WHAT DO ZONING ORDINANCES MEAN?

TIMOTHY W. BARTON

In Arizona, within the framework of present review procedure in zoning matters, a party aggrieved before a board of adjustment can pursue his statutory remedy of appeal to the superior court[1] and nowhere else because there is no further provision for appeal.[2] This absence of a right of appeal to the Supreme Court in zoning matters was noted in *Hazard v. Superior Court*[3] as follows:

> In the instant case the appeal statute, A.R.S. § 11-807, is silent as to any further review beyond the superior court in zoning matters. Thus as the right of appeal exists only by force of statute, an appeal to this court would not lie. . . .

Thus in Arizona, a city or county can adopt and implement a zoning ordinance which the Supreme Court cannot construe, except by means of extraordinary and circuitous remedies.

A statutory modification providing for appeals in this area to the Arizona Supreme Court is imperatively needed. Appeal as of right is particularly essential when one party contends that the zoning commission or board of adjustment lacked jurisdiction because it exceeded its authority. The purpose of this comment is to explore the possible means of obtaining Supreme Court review in zoning matters notwithstanding the absence of direct appeal as of right, and to suggest the enactment of a statutory provision for appeal to the Supreme Court.

Take the hypothetical case of Tom whose Blackacre is located in an area zoned residential and abuts on a large vacant lot. One day Tom is startled to discover that X Corporation has posted a notice of hearing on its application for a special use permit to place an asphalt plant on the vacant lot. Not wanting an asphalt plant next to his home and finding that the zoning statutes and ordinances do not allow such a use in this area, Tom goes to an attorney to protect his rights. The attorney and Tom appear at the hearing before the

---

[1] ARIZ. REV. STAT. ANN. § 11-807D (1956).
[2] *Ibid.*; Hazard v. Superior Court, 82 Ariz. 211, 310 P.2d 830 (1957).
[3] 82 Ariz. 211, 310 P.2d 830 (1957).

planning and zoning commission and the attorney quite properly argues that the commission is without authority to grant a special use permit.[4] The commission however issues the permit. Tom appeals to the board of adjustment pursuant to Arizona Revised Statutes § 11-807C. However, the argument that the commission lacked authority to grant the permit is rejected by the board. Once again Tom appeals, this time, pursuant to Arizona Revised Statutes § 11-807D, the appeal is to the superior court for a trial de novo.[5] Having failed to obtain satisfaction in the superior court and being familiar with *Hazard v. Superior Court*,[6] the attorney concludes that no further appeal is available.[7] At this point, feeling that his client's position is correct, how does the attorney obtain a Supreme Court determination in this matter?

Three methods appear feasible to accomplish this objective.

I

A writ of certiorari could be sought from the Supreme Court directed to the superior court which denied relief on the appeal from the board of adjustment.[8] As a basis for the issuance of the writ it must be shown that there is no appeal from the decision of the inferior tribunal, that there is no plain, speedy and adequate remedy, and that the inferior tribunal exceeded its jurisdiction.[9]

Since there is no express provision for appeal or other remedy in zoning matters beyond the superior court,[10] the remaining consideration is a possible want of jurisdiction in the superior court to hear the appeal from the board of adjustment.

In our hypothetical situation it is assumed that the planning and zoning commission acted without authority in granting the special use permit. If the planning and zoning commission had no authority to grant the permit the board of adjustment would likewise have no authority to affirm such action.[11] It would follow that an appeal to the

---

[4] ARIZ. REV. STAT. ANN. § 11-807B(2) (1956) provides that the board of adjustment may allow a variance, but in this hypothetical, the conditions there stated are assumed not to be met.

[5] ARIZ. REV. STAT. ANN. § 11-807D (1956).

[6] 82 Ariz. 211, 310 P.2d 830 (1957).

[7] *Ibid. Accord,* Bardes v. Zoning Bd., 141 Conn. 317, 106 A.2d 160 (1954). That the Arizona Administrative Review Act, ARIZ. REV. STAT. ANN. §§ 12-901-14 (1956), would not provide an appeal in this situation, see Knape v. Brown, 86 Ariz. 158, 342 P.2d 195 (1959). See Comment, 25 CONN. B.J. 162, 180 (1951).

[8] ARIZ. REV. STAT. ANN. § 12-2001 (1956); *cf.* Nicolai v. Board of Adjustment, 55 Ariz. 283, 101 P.2d 199 (1940).

[9] ARIZ. REV. STAT. ANN. § 12-2001 (1956).

[10] Hazard v. Superior Court, 82 Ariz. 211, 310 P.2d 830 (1957). *Accord,* Knape v. Brown, 86 Ariz. 158, 342 P.2d 195 (1959); Davis, *An Administrative Procedure Act for Arizona,* 2 ARIZ. L. REV. 16, 30 (1960).

[11] *Cf.* Rojas v. Kimble, 89 Ariz. 276, 361 P.2d 403 (1961); *Ex parte* Coone, 67 Ariz. 299, 195 P.2d 149 (1948).

superior court would confer no greater authority on that court than had the board of adjustment.[12] This would seem to be the logical deduction from *Rojas v. Kimble,*[13] a certiorari proceeding in the Supreme Court to test the jurisdiction of the superior court to hear an appeal from the justice court. The court there said that if the inferior tribunal (the justice court) did not have jurisdiction, an appeal from its decision would not confer jurisdiction on the appellate tribunal (the superior court), since that tribunal's jurisdiction is predicated and dependent upon that of the inferior court from which the appeal originated.[14] By a parity of reasoning, this rule governing alleged want of jurisdiction in a lower tribunal would seem to be applicable to zoning matters.

The only zoning case in which a writ of certiorari has been sought from the Supreme Court directed to the superior court is *Hazard v. Superior Court*[15] in which the issue of the superior court's order dismissing an appeal from the board of adjustment was found to be within its jurisdiction. The issue of jurisdiction of the superior court to hear an appeal from a board of adjustment which lacked jurisdiction was not discussed in the opinion. Presumably this question would be decided in accordance with the rule of the *Rojas* case, and certiorari would issue.[16]

II

The second method by which a Supreme Court hearing could be obtained in this situation would be to seek an injunction that would enjoin the use allowed by the superior court decision. The action for an injunction would be met with the defense that the former judgment is res judicata[17] and to escape the fatal effect of this defense it must be shown that the former judgment was rendered without jurisdiction.[18] The same argument made previously in the section on certiorari would be applicable here.[19] If this can be done successfully, the court will consider the plea for an injunction on the merits. The issuance of the injunction accomplishes the purpose and an appeal by the adverse party would achieve the ultimate objective of a final

---

[12] *Supra* note 11.
[13] 89 Ariz. 276, 361 P.2d 403 (1961).
[14] *Ibid.*
[15] 82 Ariz. 211, 310 P.2d 830 (1957).
[16] See generally Tube City Mining & Milling Co. v. Otterson, 16 Ariz. 305, 146 Pac. 203 (1914).
[17] See generally Comment, 4 ARIZ. L. REV. 67 (1962).
[18] See 30A AM. JUR. *Judgments* § 772 (1958); see, *e.g.*, Davies v. Johnson, 22 Ariz. 63, 193 Pac. 1019 (1920).
[19] *Supra* notes 11-14.

determination by the Supreme Court. If the injunction is denied, as is more likely the case, an appeal could be taken to the Supreme Court[20] and thus a hearing in that court would be obtained on the jurisdiction issue.

III

The third method of seeking a Supreme Court determination of the jurisdiction of the zoning authorities, although equally circuitous, is probably the best. This would be through a class action[21] praying for a declaratory judgment[22] deciding that the zoning authorities have no power to grant a special use permit under the zoning ordinances and statutes. Bringing the action on behalf of all the property owners in the area would avoid the defense of res judicata as there would be different parties to the present action.[23] The parties plaintiff would be all the property owners in the area instead of merely the single former plaintiff. The parties defendant would be the board of adjustment and the party who was seeking the special use permit, instead of the latter alone.

The superior court would thus be presented with the question of the jurisdiction of the zoning authorities to act in the matter. The decision, if unfavorable, would be appealable to the Supreme Court by reason of the Arizona Declaratory Judgment Act.[24]

Conclusion

Although three feasible methods to obtain a Supreme Court pronouncement in zoning matters are outlined above, each involves unnecessary litigation which results in loss of time, irreparable injury in some cases, and added expense in all cases. As noted at the beginning of this comment, it would seem desirable to have an express statutory method of direct appeal from decisions of the superior court in all zoning cases or at least in those cases where the grievance is that the zoning officials acted wholly without authority, as opposed to an abuse of authority.

---

[20] ARIZ. REV. STAT. ANN. § 12-2101F(2) (1956).

[21] ARIZ. R. CIV. P. 23(a).

[22] ARZ. REV. STAT. ANN. §§ 12-1831-46 (1956); National Hairdressers' & Cosmetologists' Ass'n v. Philad Co., 3 F.R.D. 199 (D. Del. 1943); see Monk v. City of Birmingham, 87 F. Supp. 538 (N.D. Ala. 1949), *aff'd*, 185 F.2d 859 (5th Cir. 1950) in which a class action was brought for the declaration of the validity of a zoning ordinance and such procedure was held proper; see generally YOKLEY, ZONING LAW AND PRACTICE § 180 (1953).

[23] Pioneer Insulation & Modernizing Corp. v. City of Lynn, 331 Mass. 560, 120 N.E.2d 913 (1954); Busch v. Metropolitan Cas. Ins. Co., 253 App. Div. 595, 3 N.Y.S.2d 316 (1938), *aff'd*, 279 N.Y. 640, 18 N.E.2d 39 (1938). *But see* Grand Int'l Bhd. of Locomotive Eng'rs v. Mills, 43 Ariz. 379, 413, 31 P.2d 971, 984 (1934) (dictum).

[24] ARIZ. REV. STAT. ANN. § 12-1837 (1956).

A statutory appeal seems desirable for the further reason that it would provide an easily accessible avenue to the Supreme Court resulting in an expansion of the decisional law in the area of zoning. At present there is a dearth of reported cases and as a result little or no Arizona authority can be cited as precedent in any zoning proceeding. As the review procedure now stands, the great bulk of zoning case law in Arizona is contained in the unreported decisions of the superior court where the zoning review procedure now ends.

Statutes providing for specific review procedures by the highest state court are found in many states or such appeals are allowed under the general appellate practice.[25] The statute in Indiana[26] is typical, providing that:

> An appeal may be taken to the Appellate Court of the state of Indiana from the final judgment of the court reversing, affirming or modifying the decision of the board of zoning appeals in the same manner, and upon the same terms, conditions and limitations as appeals in other civil actions.

A similar statute, enacted in Arizona, would provide a direct method of Supreme Court review in zoning matters and thus eliminate the circuitous and uncertain methods now available. In addition, it would help to answer the question — "What do zoning ordinances mean?"

---

[25] *E.g.*, ILL. REV. STAT. ch. 24, § 73-6.01 (1959), which provides that decisions of boards of appeal are subject to review under the administrative review act found in ILL. REV. STAT. ch. 110, § 276 (1959); MASS. ANN. LAWS ch. 40A, § 21 (1961); WYO. STAT. ANN. § 15-626 (1957).

[26] Burns IND. ANN. STAT. § 53-789 (1951).