Case Notes

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Mr. and Mrs. Johnson, desiring to sell a tract of land, listed it with plaintiff Dobbs and other real estate agencies. Dobbs found a prospective purchaser, Iarussi, and assured the Johnsons that Iarussi would be able to perform the contract of sale. After the contract was signed, Iarussi found himself unable to get the necessary financial backing, and breached the contract. The transaction was never consummated, and later, the contract between Iarussi and the Johnsons was rescinded. Dobbs brought an action against both of them to recover his commission. The trial court held that Dobbs became entitled to his commission as soon as the contract of sale was signed. The appellate division reversed, stating that the question of the Johnsons' liability was for the jury. Plaintiff appealed. Held: the owners were not liable to the broker for any commission where failure to complete the sale was caused solely by the default of the prospective purchaser; any term in the brokerage agreement to the contrary was unconscionable and therefore unenforceable, and if the buyer unreasonably refused to complete the transaction, he was liable to the broker for breach of an implied promise.

For nearly a century, the rule in New Jersey has been that a broker earns his commission when he has produced a willing and able purchaser who enters into a contract of sale according to the terms authorized by the seller. The rule in the majority of states is that if these conditions are fulfilled, the broker has a right to his commission regardless of whether the purchaser actually consummates the transaction. The trend has been to enforce this rule strictly in favor of the broker.

The court in *Dobbs* notes that a seller's responsibility in the past was based on his acceptance of the prospective purchaser brought forward by the broker and that this acceptance bound the seller to pay the commission whether or not there was a completed sale: the buyer was "'acceptable to—for he was accepted by—the vendor.'" Nor was a broker an insurer of the solvency or the willingness of the

purchaser he produced. In fact, the only way in which a seller could protect himself from having to pay the broker his commission in the event that the purchaser proved to be financially unable to complete the sale was to insert a specific provision in the brokerage agreement making closing of title a condition precedent to broker's right to a commission.

The fundamental questions are whether it is the duty of the broker or the owner to inquire into the financial responsibility of the prospective purchaser, and who must bear the risk of a mistake as to buyer's ability. Real estate agencies protected themselves by using standard-form brokerage contracts which specifically provided that a broker became entitled to his commission as soon as the parties signed a contract of sale. Because such standard-form contracts gave predictability and certainty to business transactions, their use became so widespread in the brokerage field that it was all but impossible for a seller to obtain better terms. Prior to Dobbs, no court had succeeded in relieving sellers of this burden. In practical effect, the owner of real property was oppressed by "freedom of contract."

Such a situation has never been beyond the reach of the law. Insurance was said to be a matter of public importance, for the unequal bargaining positions of the parties and the monopolistic character of insurance companies made it "illusory to speak of a liberty of contract." The New Jersey Supreme Court has dealt with illusory freedom before. In *Henningsen v. Bloomfield Motors, Inc.*, Judge Francis, confronted with the problem of an express disclaimer of warranties in a form used by all members of the Automobile Manufacturers' Association, held that there was such an inequality of bargaining position and unfairness to the consumer as to render the disclaimer unconscionable and unenforceable. Courts of equity never felt themselves bound to enforce unconscionable provisions, but the theory of unconscionability has, since the enactment of the Uniform Commercial Code, Section 2-302, been applied mainly to sales transactions. In *Williams v. Walker-Thomas Furniture Co.*, the court gave an up-to-date definition of unconscionability:

"Unconscionability has generally been recognized to include an absence of mean-

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6. *Id.* at 539, 236 A.2d 852.
9. In Taylor Real Estate & Ins. Co. v. Greene, *supra* note 4, there was no provision in the agreement as to when the commission was due and the court resolved the ambiguity against the party who drafted the instrument. In Gartner v. Higgins, *supra* note 4, the principles of "implied representation" and fault applied only in absence of a specific contractual provision to the contrary.
11. 32 N.J. 358, 161 A.2d 69 (1960). See Annot., 75 A.L.R.2d 1 (1961). It is interesting to note that it was Judge Francis who wrote for a unanimous court in that case as well as the instant one and that the court is substantially the same.
13. *UNIFORM COMMERCIAL CODE* § 2-302 provides that courts can refuse to enforce any contract which they find as a matter of law to be unconscionable.
ingful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." It has also been said that "freedom of contract must mean different things for different types of contracts. Its meaning must change with the social importance of the type of contract and with the degree of monopoly enjoyed by the author of the standardized contract."

While the instant case is not governed by the Uniform Commercial Code, it is interesting that the court finds the same conditions of unconscionability said to be ameliorated by the Code. In doing so, the court is combining its own common law with the policy of an inapplicable statute, in effect applying the sales provisions of the Code to contracts for services. While the Code may not have been intended by its drafters to apply to the situation in the instant case, the Henningsen decision is the court's precedent for a liberal application of the doctrine of unconscionability. The Code provides a modern reflection of "business practices and mores" which is the standard of application of the unconscionability doctrine. Where the Code applies this test to sales transactions, the court incorporates it into its common law doctrine of unconscionability which applies to all types of business transactions.

By deciding the case on the theory of unconscionability, the court has avoided the temptation to manipulate common law concepts such as fraud, duress, offer, and acceptance to avoid an unconscionable result. These concepts are too fluid to guarantee an escape from unconscionability, and courts that succeed in avoiding an unfair result nonetheless risk confusing these concepts to a point where their conventional meaning is destroyed. These common law concepts were not designed to implement changing policy in today's more complex commercial world. The theory of unconscionability, on the other hand, is supported by modern statute and judicial decision, and the court, in employing it here, has brought the influence of social policy to bear on an underdeveloped area of the law.

15. Id. at 449.
17. The contract was signed before the effective date of the Code in New Jersey, and in any event, this was not a sales transaction.
21. Ibid.


Dallas Masterson and his wife, Rebecca, owned a ranch as tenants in common. In February 1958, they conveyed it to Dallas' sister and brother-in-law, Medora and
Lu Sine, by grant deed "[r]eserving unto the Grantors herein an option to purchase the above described property on or before February 25, 1968 [for the] same consideration as being paid heretofore plus their depreciation value of any improvements Grantees may add to the property from and after two and a half years from this date."1 Later, Dallas was adjudged bankrupt. His trustee in bankruptcy claimed, as assignee of the bankrupt's assets,2 the right to enforce the option and purchase defendant Sine's ranch. The Sines contended, however, that the parties intended the property to be kept in the Masterson family, that an oral agreement to this effect had been made at the time of conveyance, and that the option was therefore personal to the grantors and could not be exercised by the trustee in bankruptcy. Rebecca and the trustee then brought this declaratory relief action to establish which of them was entitled to enforce the option. The trial court determined that the parol evidence rule precluded admission of extrinsic evidence by defendants to show that the parties intended the property to be kept in the Masterson family. Accordingly, that court entered judgment for plaintiff-trustee, declaring his right to exercise the option. On appeal, the Supreme Court of California reversed, the majority holding that it was error for the trial court to exclude extrinsic evidence of the personal nature of the option.3

The instant case involves an area of the parol evidence rule4 which has divided

2. The applicable section of the Bankruptcy Act provides:
   (a) The trustee of the estate of a bankrupt . . . shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . .
   (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered . . .
In the instant case, the court is concerned with the assignability of an option to repurchase, which is alleged to be personal. Generally, the question of whether real estate, or interests or rights therein may be transferred, is a substantive question of real property law and depends upon state law as interpreted by the state courts. See 4A W. Collier, Bankruptcy § 70.16 (14th ed. J. Moore, R. Oglebay, F. Kennedy & L. King 1967). The controlling statute in California provides: "Property of any kind may be transferred, except as otherwise provided by this Article." Cal. Civ. Code § 1044 (West 1954). California cases decided under this section have held that an option is not assignable where there is a relation of personal trust and confidence, i.e., where the option is personal. See, e.g., Pritchard v. Kimball, 190 Cal. 757, 214 P. 863 (1923); Mott v. Cline, 200 Cal. 434, 253 P. 718 (1927). Therefore, presumably, if it is found that the option to repurchase is personal, the trustee in bankruptcy will be unable to enforce it.
3. Masterson v. Sine, supra note 1. The court was divided 5-2 in this decision, with Chief Justice Roger Traynor writing the majority opinion.
4. The term "parol evidence rule" is, of course, a misnomer. It is not a rule of evidence, but a rule of substantive law. Therefore, the policies underlying the diverse approaches to the issue herein discussed arise under the substantive law of contracts, and not the rules of evidence.

The word "parol" is also misleading, for when used with reference to the parol evidence rule, it is not limited to oral evidence, as the word implies, but to all extrinsic evidence, be it written or oral. See 9 J. Wigmore, Evidence § 2400 (3d ed. 1940).
legal scholars and produced diverse judicial precedent. The basic issue in *Masterson*
is whether extrinsic evidence may be admitted to prove that a written agreement—
clear, whole, and unambiguous on its face—is in fact, either ambiguous or only a
partial integration of the parties' intentions. This issue arises under the substantive
law of contracts, and there is disagreement between the two leading authorities.6
The divided court in *Masterson* clearly reflects this conflict of authorities; thus, a
concise statement of each commentator's view is essential in evaluating the decision.

**Parol Evidence: Corbin v. Williston**

Professor Corbin adopts the position that *all* extrinsic evidence should be admitted
to determine the intent of the parties, inasmuch as it is impossible for a court to
determine the meaning of written words when it confines itself to the four corners
of the document.6 When interpreting a contract, the object of contract law always
is to protect the justifiable expectations of the contracting parties themselves, not
those of third parties. Therefore, the mere possibility that the admission of extrinsic
evidence might defraud one of the contracting parties, or a third party, is not
considered sufficient reason to render the true intent and purpose of the contract
void by refusing to permit admission of parol evidence.7 This view is qualified by
admitting extrinsic evidence only to show the parties' true intent, and never to
vary the specific terms of the contract.8 The rationale underlying this position is
that courts should give effect to the intent of the contracting parties, rather than
ignoring it because of a mere possibility of fraud.

The Corbin theory developed in opposition to the traditional view, supported by
Professor Williston, which holds that when an agreement appears complete on its
face, the intent of the parties is irrelevant.9 Under this rule, the court is confined to
the language of the contract itself when determining whether there is any ambiguity,
and evidence is not admissible to add to the contract's terms. This view proceeds
on the premise that contract law should treat as whole that which appears on its
face to be whole. Strict application of the parol evidence rule seeks to stabilize
contractual transactions, reduce litigation, and eliminate the possibility of fraud.10

In reversing the lower court, the majority in *Masterson* indicates that it is not a
question of how the California parol evidence rule11 is to be construed, but

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5. Professors Corbin and Williston, whose views are presented infra.
6. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL
7. 3 A. Corbin, *Contracts* § 573 (1960). For a discussion of the Corbin view on this point,
8. 3 A. Corbin, supra note 7, § 583.
10. Id. § 631.
11. CAL. CIV. CODE § 1625 (West 1954), which provides: "The execution of a contract in
    writing . . . supersedes all the negotiations or stipulations concerning its matter which
    preceded or accompanied the execution of the instrument." See also CAL. CODE CIV. PROC.
    § 1856 (West 1955), providing in part:
    When the terms of an agreement have been reduced to writing by the parties, it is
to be considered as containing all those terms, and therefore there can be between
whether it is to be applied. Its application depends upon whether or not there has been an integration and what the court seeks is a criterion for determining this. In the court's own words, "[t]he crucial issue in determining whether there has been an integration is whether the parties intended their writing to serve as the exclusive embodiment of their agreement." The proposition that integration is to be determined "solely from the face of the instrument" is thereby rejected; the intent of the parties is held controlling. This reflects Corbin's position, which the court cites repeatedly in reaching its conclusion. Ultimately, the decision is based on Section 240 (1)(b) of the Restatement of Contracts, which embodies the Corbin rationale in a workable rule of law. It permits proof of a collateral agreement if it "is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract."

The Masterson deed did not explicitly provide that it contained the complete agreement of the parties, and it was silent on the question of assignability. The oral agreement that the option to repurchase was personal to the grantors in no way contradicted the written instrument. Given these facts, the court further pointed out that the statement of the reservation of the option might well have been placed in the recorded deed solely to preserve the grantor's rights against any possible future purchaser, and that this function could well be served without any mention of the parties' agreement that the option was personal. Emphasizing the family relationship that existed between the grantors and grantees, the majority concluded that such an agreement was a natural one, for it is quite reasonable that a brother and sister would desire to keep land within the family. In determining that the collateral agreement was a natural one within the meaning of the Restatement, the court was, in effect, weighing the credibility of the evidence. Having found it credible under the circumstances that it was the intent of the parties to make the option personal, the then minimal possibility of fraud was considered insufficient reason to frustrate the parties' intent.

The dissent disagrees with this conclusion, viewing it rather as the creation of a "new technique" for frustrating creditors' rights, and as a threat to the reliance placed upon written instruments affecting the title to real estate. These fears re-

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12. Masterson v. Sine, supra note 1, at 563, 65 Cal. Rptr. at 547.
13. Ibid.
14. Id. at 563-66, 65 Cal. Rptr. at 547-50.
15. Restatement of Contracts § 240 (1)(b) (1932), which states:
   (1) An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration, nor a written agreement by a subsequent integration relating to the same subject-matter, if the agreement is not inconsistent with the integrated contract, and
   (b) is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract. (Emphasis added.)
16. Ibid.
17. See text accompanying note 1 supra.
18. Masterson v. Sine, supra note 1, at 567, 65 Cal. Rptr. at 551.
sult from the court finding credibility in the testimony of the bankrupt optionee himself, and flow naturally from the dissent’s strict construction of the parol evidence rule. The dissent supports its argument for strict application by pointing out that in California, deeds are presumed to be assignable by statute. The majority’s admission of parol evidence effectually rebuts this presumption.

State Application of Parol Evidence Rule

Disagreement over application of the parol evidence rule is by no means confined to California. An analysis of other jurisdictions further reflects the diverse approaches previously discussed, and demonstrates some of the policies underlying various judicial interpretations.

Pennsylvania, for example, interprets the parol evidence rule strictly and, almost without exception, cites the leading case of Gianni v. R. Russel & Co. as controlling authority. In Gianni, the parties signed a three-year lease in which the tenant agreed not to sell tobacco in any form on the premises, but was permitted to sell soft drinks. Shortly after the contract was entered into, defendant landlord leased an adjoining room in the building to a drug company, without restricting the latter’s right to sell soda water and soft drinks. Gianni then brought this action for breach of contract and resulting damages, claiming that his promise to refrain from the sale of tobacco was given in consideration of an oral promise by the lessor to give him the exclusive right to sell soft drinks on the premises. The court held evidence of the oral agreement inadmissible, stating:

In cases of this kind, where the cause of action rests entirely on an alleged oral understanding concerning a subject which is dealt with in a written contract it is presumed that the writing was intended to set forth the entire agreement as to that particular subject. (Emphasis added.)

The court was saying, in effect, that when parties adopt a written form that gives every appearance of finality, they are required to incorporate in that form their entire agreement. If they fail to do so, unincorporated agreements relating to the same subject matter are unenforceable. This was further substantiated by the court when it stated: “[W]e . . . stand for the integrity of written contracts . . . .”

New York, like Pennsylvania, consistently applies the parol evidence rule strictly; extrinsic evidence is not admitted “if a written agreement contains no obvious or latent ambiguities” and “neither the parties nor their privies may

23. Id. at 325, 126 A. at 792.
testify to what the parties meant but failed to state." South Dakota applies the so-called four corner rule: this is a doctrine of strict application and holds that unless it appears on the face of the written instrument that this was not a complete integration of their agreement, parol evidence may not be introduced. Similarly, in Missouri, the written contract is conclusively presumed to contain all prior negotiations and to express the final agreement. Parol evidence, therefore, will not be admitted. When presented with a fact situation similar to that in Masterson, the Texas Civil Court of Appeals excluded parol evidence in a case involving an eighteen-month option to purchase land at a stated price. As a defense, the vendor alleged that at the time the option was given, the purchaser orally promised to return it if vendor obtained a loan within three months. On this issue, the jury found for the vendor, but the court held that proof of the oral promise was excluded by the parol evidence rule.

These five states, then, apply the parol evidence rule strictly, and presumably would have excluded the extrinsic evidence that the Supreme Court of California held admissible in Masterson. In several other jurisdictions, however, there is little doubt that the courts would approve of this holding.

Connecticut courts have freely admitted extrinsic evidence of oral agreements made contemporaneously with a writing that appears to be a total integration. In an action brought by plaintiffs, as assignees, for specific performance of a contract calling for defendant to transfer certain property to plaintiff's assignor, the Supreme Court of Connecticut admitted evidence of an oral agreement which provided that the assignor could not transfer his rights under the contract of sale without the defendant-vendor's consent. In reaching its decision, the court stated:

The fundamental question is one of the intent of the parties. If they intended the writing to be the repository of their final agreement, parol evidence is not admissible. If, however, it appears that the parties in-

26. Janssen v. Tusha, 66 S.D. 604, 287 N.W. 501 (1939), demonstrates the position of the South Dakota courts. An agreement between a mother and her three sons was in issue. The written agreement provided that the three sons were to pay her $500 per year for life, and certain specified balances to her estate when she died. Payments were made for fourteen years by the sons, and when the mother died, the sons contended that, pursuant to an alleged oral agreement, their obligations were completed, and that no further sums were due. No extrinsic evidence was admitted and the sons had to pay the additional amounts. This jurisdiction reached a similar result recently in Kindley v. Williams, 76 S.D. 225, 76 N.W.2d 227 (1956). See also McDonough, The Parol Evidence Rule in South Dakota and the Effect of Section 2-202 of the Uniform Commercial Code, 10 S.D.L. Rev. 60 (1965).
27. See Commerce Trust Co. v. Watts, 360 Mo. 971, 231 S.W.2d 817 (1950); Poe v. Illinois Cent. Ry., 339 Mo. 1025, 99 S.W.2d 82 (1936). See also Comment, The Parol Evidence Rule in Missouri, 27 Mo. L. Rev. 269 (1962).
tended to enter into a contemporaneous oral agreement, parol evidence will be permitted to prove such an agreement.31

The court reasoned that the intent of the parties should control, rather than the substantive contract law which treats as whole all writings appearing whole on their face.

The same rationale prevails in New Jersey, where the determinative test in admitting parol evidence is "whether the parties assented to the writing as the complete integration of their agreement. The writing itself is not conclusive of this issue."32 This rule of liberal admission has been consistently applied in this state.33 Maryland, too, has admitted evidence of an oral agreement, where the contracting parties had embodied their agreement in a seemingly complete and unambiguous instrument.34 In Virginia, contemporaneous oral agreements are admitted under the collateral contract doctrine, which states:

Where the entire agreement has not been reduced to writing, parol evidence is admissible, not to contradict or vary its terms but to show additional independent facts contemporaneously agreed upon, in order to establish the entire contract between the parties.35

Presumably then, these states would agree with the majority in Masterson.

The foregoing analysis of other jurisdictions shows that there was no uniform application of parol evidence rule for the Masterson court to follow. It is believed that in admitting extrinsic evidence, the court made the better choice. In so doing, it rejected the rigid, traditional standard of strict application in favor of the more flexible rule embodied in the Restatement. This gave the court the opportunity to weigh the credibility of the extrinsic evidence and give effect to the parties' intent. At the same time, it allowed the court to examine the possibility of fraud, thereby preserving the security of contractual transactions. Certainly, this is a proper function of the judicial process.

31. Id. at 207, 112 A.2d at 888-89.


In a previous proceeding, Judge J. Skelly Wright in a 118-page opinion rendered a judgment finding that Negro and poor children of the District of Columbia were
being denied their constitutional rights to equal educational opportunity. Pursuant to his judgment, Judge Wright entered a decree ordering the defendant Board of Education to remedy the situation. By a six-to-two vote, the Board decided not to appeal; it further ordered Dr. Carl Hansen, who was a party defendant in the suit, not to appeal in his then capacity as Superintendent of Schools. Notices of appeal and motions to intervene as of right were filed, one on behalf of Dr. Hansen in his individual capacity, and one on behalf of twenty parents, not as members of a class and not claiming a denial of a constitutional or other right. Plaintiff Hobson moved to dismiss the appeals and opposed the motions to intervene. Hansen's motion specified his interest and in other respects complied procedurally with Rule 24 of the Federal Rules of Civil Procedure, while the parents' interests were unspecified except for their asserted dissatisfaction and dissent from the Board's decision not to appeal. The court found Hansen's interest insufficient and doubted that he had any "legal interest" to protect by intervention under Rule 24. As to the parents, the court found procedural and substantive inadequacies in their failure either to file a separate pleading pursuant to Rule 24(c) or to claim any interest cognizable under Rule 24(a). The applicants—Hansen and the twenty parents—did not seek permissive intervention pursuant to Rule 24(b) because that subdivision contemplates adding parties to an existing controversy rather than permitting a new party to litigate issues the original party chose not to contest on appeal.

In a lengthy discussion, Judge Wright indicated that the applicants did not establish a right to intervene pursuant to Rule 24(a). Nevertheless, the motions to intervene were granted "in order to give the Court of Appeals an opportunity to...

2. Fed. R. Civ. P. 24 (after the 1966 amendment) [matter stricken out is in brackets; new matter is in italics]:

   (a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof. Applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

   (b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

   (c) PROCEDURE. . . . The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

3. Dr. Hansen resigned his position as superintendent.
pass on the intervention questions raised here, and the questions to be raised by
the appeal on the merits if it finds the intervention was properly allowed . . . .” 4

Applications for leave to intervene after final judgment are unusual, 5 and allow-
ance of such motions even more rare. That the motion is filed after a final judg-
ment may be sufficient ground for denying it, 6 since both subdivision (a) and (b)
of Rule 24 are couched in terms of timeliness: “the question of timeliness requires
a discretionary balancing of interests, and in this sense all intervention is discre-
tionary.” 7 (Emphasis added.) An assertion of a right to intervene may be con-
"dered timely even though made after entry of a final judgment, 8 but where there
is no proper showing of excuse for the delay, the court may in its discretion deny
intervention. 9 Such intervention may be allowed where it is necessary to preserve
some right which cannot otherwise be protected, 10 but, at so late a stage in the pro-
ceedings, a strong showing must be made. 11

An order granting intervention may be reviewed upon appeal from the final judg-
ment, 12 and denial of intervention as of right is also clearly appealable. 13 Where
the denial is by exercise of judicial discretion, the decision, if final, may be re-
viewed, but only as to whether there was abuse of discretion. 14 The Hobson court’s
analysis of existing law made out a case for denying the motions; yet it granted
them in order to probe for guidelines from the court of appeals on review. It is
questionable whether the latter court’s scope of review is broad enough to provide
these guidelines. A denial of the motions would have accomplished the same
purpose by forcing the applicants to appeal.

In Wolpe v. Poretsky, 15 adjoining landowners were allowed to intervene after
the Zoning Commission, in its suit to enforce a zoning order, had decided not to
appeal a decision that it had acted arbitrarily and capriciously in adopting the
order. A zoning statute allowed neighboring landowners an independent action.
These landowners were represented adequately by the Zoning Commission until its
decision not to appeal a questionable judgment.

The failure of the Zoning Commission to take an appeal clearly indicates
that its representation of the interest of the interveners was inadequate.
We do not go so far as to hold that adequate representation requires an
appeal in every case. But here an administrative body is charged with ar-

F. 808, 810 (C.C.S.D. Minn. 1904); Caldwell v. Guardian Trust Co., 26 F.2d 218, 222 (8th
Cir. 1928).
9. Stallings v. Conn, 74 F.2d 189 (5th Cir. 1934).
11. 2 W. BARRON & A. HOLTZOFF, supra note 7, § 594. See also 4 J. MOORE, FEDERAL PRACTICE § 24.13
(2d ed. 1967).
bittary and capricious action in the face of a strong presumption that they properly perform their duties.\textsuperscript{10}

Intervention as a matter of right existed in \textit{Wolpe}. The circumstances were such that the decision not to appeal resulted in inadequate representation of landowners' interest.

Later, in \textit{Pellegrino v. Nesbit},\textsuperscript{17} the fifth circuit echoed \textit{Wolpe} in language to the effect that intervention after a final decree must be allowed to preserve a right which cannot otherwise be protected, and that such a right is the right to appeal. \textit{Pellegrino} allowed a holder of two shares of stock to intervene after the corporation decided not to appeal from an adverse judgment in a suit against the corporation's officers to recover profits obtained from a stock purchase agreement. A statute entitled the stockholder to intervene if the corporation failed to diligently prosecute the action. The circumstances therefore were such that the stockholder was entitled to intervention as a matter of right without concern as to the substantiality of the shareholder's interest. With respect to the broad dictum in \textit{Pellegrino} the Hobson court commented:

One does not have a right to appeal in the abstract, but only if he establishes such an interest that he should be allowed to intervene to appeal to protect his interest. One does not have the right to appeal unless he can establish that his interest is not adequately represented by the decision not to appeal.\textsuperscript{18}

Judge Wright's statement is borne out by decisions subsequent to \textit{Wolpe} and \textit{Pellegrino} allowing intervention after final judgment. In \textit{American Brake Shoe \& Foundry Co. v. Interborough Rapid Transit Co.},\textsuperscript{19} bondholders represented by a bondholder-attorney in a suit contesting a corporate reorganization plan allegedly not compensating them adequately were allowed to intervene when the attorney decided to settle his claim and abandon the appeal. The intervenors clearly had an interest, and the attorney's personal decision not to appeal resulted in inadequate representation of that interest. Similarly, in \textit{Cuthill v. Ortman-Miller Machine Co.},\textsuperscript{20} where collusion between the original parties—an employee and the employer corporation—gave the employee a fraudulent judgment when the corporation failed to assert a valid defense, the court allowed a stockholder to intervene and appeal because his interest had been inadequately represented.

In \textit{Blocker v. Board of Education},\textsuperscript{21} on facts nearly identical with \textit{Hobson}, white parents, as taxpayers, were denied intervention in a desegregation suit because

\textsuperscript{10} Id. at 507.
\textsuperscript{17} Supra note 10.
\textsuperscript{18} Hobson v. Hansen, supra note 4, at 19 n.11.
\textsuperscript{19} 3 F.R.D. 162 (S.D.N.Y. 1942).
\textsuperscript{20} 216 F.2d 336 (7th Cir. 1954).
\textsuperscript{21} 229 F. Supp. 714 (E.D.N.Y. 1964). In Allen v. County School Bd., 28 F.R.D. 358 (E.D. Va. 1961), the court denied the United States the right to intervene because the relief it sought did not involve common questions of law or fact and would prejudice rights of the parties by unnecessary delay due to additional relief it sought. \textit{But cf.} later cases in which the Attorney General intervened under § 902 of the Civil Rights Act of 1964, 42 U.S.C. 2000 h-2, \textit{e.g.}, Stell v. Board of Educ., 333 F.2d 55 (5th Cir. 1964) (allowing intervention by Negro students previously accepted for transfer to an all white school
the applicants would not be "bound" by the decision. In this pre-1966 case, the now defunct "legally bound" concept was dispositive of applicants' claim. Although the court did not pass on the adequacy of representation, it did find that the effect of the decision on the applicants' taxes was purely speculative.

Determining the applicant's interest is thus a prerequisite to determining adequacy of representation. There is no present case law, however, on the "interest" required under new Rule 24(a) as amended. Under the old rule, courts finding an interest inadequately represented by a decision not to appeal predicated such a finding on the fact that the applicant would be "bound by a judgment" or be "so situated as to be adversely affected." At the same time, however, there was tendency toward liberality in applying old Rule 24(a). Nonetheless this tendency, combined with the further liberalization under the amendment, does not lead to a right of indiscriminate intervention.

In Hobson, the circumstances were unlike those in other cases granting intervention. No collusion, inadequate representation, unprotectable interest, or other circumstance is apparent to support the granting of the motions. The court clearly stated that the applicants were not entitled to intervention as of right without establishing an interest, and further establishing that their interest was inadequately represented. Yet the court allowed the intervention. Its justification for such granting is without proper basis. Although a need exists for guidelines under the new rule and the decision is of public significance, this abuse of the judicial process is not thereby justified.

in a suit by white parents to enjoin the effectuation of a voluntary plan for desegregation).


25. See Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967), a proceeding to frame a decree of divestiture after a determination that a natural gas company's acquisition of a pipeline corporation was unlawful. A natural gas distributor, whose sole supplier was the pipeline company, was allowed to intervene under the old rule after a showing of a somewhat remote but direct economic interest. The Court's irritation with the Justice Department's "knuck[ling] under" to El Paso and with the district court judge's ignoring the Court's mandate, casts some doubt as to the effect of the decision. The Cascade Court took a liberal view respecting intervention under the new rule, but the opinion does not provide clear guidelines. Cf. United States v. Chicago Title & Trust Co., 10 F.R. Serv. 2d 2451 Case 1 (Ill. 1966). See also, Kaplan, supra note 24, and Note, 16 CATHOLIC L. REV. 462 (1967).


27. Atlantis Dev. Corp. v. United States, 379 F.2d 818, 823-24 (5th Cir. 1967): The 1966 amendment to Rule 24(a) "amounts to a legislative repeal of the rigid... res judicata rule" of Sam Fox Pub. Co. v. United States, supra note 13.


On Thursday, August 11, 1966, following an exchange of checks between Byron Swidler and the stockbrokerage firm of Paine, Webber, Jackson & Curtis (Paine, Webber), Mr. Swidler deposited Paine, Webber's check in West Side Bank (West Side). On Friday, August 12, West Side presented for payment the $262,000 check to defendant, Marine National Exchange Bank (Marine), at the Milwaukee clearing house, where both were members. On Friday evening, Marine commenced the posting process by sending the check through sorting and encoding machines and through the electronic computer which charged the account of its customer and affixed a "paid" stamp. On Monday morning, the next business day, Marine's bookkeeper examined the computer report and, finding no deficiencies, photographed, cancelled, and filed the check in its customer's folder. Later Monday, at about 4 o'clock, Paine, Webber, after learning that Swidler's check had been returned for insufficient funds, notified Marine to stop payment on its check. Marine then withdrew the check from Paine, Webber's file, notified West Side that the check was being returned because of the stop-payment order, reversed the entries in the Monday night computer run, and stamped the check "payment stopped" and "cancelled in error." On Tuesday, August 16, the check was returned to West Side at the morning exchange in accordance with clearing house rules.

West Side brought an action to compel Marine to pay the check. Plaintiff moved for summary judgment on the ground that the pleadings and affidavits indicated that Marine had "finally paid" the check by completing the process of posting and was therefore indebted to West Side for the amount of the check. Summary judgment was denied and West Side appealed to the intermediate appellate court, which upheld the trial judge.

The Supreme Court of Wisconsin, in affirming the circuit court's decision, held: the process of posting was not completed until the clearing house time limit for re-

   (1) Summary judgment may be entered as provided in this section in any civil action or special proceeding. Notice of motion for summary judgment and the papers in support thereof shall be served within 40 days after issue is joined, subject to enlargement of time as provided in section 269.45.
   (2) The judgment may be entered in favor of either party, on motion, upon the affidavit of any person who has knowledge thereof, setting forth such evidentiary facts, including documents or copies thereof, as shall, if the motion is by the plaintiff, establish his cause of action sufficiently to entitle him to judgment; and, if on behalf of the defendant, such evidentiary facts, including documents or copies thereof, as shall show that his denials or defenses are sufficient to defeat the plaintiff, together with the affidavit of the moving party, either that he believes that there is no defense to the action or that the action has no merit (as the case may be) unless the opposing party shall, by affidavit or other proof, show facts which the court shall deem sufficient to entitle him to a trial.

versal of entries had expired. It asserted that the clear and unambiguous meaning of Section 4-109 (e) of the Uniform Commercial Code (UCC), allowing for “correcting or reversing an entry or erroneous action with respect to the item” permitted “the reversal of entries for any reason whatsoever (subject to the good-faith provisions of the Code) if made within the time limited for return of items to the clearing house.”3 (Emphasis added.) The court further held “[i]n view of the express approval of the statutes that the Code may be waived or altered by agreement . . . that the clearing-house agreement [superseded] any inconsistent portions of the Code, and in this instance additionally [served] to expand the time in which entries may be reversed.”4

The effect of this decision is to allow banks to postpone their liability by defining their internal process of posting as completed only when the clearing house time for returning checks has expired—usually a midnight deadline. The midnight deadline is the latest point in time in which a bank is allowed to hold a presented item before determining whether to pay it. The court held: the Code is superseded by the agreement.5 Clearing house rules may further extend the midnight deadline beyond the one provided for in the Code. Section 4-104 (h) of the UCC defines this deadline: “Midnight deadline” with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later.” (Emphasis added.) Therefore, if an item was received by the payor bank on Friday, it would have, as an outside limit, until midnight Monday to determine whether to pay. In fact, the Milwaukee County Clearing House Association has in By-Law IV, Section 3 (a) further extended this midnight deadline since it provides that “unacceptable items may be returned through the exchanges on the second business day following the date they shall be deemed presented at the exchanges.” (Emphasis added.) This means that a check presented on Friday could be returned on the “second business day following the date” of presentment, or any time until midnight on Tuesday. While Marine notified and returned the check to West Side within the time limit of the Code,6 according to clearing house rules under this interpretation, Marine had still another day within which to act. This result tends to defeat the general policy of the Code which favors prompt handling of checks and final settlement of accounts.

4. Id. at 594.
5. UNIFORM COMMERCIAL CODE § 4-103:
   (1) The effect of the provisions of this Article may be varied by agreement except that no agreement can disclaim a bank’s responsibility for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for such lack or failure; but the parties may by agreement determine the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable.
6. UNIFORM COMMERCIAL CODE § 4-301 (1). Under this section, a payor bank must return or send notice of a dishonored item before the midnight deadline. In West Side, Marine gave notice to West Side on Monday afternoon, thereby fulfilling its duty under the Code as to method of return.
At common law three rules developed fixing final payment: (1) intention-to-pay; (2) posting-to-account; and (3) recapture.7 Nineteenth Ward Bank v. First National Bank,8 a leading case which discussed intention-to-pay, held that since a check was stamped paid, perforated, filed, and “nothing more was to be done as to the payment,”9 it was finally paid and, therefore, a subsequent notice to stop payment received the same afternoon came too late. First National Bank v. Wisconsin National Bank,10 following the posting-to-account rule, held that the drawing and mailing of a remittance draft constituted payment, so that a stop order the following day was ineffective. In Bohlig v. First National Bank,11 the Minnesota court, using an ability-to-recapture test, found that since the drawee bank had the privilege under postal regulations to retrieve the mailed remittance draft, it had an obligation to do so in order to honor the stop-payment order. It concluded that the debit entry to the drawer’s account was subject to revocation, and that the drawee was liable to the drawer “for having neglected its duty to honor the stop order.”12

Under Section 136 of the Negotiable Instruments Law (NIL), a “drawee [was] allowed twenty-four hours after presentment, in which to decide whether or not he [would] accept the bill.” Section 137 of the NIL provided that “[w]here a drawee . . . [refused] within twenty-four hours . . . to return the bill . . . he [was] deemed to have accepted the same.” Lawyers, bankers, and some courts13 interpreted these sections as giving the payer bank only twenty-four hours—regardless of the circumstances—in which to return a dishonored item. Where a bank exchanged checks only once a day, this meant that it had to decide by the next morning. Banks, finding this time inadequate, and owing to the “shortage of personnel and machines during World War II,”14 instigated legislation and procedures permitting “deferred posting.” Deferred posting allowed a bank to process checks the day following presentment and, by agreement, extended the deadline for returning dishonored items. Because of a tremendous increase in the use of checks following World War II, deferred posting continued to endure in the banking community.

In response to the need for “uniformity in the law of bank collections,”15 Article IV of the UCC, Bank Deposits and Collections, attempts to set out statutory rules and procedures to govern banking on a nationwide basis. Since the UCC preempts the field, pre-Code cases are helpful only to the extent that they demonstrate

9. Id. at 52, 67 N.E. at 671.
10. 210 Wis. 553, 246 N.W. 598 (1933).
11. 223 Minn. 523, 48 N.W.2d 445 (1951).
12. Id. at 532, 48 N.W.2d at 450.
13. Wisner v. First Nat’l Bank, 220 Pa. 21, 68 A. 955 (1905) was a leading case. The result in this case was subsequently changed by PA. STAT. ANN. tit. 56, § 326 (Purdon 1964).
15. UNIFORM COMMERCIAL CODE § 4-101, COMMENT.
the context in which the Code was written. Because of the recent enactment of the Code, few cases have been decided under this section.

In accord with the general policy of the Code in favor of prompt handling and speedy retirement of checks, Section 4-213 (1), defining final payment, lists four separate actions which will constitute payment in the order in which they are most likely to occur.

(1) An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:
   (a) paid the item in cash; or
   (b) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearing house rule or agreement; or
   (c) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith; or
   (d) made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearing house rule or agreement.

Upon a final payment under subparagraphs (b), (c) or (d) the payor bank shall be accountable for the amount of the item. (Emphasis added.)

While West Side contended that Section 4-213 (1) (c) was controlling in determining when an item is finally paid, Marine argued, in the alternative, that even if this section is applicable, the definition of the “process of posting” in Section 4-109 of the UCC allows a payor bank to determine its own “usual procedure” of posting. Although this is certainly true, an interesting question arises as to whether a payor bank may attempt to establish its particular “usual procedure” by reference to clearing house rules. Section 4-213 (b) and (d) both contain phrases that their effect may be altered by “statute, clearing house rule or agreement,” while subparagraph (c) has no such language, but impliedly refers to the definition of the process of posting. Admittedly, however, Section 1-102 (4) provides that “[t]he presence in certain provisions of this Act of the words ‘unless otherwise agreed’ or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).” (Emphasis added.) Nevertheless, Section 1-102 (4) is a general provision of the Code and arguably should not be interpreted so as to render less meaningful other particular provisions.

In an attempt to determine whether final payment has occurred under Section 4-213 (1) (c), the definition of the process of posting in Section 4-109 must be examined. Section 4-109 was added to the UCC in 1962. While no reason for the addition was given by the Permanent Editorial Board, it was apparently because of the confusion which existed in determining the point at which the process of posting was completed. This section provides:

   The “process of posting” means the usual procedure followed by a payor bank in determining to pay an item and in recording the payment including one or more of the following or other steps as determined by the bank:

16. 2 NEW YORK LAW REVISION COMM’N, REPORT FOR 1955, at 161.
17. UNIFORM COMMERCIAL CODE § 4-109, Comment.
(a) verification of any signature;
(b) ascertaining that sufficient funds are available;
(c) affixing a "paid" or other stamp;
(d) entering a charge or entry to a customer's account;
(e) correcting or reversing an entry or erroneous action with respect to the item. (Emphasis added.)

This section lists five common banking practices which may indicate that a check has been paid. They are neither necessary procedures nor conjunctive conditions. Rather, they are the normal practices of a bank to be applied as tests of whether a bank has, in fact, completed the process of posting. Section 4-109 states that the process of posting may include "one or more of the following or other steps as determined by the bank." The fifth practice listed is that of "correcting or reversing an entry or erroneous action with respect to the item." Fairfax Leary, formerly Reporter for Article IV, although not an author of the final draft, seems to refer to these five procedures as necessary steps, rather than as disjunctive criteria to be determined by each bank according to its own modus operandi. Mr. Leary states that "[s]o long as time remains in which entries could be reversed, it would, in view of the enumeration of 'reversal of entries' as one of the steps included in the 'process of posting,' be difficult for a court to say that the 'process of posting' had been completed."18

The West Side court, citing Leary, held that this language included any and all reversals for any reason whatsoever as long as it occurred before the clearing house midnight deadline. Since this interpretation allows a payor bank to include the midnight deadline when it defines its usual procedure, the other four practices or steps, which normally would already be completed prior to the deadline, become meaningless.

Section 4-213 (1) (c) likewise is rendered impotent. Since its test for final payment is the completion of the process of posting, then (c) will probably never occur before (a), (b), or (d), which confounds the meaning of "which ever happens first."

Section 4-303 (l) (d), under this interpretation, adds little if anything in determining earlier liability. It states "[a]ny . . . stop-order . . . comes too late . . . after the bank has done any of the following . . . (d) completed the process of posting the item to the indicated account of the drawer . . . ." Therefore, since the process of posting is not completed until the midnight deadline, a stop-order will be honored until that time.

Section 4-303 deals generally with stop-payment instructions and their effect on checks in commerce. These instructions, frequently called the "four legals," consist of "[a]ny knowledge, notice or stop-order received by, legal process served upon or setoff exercised by a payor bank . . . ." At least one court, in an attempt to give effect to the reasoning behind disallowing late stop-orders, has relied upon the second part of Section 4-303 (l) (d) which states that the four legals come too late if the bank has "evidenced by examination of such indicated account and by action

18. Leary, supra note 7, at 360.
its decision to pay the item." This Massachusetts court, in *Yandell v. White City Amusement Park, Inc.*, found as a conclusion of law that: "By an examination of the ledger card . . . by penciling the notation on the ledger card . . . and by stamping and initialing the 'bull's eye' on each check . . . the bank had evidenced its decision to pay the checks . . . The trustee writ, therefore, was served too late to terminate or suspend the bank's right and duty to charge the amount . . . to the White City regular account." The Massachusetts court, interpreting Section 4-303 (I) (d) in the spirit in which it was written, preferred to avoid the question of process of posting and decided the case on the basis that the bank "otherwise [had] evidenced by examination of such indicated account and by action its decision to pay the item." Had Marine decided to ignore the stop-payment order and been sued by Paine, Webber, the court easily could have found that Marine had evidenced an intention to pay. Instead, by its broad interpretation of "process of posting," the Wisconsin Supreme Court diminished the meaning and value of several sections.

It is difficult to believe that the Permanent Editorial Board of the UCC intended the addition of Section 4-109 (e) to render meaningless other sections of the Code. Apparently, they attempted to affirm the common-law doctrine of early payment as expressed in the *Nineteenth Ward Bank* case—a decision to pay and some recording of that decision. It is also difficult to believe that they intended to extend the time for the process of posting to the clearing house deadline. If they had meant that, it would have been easy so to state.

Subsection (e) of Section 4-109 is more readily and meaningfully understood as a concession to computerized banking. The correcting and reversing of an erroneous action more logically refers to mechanical errors involved when using an elaborate system of computers to process checks. Mr. Leary recognized this meaning stating that "human error, and sometimes even machine error, can creep in. And so one of the included steps in the process of posting includes the correction of errors and reversal of entries." Under this interpretation, the process of posting is extended, not to the midnight deadline, but until the last normal procedure for scrutinizing checks has been completed. While it will be conceded that Section 4-109 (e) is ambiguous on its face, and that there is no official legislative history dealing with this section, at the same time an attempt should be made to interpret the Code as internally consistent. Allowing the reversal of entries for mechanical error but not for subsequent stop orders would render this section of the Code both meaningful and consistent. In the final analysis, the real tests in 4-109 are: (1) the determination to pay, and (2) some recording of the payment.

In *West Side*, the check in question had already been filed in the folder of the drawer and nothing remained to be done according to the bank's usual procedure. No clerical or mechanical error occurred in the process of posting. A stop order

20. Id. at 585.
was received from a good customer of Marine subsequent to filing. Marine reversed the procedure at this point to the benefit of its customer and the Supreme Court of Wisconsin upheld its action.

It is doubtful whether the Code's draftsmen intended such a construction as the West Side court imposed. Full responsibility for confusion, however, should not rest on that court alone. The drafters of the Code, in view of this decision, may well wish to revise Section 4-109 (e).


Defendants Ronald and Jacqueline Heck owned and maintained a residence on a 186- by 2800-foot parcel of land in Northampton Township. The land was chosen for its suitability as an airstrip for Mr. Heck's light plane. Two plaintiffs own land adjoining the Heck's and a third lives directly across the road. The adjoining lots are separated from the Hecks' property by tree lines; a summer concert site is under construction approximately one mile to the southeast. On the fourth side is a heavily wooded vacant lot. The property, zoned as a residence district, may be used only for agriculture or for a single- or two-family dwelling. The zoning ordinance provides for accessory uses customarily incidental to the permitted primary ones.

Soon after purchasing the property, the Hecks began preparing the airstrip site. The airstrip was to be approximately 100 by 2,200 feet and was to be used by Mr. Heck and, occasionally, by his invited guests. After the Hecks had expended approximately $8,200 preparing the site, the plaintiffs, one of which was the zoning board, sued to enjoin further construction. A temporary injunction granted by the Court of Common Pleas of Summit County, Ohio, was dissolved after trial in the same court. The court found that the proposed airstrip was purely for private use, that the defendants' plane could use this airstrip without danger to adjacent landowners, and that the noise of the plane was no louder than that of a gas lawn mower. Plaintiffs' counsel stipulated that operation of the airstrip would not constitute a nuisance per se. The court's conclusions of law were that the airstrip was an accessory use to a residence, that no rational relationship to the public safety or welfare existed in application of this zoning ordinance to the defendants' property, that to refuse a permit would be an invasion of the defendants' constitutional right to use the property as they saw fit, and that it is the policy of Ohio to promote aviation.\(^1\) The injunction was dissolved. The court of appeals reversed and held

\(^{1}\) Samsa v. Heck, No. 259565 (C.P. Ohio 1966).
that the court should not supersede the judgment of the township, that the legisla-
tion falls within constitutional limitations, and that a personal airstrip is not an
accessory use to a residence. The decision of the court of appeals contains three
major issues: the scope of judicial inquiry into zoning board decisions; the limits of
the police power; and the nature and purpose of the accessory use concept in zoning
law.

I. Scope of Judicial Inquiry into Zoning Board Decisions

In evaluating a zoning board decision, a court will not substitute its judgment
for the board’s if the correctness of the board’s decision is clear or at least debat-
able. The board’s decision is entitled to a presumption of validity which fails only
when the record indicates arbitrary and unreasonable action. Most modern opin-
ions counseling deference to a zoning board’s decision trace their origin to Village
of Euclid v. Ambler Realty Co. Deference was sanctioned by the United States
Supreme Court in that opinion, but it does not stand for the proposition that
zoning boards are infallible. Their decisions are the same as any other administra-
tive body: they should be given serious consideration. Less than two years after
Euclid, the Court demonstrated this point in Nectow v. City of Cambridge, where it looked closely at the merits of the zoning board’s decision, voiding it as
applied to a specific piece of property.

Euclid and Nectow are distinguishable. In Euclid, the Court refused to overturn
a legislative decision of the zoning board where only the board’s power to validly
adopt a zoning ordinance was challenged. The landowner’s attack in Nectow, on
the other hand, was directed at the board’s action as it affected specific property,
i.e., Nectow was an attack upon the board’s administrative act. Together, these
decisions mean that zoning generally is a proper function of the local legislature
under its police power, but one which may, when specifically applied, exceed this
power. Following Nectow, courts should look more closely at the merits of a zoning
board’s decision when the challenge is to an administrative act as opposed to a
legislative decision.

II. The Limits of the Police Power

To be valid, zoning which restricts personal or property rights, must have a law-
ful purpose within the community’s police power. Legislation under this power
must further the health, safety, morals, or general welfare of the community. Many

5. 272 U.S. 365 (1926).
6. City of Miami Beach v. Lachman, 71 So. 2d 148 (1953).
7. Ibid.
8. 277 U.S. 183 (1928).
10. 8 E. MCQUILLIN, MUNICIPAL CORPORATIONS 54 (3d rev. ed. 1965); State v. Joseph,
139 Ohio St. 229, 39 N.E.2d 515 (1942).
states have adopted the Standard Zoning Enabling Act,\textsuperscript{11} which states that the furtherance of these objectives is the purpose of zoning. In a case involving a personal airstrip, the court should confine its consideration to the public safety and welfare as bases for exercising the police power.\textsuperscript{12}

The most obvious safety objective would be the protection of adjacent landowners' lives and property. The danger from which they are protected must, however, be greater than the mere apprehension of injury;\textsuperscript{13} danger must be measured by an objective standard rather than by the opinions of a few parties.\textsuperscript{14} The safety of airports depends primarily upon three elements: the type of aircraft using the facility; the length of the runways; and the character of the surrounding land and its uses. Illustrating the second element, the Ohio Division of Aviation requires commercial airports within the state to have runways of at least 100 feet by 1,800 feet.\textsuperscript{15} \textit{Warren Township School District v. City of Detroit},\textsuperscript{16} illustrates the third element. There, two school buildings, a U.S.O. building, and a church adjoined what was to be the Detroit Municipal Airport. One school with an enrollment of 910 students, was only 125 feet from the proposed airport. An injunction to prohibit construction of the airport was denied. The first element, variety of aircraft, needs no illustration.

Public welfare as a basis for the exercise of police power is, among zoning criteria, the least susceptible of definition, but that it does have its limits is without doubt. The general welfare does not authorize acts founded upon mere expediency, whim, caprice, or sentimental objects;\textsuperscript{17} it does go beyond the public health, safety, and morals.\textsuperscript{18} The basis which supports the invasion of an owner's property rights and its sufficiency must be judged by reference to the operation of the particular ordinance provision on specific property.\textsuperscript{19} If such basis is lacking, the ordinance is banned by the fourteenth amendment and cannot be sustained.\textsuperscript{20}

In determining what furthers the public welfare, the court should weigh the public interest in fostering the proposed use against its interest in enforcing the ordinance.\textsuperscript{21} A question to be answered before this balance can be struck is: How large a public is to be considered in making the determination? Local interests may be contrary to the welfare of the public at large, and when this is the case, the local interests must yield.\textsuperscript{22} Interests of a township may be contrary to the policy of Ohio favoring the development of civil aviation.\textsuperscript{23} In \textit{Yorkavitz v. Board of Commerce}, A STANDARD ZONING ENABLING ACT (rev. ed. 1926).

17. \textit{E. McQuillen, supra} note 10, at 60.
20. \textit{Ibid.}
Township Trustees, the court invoked this policy to strike down local legislation declaring airports to be a nuisance per se. The United States has a similar policy favoring the development of civil aviation. That the public has an interest in fostering aviation has been recognized even in the absence of an express statute. In other areas, e.g., defense housing, a local zoning ordinance has been required to yield to an interest deemed to be greater.

While no case involving the use of property for a personal airstrip in violation of a zoning ordinance has been found, at least two cases involving public or commercial airports have been litigated. In both, the landowner-airport operator prevailed. Numerous suits instituted by adjoining landowners to enjoin construction or operation of an airport have come before the courts on a theory of nuisance. Since the law of nuisance may be consulted, not for controlling law, but for helpful analogies in ascertaining the scope of the police power, those decisions are relevant. Those cases held that an airport is not a nuisance per se and may not be made such through an act of a local legislature. While the manner in which an airport is operated may constitute a nuisance, it does not follow that the mere presence of airplanes or operation of an airport will result in a nuisance.

III. The Nature and Purpose of the Accessory Use Concept in Zoning

Two types of zoning provisions are in common use today. The “exclusive-type” ordinance permits any use not specifically prohibited; the “inclusive-type” permits only uses specifically named. The zoning ordinance involved in the Samsa case is the latter. When the “inclusive-type” ordinance is used, an accessory use provision is often included. This results in more flexibility.

Generally, accessory uses are permitted if they are customarily incidental to the permitted use. Their purpose is to include uses not specifically named in an “inclusive-type” ordinance, provided they do no violence to the ordinance’s plain intent. In Pratt v. Building Inspector, the zoning ordinance was silent as to accessory uses; but the court held that an accessory use incident to a residential district was impliedly permitted. The court went on to hold that to allow accessory uses is only to apply the ordinance in a reasonable manner guided by the intent to maintain the neighborhood.

24. 166 Ohio St. 349, 142 N.E.2d 655 (1957).
32. Thrasher v. City of Atlanta, supra note 13.
34. 3 J. METZENBAUM, ZONING 1811 (2d ed. 1955).
35. Ibid.
An unreported Ohio decision, Csanyi v. Turocy, not involving a zoning ordinance, has held a personal airstrip to be an incidental use to a residence for purposes of interpreting a private covenant restricting use of the property to a single-family residence and against nuisance.

Building Inspector v. Gingrass, a case relied upon by the appellate court in Samsa, found that the use of a garage for storing a seaplane was not an accessory use to a residence under the zoning ordinance. The court in Gingrass, as in Samsa, based its decision primarily upon a finding that the presence of a seaplane was not customary in a residence district. The reasonableness of the ordinance, as applied, was not discussed in Gingrass.

Pratt and Gingrass represent two distinct approaches to accessory uses. The Pratt approach is the better, for it recognizes that accessory uses should be permitted, even in the absence of a provision in the ordinance, if they do not impair the purpose of the ordinance. Under the Gingrass approach, a use innocuous to the plan of the ordinance could be excluded merely because it was not customary. An ordinance thus applied would be vulnerable to attack as arbitrary and capricious and lacking sufficient bases to justify invasion of the property owner’s rights.

IV. Conclusion

In deciding Samsa, the appellate court failed to analyze the scope of judicial inquiry or consider the limits of safety and the public welfare as bases for exercising the police power. Furthermore, the accessory use issue was approached formalistically rather than through the better reasoned Pratt test. Had that test been applied, the court could have discarded the “customary” requirement and allowed this accessory use by implication rather than looking for it in the ordinance itself. With the customary requirement discarded, the use need only be incidental to the primary use. Csanyi had already held a personal airstrip to be a use “incidental” to a residence.

40. 8 E. McQUILLIN, supra note 10, at 60.
41. See Nectow v. City of Cambridge, supra note 8.