rochester* established the principle that houses of worship are inherently beneficial as "clearly in furtherance of the public morals and general welfare."[19] However, as the court plainly stated: "That is not to say that appropriate restrictions may never be imposed with respect to a church

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13. Id. at 517, 136 N.E.2d at 830, 154 N.Y.S.2d at 854. The planning board's decision did not mention traffic hazards but the board raised this issue at trial. See note 18 infra.

14. 1 N.Y.2d at 517, 136 N.E.2d at 830, 154 N.Y.S.2d at 854.

15. Id. at 522, 136 N.E.2d at 834, 154 N.Y.S.2d at 858. For cases which have adopted the contrary minority view that houses of worship may be completely excluded from residential areas see note 39 infra.

16. " '[W]herever the souls of men are found, there the house of God belongs.' " 1 N.Y.2d at 523, 136 N.E.2d at 835, 154 N.Y.S.2d at 860, citing O'Brien v. City of Chicago, 347 Ill. App. 45, 51, 105 N.E.2d 917, 920 (1952).

17. 1 N.Y.2d at 524-25, 136 N.E.2d at 835-36, 154 N.Y.S.2d at 861.

18. "Although nothing is mentioned in the planning board's decision about possible traffic hazards, evidence was presented on this question to that board, and much is made of it in respondents' answer and brief, apparently by way of afterthought." Id. at 525, 136 N.E.2d at 836, 154 N.Y.S.2d at 861. The court also pointed out that unless traffic considerations were specifically mentioned in the statute, the court would not read such a consideration as validly incorporated into a general statutory mandate. Id., 136 N.E.2d at 836, 154 N.Y.S.2d at 861-62, citing Small v. Moss, 279 N.Y. 288, 18 N.E.2d 281 (1938). In Roslyn Harbor, traffic considerations were specifically mentioned in the statute. See note 5 supra. The court noted that several jurisdictions have held that to deny a permit to a church or parochial school because of the creation of potential traffic hazards is arbitrary and unreasonable. 1 N.Y.2d at 525, 136 N.E.2d at 836, 154 N.Y.S.2d at 862. However, nowhere in Rochester does the court adopt this rule for New York.

19. 1 N.Y.2d at 526, 136 N.E.2d at 836-37, 154 N.Y.S.2d at 862.

. . . nor is it to say that under no circumstances may they ever be excluded from designated areas."[20]

The third major case considered by the *Roslyn Harbor* court was *Westchester Reform Temple v. Brown.*[21] Two issues were involved in the attack on a Scarsdale ordinance: (1) whether the setback requirements applicable to the expansion of houses of worship were arbitrary and unreasonable, and (2) whether in determining construction permit grants, the planning board's compulsory consideration of the ensuing structure's potential for aggravating a traffic hazard, impairing the use, enjoyment or value of properties in the surrounding areas, or adversely affecting the prevailing character of the area was proper. These latter requirements were attacked as infringing on the free exercise provisions of the state and federal constitutions.[22]

The court of appeals held that in light of the special status of houses of worship—a status which makes them inherently beneficial to the public welfare—the setback requirements were arbitrary and unreasonable.[23] The planning commission would have had to show that failure to enforce the setback requirement would "have a direct and immediate adverse effect upon the health, safety or welfare of the community." This was not done.[24]

As to the second issue, the court stated that, based on its decision in *Rochester,* the right of a municipality to prohibit a house of worship due to diminution in value, noise or similar inconvenience, and traffic hazards must always yield to the right to erect a religious structure.[25] The municipality may only attempt to minimize these detrimental effects.[26]

It is submitted that this is a misinterpretation of *Rochester. Rochester* merely rules out property devaluation, tax losses, noise and similar inconveniences as factors to be considered in determining zoning decisions as to houses of worship. Traffic hazards are not directly ruled out.[27] Furthermore, the *Rochester* court had explicitly limited its decision by stating that there may well be circumstances under which houses of worship could be excluded from designated areas.[28]

The *Roslyn Harbor* majority opinion seems to follow as a natural progression from *Bates, Rochester* and *Westchester.* Insofar as the special use permit is concerned—since the ordinance directs the zoning board to deny the permit upon a finding that the "religious use will have *any* detrimental effect on public safety, health, or welfare, including effects on traffic, on fire safety, and on the character of the surrounding neighborhood"[29]—it was, in the

20. Id. This dictum has apparently been ignored in subsequent New York cases. See notes 27-38 infra and accompanying text.

21. 22 N.Y.2d 488, 239 N.E.2d 891, 293 N.Y.S.2d 297 (1968).

22. Id. at 492-95, 239 N.E.2d at 894-95, 293 N.Y.S.2d at 301-02.

23. Id. at 494, 239 N.E.2d at 895, 293 N.Y.S.2d at 302.

24. Id.

25. Id. at 496-97, 239 N.E.2d at 896, 293 N.Y.S.2d at 303-04.

26. Id.

27. See notes 17-18 supra and accompanying text.

28. 1 N.Y.2d at 526, 136 N.E.2d at 837, 154 N.Y.S.2d at 863.

29. 38 N.Y.2d at 289, — N.E.2d at —, — N.Y.S.2d at —.

court's opinion, unconstitutional on its face.[30] The court looked to *Westchester,* pointing out that the statutes there were unconstitutional as applied, not on their face, in that they directed the planning commission to "*avoid or minimize 'insofar as practicable'* any detrimental effects."[31] The statute in *Roslyn Harbor,* however, did not contain a requirement that efforts to accommodate or mitigate their negative effects be made. As a result, it served to "restrict religious uses without recognizing their special, protected status under the First Amendment."[32]

Because the setback requirement was invariable it too had to fall. "There could well be situations in which no detriment to any aspect of public safety or welfare would result from a setback of less than 100 feet."[33] Moreover, there was no hard evidence that traffic hazards or noise-related inconveniences to the synagogue's neighbors would result and, in the court's view, no effort short of complete denial of the variance was made to mitigate these inconveniences.[34]

The village urged that, since only four percent of the members of the house of worship lived in Roslyn Harbor, the synagogue should bear the burden of showing other locations to be inadequate. Alternatively, the village argued that it could exclude the religious use if it could show the inappropriateness of the chosen location. These considerations were stricken by the court. "[T]he power to decide where churches may not locate becomes the power to say where they may do so. That is impermissible."[35]

The most striking aspect of *Roslyn Harbor* was its continued acceptance of the right of a religious group, at its discretion, to convert an existing residential structure into a house of worship. The court of appeals approvingly cited that part of the *Westchester* decision which stated that the right to build a house of worship must win out over considerations of noise and similar inconveniences to the surrounding area and potential traffic hazards.[36] The court went on to state that

> [g]iven this record, the question which the village must answer is not whether 29 feet [the actual setback] is reasonable, but rather, what reasonable measures can be taken

30. Id., — N.E.2d at —, — N.Y.S.2d at —.

31. Id., — N.E.2d at —, — N.Y.S.2d at —.

32. Id. at 288, — N.E.2d at —, — N.Y.S.2d at —. However, zoning a house of worship is not identical to regulating an individual's religious activities. See Giannella, Religious Liberty, Nonestablishment and Doctrinal Development, 80 Harv. L. Rev. 1381, 1422-23 (1967) [hereinafter cited as Giannella].

33. 38 N.Y.2d at 289, — N.E.2d at —, — N.Y.S.2d at —. The Jewish Reconstructionist Synagogue submitted, along with the request for a variance of the setback requirement for the estate house, a request for a variance "to accommodate the location of the guest house which will be used to house the congregation's Rabbi. While it presently meets residential requirements, under the village's zoning ordinances, it becomes an accessory use to the main building and is thus required to have a larger setback. Our [the court of appeals] rulings with respect to the primary setback dispute apply with equal force to the guest house setback." Id. at n.2.

34. Id. at 289-90, — N.E.2d at —, — N.Y.S.2d at —.

35. Id. at 291, — N.E.2d at —, — N.Y.S.2d at —.

36. Id. at 288, — N.E.2d at —, — N.Y.S.2d at —.

to mitigate the effect upon the neighbors of having a synagogue 29 feet from the property line.[37]

Thus, with *Roslyn Harbor,* New York has reinforced its opinion that houses of worship are a per se benefit to the community and as such, municipalities can merely tailor zoning ordinances and their application around a church or synagogue's decision to establish a house of worship. The decision to establish, itself, may not be negatived by the municipality.

New York's position appears to be unique.[38] States which have confronted the issue of constitutional limitations on the zoning of houses of worship agree that a house of worship may not, consistent with the first and fourteenth amendments, be totally banned from a residential district.[39] However, most jurisdictions have held that houses of worship are subject to reasonable zoning regulations.[40]

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37. Id. at 290, — N.E.2d at —, — N.Y.S.2d at —. It was this "all but conclusive presumption that considerations of public health, safety and welfare are always outweighed . . . by the policy favoring religious structures" which caused Chief Judge Breitel to disagree with the majority. Id. at 292, — N.E.2d at —, — N.Y.S.2d at — (Breitel, C.J., concurring). Chief Judge Breitel noted that there might well be situations in which the public safety and welfare would outweigh the right of a house of worship to build on a certain location. The facts in Roslyn Harbor, however, did not present such a situation. Id. at 291-92, — N.E.2d at —, — N.Y.S.2d at —.

38. Michigan and Ohio have adopted positions similar to that of New York. See Congregation Dovid Ben Nuchim v. City of Oak Park, 40 Mich. App. 698, 199 N.W.2d 557 (1972); State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph, 139 Ohio St. 229, 22 Ohio Op. 241, 39 N.E.2d 515 (1942); Young Israel Organization v. Dworkin, 105 Ohio App. 89, 5 Ohio Op. 2d 387, 133 N.E.2d 174 (1956); State ex rel. Anshe Chesed Congregation v. Bruggemeier, 97 Ohio App. 67, 55 Ohio Op. 305, 115 N.E.2d 65 (1953).

39. E.g., Ellsworth v. Gercke, 62 Ariz. 198, 156 P.2d 242 (1945); City of Englewood v. Apostolic Christian Church, 146 Colo. 374, 362 P.2d 172 (1961); Rogers v. Mayor, 110 Ga. App. 114, 137 S.E.2d 668 (1964); Columbus Park Congregation of Jehovah's Witnesses, Inc. v. Board of Appeals, 25 Ill. 2d 65, 182 N.E.2d 722 (1962); Board of Zoning Appeals v. Decatur, Ind. Co. of Jehovah's Witnesses, 233 Ind. 83, 117 N.E.2d 115 (1954); Congregation Temple Israel v. City of Creve Coeur, 320 S.W.2d 451 (Mo. 1959); Congregation Comm., Jehovah's Witnesses v. City Council, 287 S.W.2d 700 (Tex. Civ. App. 1956). There is, however, a contrary minority view which holds that a house of worship may be banned entirely from residential districts. E.g., Minney v. City of Azusa, 164 Cal. App. 2d 12, 330 P.2d 255 (2d Dist. 1958), appeal dismissed, 359 U.S. 436 (1959); Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 P.2d 823 (4th Dist.), appeal dismissed, 338 U.S. 805 (1949); Miami Beach United Lutheran Church of the Epiphany, Inc. v. City of Miami Beach, 82 So. 2d 880 (Fla. 1955).

40. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 P.2d 823 (4th Dist.), appeal dismissed, 338 U.S. 805 (1949); Miami Beach United Lutheran Church of the Epiphany, Inc. v. City of Miami Beach, 82 So. 2d 880 (Fla. 1955); Rogers v. Mayor, 110 Ga. App. 114, 137 S.E.2d 668 (1964); Columbus Park Congregation of Jehovah's Witnesses, Inc. v. Board of Appeals, 25 Ill. 2d 65, 182 N.E.2d 722 (1962); O'Brien v. City of Chicago, 347 Ill. App. 45, 105 N.E.2d 917 (1952); Board of Zoning Appeals v. Decatur, Ind. Co. of Jehovah's Witnesses, 233 Ind. 83, 117 N.E.2d 115 (1954); Congregation Temple Israel v. City of Creve Coeur, 320 S.W.2d 451 (Mo. 1959); Archdiocese of Portland v. County of Washington, 254 Ore. 77, 458 P.2d 682 (1969); Milwaukie Co. of Jehovah's

The dissent in *Roslyn Harbor* would have New York adopt such a view. It asserted that while houses of worship do have a high moral purpose and make unique contributions to public welfare, "[t]hey also bring congestion; they generate traffic and create parking problems; they can cause a deterioration of property values in a residential zone; in consequence of customary exemption from taxation they work an economic disadvantage to taxable properties . . . ."[41] While the dissent would not hold religious uses to a standard identical to that of non-religious uses, it did maintain that regulations which are sensitively designed to take into account that houses of worship are being zoned should not be considered "materially [and] adversely [to] affect the full and free exercise of religious . . . freedom."[42] The dissent concluded that the zoning ordinances and their application were constitutional and reasonable.[43]

The majority maintained that the dissent's viewpoint presented an incomplete picture inasmuch as it failed to recognize the "peculiarly pre-eminent status of religious institutions under the First Amendment provision for free exercise of religion . . . ."[44] The majority implied that the dissent's point of view, in overlooking a first amendment guarantee, would be unconstitutional. In evaluating the validity of the majority's argument, it is helpful to survey the decisions of other jurisdictions which maintain that a municipality may place reasonable zoning restrictions on a house of worship. Three justifications for these holdings emerge: (1) the court will simply state that houses of worship are subject to reasonable zoning regulations;[45] (2) the church involved is a corporation and is, therefore, subject to reasonable police power regulations;[46] (3) zoning ordinances which result in reasonable regulation of houses of

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Witnesses v. Mullen, 214 Ore. 281, 330 P.2d 5 (1958), appeal dismissed and 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). Giannella, supra note 32, at 1422. For a general discussion of state court decisions regarding zoning of churches see J. Curry, Public Regulation of the Religious Use of Land 310-29 (1964).

41. 38 N.Y.2d at 293, — N.E.2d at —, — N.Y.S.2d at — (Jones, J., dissenting). The Florida supreme court has pointed out that the modern church building is used week long as a place of entertainment and instruction. In light of these activities the court concluded that it would be constitutionally permissible to exclude houses of worship from residential areas. Miami Beach United Lutheran Church of the Epiphany, Inc. v. City of Miami Beach, 82 So. 2d 880, 882 (Fla. 1955). See generally 1 A. Rathkoph, Law of Zoning and Planning, ch. 19 (3d ed. 1974).

42. 38 N.Y.2d at 294, — N.E.2d at —, — N.Y.S.2d at — (Jones, J., dissenting).

43. Id. at 295, — N.E.2d at —, — N.Y.S.2d at — (Jones, J., dissenting).

44. Id. at 288, — N.E.2d at —, — N.Y.S.2d at —.

45. Rogers v. Mayor, 110 Ga. App. 114, 137 S.E.2d 668 (1964); Columbus Park Congregation of Jehovah's Witnesses, Inc. v. Board of Appeals, 25 Ill. 2d 65, 182 N.E.2d 722 (1962); O'Brien v. City of Chicago, 347 Ill. App. 45, 105 N.E.2d 917 (1952); Board of Zoning Appeals v. Decatur, Ind. Co. of Jehovah's Witnesses, 233 Ind. 83, 117 N.E.2d 115 (1954); Congregation Temple Israel v. City of Creve Coeur, 320 S.W.2d 451 (Mo. 1959); Congregation Comm., Jehovah's Witnesses v. City Council, 287 S.W.2d 700 (Tex. Civ. App. 1956).

46. This view is unique to California and is found in the following cases: Minney v. City of Azusa, 164 Cal. App. 2d 12, 330 P.2d 255 (2d Dist. 1958), appeal dismissed, 359 U.S. 436 (1959); Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 P.2d 823 (4th Dist.), appeal dismissed, 338 U.S. 805 (1949).

worship are not prohibited by the first and fourteenth amendments as long as they do not result in an undue interference with freedom of religion.[47]

Jurisdictions which justify their decision by a reliance on the first category beg the question. It is the universally accepted view that reasonable zoning ordinances are a valid exercise of the police power.[48] The question to be answered is whether, and to what extent, this usually valid power is voided when it conflicts with the free exercise clause of the first amendment. Yet, this aspect of the problem appears to be ignored by these courts.

In *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville,*[49] California adopted the second justification.[50] When petitioner is a corporation, its existence depends on the state, and it is subject to reasonable state regulations.[51] This approach presents obvious problems. In a given case, the house of worship may not be a corporation, but rather a sole proprietorship or a partnership. The extent to which a municipality would be prohibited from placing zoning restrictions on a house of worship in these latter situations is left unanswered. A more basic problem with the California view, however, is that it fails to resolve the fundamental problem of determining to what extent the state's usually legitimate power to regulate corporations is voided when the regulation infringes on free exercise of religion.

Very few courts have directly addressed the conflict between the free exercise clause and the power of a state to zone.[52] The Oregon and Wisconsin supreme courts,[53] through an analysis of United States Supreme Court decisions on the limits of the free exercise clause, have adopted the undue influence approach and have reached conclusions similar to the dissent in *Roslyn Harbor.*[54]

It has been established that "[l]aws are made for the government of actions, and while [government] cannot interfere with mere religious belief and opinions, [it] may with practices."[55] Thus, the free exercise clause does not create a blanket prohibition against government interference with the free exercise of religion.

In *Cantwell v. Connecticut,*[56] the Supreme Court held that a state may not unduly infringe on free exercise;[57] and more specifically, the right to preach or

47. Milwaukie Co. of Jehovah's Witnesses v. Mullen, 214 Ore. 281, 330 P.2d 5 (1958), appeal dismissed and cert. denied, 359 U.S. 436 (1959); State ex rel. Lake Drive Baptist Church v. Village of Bayside, 12 Wis. 2d 585, 108 N.W.2d 288 (1961). For a further view that a balancing standard is favorable to absolute rules of exclusion or nonexclusion see J. Curry, Public Regulation of the Religious Use of Land 24-49 (1964).

48. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926).

49. 90 Cal. App. 2d 656, 203 P.2d 823 (4th Dist.), appeal dismissed, 338 U.S. 805 (1949).

50. This view has been reaffirmed by the California courts. See note 46 supra.

51. 90 Cal. App. 2d at 660, 203 P.2d at 825-26.

52. See 26 Mo. L. Rev. 45, 48 (1961).

53. See note 47 supra.

54. See notes 41-43 supra and accompanying text.

55. Reynolds v. United States, 98 U.S. 145, 166 (1878).

56. 310 U.S. 296 (1940).

57. "Conduct remains subject to regulation for the protection of society. The freedom to act

disseminate religious views may not be wholly denied by a state.[58] But, just as a state may "regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon,"[59] so may the state "in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment."[60] This view was reasserted in *Wisconsin v. Yoder*,[61] where it was contended that the "undoubted" power of the states to promote the health, safety and general welfare often subject religiously based activities to state regulation.[62] Thus, in *Braunfeld v. Brown*,[63] the claim of orthodox Jews that Sunday closing laws unduly interfered with their free exercise of religion was struck down. The laws were heid to be valid exercises of the police power.[64]

In light of these Supreme Court decisions, it is safe to say that a reasonable zoning ordinance which places restrictions on houses of worship is not unconstitutional provided that the regulations do not unduly infringe on free exercise. Further, the Court has not taken a restrictive view of regulations claimed to infringe unduly on free exercise. That a decision to exclude all churches from a residential area—a move which goes further than the regulations found unconstitutional in *Roslyn Harbor*—is not, without more, to be considered a violation of the free exercise clause is indicated by the decision in *American Communications Association v. Douds*.[65] There, the Court, speaking of the *Porterville* case,[66] wrote:

> When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a

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must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." Id. at 304 (footnote omitted).

58. Id.

59. Id.

60. Id.

61. 406 U.S. 205 (1972).

62. Id. at 220.

63. 366 U.S. 599 (1961).

64. "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless." Id. at 606 (italics omitted).

65. 339 U.S. 382 (1950).

66. 90 Cal. App. 2d 656, 203 P.2d 823 (4th Dist.), appeal dismissed, 338 U.S. 805 (1949).

municipal zoning ordinance preventing the building of churches in certain residential areas.[67]

Thus, it appears that the majority's statement in *Roslyn Harbor* that "the question which the village must answer is not whether 29 feet is reasonable, but rather, what reasonable measures can be taken to mitigate the effect upon the neighbors of having a synagogue 29 feet from the property line"[68] is not constitutionally required by the free exercise clause. Nothing in any Supreme Court decision indicates that houses of worship are as nearly immune from government regulation as the *Roslyn Harbor* majority has indicated. The minority's view—that municipalities can reasonably regulate houses of worship, and that these regulations will be upheld as long as the ordinances themselves or the effect of the ordinances are not arbitrary and unreasonable—is in fact, constitutionally acceptable. The only limit placed on the zoning power by the first amendment is that the zoning ordinances either themselves or as applied, not *unduly* interfere with the free exercise of religion.

It is submitted that what is an undue interference with free exercise must be determined on a case-by-case basis. Due to the peculiar factual situations involved in *Bates, Rochester* and *Westchester,* it is likely that even under such a view, the results would not have been different. In *Bates,* evidence was presented that the nearest reformed synagogue was twelve miles away.[69] If the effect of denying the synagogue a permit to build would result in forcing the members of the house of worship to drive twelve miles to worship, free exercise of religion may have been unduly infringed. Furthermore, the village's contention that it could prohibit a house of worship, *qua* house of worship, from locating on a "precise spot"[70]—an issue not present in *Roslyn Harbor*—smacks of undue interference.

In *Rochester,* petitioners alleged that there was only one Catholic church in Brighton which was inconveniently located and inadequate to serve the needs of the Catholic community.[71] It is not unlikely that the *Roslyn Harbor* minority would have found the city's plan to "banish" the church to an undeveloped part of the city to be an undue interference with free exercise.

Westchester involved an existing house of worship which indisputably had to be expanded to suit the needs of the congregation.[72] If the planning board's

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67. 339 U.S. at 397-98.

68. 38 N.Y.2d at 290, — N.E.2d at —, — N.Y.S.2d at —.

69. 1 N.Y.2d at 448, 136 N.E.2d at 490, 154 N.Y.S.2d at 18.

70. Id. at 458, 136 N.E.2d at 496, 154 N.Y.S.2d at 26; see note 11 supra and accompanying text.

71. Had the city had its way, the diocese would have been forced to locate in an undeveloped section of the town and, unless members of the Catholic faith moved to the undeveloped section, would have been unable adequately to serve the territorial needs of its parishioners. 1 N.Y.2d at 523, 136 N.E.2d at 835, 154 N.Y.S.2d at 860.

72. "It is an undisputed fact and the Planning Commission has so found that the present facilities must be expanded to meet the increasing needs of the congregation." 22 N.Y.2d at 492, 239 N.E.2d at 894, 293 N.Y.S.2d at 300.

scheme were followed, a heavy financial burden would have been placed on the synagogue.[73] This heavy financial burden may well have been found to constitute an undue infringement on free exercise.

In *Roslyn Harbor,* on the other hand, the denial of the permit to build a house of worship would not make synagogue attendance more difficult and inconvenient for worshippers.[74] While conforming with the village's zoning requirements might well have been expensive, the house of worship, with full knowledge of the zoning laws of Roslyn Harbor, nevertheless purchased property within the village and then sought to use the property in contravention of these laws.[75]

In New York, under the doctrine developed in *Bates, Rochester, Westchester* and *Roslyn Harbor,* whenever a house of worship challenges a zoning ordinance, the courts will willingly intervene and place an aura of unconstitutionality around the municipality's zoning ordinances and their application.[76] This preemption of the powers and duties of local zoning boards has the effect of the judiciary making routine decisions about what is in the best interests of a municipality.[77] It is submitted that this judicial usurpation of local affairs should only be justified on grounds that there is something inherently unconstitutional about the placing of reasonable zoning requirements on a house of worship. Indeed, this has been the position adopted by the New York Court of Appeals.[78] It is this presumption of unconstitutionality, however, which this casenote questions. The courts should limit their review of local zoning board decisions to a determination of whether the challenged ordinance or the enforcement of the ordinance is reasonable and if so, whether this otherwise reasonable regulation represents an undue interference with free exercise.[79] In determining reasonableness, the court should ignore the alleged conflict

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73. Id. at 497, 239 N.E.2d at 897, 293 N.Y.S.2d at 304.

74. "It is conceded that its membership is spread over a fairly wide area surrounding the Village of Roslyn Harbor, and that only 4% of its family members actually live in the respondent village itself." 38 N.Y.2d at 285-86, — N.E.2d at —, — N.Y.S.2d at —.

75. Id. at 294-95, — N.E.2d at —, — N.Y.S.2d at — (Jones, J., dissenting).

76. See notes 7-38 supra and accompanying text.

77. "[I]t must be borne in mind that churches . . . occupy a different status from mere commercial enterprises and, when the church enters the picture, different considerations apply." 1 N.Y.2d at 523, 136 N.E.2d at 834, 154 N.Y.S.2d at 859 (citation omitted).

78. "We have not said that considerations of the surrounding area and potential traffic hazards are unrelated to the public health, safety or welfare when religious structures are involved. We have simply said that they are outweighed by the constitutional prohibition against the abridgement of the free exercise of religion . . . ." 22 N.Y.2d at 496, 239 N.E.2d at 896, 293 N.Y.S.2d at 304.

79. See notes 55-68 supra and accompanying text. For a discussion of the possible interests that the court might weigh in determining reasonableness see J. Curry, Public Regulation of the Religious Use of Land 50-70 (1964). "[T]here is neither a set of principles which allocates rules of decision to particular types of fact situations, nor objective criteria for assigning weights to religious and governmental interests in various contexts." Dodge, The Free Exercise of Religion: A Sociological Approach, 67 Mich. L. Rev. 679, 687 (1969); see Clark, Guidelines for the Free Exercise Clause, 83 Harv. L. Rev. 327, 329 (1969).

between zoning and free exercise. The ordinance and its application should be studied solely to determine if it is arbitrary or unreasonable. Once reasonableness is determined, the inquiry should involve a determination of whether, under the facts of the particular case, free exercise of religion is unduly infringed. In all other respects the decision as to what zoning restrictions ought to be placed on houses of worship, as well as the enforcement of these zoning requirements, should be left to the local municipalities. It is these bodies, and not the judiciary, in which the legislature has vested the power to zone.[80]

Barry Gene Felder

Labor Law—Third Circuit Holds Impasse in Bargaining Excuses Employer's Unilateral Withdrawal from Multiemployer Negotiations.—The employer, Beck Engraving Co., was a member of a multiemployer bargaining unit composed of the Philadelphia Printing Pressman, Assistants and Offset Workers Union and the Allied Printing Employer's Association. After negotiations on a new contract had proceeded for several months and a strike had been in progress for over one month, six of Beck's original seven employees resigned from the union and returned to work. The seventh employee, allegedly distraught over the prolonged strike, had committed suicide. At this point, Beck's president notified the union that it had withdrawn from the multiemployer association. The union responded that it did not consent to Beck's withdrawal from the negotiations nor did it consider the withdrawal timely. When the union and the remaining members of the association reached a contract, Beck refused to sign it.

Beck argued before the National Labor Relations Board that its withdrawal was justified on three grounds: that it had a good faith doubt that the union continued to represent its employees, that the union had consented to the withdrawal of another employer, and that the union had struck it and other association members during the negotiations.[1] The Board found that these circumstances would not excuse unilateral employer withdrawal from multiemployer negotiations[2] and that Beck's refusal to sign the contract violated sections 8(a)(1), and 8(a)(5)[3] of the National Labor Relations Act. On a motion for rehearing before the Board, Beck urged that a bargaining impasse justified its withdrawal. The motion was denied and the Board petitioned the Third

80. See N.Y. Village Law § 7-700 (McKinney 1973).

1. Beck Engraving Co., 87 L.R.R.M. 1037 (1974), enforcement denied, 522 F.2d 475 (3d Cir. 1975).

2. Id. at 1038-39.

3. 29 U.S.C. § 158(a) (1970) provides: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in section 157 . . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

Circuit Court of Appeals to enforce its order. The court refused, holding that impasse in bargaining excuses an employer's unilateral withdrawal from multiemployer negotiations. The court then determined that since at the time Beck withdrew, lengthy and frequent negotiations had taken place between the union and the association over a four month period without success, an impasse had existed and Beck's withdrawal was excused. *NLRB v. Beck Engraving Co.*, 522 F.2d 475 (3d Cir. 1975).

Negotiations between employers and unions are often conducted on a multiemployer bargaining basis.[4] The process offers advantages to both labor and management. It permits a union to save time and money by negotiating one contract instead of several and also helps achieve its goal of standardization of wages and working conditions.[5] Moreover, many beneficial employee programs can be achieved on a multiemployer basis that individual employers could not provide.[6]

Although these features make it attractive to labor, multiemployer bargaining can be a management weapon. The practice offers the individual employer increased bargaining power in dealing with strong unions. In addition, since all the employers are bound by a single master contract, they are assured that their competitors will not enjoy more advantageous terms.[7] The most significant protection an employer achieves through group bargaining, however, is the prevention of whipsawing,[8] the tactic whereby a union gains quick concessions by striking an individual employer while his competitors remain in business. In *NLRB v. Teamsters Local 449 (Buffalo Linen)*,[9] the Supreme Court held that if a multiemployer member is struck, the entire unit may engage in a lockout[10] to protect its interest in group negotiations.

Although the practice of multiemployer bargaining long antedated the Wagner Act, it did not receive official sanction until the Supreme Court's 1957

4. Multiemployer bargaining is the practice whereby two or more employers, usually in the same industry, agree to bargain jointly with the union representing their employees. The employers often form an association which conducts the negotiations on their behalf. See generally Rains, Legal Aspects and Problems of Multi-Employer Bargaining, 34 B.U.L. Rev. 159 (1954); Comment, The Status of Multiemployer Bargaining Under the National Labor Relations Act, 1967 Duke L.J. 558.

5. See Comment, The Status Of Multiemployer Bargaining Under the National Labor Relations Act, 1967 Duke L.J. 558, 560-61.

6. "[W]elfare benefits such as pension plans, medical payments, and unemployment compensation, as well as industry-wide apprenticeship and training programs . . . may be desirable by-products of bargaining on a multiemployer basis." Id. at 561.

7. See Rains, Legal Aspects and Problems of Multi-Employer Bargaining, 34 B.U.L. Rev. 159, 160-62 (1954).

8. For a detailed discussion of the whipsawing process, see Note, The Right to Lock-Out Where a Union Strikes One Member of a Bargaining Association, 43 Geo. L.J. 426 (1955) [hereinafter cited as The Right to Lock-Out].

9. 353 U.S. 87 (1957) [hereinafter referred to in text and notes as Buffalo Linen], noted in 57 Colum. L. Rev. 1172 (1957).

10. 353 U.S. at 97. A lockout is the tactic whereby an employer seeks to gain acceptance of its bargaining demands by closing its doors and refusing to provide work for its employees. See The Right to Lock-Out, supra note 8, at 426.

decision in *Buffalo Linen.*[11] Addressing itself to the question of the NLRB's right to certify multiemployer units,[12] the Court decided that Congress' refusal to interfere with multiemployer bargaining at the time of the Taft-Hartley Amendment debates demonstrated its recognition of multiemployer bargaining as a "vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining."[13]

Specifically excluded from consideration in the Supreme Court's decision in *Buffalo Linen* was the question of an employer's or union's right to dissolve the multiemployer unit once it has been established.[14] As a result the Board has formulated its policy toward withdrawals from multiemployer bargaining without judicial or statutory guidance. In fashioning this policy the Board was faced with two conflicting interests. Unlike the single employer unit, the multiemployer unit is based upon the consent of the parties[15] so withdrawal from these units must be permitted. A too liberal withdrawal policy, however, would conflict with the Act's fundamental purpose of promoting stability in bargaining relationships.[16]

An attempt at achieving a balance of these interests was evidenced in the Board's decision in *Evening News Association,*[17] that unions and employers should have equal withdrawal rights.[18] Since a union's withdrawal is likely to have a more dramatic effect on the viability of a multiemployer unit than a single employer's withdrawal, the decision has been criticized as promoting needless instability in multiemployer bargaining.[19] In the Board's view, however, even greater instability would be caused by having unions locked into the multiemployer unit against their will.[20]

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11. 353 U.S. at 94.

12. There are no statutory provisions providing for multiemployer bargaining. The Board derived its power to certify multiemployer units from 29 U.S.C. § 159(b) (1970) which provides: "The Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ." The Board reads this section in conjunction with 29 U.S.C. § 152(2) (1970) which defines employer as including the "agent of an employer." The Board considers the multiemployer association to be the agent of each of its members, thus permitting it to exercise its power under section 159(b) to certify an "employer" unit as appropriate for bargaining.

13. 353 U.S. at 95.

14. Id. at 94 n.22.

15. NLRB v. Central Plumbing Co., 492 F.2d 1252, 1255 (6th Cir. 1974); NLRB v. Sklar, 316 F.2d 145, 150 (6th Cir. 1963). Such consent is important since the Board considers bargaining as being determinative of the appropriateness of the bargaining unit. See Continental Baking Co., 99 N.L.R.B. 777, 784 (1952).

16. Retail Associates, Inc., 120 N.L.R.B. 388, 393 (1958).

17. 154 N.L.R.B. 1494 (1965), enforced sub nom., Detroit Newspaper Publishers Ass'n v. NLRB, 372 F.2d 569 (6th Cir. 1967).

18. Id. at 1499.

19. Id. at 1504 (Member Brown dissenting). See also Comment, The Status of Multiemployer Bargaining Under the National Labor Relations Act, 1967 Duke L.J. 558, 589-92; 41 N.Y.U.L. Rev. 651 (1966).

20. 154 N.L.R.B. at 1499. A union locked into a multiemployer bargaining group would have no choice but to engage in conduct aimed at causing employer withdrawals. Therefore, the Board

The union's equality of withdrawal rights was further strengthened and clarified in *Pacific Coast Association of Pulp and Paper Manufacturers*,[21] wherein the Board held that a union may withdraw from multiemployer bargaining with respect to one or more employers while continuing bargaining with the remaining members of the group.[22] Although it was argued that such a rule permits the union to determine unilaterally the scope of the bargaining unit, the Board declared that if the employers "believe that the employer with respect to whom the union has withdrawn is so vital to the multiemployer unit that multiemployer bargaining is no longer desirable, they may themselves withdraw . . . ."[23] Therefore, in the Board's view, permitting the union to withdraw selectively would not destroy the policy favoring equality of withdrawal rights.

Although the *Evening News Association* and *Pacific Coast Association* decisions assure that employers and unions will have equal rights to withdraw from multiemployer bargaining, neither may do so without complying with Board rules as to the time and manner of withdrawal. These rules were first enunciated in *Retail Associates Inc.*,[24] where the NLRB held that prior to the start of negotiations either an employer or a union may withdraw unilaterally—without the consent of the other party—simply by giving written notice.[25] Once negotiations on a new contract have begun, however, neither party may withdraw unless there is mutual consent[26] or, in the Board's opinion, unusual circumstances exist which would excuse an untimely withdrawal. The exception for unusual circumstances has been limited by the Board to two basic situations. First, unusual circumstances have been found to exist where an employer's business has in the course of negotiations

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reasoned that "[i]nequality of freedom to withdraw thus could become a means of producing, not stability, but friction and instability in the bargaining unit." Id.

21. 163 N.L.R.B. 892 (1967) [hereinafter referred to in text and notes as Pacific Coast Association].

22. Id. at 895.

23. Id. at 896.

24. 120 N.L.R.B. 388 (1958).

25. The Board has since stated that the notice must be written. Evening News Ass'n, 154 N.L.R.B. 1482, 1483 (1965), enforced sub nom., Detroit Newspaper Publishers Ass'n v. N.L.R.B., 372 F.2d 569 (6th Cir. 1967). However, it appears that actual notice to the other party is sufficient. See Imperial Outdoor Advertising, 192 N.L.R.B. 1248 (1971), enforced, 470 F.2d 484 (8th Cir. 1972) (oral notice when conveyed in person to the union representative found to constitute an effective withdrawal).

26. "Mutual consent" appears to require the consent of the union, the employer, and the multiemployer association. See NLRB v. Beck Engraving Co., 522 F.2d 475, 478 (1975). It is important to note that such consent may be express or implied. See, e.g., I.C. Refrigeration Service, Inc., 200 N.L.R.B. 687 (1972), where the Board stated "acquiescence exists where a union engages in separate negotiations with a withdrawing employer, listens to counterproposals, and agrees to make certain concessions not offered the association." Id. at 690. Accord, Hartz-Kirkpatrick Constr. Co., 195 N.L.R.B. 863 (1972) (offer of terms not in the multiemployer contract). See also Site-Con Indus., Inc., 200 N.L.R.B. 46 (1972) (failure to object to the exclusion of employer's name from list of bargaining group members constitutes union acquiescence to his withdrawal).

suffered an extreme financial setback, threatening its viability as a functioning enterprise. Thus, an employer whose financial distress was forcing him to move his business out of New York City was permitted to withdraw,[27] as was an employer whose business underwent a reorganization in bankruptcy.[28] The second situation where the Board recognizes unusual circumstances is when the bargaining unit itself has been dissipated by consensual employer withdrawals during the course of bargaining. In one case where the union had consented to deal separately with twenty-three of thirty-six employers engaged in multiemployer negotiations, the Board found that the bargaining unit was so fragmented that it would be "unfair and harmful to the collective-bargaining process" to refuse to permit the remaining employers to withdraw.[29] Absent such extreme circumstances, the Board has consistently refused to permit withdrawals once multiemployer negotiations are underway. Although the *Retail Associates* rule has been criticized as overly rigid,[30] the Board's judgment that it is necessary to preserve stability in the multiemployer bargaining situation[31] has generally been supported by the courts.[32]

While the *Retail Associates* rule strictly limits the right of withdrawal during negotiations, unions often engage in what amounts to a withdrawal during bargaining through the process of offering individual contracts to members of the multiemployer group. In *Ice Cream Council, Inc.*,[33] the Board held that a union did not violate the Act by entering into individual agreements with multiemployer bargaining group members.[34] Since there was

27. Spun-Jee Corp., 171 N.L.R.B. 557 (1968).

28. U.S. Lingerie Corp., 170 N.L.R.B. 750 (1968).

29. Connell Typesetting Co., 87 L.R.R.M. 1001, 1004 (1974). See also NLRB v. Southwestern Colorado Contractors Ass'n, 447 F.2d 968, 969 (10th Cir. 1971) (employers relieved of their duty to bargain in a multiemployer unit that had been reduced from fifteen to five employers).

30. See NLRB v. Sheridan Creations, Inc., 357 F.2d 245, 250 (2d Cir. 1966) (Lumbard, C.J., dissenting), cert. denied, 385 U.S. 1005 (1967) (withdrawals should be permitted at any time absent bad faith or harm to the collective bargaining process). See also Comment, Withdrawal From Multi-Employer Bargaining—Reconsidering Retail Associates, 115 U. Pa. L. Rev. 464 (1967); Note, Labor Law—Employer and Union Withdrawal From Multi-Employer Collective Bargaining, 12 N.Y.L.F. 484, 500 (1966).

31. In Retail Associates, Inc., 120 N.L.R.B. 388, 395 (1958), the Board stated that the timing of attempted withdrawals from multiemployer bargaining is "an important lever of control in the sound discretion of the Board to insure stability of such bargaining relationships."

32. The Second Circuit was the first court to adopt the Retail Associates rule. NLRB v. Sheridan Creations, Inc., 357 F.2d 245 (2d Cir. 1966), cert. denied, 385 U.S. 1005 (1967); accord, NLRB v. John J. Corbett Press, Inc., 401 F.2d 673 (2d Cir. 1968). The rule was also followed in NLRB v. Johnson Sheet Metal, Inc., 442 F.2d 1056 (10th Cir. 1971) and Universal Insulation Corp. v. NLRB, 361 F.2d 406 (6th Cir. 1966). But see NLRB v. Unelco Corp., 83 L.R.R.M. 2447 (7th Cir. 1973) (withdrawal during negotiations would be permissible because of conflict of interest between the employer and other members of the multiemployer group) (dictum); NLRB v. Field & Sons, Inc., 462 F.2d 748 (1st Cir. 1972) (by analogy to a union member's right to withdraw from the union even after voting to strike, a multiemployer group member should be free to withdraw before a contract is reached absent detriment or bad faith) (dictum).

33. 145 N.L.R.B. 865 (1964).

34. Id. at 870.

an impasse in negotiations, the Board found that the employer could, if the union agreed, execute an individual contract.[35]

Similar to the union tactic of negotiating separate contracts with multiemployer group members is the negotiation of "interim agreements."[36] Such agreements are usually entered into after a union has struck members of a multiemployer bargaining unit. The employer accepting the interim pact agrees in advance to the demands the union is making in the negotiations with the stipulation that he will remain bound by whatever contract is ultimately reached with the association.[37] In one recent case, a struck multiemployer group member, dissatisfied with the delay in his work schedule, purportedly solicited such an agreement with the union.[38] The Trial Examiner expressed the view that the individual employer "could not validly negotiate separately . . . as it did and reach agreement pursuant to which it alone of the multiemployer group resumed work to the obvious disadvantage of the other members of the group."[39] The Board, however, disagreed, finding that the execution of the individual agreements did not have "a significantly adverse impact upon the integrity of the multiemployer bargaining unit."[40] Unlike the individual contracts in *Ice Cream Council,* such "interim agreements" do not appear to require impasse in negotiations[41] or actual withdrawal by the defecting employer from the multiemployer group.[42]

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35. Id. This practice of offering multiemployer group members completely individual contracts should be distinguished from the type of limited individual bargaining sanctioned by the Board in The Kroger Co., 148 N.L.R.B. 569, 575, enforced sub nom. Retail Clerks Union v. NLRB, 330 F.2d 210 (D.C. Cir.), cert. denied, 379 U.S. 828 (1964) wherein the Board held that an employer could insist on dealing with the union singly on matters of specialized concern to him. But see Springfield Electrotype Serv., Inc., 166 N.L.R.B. 639, 648 (1967) (union effort to negotiate singly on matters of substantial economic importance held not within the Kroger exception).

36. "Interim agreement" apparently has no fixed meaning. In addition to the type of interim agreement discussed in the text, such an agreement may simply obligate the multiemployer member in advance to accept without reservation the multiemployer contract. See NLRB v. Tulsa Sheet Metal Works, Inc., 367 F.2d 55 (10th Cir. 1966). In such a case it is no more than a formality, since multiemployer members are normally bound by the product of group negotiations. Contracts by which an employer who is not a member of a multiemployer association binds himself in advance to the contract reached by the association are also termed interim agreements. The Board has held that these blank check agreements are enforceable. See Sheet Metal Workers' Int'l Ass'n, 144 N.L.R.B. 773 (1963).

37. See, e.g., Plumbers Union No. 323, 191 N.L.R.B. 592 (1971) (employer agrees to wage demand, not acceptable to the association).

38. Sangamo Construction Co., 188 N.L.R.B. 159, 160 (1971).

39. Id.

40. Id. The Board's reasoning apparently was that since there was no finding that Sangamo's agreement to grant retroactive wage increases had any influence on the association's finally agreeing to that term, and since Sangamo was ultimately bound by the association contract, the union's conduct did not rise to the level of a violation of the Act.

41. Although in Sangamo the Board did not discuss the question of impasse, it found that "bargaining did continue during the operative period." Id.

42. See Plumbers Union No. 323, 191 N.L.R.B. 592, 593 n.11 (1971).

The Board's policy of permitting unions to execute separate agreements during the course of multiemployer negotiations undoubtedly undermines the goals of the employer association. The individual employer who agrees to a separate contract or "interim agreement" weakens the strength of the association. In addition, as his employees return to work, pressure is brought to bear on the remaining employers to accede to the union's demands or face competitive disadvantage. The resulting whipsaw effect on the multiemployer association leaves it with considerably less bargaining power. In light of these considerations, a question has arisen as to the rights of the employers with whom the union does not negotiate separately. Do they have the option to withdraw from the multiemployer unit or does the *Retail Associates* rule still operate to preclude their withdrawal once negotiations have begun, absent union consent or "unusual circumstances"?

The Eighth Circuit considered this question in *Fairmont Foods Co. v. NLRB*.[43] Fairmont had attempted to withdraw from a multiemployer association after participating in negotiations. The Board determined that there was no union consent to the withdrawal and ordered Fairmont to sign the contract.[44] The court refused to enforce the Board's order on the grounds *inter alia* that it was "particularly incongruous" that the Board had not found union consent to Fairmont's withdrawal in light of the fact that the union had executed separate contracts with members of the multiemployer association, and such an agreement was the basis for withdrawing pickets from one employer's premises.[45]

In *NLRB v. Hi-Way Billboards, Inc.*,[46] the Fifth Circuit was faced with the similar situation of an employer claiming the right to withdraw after negotiations had begun on a multiemployer basis. In its first decision in the *Hi-Way Billboards* case, the Board had rejected the employer's contention that the union's entering into separate contracts with other members of the employer group justified his belated withdrawal.[47] When the Board petitioned the Fifth Circuit for enforcement, the court reversed the Board's factual finding that no impasse was reached during the negotiations,[48] and remanded the case to the Board to consider whether an impasse was an "unusual circumstance" under the *Retail Associates* rule so as to validate Hi-Way's otherwise unlawful withdrawal.[49] On remand, the Board unanimously held

43. 471 F.2d 1170 (8th Cir. 1972).

44. Fairmont Foods Co., 196 N.L.R.B. 849, enforcement denied, 471 F.2d 1170 (8th Cir. 1972). The Board majority considered that affirmative conduct was necessary by the union to indicate their consent to the withdrawal. Id. Chairman Miller, however, argued that the union's silence under the circumstances amounted to consent. Id. at 850. See note 26 supra.

45. 471 F.2d at 1174 n.1.

46. 473 F.2d 649 (5th Cir. 1973).

47. Hi-Way Billboards, Inc., 191 N.L.R.B. 244, 245 (1971), enforcement denied, 473 F.2d 649 (5th Cir. 1973).

48. 473 F.2d at 654-55.

49. Id. In Fairmont Foods Co. v. NLRB, 471 F.2d 1170 (8th Cir. 1972), the court held that impasse excused unilateral withdrawal from multiemployer bargaining relying on the Board's decision in Morand Bros. Bev. Co., 91 N.L.R.B. 409 (1950), enforced, 190 F.2d 576 (7th Cir.

that impasse was not an "unusual circumstance" but "merely a momentary eddy in the flow of collective bargaining" and that it would "herald the demise of multiemployer bargaining" if an employer were permitted to seize upon the occurrence of impasse as grounds for withdrawal from the multiemployer unit.[50] Therefore, in the Board's view, impasse alone, without union consent, does not relieve an employer from his obligation to remain in the bargaining unit once negotiations have begun and to be bound by the resulting contract.

When the case returned to the Fifth Circuit, the court, while acknowledging the "cogency of the Board's reasoning" on the impasse question,[51] again refused to enforce the Board's order. The court reasoned that the *Pacific Coast Association* decision,[52] which gave unions the right to withdraw with respect to one or more employers while continuing bargaining on a multiemployer basis with the remaining members of the unit, would result in an unfair whipsaw effect on the remaining employers.[53] In the original proceeding in *Hi-Way Billboards*,[54] the employer had argued before the Board that the *Pacific Coast Association* decision justified its withdrawal. The Board rejected this contention pointing out that the *Pacific Coast Association* rule involved a timely partial withdrawal by a union, that is, one made before the start of negotiations, and that it was implicit in that decision that any employer withdrawals without union consent must also be timely.[55] The *Pacific Coast Association* decision does not lead to a whipsaw effect since the union's withdrawals under that rule are made at a time when the employer is free to withdraw as well. The Fifth Circuit did not comment on this interpretation of the Board's *Pacific Coast Association* rule but apparently relied on the implicit holding in the Board's original decision,[56] that while the union was permitted to enter into separate contracts during negotiations, Hi-Way did not get a correlative right to withdraw at that point.

The Fifth Circuit's decision in *Hi-Way Billboards* was followed by the Ninth Circuit's decision in *NLRB v. Associated Shower Door Co.*[57] The employer in that case contended before the Board that his withdrawal in the midst of negotiations was permitted because, after impasse was reached, the union had entered into separate contracts with members of the multiemployer

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1951). This case predated the rules laid down in Retail Associates and it is the Board's position that it is no longer valid. See NLRB v. Hi-Way Billboards, Inc., 500 F.2d 181, 184 (5th Cir. 1974).

50. Hi-Way Billboards, Inc., 206 N.L.R.B. 22, 23 (1973), enforcement denied, 500 F.2d 181 (5th Cir. 1974).

51. NLRB v. Hi-Way Billboards, Inc., 500 F.2d 181, 183 (5th Cir. 1974). The court expressed the opinion that the Board's decision protected the interests of employees and unions but was "unfair" to the employer. Id. at 184.

52. 163 N.L.R.B. 892 (1967); see notes 21-23 supra and accompanying text.

53. 500 F.2d at 183.

54. Hi-Way Billboards, Inc., 191 N.L.R.B. 244 (1971).

55. Id. at 245.

56. The Board accorded no significance to the separate agreements, simply pointing out that since Hi-Way's withdrawal occurred after negotiations had begun, it was untimely. Id.

57. 512 F.2d 230 (9th Cir.), cert. denied, 96 S. Ct. 191 (1975).

group.[58] The majority of the Board took the position that the fact that some employers had abandoned multiemployer bargaining by accepting the separate contracts did not show that the union had abandoned the multiemployer unit.[59] In a concurring opinion,[60] however, Chairman Miller stated that the union's conduct in forcing the separate contracts on bargaining group members showed acquiescence by the union to a specific withdrawal or breakup of the unit.[61] Although enforcing the Board's order on other grounds,[62] the Ninth Circuit agreed with Miller's conclusion commenting that "when an impasse is reached and a union . . . enters into substantial individual agreements with employers who had been members of the multiemployer unit, the withdrawal of the remaining members . . . should be permitted."[63] The court thought that if the employers could not withdraw under such circumstances, the union could effectively whipsaw the members with whom it did not negotiate individually.[64]

In *NLRB v. Beck Engraving Co.*,[65] the Third Circuit referred to the prior court decisions in *Fairmont, Hi-Way Billboards,* and *Associated Shower Door* as formulating what it termed the "impasse doctrine."[66] The phrase seems inapposite since these cases were not concerned with the occurrence of impasse itself as providing grounds for unilateral withdrawal. Rather they expanded the right of an employer to exercise a lawful withdrawal from multiemployer negotiations when a union has entered into separate agreements with members of the bargaining unit.[67] Similarly, the Third Circuit's decision in *Beck* that the employer's unilateral withdrawal was permitted at impasse was dictated by the Board's policy of permitting these separate negotiations.

The employer in *Beck* had not raised before the Board the issue of impasse as excusing his untimely withdrawal until his motion for reconsideration by the Board.[68] The Third Circuit, however, noting the recent "impasse doctrine" decisions, held that the issue was not waived. The court then determined that the Board's policy of permitting individual interim agreements[69]

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58. Associated Shower Door Co., 205 N.L.R.B. 677 (1973), enforced, 512 F.2d 230 (9th Cir.), cert. denied, 96 S. Ct. 191 (1975).

59. 205 N.L.R.B. at 677.

60. The entire Board panel agreed that Associated had later reentered the multiemployer unit and thus had agreed to be bound by the contract. Id.

61. Id. The majority held that Chairman Miller's rationale for finding that the multiemployer unit was destroyed by the union's conduct was an "entirely novel theory without support in Board or court decisions."

62. The court accepted the Board's factual conclusion that Associated had reentered the bargaining unit. 512 F.2d at 233.

63. Id. at 232.

64. Id.

65. 522 F.2d 475 (3d Cir. 1975).

66. Id. at 479 n.8.

67. See notes 43-64 supra and accompanying text.

68. 522 F.2d at 478-79.

69. Although the court spoke specifically of "interim agreements," it is submitted that the

"strengthens the union's hand" against the remaining employers and amounted to the "rejection of the existence" of multiemployer bargaining.[70] Therefore, the court held that the Board's approval of this union tactic justified the granting of an "equivalent right" to the employer, that is, unilateral withdrawal at impasse.[71]

The significant factual difference between the *Beck* case and the prior "impasse doctrine" cases was that the union in *Beck* had not engaged in separate bargaining. The court, however, reasoned that "[t]he employer's right to withdraw during a bargaining impasse cannot be made contingent upon the union's prior exercise of its right to negotiate individual interim agreements."[72] The court concluded that to avoid giving an unfair advantage to either party, the employer's right to withdraw and the union's right to engage in separate bargaining, must accrue at the same time, *i.e.*, at impasse.[73] The court then reviewed the history of the negotiations in *Beck* and concluded that they presented "a portrait of impasse" excusing Beck's unilateral withdrawal.[74]

The Third Circuit's decision in *Beck* that impasse alone should be the standard for withdrawal from multiemployer negotiations represents an expansion of the "impasse doctrine" beyond the circumstances that led to its formulation. It can hardly be doubted that the Board's policy with regard to the making of separate agreements tends to favor the union. The Board apparently views these separate contracts as a bargaining weapon that the union may utilize, without leading to the accrual of new withdrawal rights on the part of the remaining employers,[75] provided that the contracts are not entered into on such a scale that the multiemployer unit is fragmented.[76] The

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court's finding would be the same if the type of separate contract made in Ice Cream Council were at issue. See notes 33-35 supra and accompanying text. The same whipsaw effect is possible with both types of agreements. See Connell Typesetting Co., 87 L.R.R.M. 1001, 1004 (1974), where the Board refused to distinguish between interim agreements and separate contracts in finding that a multiemployer unit was no longer viable because of the fragmenting effect they engendered.

70. 522 F.2d at 483.

71. Id.

72. Id.

73. Id. at 483-84.

74. Id. at 484.

75. The Board's position can perhaps be defended by the language of the Supreme Court in NLRB v. Brown, 380 U.S. 278 (1965). In that case the Board had decided that employers engaged in a multiemployer lockout could not hire replacements to continue in business during the strike. The Board's reasoning was that the hiring of replacements greatly increased the employer's bargaining power and was not aimed exclusively at protecting the multiemployer unit from whipsawing. Brown Food Store, 137 N.L.R.B. 73, 75 (1962). The Tenth Circuit refused to enforce the Board's decision in NLRB v. Brown, 319 F.2d 7 (10th Cir. 1963), and the Supreme Court affirmed concluding that the Board should not become the "arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands." 380 U.S. at 283, quoting NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 497 (1960).

76. See note 29 supra and accompanying text.

belief that the Board's position was unfair and not any conviction that impasse is an appropriate time to permit unilateral withdrawals from multiemployer negotiations, led the courts considering this problem prior to *Beck* to conclude that the employer must be given the option to withdraw whenever such separate agreements are executed.[77]

The articulation of the "impasse doctrine" in *Beck,* however, may create more serious problems in the multiemployer situation than it solves. Instead of tying the employer's right to unilaterally withdraw to the occurrence of some identifiable conduct on the part of the union (the making of separate agreements), the Third Circuit would permit withdrawals whenever impasse is reached in the bargaining.[78] In its decision on this subject, the Board unanimously concluded that such a standard for withdrawal "would effectively negate the benefits of [multiemployer bargaining] to all parties."[79] The Board's reasoning was that impasse is a normal phase in negotiations during which the parties resort to economic weapons to establish the primacy of their bargaining positions, and not an end to bargaining.[80] Impasse as a standard for withdrawal would also lead to confusion as to the rights of the parties, since there is no set formula for determining when genuine impasse has occurred.[81] In addition, the court's view that impasse is an event which "neither [party] can manipulate"[82] neglects the fact that impasse is often only avoided by the parties' willingness to compromise. Such compromises will not be encouraged if the parties, particularly employers in multiemployer bargaining who often have differing economic interests, see impasse as an event that will permit them to avoid[83] or at least delay reaching an unfavorable agreement.

In a footnote to its decision in *Beck,* the court suggested that the ultimate policy judgments in the multiemployer area should be left to the Board, and its decision was aimed solely at redressing what it perceived as an imbalance created by the Board's policy of permitting the separate contracts.[84] In future decisions on this question the Board hopefully will be guided by the view advanced by Chairman Miller in *Associated Shower Door, Inc.* that the

77. See NLRB v. Associated Shower Door Co., 512 F.2d 230, 232 (9th Cir.), cert. denied, 96 S. Ct. 191 (1975); NLRB v. Hi-Way Billboards, Inc., 500 F.2d 181, 183-84 (5th Cir. 1974); Fairmont Foods Co. v. NLRB, 471 F.2d 1170, 1174 n.1 (8th Cir. 1972).

78. 522 F.2d at 483.

79. Hi-Way Billboards, Inc., 206 N.L.R.B. 22, 23 (1973).

80. Id.

81. "The Board has never defined with any precision the means by which it finds parties at an impasse. Its common decisional method is to list a variety of factors it finds in the record and then conclude, abruptly, that the parties were at an impasse. . . . Closer examination of the cases shows that the finding of impasse comes close to being a visceral reaction of the trial examiner and the Board to the record." Stewart & Engeman, Impasse, Collective Bargaining and Action, 39 U. Cin. L. Rev. 233, 241 (1970).

82. 522 F.2d at 483.

83. The court found that Beck had no duty to negotiate with the union on an individual basis after its withdrawal because it had "a good faith doubt as to the majority status of the union among its employees." Id. at 485.

84. Id. at 484 n.15.

making of such agreements constitutes implied union acquiescence to employer withdrawals from the multiemployer negotiations.[85] Since multiemployer bargaining is based on consent of the parties, it seems illogical to view this consent as continuing when a union has changed the scope of the unit by its voluntary conduct during negotiations. This is especially true since many employers are willing to engage in multiemployer bargaining only because of the increased bargaining power and freedom from competitively disadvantageous terms that result from bargaining in an expanded unit. Such a holding would answer much of the courts' criticism of the Board's position and effectively avoid the destabilizing effect of the solution advanced by the Third Circuit in *Beck*. The Third Circuit was correct in its conclusion that the Board should not have given unions "two weapons for its economic arsenal (i.e., the selective strike and individual negotiations) while the employers are given only one (viz., the lockout)."[86] However, the ultimate solution of the problem should be aimed at maintaining as far as possible the stability of the multiemployer unit, which has proven advantageous to both employers and employees, rather than creating increasing opportunities for its dissolution.

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85. 205 N.L.R.B. 677 (1973); see notes 60-61 supra and accompanying text.
86. 522 F.2d at 483.