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PRESUMPTIVE VALIDITY AND PROHIBITIVE ZONING ORDINANCES

"It must always be borne in mind, however, that the strong presumption in favor of the validity of a legislative act likewise applies to municipal and county zoning ordinances and resolutions. No rule of zoning law is better settled by the decisions of the courts."¹

In *Beaver Gasoline Co. v. Zoning Hearing Bd.*² the new seven judge Commonwealth Court of Pennsylvania³ overruled the Court of Common Pleas of Allegheny County and modified the well established rule that a zoning ordinance is presumed constitutional and that the challenging party has the burden of proof in establishing a lack of substantial relationship between the ordinance and public health, safety and general welfare. The court held that a municipality enacting a zoning ordinance prohibiting a legitimate land use within the entire municipal area must bear the burden of showing a "more substantial" relationship to those interests protected by its police power than is presumed to exist in the more common, purely regulatory zoning ordinances.

The Borough of Osborn enacted a zoning ordinance which created two residential districts and a small commercial district. The ordinance expressly prohibited gasoline service stations in the commercial district and by implication also prohibited them in the residential districts, thus banning their use throughout the entire municipal area. The plaintiff corporation and the individual plaintiffs entered into a contract for the sale of land located in the commercial district. The contract was conditioned upon issuance of a service station building permit by the borough council. When the permit

¹ 1 E. YOKELY, ZONING LAW AND PRACTICE § 2-23, at 104 (3d ed. 1965).

² 1 Pa. Cmwlth. 458, 275 A.2d 702 (Comwlth. Ct. 1971).

³ The Commonwealth Court Act, PA. STAT. tit. 17, § 211.2 (1970).

was refused, appeal was taken to the Zoning Hearing Board on the stipulated issue of the constitutionality of the zoning ordinance. The board upheld the council's refusal by concluding that the prohibition in the ordinance was binding and the plaintiffs appealed to the Court of Common Pleas of Allegheny County. After hearing oral arguments in which no evidence de novo was presented, the court refused the appeal on the traditional ground that the plaintiffs had not met the burden of proof necessary to overcome the presumptive validity of the ordinance. Thereafter, the appeal was taken to the Commonwealth Court where, with two dissenting opinions, the lower court's decision was overturned.

There is a general presumption as to the constitutional validity of legislation unless it is clearly within an express constitutional prohibition.⁴ The presumption is said to be based upon the separation of powers of the coordinate branches of government.⁵ This presumption is normally classified as strong, although rebuttable⁶ and has been expressly extended to municipal ordinances.⁷ In cases where the general presumption of constitutionality is indulged, the burden of overcoming or rebutting the presumption is on the challenging party.⁸

The presumption of validity that attaches to the usual zoning ordinance which merely proscribes certain land uses in one or more areas of the municipality while permitting it in another is said to be based, in addition to the separation of

⁴ *Allen v. Burkhardt*, 377 P.2d 821 (Okla. 1962); *Tate v. Logan*, 362 P.2d 670 (Okla. 1961); *Dobbs v. Board of Co. Comm'rs*, 208 Okla. 514, 257 P.2d 802 (1953).

⁵ *Sinking-Fund Cases*, 99 U.S. 700 (1878); *Allen v. Burkhardt*, 377 P.2d 821 (Okla. 1962); *Tate v. Logan*, 362 P.2d 670 (Okla. 1961).

⁶ *Borden's Farm Prods. v. Baldwin*, 293 U.S. 194 (1934); *United States v. Mullendore*, 74 F.2d 286 (10th Cir. 1934).

⁷ *Bilbar Constr. Co. v. Board of Adjustment*, 393 Pa. 62, 141 A.2d 851 (1958).

⁸ *White v. Coleman*, 475 P.2d 404 (Okla. Crim. App. 1970); *Williamson v. State*, 463 P.2d 1004 (Okla. Crim. App. 1969).

powers doctrine, upon the fundamental reasonableness of such land use regulation.⁹ Both Pennsylvania and Oklahoma indulge in this general presumption when challenges concerning the constitutionality of such ordinances arise.¹⁰ However, when an ordinance goes beyond restricting a use to a portion of the municipality's area, so as to proscribe the use completely, it now appears that the Pennsylvania courts will not presume constitutionality.

In *Beaver* the court reasoned that governmental proscription of a land use should be afforded the presumption of constitutionality only when there exists some fundamental and reasonable purpose of control which has been consistently demonstrated to bear a sufficient relationship to the interests protected by the police power of the governmental unit involved.¹¹ Discrimination between legitimate businesses by allowing some and completely proscribing others without clearly identifying the purpose of such prohibition was said to have no basis in fundamental reasonableness. Using this reasoning and the reasoning of an earlier Pennsylvania Supreme Court decision¹² the court held that in order to shift the burden of

⁹ *Beaver Gasoline Co. v. Zoning Hearing Bd.*, 1 Pa. Cmwlth. 458, 460, 275 A.2d 702, 704 (Cmwlth. Ct. 1971); *Exton Quarries, Inc. v. Zoning Bd of Adjustment*, 425 Pa. 43, 228 A.2d 169, 174 (1967).

¹⁰ *Exton Quarries, Inc. v. Zoning Bd. of Adjustment*, 425 Pa. 43, 228 A.2d 169 (1967); *Sand Springs v. Colliver*, 434 P.2d 186 (Okla. 1967); *National Land and Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965).

¹¹ *Beaver Gasoline Co. v. Zoning Hearing Bd.*, 1 Pa. Cmwlth. 458, 460, 275 A.2d 702, 704 (Cmwlth. Ct. 1971).

¹² *Exton Quarries, Inc. v. Zoning Bd. of Adjustment*, 425 Pa. 43, 228 A.2d 169 (1967). In this decision the court held that totally prohibitory zoning ordinances must bear a more substantial relationship to the police power than those which merely confine a business to certain areas of a municipality, and that the existence of that relationship is suspect.

proof to the municipality the challenging party need only show that his proposed use is legitimate, that the prohibition is total as to the municipality, and that his building plans conform to all other requirements of the zoning and building codes.¹³ Once such a showing is made, the court held that the validity of the ordinance depends upon the municipality proving the existence and propriety of its findings that the prohibited use would have detrimental effects upon the interests protected by the police power, that the same undesirable effects are not caused by other permitted uses, and that those effects are not capable of cure by regulation rather than prohibition.¹⁴

The majority held that the plaintiff had presented sufficient evidence to shift the burden to the municipality, that the municipality had not met its burden and that, therefore, insofar as all gasoline service stations were prohibited, the ordinance was unconstitutional.¹⁵

Two judges wrote concurring opinions. Judge Kramer stated that the case should be remanded since the municipality had not previously known of its burden of proof.¹⁶ Judge Manderino concurred in the result but disagreed that the burden of proof should be shifted to the municipality. To Judge Manderino, the "burden of proving unconstitutionality" merely meant convincing the court that there was no relationship between the prohibited conduct and the protection of society. In those cases where general knowledge allows the court to take judicial notice of the lack of the required nexus, the municipality has the burden of going forward with evidence sufficient to dispel the court's state of mind and the failure

¹³ *Beaver Gasoline Co. v. Zoning Hearing Bd.*, 1 Pa. Cmwlth. 458, 461, 275 A.2d 702, 705 (Cmwlth. Ct. 1971).

¹⁴ *Id.* at 461-62, 275 A.2d at 705-06.

¹⁵ *Id.* at 462-63, 275 A.2d at 706-07.

¹⁶ *Id.* at 465, 275 A.2d at 710.

of a municipality to do so should not be confused with who has the burden of proof.¹⁷

The first dissenting opinion expressed the belief that the traditional presumption and burden placement was so well settled as to warrant no shifting of the burden.¹⁸ The second dissenting opinion stated that the constitutional validity of the ordinance should be tested in the context of the facts peculiar to the municipality. In view of the predominantly residential character of the borough and the size and shape of the commercial district, the second dissenting judge was of the opinion that the ordinance should be upheld.¹⁹

While Oklahoma courts adhere to the general presumption of the validity of ordinances and the traditional placement of the burden of proof,²⁰ no litigation involving the validity of a zoning ordinance which completely prohibits a land use everywhere within a municipality has arisen in the state. However, if confronted with such a prohibition and an attack on its validity, the Oklahoma courts might be persuaded by the argument that such an ordinance does not rest upon any "fundamental and reasonable principle of governmental control which has been consistently demonstrated to bear a sufficient relationship to the police power"²¹ and hold, as did the Pennsylvania majority, that the municipality rather than the challenging party must bear the burden of proof.

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¹⁷ *Id.* at 463-65, 275 A.2d at 707-09.

¹⁸ *Id.* at 467, 275 A.2d at 711.

¹⁹ *Id.* at 469, 275 A.2d at 713-14.

²⁰ See cases cited in notes 4 & 8 *supra*.

²¹ 1 Pa. Cmwlth. at 460, 275 A.2d at 704.