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THE CONSTITUTIONALITY OF THE USE OF MIDDLE INCOME PUBLIC HOUSING RENTALS TO SUBSIDIZE LOW INCOME PUBLIC HOUSING

The state legislature of Massachusetts recently requested an advisory opinion of the Supreme Judicial Court concerning the constitutionality of a proposed public housing bill.[1] In essence, the proposed bill provided the public housing would include both middle income and low income units. Rentals provided from the middle income units could be set at a figure so as to provide a profit to subsidize the low income units. The proposed bill declared a public need for low income housing, but made no such provision in regard to middle income housing. In its advisory opinion, the Massachusetts Court limited its ruling to the question of whether there was a use of public funds for a public purpose. The court said that it was not clear that the funds spent on the middle income housing would be for the public purpose, and, therefore, held the bill to be unconstitutional.[2]

The Oklahoma legislature, in its 1965 session, passed legislation providing for public housing for low income individuals or family units.[3] The Oklahoma statute does not provide a fixed manner in which this housing is to be provided, but rather establishes local housing authorities. Under this enabling act it is entirely conceivable that a housing program such as that proposed by the Massachusetts legislature will be suggested by the state or local housing authority. A few observations concerning current judicial thinking along these lines would, therefore, be of value.

There is little doubt but that the Massachusetts court saw the point of contention in the proposed bill before it. Providing low income public housing where there is a need for such is constitutionally well settled.[4] The Massachusetts

[1] Opinion of the Justices, 219 N.E.2d 18 (Mass. 1966).
[2] *Id.* at 26.
[3] Okla. Stat. tit. 63, §§ 1051-82 (Supp. 1965).
[4] Hogue v. Housing Authority of North Little Rock, 144 S.W.2d

court agreed with this premise.[5] The court did not agree, however, that the middle income housing use to subsidize the low income housing was constitutional.[6] For isolating this single issue in its review, the Massachusetts decision is not sound and a critical analysis is warranted.

The United States Supreme Court has extended its definition of "public purpose" to the ultimate point where, today, there are no definable limits. In 1908 the Court said that what a state tribunal had said to be for the public purpose, be it express or implied, would not be upset by the Court except in rare circumstances.[7] What served the public purpose of a state as determined by state courts would not be challenged by the Court unless clearly improper. In 1946, in a case involving the Tennessee Valley Authority, the Court looked at how a legislative enactment should be interpreted when its overall proposal is for the public purpose.[8] The TVA, in the process of filling a reservoir, had flooded a highway going to a certain area owned by private individuals. To replace the flooded road with a new one would have cost in excess of one million dollars, but to acquire the land cut off by the flooding of the road by eminent domain would cost about one-third that of the new road. A proposal to condemn the land cut off was attacked by the landowners as not being within the public purpose as provided by the TVA legislation. The Court, however, said that one inseparable transaction could not be divided into separate units.[9] The Court pointed out that, "we view the entire transaction as a single integrated effort to carry on congressionally authorized functions."[10] When the landown-

49 (Ark. 1940); Cremer v. Peoria Housing Authority, 399 Ill. 579, 78 N.E.2d 276 (1948); Redfern v. Board of Comm'rs, 137 N.J.L. 356, 59 A. 2d 641 (1948).

[5] *Supra* note 1, at 25.

[6] *Id.* at 26.

[7] Hairston v. Danville & Western Ry. Co., 208 U.S. 598 (1908).

[8] United States v. Welch, 327 U.S. 546 (1946).

[9] *Id.* at 552-53.

[10] *Id.* at 553.

ers in that case attacked the taking of their land by the TVA, they were attempting to separate inseparable transactions undertaken by the TVA. And this is what the Massachusetts court has done. The proposed bill was for an end admittedly within the public interest — suitable low income public housing. The bill was a package plan, so to speak. The TVA could have constructed a new road to the stranded land, but chose not to do so. The Supreme Court called this transaction inseparable from the overall plan and the proposed Massachusetts bill falls within the same category.

There is a section in the Oklahoma public housing enabling act for which this proposition of an inseparable transaction might be applied. The act provides that: ". . . no authority shall construct or operate any housing project for profit, or as a source of revenue to the city or county."[11] "Housing project" is defined as, ". . . any work or undertaking . . . to provide or assist in providing . . . living accommodations for persons of low income. . . ."[12] To attack a proposed housing plan under this enabling legislation as providing for construction of a profit making project would be to attempt to separate an inseparable transaction. In the TVA case, the Supreme Court said to look at the project as a whole and not to each portion making up the whole. To argue that middle income housing is provided to make a profit and thus outside the scope of the act is to break up the overall transaction. The "housing project" is the entire integrated plan. The entire plan must be shown to be outside the public purpose, not individual pieces of the plan.

In 1954, in *Berman v. Parker,* the Supreme Court ruled that "public purpose" is broad and encompassing.[13] That case involved legislation providing for slum clearance in the District of Columbia. Petitioners' property was not a slum location, but a department store. In allowing condemnation

[11] OKLA. STAT. tit. 63, § 1062 (Supp. 1965).
[12] OKLA. STAT. tit. 63, § 1054 (i) (Supp. 1965).
[13] 348 U.S. 26 (1954).

of the petitioners' property to fulfill the overall scope of the total slum clearance plan, the Court said of public purposes:

> . . . an attempt to . . . trace its outer limits is fruitless . . . The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be the Congress legislating concerning the District of Columbia or the States legislating concerning local affairs.[14]

The Court's statement is clear—what the legislature may do for a public purpose is practically incapable of limitation and the legislature is the primary determining body of what serves the public purpose in social legislation. The Massachusetts court has attempted to impose its determination of the public purpose on the legislature. Certainly it is within its judicial province to do this. But is it proper under modern constitutional jurisprudence?

It must be noted that state courts do not necessarily follow the guidelines set by the Supreme Court for the federal government. But the state courts must and do look to the public purpose of legislation to determine its constitutionality. A similar situation to the problem under consideration is the state's aid to private industry to encourage it to build within the state. The mere attraction of industry to a state has been held to be for the public purpose in order to allow the state to loan public funds to entering industry.[15] Industry will bring more tax revenue into the state and provide employment for residents of the state. Financial aid to industry has been upheld on the basis that the providing of

[14] *Id.* at 32.

[15] Roan v. Connecticut Industrial Bldg. Comm'n, 150 Conn. 333, 189 A.2d 399 (1963); Opinion of the Justices, 169 A.2d 634 (N.H. 1961); Roe v. Kervick, 42 N.J. 191, 199 A.2d 834 (N.J. 1964).

expanded employment of residents by industry is a public purpose for which public funds may be spent.[16] Certainly mere aid to industry alone is not a public, but a private purpose. But when the transaction is considered as a whole, the public purpose is evident and the parts are inseparable from the whole.

As has been stated before, to provide public housing of some type when needed by the public is settled as constitutional when public funds are spent for its construction. In the proposed Massachusetts bill there was a professed need for low income housing. Since public funds may be spent for public needs, they could be used directly in financing low income housing without running afoul of any constitutional prohibitions. The argument is logical that the fact that the legislature has chosen to provide for public needs by using middle income housing profits to finance in part low income housing does not necessarily take those funds out of the category of funds spent for a public purpose. The public purpose is low income public housing for which there is a need. What is the public purpose in building middle income housing when there is no need for that type of housing in and of itself? The answer is obvious. The public purpose served by middle income housing is providing subsidies to support low income public housing. The parts cannot be separated from the whole of the legislative purpose.

The most important point is that the legislation is to be considered constitutional unless it has no reasonable basis.[17] This logically follows the rule that what is for the public purpose is for the legislature to decide, not the judiciary. This point weighs most heavily of all upon the determination of the constitutionality of a public expenditure dependent upon whether it is for the public purpose. In an

[16] Roe v. Kervick, 42 N.J. 191, 199 A.2d 834 (1964).

[17] Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1936); McClelland v. Mayor and Council of Wilmington, 159 A.2d 596 (Dela. 1960); Hill v. City of Summit, 64 N.J. Super. 522, 166 A.2d 610 (1960); Torizan v. Saunders, 97 N.W.2d 586 (S.D. 1959).

advisory opinion to the legislature concerning a bill under consideration to buy industrial facilities and then transfer them to private or public utilities to promote growth of the state, cities, towns and villages, the New Hampshire Supreme Court pointed out that there was no assurance that this was in the public interest, and held it unconstitutional.[18] In a later advisory opinion by the same court concerning a revised version of the bill, providing that the governor of the state and a council would determine if the public purpose would be served in each transaction under the bill, the court found it was constitutional so long as the governor and the council found that the individual transaction was for the public purpose.[19] Thus, the court said that it did not need to pass upon the public purpose problem in each transaction as the governor would determine such purpose under the bill. This gives the legislature and the governor the power to determine if something is within the public purpose without the consent of the court so long as it falls within the act. The legislature need only say an act is within the public purpose or that some agency is to determine that acts under the bill will be for the public purpose, and generally the court will not disturb such legislative action.

Of course, arguments will be made that middle income housing is unconstitutional. It could be argued that middle income housing has no public purpose *per se*; that there is no public need for it. Critics may say that the dominant purpose of the middle income housing is not public purpose. But to answer these arguments and others that may arise, one need only point to consideration of the transaction as a whole and not of parts, and the legislation must be construed as constitutional if at all possible. The Oklahoma Supreme Court, to decide such a question as this, should look to the same propositions. The Oklahoma court in the syllabus of one case pointed out that the Oklahoma constitution vested the legislature with the supreme power to enact laws, and unless plainly and clearly within express

[18] Opinion of the Justices, 207 A.2d 574 (N.H. 1965).
[19] Opinion of the Justices, 209 A.2d 474 (N.H. 1965).

constitutional prohibitions and limitations, acts of it should be upheld.[20] In another case the Oklahoma court points out that the state legislature is supreme, except as limited by express constitutional provisions. Any doubt as to the validity of a legislative act must be in favor of the act's constitutionality.[21] There is sufficient authority, both from prior Oklahoma Supreme Court decisions and decisions from other jurisdictions to allow the Oklahoma court to make the modern decision in a case such as the one under discussion.

It is apparent that a housing bill such as this would have no problem being found constitutional in a federal court. Under the prevailing constitutional principles the Massachusetts' opinion cannot be supported. Not only does it fail to meet these standards, the Massachusetts opinion also deters socially progressive programs. Oklahoma, in administering its new Public Housing Act, would do well to follow the method of construction favored by the United States Supreme Court.

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[20] Tate v. Logan, 362 P.2d 607, 671 (Okla. 1961).
[21] Application of County Courthouse Building Comm'n of Stephens County, 403 P.2d 501 (Okla. 1965).