b. Administrative Law

A case in which a disposition not to permit use of a municipal hall because it fell under "the occasion that has a possibility of disturbing public order", provision stipulated in Article 7 (1) of the Izumisano City Ordinance, was held not to be in violation of Article 21 of the Constitution of Japan nor Article 244 of the Local Autonomy Law.

Decision by the Third Petty Bench of the Supreme Court on March 7, 1995. Case No. (*o*) 762 of 1989. A case claiming damages. 49 *Minshū* 3-687; 1525 *Hanrei Jihō* 34; 876 *Hanrei Taimuzu* 84.

[Reference: Constitution of Japan, Article 21; Local Autonomy Law, Article 244.]

[Facts]

X and others (plaintiffs, *kōso* appellants, *jōkoku* appellants) made a plan to hold a nation-wide rally opposing the New Kansai Airport in the Izumisano municipal hall on June 3, 1984. In accordance with Article 6 of the Izumisano City Ordinance, X applied to the mayor for permission to use the hall in the name of the "All Kansai Executive Committee" on April 2, 1984. The hall was founded by Izumisano City (defendant, *kōso* respondent, *jōkoku* respondent) for the purpose of enhancing the level of citizens' culture and education and of having them use it for meetings and the like. The hall is located in the corner of a railroad terminal and is across the road from a shopping center comprising about two hundred fifty stores that constitutes the city's busiest area. The capacity of the hall is eight hundred sixteen persons (one thousand twenty eight persons including auxiliary seats).

The general manager of the city, who can decide by himself whether to grant an application, made a disposition to deny the application in question in the name of the mayor on April 23, 1984, because he decided that the use of the hall for the rally in question fell under two grounds stipulated in Article 7 of the Izumisano City Ordinance upon which the city must not grant permission to use the hall: "on the occasion that has a possibility of disturbing public order"

(I) and "on all other occasions that are recognized as hindering administration of the hall" (III). In making this decision, the general manager enumerated the reasons mentioned below.

First, the rally in question was scheduled to be held under the name of the All Kansai Executive Committee, but in substance was to be held under the auspices of what is called *Cuukakuha* (the Antiwar Young People's Committee of the National Federation of Students' Self-Government Associations), which is a radical organization causing, among other things, a series of bombings on April 4, 1984, immediately after the application in question. Various organizations, including the Izumisano shopkeepers' association, made petitions or submitted requests to the effect that the city should not have these so-called violent ultraleftist groups use the hall. There was anxiety about causing an unforeseen situation through the rally in question and demonstration parades accompanying it, and the possibility of threatening the quiet lives of the inhabitants in the neighborhood near the hall as a result, by having such an organization use the hall. Thus, to permit the application in question is contrary to public welfare.

Second, the application in question estimated the number of participants in the rally at three hundred persons, but taking into the consideration that the rally in question was to be drawn from supporters nation-wide, the estimated number is dubious and, thus, calls into question the capacity of the hall to hold those people who might attend.

Third, X, who made the application in question, is the person who was disorderly at an explanatory meeting concerning the New Kansai Airport in 1981, and *Cuukakuha*, which had been struggling against other organizations, once caused trouble by intruding into a rally sponsored by another organization in 1983. In view of these circumstances, this rally has the possibility of causing chaos in the neighborhood as well as inside the hall by causing, among other things, rival organizations also to break into the rally in question.

Since X and others could not obtain permission to use the hall, they held the rally in question by substituting a beach in Izumisano City for the hall. According to the official bulletin of *Chuukakuha*,

it was reported that two thousand six hundred persons gathered and at least approximately one thousand persons participated in the rally.

Based on this background, X and others brought an action for damges. However, since the Osaka District Court and the Osaka High Court ruled in favor of Y in 1985 and 1989, respectively, the plaintiffs appealed to the Supreme Court.

[Opinions of the Court]

Because the hall in question meets the definition of a public institution according to Article 244 of the Local Autonomy Law, Y must not refuse the inhabitants to use it without a due reason [Article 244 (2)] and must not discriminate unfairly concerning its use by the inhabitants [Article 244 (3)]. The ordinance in question, in accordance with Article 244-2 (1) of the Local Autonomy Law, is interpreted as providing the establishment and administration of the hall in question, which is a public institution, and each provision of Article 7 of the ordinance is interpreted as detailing the due reasons requisite to refuse its use.

When an institution used for meetings such as the hall in question is established as a public institution of a local public entity under the definition of Article 244 of the Local Autonomy Law, the inhabitants may be allowed to use it in principle unless the meeting is contrary to the purpose of its establishment, so that, if a person in a managerial position refuses its use without due reason, there arises a possibility of leading to unfair restriction on the freedom of assembly guaranteed by the Constitution. Therefore, when interpreting and applying Article 7 (1) and (3) of the ordinance in question, it should be determined whether the freedom of assembly guaranteed by the Constitution is not substantially denied by refusing the use of the hall.

Considered from such a viewpoint, a person who is in a managerial position concerning a public institution used for meetings should fairly exercise his or her right of management of property in order to have the functions of the public institution fully accomplished, corresponding to the type of a public institution involved and taking into consideration its scale, structure, equipment, and the like.

Of course, even when there are no grounds recognized for making its use inappropriate in those respects, there is a case in which its use may be refused. But that should only be when there is a danger that others' fundamental human rights may be infringed and the public welfare may be impaired by having an institution used for the purpose of the meeting concerned, except when there are competing demands for its use. In such a case, one should say that holding a meeting in such an institution may be subject to restriction to a necessary and reasonable extent to avoid and prevent those dangers. In addition, whether the restriction is affirmed as a necessary and reasonable one should be basically decided by balancing the importance of the freedom of assembly as a fundamental human right on the one hand, and the content of the other fundamental human rights that may be infringed by holding the meeting in question and the extent of danger that infringement will give rise to, and the like on the other hand.

When applying this balancing, since restriction on the freedom of assembly is one which restricts freedom of mind among fundamental human rights, it should be done under a more rigorous standard than when economic liberties are restricted.

Article 7 (1) provides that "the occasion that has a possibility of disturbing public order" is a ground under which the city may deny permission to use the hall in question. Although Article 7 (1) adopts broader expressions for denial, in light of the purport mentioned above, it should be interpreted narrowly to mean when the necessity to avoid and prevent such dangers as infringing on others' life, body or property and impairing public safety, which will be caused by holding a rally in the hall in question, is predominant over the importance of guaranteeing the freedom of assembly in the hall in question. In addition, when considering the extent of such dangers, the probability of causing a merely dangerous situation should not be sufficient; it is appropriate to demand that the occurrence of a clear and imminent danger should be foreseeable concretely. As long as construed in such a way, a regulation such as this one should not be in violation of Article 21 of the Constitution nor Article 244 of the Local Autonomy Law since it is necessary and reasonable to avoid

and prevent infringement of other fundamental human rights.

Moreover, it must be said that one can affirm the existence of the ground mentioned above only when the occurrence of the situation is foreseen not only based on the subjective views of the persons who have the discretion to grant permission, but also concretely and clearly in light of the objective facts.

The determination not to grant permission in the case at issue is not due to the purpose of the rally nor the very nature of the organization, *Chuukakuha*, which is regarded as the actual sponsor of the rally. Neither is it because of a fear of the occurrence of a probable danger based on Y's subjective judgment. Instead, it is by the reason that, judging from the objective facts that *Chuukakuha* had repeated the illegal use of force at the time of the determination in question to oppose the construction of the New Kansai Airport and had been continuing to struggle against rival organizations through use of violence, it was foreseen concretely and clearly that conflicts accompanying violence among these groups would have occurred in the hall, on neighboring streets, and the like, so that the life, body, or property of staff members of the hall in question, passersby, neighboring inhabitants, and the like would have been endangered, if the rally in question had been held in the hall in question.

Therefore, it cannot be said that the disposition not to grant permission in this instance violates Article 21 of the Constitution nor Article 244 of the Local Autonomy Law.

[Comment]

Recently legal disputes concerning the use of a municipal hall have received attention. This is partly because some local public entities tend to take a negative attitude toward granting permission to use it for fear of getting involved in trouble caused by other organizations which strongly oppose the meeting to be held there. The instant decision is important in having given a warning to such local public entities and having interpreted narrowly the grounds on which government bodies may refuse such permission.

First of all, the decision confirms Article 244 of the Local Autonomy Law, which provides that a local public entity may not re-

fuse the use of a public institution without a due reason once it establishes such an institution. Although it is not generally accepted that the citizens have a right to demand that the government offer a site for a meeting, the decision at least recognizes a right to access to a public institution on a nondiscriminatory basis once it is established, by invoking the freedom of assembly guaranteed by the Constitution, which has been substantially read into Article 244 of the Local Autonomy Law. According to the decision, then, since the ordinance in question is interpreted to have been mandated by Article 244, whether the ordinance is within the purview of the mandate naturally comes into question. In this respect, however, as the concurring opinion in this case suggests, the provision of "the occasion that has a possibility of disturbing public order" has a possibility of exceeding the mandate, because provisions concerning police power such as this should be differentiated from provisions concerning management of a public institution which are mandated by the Article. Although the opinion of the Court neglected this issue, it should be further examined.

From the perspective of substantive law, then, it is critically important whether there are devices to prevent abuse of discretion by administration. In this respect, the decision tacitly turned down the challenges based on the doctrines of being void for vagueness or overbreadth in the first place. Thus, the Court interpreted the provision narrowly by using the method of balancing of interests, and it justified the provision as a necessary and reasonable restriction to avoid and prevent the danger that others' fundamental human rights might be infringed and the public welfare might be impaired. As for this handling of the case, however, there remains some doubt in light of the nature of the provision, which functions as a prior restraint on the freedom of assembly. In addition, even if the provision may be upheld on its face, it seems that the decision should have required a less restrictive alternative to serve the purpose of the ordinance, instead of determing whether the means employed was necessary and reasonable. Moreover, although the decision mentioned what is called a double standard of fundamental human rights and paid attention to balancing interests rigorously, one can still question the ad hoc

nature of a balancing approach in general.

Regardless of these problems, however, this decision should be appreciated. First, it is important that it recognized a content neutral principle in deciding whether permission to use a public institution should be granted. Thus, in doing this, local public entities must not take into consideration the subject of the application, the subject, purpose, standpoint or viewpoint of the meeting, the possibility of obtaining an alternative site for the meeting, and so on. In other words, except when there is attendance in excess of capacity, a use for purposes other than those allowed, or competition of demands for its use, an applicant should be permitted to use a public institution in principle. Second, it is also remarkable that in performing a balancing of interests, the Court demanded that the occurrence of a clear and imminent danger should be foreseen not only based on the subjective views of the persons who can grant permission but also concretely and clearly in light of the objective facts. By the existence of these requirements, local public entities may not come to refuse permission easily.

Finally, because of the peculiar nature of the case, the decision did not support the plaintiffs' claim. In particular, while the decision mentioned what is called a "heckler's veto", it still distinguished the case and rejected the plaintiffs' arguments based on the doctrine of hostile audience. Although it is not completely without doubt concerning the fact-finding or the application to the facts, the criteria this decision indicated are expected to be guidelines for resolving future cases of the same kind.

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