SEBASTIAN GANGEMI ET AL. *v.* ZONING BOARD OF APPEALS OF THE TOWN OF FAIRFIELD (SC 16208)

McDonald, C. J., and Borden, Norcott, Katz, Palmer, Sullivan and Vertefeuille, Js.[1]

Argued June 1, 2000—officially released January 2, 2001

Counsel

John E. Curran, for the appellants (plaintiffs).

Richard H. Saxl, for the appellee (defendant).

John F. Fallon, for the appellees (intervening defendants).

Opinion

BORDEN, J. The dispositive issue in this certified appeal is whether the continued maintenance of a certain ''no rental'' condition imposed on a zoning variance granted to the plaintiffs in 1986 by the defendant, the zoning board of appeals of the town of Fairfield (board), which the plaintiffs did not challenge by direct appeal at that time, violates the public policy against restraints against alienation of property. The plaintiffs, Sebastian Gangemi and Rebecca J. Gangemi, appeal, pursuant to

Appellate Court affirming the judgment of the trial court. The trial court dismissed the plaintiffs' appeal from the defendant's denial of their application to invalidate the no rental condition for lack of subject matter jurisdiction.[2] The plaintiffs claim that the trial court improperly dismissed their appeal because the continued maintenance of the condition violates the strong public policy against restraints on the alienation of property.[3] We agree. Accordingly, we reverse the judgment of the Appellate Court.

In 1986, the plaintiffs secured a zoning variance from the board, one condition of which was "[o]wner occupancy only."[4] In 1996, the Fairfield zoning enforcement officer determined that the plaintiffs were violating the condition by renting their property, and he ordered them to comply with the condition. The plaintiffs applied to the board requesting that it invalidate the condition. The board denied the application. The plaintiffs appealed to the trial court, which rendered judgment dismissing the appeal. The plaintiffs appealed to the Appellate Court, which affirmed the trial court's judgment. *Gangemi* v. *Zoning Board of Appeals*, 54 Conn. App. 559, 736 A.2d 167 (1999). This certified appeal followed.[5]

The procedural history and certain of the undisputed facts of the case are set forth in the opinion of the Appellate Court as follows. "[T]he plaintiffs are the owners of property located at 863 Fairfield Beach Road in Fairfield. On March 13, 1986, the plaintiffs filed an application with the board requesting a variance in the setback requirements from the Fairfield zoning regulations. The variance that the plaintiffs sought would have allowed them to enlarge their nonconforming home[6] and also would have allowed them to convert the home from summer use to year-round use. The plaintiffs asserted that to complete the conversion of the home, they needed to enclose the existing porch, enlarge the bathroom and construct a furnace room. In their application, the plaintiffs indicated that they '[intended] to use the property for family use only on a [year-round] basis.'

"The board conducted a public hearing on the plaintiffs' application. On May 1, 1986, the board granted the plaintiffs' application subject to the following conditions: (1) the plaintiffs would provide two off-street parking spaces; and (2) the use of the home would be limited to family use and would not be used for rental purposes.[7] The plaintiffs did not appeal or otherwise challenge the validity or imposition of either condition. Thereafter, in 1990, the plaintiffs moved out of the home and started renting the property to various tenants. On May 20, 1996, Peter Marsala, Fairfield's zoning enforcement officer, issued to the plaintiffs an order to comply that indicated that the plaintiffs were violating the board's conditional approval by renting the home and

ordered the plaintiffs to have the tenants vacate the subject property.

"Thereafter, on June 3, 1996, the plaintiffs filed an application with the board requesting that the board invalidate the no rental condition and, thereby, reverse the order to comply. On August 1, 1996, the board conducted a public hearing and denied the plaintiffs' application.[8] The plaintiffs appealed from the board's decision to the Superior Court on August 21, 1996, pursuant to General Statutes § 8-8 (b). The Superior Court concluded that the plaintiffs' failure to file an appeal challenging the validity of the no rental condition within fifteen days from the date when notice of the board's decision was published in 1986 deprived the court of subject matter jurisdiction to entertain the appeal." Id., 561–63.

In addition, certain other sets of facts are undisputed. The first involves the extent and context of the variance at issue as it is currently maintained. The variance permitted the plaintiffs to reduce the required side setback line from 7 feet to 3.2 feet, thus giving them an additional 3.8 feet of footprint and adding 59.6 square feet to their house. In this connection, we note that the variance also gave the plaintiffs permission to convert the house from a seasonal cottage to a year-round dwelling by enclosing the open porch and adding a one-story addition in order to enlarge the bathroom and construct a furnace room. At oral argument before this court, the parties informed us that, at the time the variance was granted, applicable zoning regulations permitted only seasonal use of the plaintiffs' property. The parties further informed us, however, that the zoning regulations have since been amended to eliminate the prior seasonal restriction, thereby permitting year-round use.[9] Thus, under the current zoning regulations, the plaintiffs' house, as well as all of the other houses in the Fairfield beach district, may now be used year-round irrespective of the variance and its original conditions.

Second, the property in question is located within the Fairfield beach district, which is subject to § 11.1.1 of the Fairfield zoning regulations. Section 11.1.1 of the Fairfield zoning regulations imposes the following limitations: "A single detached dwelling for one family . . . [and] no dwelling or dwelling unit in the Beach District may be occupied by more than four (4) unrelated persons." Thus, there is nothing in the zoning regulations that prohibits either the plaintiffs or any other property owners in the beach district from renting their houses to others. Moreover, there is nothing in our zoning statutes that, at least specifically, permits such a flat prohibition.

The third set of facts involves the absence from the applicable zoning restrictions of any provision limiting occupancy to "families."[10] The only restriction in this regard is in § 11.1.1 of the Fairfield zoning regulations

that ''no dwelling or dwelling unit in the Beach District may be occupied by more than four (4) unrelated persons.'' Thus, presumably all other property owners in the beach district are permitted, and but for the no rental condition in question the plaintiffs would be permitted, to rent their houses to four friends or, for that matter, to four individuals who do not even know one another but who are willing to share a beach rental for the summer—or even for the entire year. In fact, *all* the property owners in the beach district, *including* the plaintiffs, could legally *sell* their properties to four such individuals. The point is that the town has not seen fit to limit occupancy in the beach district beyond these two elements: (1) no more than four unrelated persons; and (2) occupying a single-family type structure.

With this undisputed factual background in mind, we turn to the legal standard that controls the present case. In *Upjohn Co.* v. *Zoning Board of Appeals*, 224 Conn. 96, 102, 616 A.2d 793 (1992), we held that the plaintiff, ''having secured [certain zoning] permits in 1983 subject to condition seven and not having challenged the condition by appeal at that time, was precluded from doing so in the 1986 enforcement proceedings at issue in this case.'' Two considerations, which are relevant to the present case,[11] led to that conclusion.

First, we reasoned that the rules requiring a contemporaneous appeal from the imposition of a zoning condition, and thus depriving a trial court of subject matter jurisdiction over a subsequent challenge, rest ''on the need for stability in land use planning and the need for justified reliance by all interested parties—the interested property owner, any interested neighbors and the town—on the decisions of the zoning authorities.'' Id. Second, we noted that ''there are limits to the notion that subject matter jurisdictional defects may be raised at any time''; id., 103; and that those limits applied to that case because ''[t]he lack of jurisdiction, if any, was far from obvious, [the plaintiff] had the opportunity to challenge it at the time, and we perceive[d] no strong policy reasons to give [the plaintiff] a second opportunity to do so now.'' Id., 104.

Despite this conclusion and reasoning, however, we ''recognize[d] . . . that there may be exceptional cases in which a previously unchallenged condition was so far outside what could have been regarded as a valid exercise of zoning power that there could not have been any justified reliance on it, *or in which the continued maintenance of a previously unchallenged condition would violate some strong public policy*.''[12] (Emphasis added.) Id., 104–105. We conclude that, under the facts of the present case, the continued maintenance of the no rental condition violates our strong public policy against restrictions on the free alienability of property.

We begin by emphasizing that, under this prong of

the *Upjohn Co.* formulation, we focus, not on the state of affairs that existed when the condition at issue originally was imposed, but on the current state of affairs in which the condition is being enforced. Thus, in the present case, we do not focus, as we do with regard to the first prong of *Upjohn Co.*, on whether the condition was so far outside the normal limits of zoning authority that there could not have been any ''justified reliance'' on the challenged condition. Id., 105. Instead, we focus on the ''continued maintenance'' of the condition, and whether, irrespective of the fact that the condition was ''previously unchallenged,'' it nonetheless currently ''violate[s] some strong public policy.'' Id.

It is undisputable that ''[i]t is the policy of the law not to uphold restrictions upon the free and unrestricted alienation of property unless they serve a legal and useful purpose.'' *Peiter* v. *Degenring*, 136 Conn. 331, 336, 71 A.2d 87 (1949). It is also undisputable that this policy is strong and deeply rooted. J. Dukeminier & J. Krier, Property (3d Ed. 1993) p. 223 (''[t]he rule against direct restraints on alienation is an old one, going back to the fifteenth century or perhaps even earlier''). Moreover, it is undisputable that the right of property owners to rent their real estate is one of the bundle of rights that, taken together, constitute the essence of ownership of property. See, e.g., id., p. 86 (''[property] consists of a number of disparate rights, a 'bundle' of them: the right to possess, the right to use, the right to exclude, the right to transfer''). The question that the present case poses, therefore, is whether, under the facts of this case, the continued maintenance of the no rental condition serves ''a legal and useful purpose.'' *Peiter* v. *Degenring*, supra, 336; see also T. Tondro, Connecticut Land Use Regulation (2d Ed. 1992) p. 89 n.185 (''[t]he real question is whether a valid zoning objective is being served''). We conclude that it does not.

Owners of a single-family residence can do one of three economically productive things[13] with the residence: (1) live in it; (2) rent it; or (3) sell it.[14] Thus, if the owners of a single-family residence do not choose, for reasons of family size[15] or other valid reasons, to live in the house they own, their only viable options are to rent it or to divest themselves entirely of their ownership by selling it. Stripping the plaintiffs of essentially one-third of their bundle of economically productive rights constituting ownership is a very significant restriction on their right of ownership. In addition, when the variance was granted in 1986, the no rental condition deprived the plaintiffs only of the right to rent their property on a seasonal basis.[16] With the change in the zoning regulations, however, the plaintiffs now also have lost the more significant right to rent their property on a year-round basis, resulting in a total loss of the right to rent.

Furthermore, the maintenance of the no rental condi-

tion in the present case not only strips the plaintiffs of one of those three options, it also significantly reduces the value of the third because when they do put the house on the market it will necessarily bring significantly less than the fair market value that it would have commanded without the condition. It takes little imagination to predict that the only pool of potential buyers for a house with a no rental condition permanently attached to it would be those persons who are so confident that their life circumstances will never change that, despite the passage of time or changes in health or family circumstance, they will, forever, either occupy the house or sell it. Moreover, those potential buyers also will have to be supremely confident that, when *they* go to sell it, they also will be able to find buyers who have the same degree and type of confidence. Needless to say, this surely will be a very small pool of buyers, thus significantly and adversely affecting the fair market value of the house.

Finally, insofar as this record discloses, the condition limiting the plaintiffs' economic use of the house to occupancy, and prohibiting their economic use of it by renting it, is a limitation that does not adhere to the rest of the property owners in the beach district. Thus, the most obvious consequence of the continued maintenance of the no rental condition on the plaintiffs' property is to give those other property owners a grossly unfair advantage over the plaintiffs in the marketplace. A house, particularly a house located in a beach district, that can never be rented obviously would be significantly less desirable to a potential purchaser than the rest of the houses in the beach district, which do not have such a drastic limitation on their economic use.[17]

Neither the state zoning statutes nor the local zoning regulations place any such limitation on those other property owners. Thus, whatever adverse consequences to other properties may be imagined to flow from occupancy of the houses in the beach district by *renters* as opposed to *owners* cannot be reasonably attributable to the plaintiffs' use of their property, because presumably no other properties are so encumbered. Put another way, if all or most of the other houses in the beach district legally can be rented to any group of four or fewer unrelated persons, we fail to see how this condition on this one house conceivably may serve any legal or useful purpose—except to maintain the unfair market advantage that the other unencumbered houses have, a purpose that the law should hardly label as "legal and useful . . . ." *Peiter* v. *Degenring*, supra, 136 Conn. 336.

Finally, the continued maintenance of this no rental condition violates another strong and deeply rooted policy, namely, the policy against economic waste. Our law has long recognized such a policy. See *Levesque* v. *D & M Builders, Inc.*, 170 Conn. 177, 181–82, 365 A.2d

1216 (1976). By artificially and significantly devaluing the plaintiffs' property, as compared to the value of the surrounding parcels, the continued maintenance of the condition in question removes from the marketplace, and thereby from the economy, that significant differential in value. We can see no legal or useful purpose in doing so. The consequence of such conduct is economic waste.

We acknowledge that permitting the plaintiffs to challenge the condition now means that they will receive what could be regarded as a windfall, because they secured a variance in 1986 coupled with the no rental condition, and it is possible that, had the condition not been imposed, either the zoning authority might not have granted the variance[18] or an aggrieved neighbor might have successfully challenged the granting of the variance by way of appeal at that time. Moreover, for the period between 1986, when they secured the variance, and whenever the zoning regulations were amended to eliminate the seasonal use restriction on the beach district, the plaintiffs had the full benefit of the variance. That, however, does not alter our conclusion, however, for two reasons.

First, whenever the law permits a previously imposed condition to be challenged collaterally—as the dictum in *Upjohn Co.* suggested and as we now hold—some similar windfall is afforded the property owner. Indeed, subsequent to our decision in *Upjohn Co.* we implicitly permitted a condition that was personal to the property owner to be challenged collaterally. See *Reid* v. *Zoning Board of Appeals*, 235 Conn. 850, 670 A.2d 1271 (1996). Thus, the presence alone of such a windfall cannot be enough to preclude such a collateral attack because it is inherent in the *Upjohn Co.* formulation. Second, on the facts of the present case the windfall amounts to: (1) an additional 3.8 feet of width and 59.6 square feet to the plaintiffs' house; and (2) the full use of the variance for a finite period of time, namely, from 1986 to whenever the zoning regulations were amended. Against this, however, must be balanced the current effects of the condition. Those effects are: (1) the drastic and direct restriction on the alienability of the plaintiffs' property; (2) its grossly unfair consequence, when compared with the freedom of alienability of the other property owners in the beach district; and (3) the fact that the restriction is, unlike the second part of the windfall, temporally unlimited—in fact, permanent. This balance leads us to conclude that the no rental condition is so restrictive of the plaintiffs' ability to alienate their property that it outweighs the public policy considerations underlying the bar on collateral attacks.[19] We need not, and do not, decide whether a no rental condition may never be valid in the zoning context. Compare *Kirsch Holding Co.* v. *Manasquan*, 59 N.J. 241, 281 A.2d 513 (1971) (invalidating regulation prohibiting rental to groups of persons not meeting

statutory definition of family), *United Property Owners Assn. of Belmar* v. *Belmar*, 185 N.J. Super. 163, 447 A.2d 933 (1982) (invalidating regulation prohibiting rental for one year or less when residence not intended to be permanent residence of renter), *Kulak* v. *Zoning Hearing Board*, 128 Pa. Commw. 457, 563 A.2d 978 (1989) (condition to special exception requiring apartment building owner to reside in one apartment did not serve any valid zoning purpose, but owner nonetheless bound because not appealed from when imposed), and 5 A. Rathkopf & D. Rathkopf, The Law of Zoning and Planning (4th Ed. Ziegler 2000) § 56A.02 [1] [e], p. 56A-8 ("[t]he principle that zoning enabling acts authorize local regulation of 'land use' and not regulation of the 'identity or status' of owners or persons who occupy the land would likely be held to apply to invalidate zoning provisions distinguishing between owner-occupied and rental housing"), with *Ewing* v. *Carmel-by-the-Sea*, 234 Cal. App. 3d 1579, 286 Cal. Rptr. 382 (1991), cert. denied, 504 U.S. 914, 112 S. Ct. 1950, 118 L. Ed. 2d 554 (1992) (upholding constitutionality of ordinance prohibiting rental of residential property for fewer than thirty days), and *Kasper* v. *Brookhaven*, 142 App. Div. 2d 213, 535 N.Y.S.2d 621 (1988) (upholding ordinance requiring homeowners who apply for accessory rental apartments to occupy principal residence).

It may be that where such a condition is imposed by virtue of a statute or regulation that is of district-wide application and is tailored to a specific land use policy; see, e.g., *Ewing* v. *Carmel-by-the-Sea*, supra, 234 Cal. App. 3d 1590 (maintenance of residential character of district by prohibiting very short term rentals); such a condition might be valid. Where, however, as in the present case, the no rental condition is not district-wide and therefore presumably applies only to the property at issue, thereby affording the other property owners in the beach district a distinct market advantage, and there is no other regulation even approaching its scope or purpose, the continued maintenance of the no rental condition serves no valid purpose, and violates the strong and deeply rooted public policy in favor of the free and unrestricted alienability of property.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to remand the case to the trial court for further proceedings according to law.

In this opinion NORCOTT, PALMER and VERTEFEUILLE, Js., concurred.

[1] This appeal originally was heard by a panel consisting of Justices Borden, Norcott, Katz, Sullivan and Vertefeuille. Thereafter, the court, pursuant to Practice Book § 70-7 (b), sua sponte, ordered that the case be considered en banc. Chief Justice McDonald and Justice Palmer were added to the panel, and they have read the record, briefs and transcript of the original oral argument.

[2] Judith Kramer and Barry Kramer, the owners of the property abutting the property owned by the plaintiffs, intervened as defendants in the trial court, and have participated as such in this appeal. Hereafter, we refer to

the board and Judith and Barry Kramer collectively as the defendants.

[3] The plaintiffs also claim that: (1) the condition was void as being personal in nature; (2) the condition was so far outside what could have been regarded as a valid exercise of zoning power that there could not have been any justified reliance on it; and (3) the condition constituted an unconstitutional taking of the plaintiffs' property without just compensation. In view of our conclusion that the continued maintenance of the condition violates public policy, we need not, and do not, consider any of these other claims.

[4] The parties and the Appellate Court have characterized this as a ''no rental'' condition, prohibiting the plaintiffs from renting the property in question. For purposes of consistency, we adhere to this characterization.

[5] We granted the plaintiffs' petition for certification to appeal, limited to the following issue: ''Did the Appellate Court properly conclude that the trial court lacked subject matter jurisdiction over the plaintiffs' appeal from the decision of the zoning board of appeals' refusal to invalidate the 'no rental' condition on the 1986 zoning variance?'' *Gangemi* v. *Zoning Board of Appeals*, 251 Conn. 911, 739 A.2d 1248 (1999).

[6] It is undisputed that the plaintiffs' lot consists of 3979 square feet, although the zoning regulations applicable to the Fairfield beach district require 9375 square feet. The record does not disclose whether other lots in the beach district are similarly nonconforming. We note, however, that in their original application for a variance the plaintiffs asserted that ''[a]n examination of the Assessor's map along the entire length [of Beach Road, on which the plaintiffs' property fronts] would reveal that the average lot is only 30-50' in width and is nonconforming according to present zoning regulations.''

[7] ''Property located within the beach district in Fairfield is subject to § 11.1.1 of the Fairfield zoning regulations, which provides in relevant part: 'A single detached dwelling for one family . . . [and] no dwelling or dwelling unit in the Beach District may be occupied by more than four (4) unrelated persons.' The plaintiffs' property is located within the beach district.'' *Gangemi* v. *Zoning Board of Appeals*, supra, 54 Conn. App. 562 n.4.

[8] ''The board, in its denial of the application, stated the following reasons: 'The Board felt that the [board] in 1986 did not attach the condition to the variance as it was offered by the applicant on the applicant's application for a variance and the application was basically approved as submitted. It would be absurd to now allow the applicant to come forward and simply say we did not mean what we said when we originally applied for the variance or that we have now changed our mind. This Board further finds that because of the proximity of the houses in the beach section it does create a uniqueness and because of its uniqueness this condition of family use only can be defended as it does promote the public health of the neighborhood, it promotes the general welfare of the neighborhood and it does in fact conserve the value of the buildings located in the neighborhood.' '' *Gangemi* v. *Zoning Board of Appeals*, supra, 54 Conn. App. 562–63 n.5.

[9] The record does not reflect, however, precisely when that amendment to the zoning regulations took effect.

[10] The parties assume that the zoning restriction to ''[a] single detached dwelling for one family'' refers, not to the persons occupying the house, but instead to the type of house, namely, a single-family type dwelling. Indeed, this is the only plausible interpretation, given the limitation in the next sentence of the zoning regulation to occupancy by not ''more than four (4) unrelated persons.'' See Fairfield Zoning Regs., § 11.1.

[11] A third consideration was specific to the facts of *Upjohn Co.*; *Upjohn Co.* v. *Zoning Board of Appeals*, supra, 224 Conn. 103; and is inapplicable to this case.

[12] In this connection, we note that this statement was not a holding of *Upjohn Co.*, but was dictum. This is apparent from the very next two sentences in the decision: ''It may be that in such a case a collateral attack on such a condition should be permitted. We leave that issue to a case that, unlike this case, properly presents it.'' *Upjohn Co.* v. *Zoning Board of Appeals*, supra, 224 Conn. 105. Nonetheless, we now conclude that the present case properly presents the issue, and we adopt the exception that we suggested in *Upjohn Co.* and apply it to the facts of this case.

[13] The dissent's characterization of the other sticks in an owner's bundle of rights, such as the right to exclude, to occupy, to improve, and the like; see footnote 10 of the dissent; do not undermine our tripartite characterization. All of those individual sticks are, we acknowledge, legal incidents of ownership. From a practical standpoint, however, an owner's *economic*

choices boil down to occupying, renting or selling.

[14] Of course, such owners also have the economically unproductive option of leaving the residence unoccupied. The law should not, however, encourage economic waste. See the subsequent discussion.

[15] In the present case, the plaintiffs alleged in their complaint that "[c]ommencing in the Fall of 1989, following the birth of a second child, the plaintiffs found it impractical to utilize the premises for their growing family. They thereafter moved out and allowed a family friend to reside on the premises for approximately one year. Following said year they rented to a series of professional and business people on a year-to-year basis." The trial court had no opportunity to consider this allegation because it dismissed the appeal on subject matter jurisdictional grounds.

[16] Indeed, the change in the zoning regulations to permit year-round rental of properties in the beach district is consistent with the public policy favoring the free alienation of property.

[17] At oral argument before this court, the defendants informed us that there may be other houses in the beach district that had a similar condition placed on them when variances were granted. The record, however, does not disclose this. Furthermore, the defendants do not represent that such a condition encumbers most or all of the houses in the beach district. Finally, even if there are other such houses, the likely conclusion to be drawn would be that those conditions are invalid as well.

[18] In this regard, however, we note that, in the present zoning proceedings, the board stated: " 'The [current] Board felt that the [board] in 1986 did not attach the condition to the variance as it was offered by the applicant on the applicants application for a variance . . . .' " *Gangemi* v. *Zoning Board of Appeals*, supra, 54 Conn. App. 562 n.5.

[19] To the extent that the dissent relies on *Auburn* v. *McEvoy*, 131 N.H. 383, 553 A.2d 317 (1988), we disagree. In our view, a condition that was an " 'out-and-out plan of extortion' "; id., 384; and also violated the state constitution; see part IV B of the dissent; would be sufficiently egregious to outweigh the policy against collateral attacks.