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JUDICIAL REVIEW OF ZONING CASES— NEW RULES?

LOUIS LEVY*

Beginning almost as early as the adoption of zoning laws in Oklahoma nearly fifty years ago,¹ persons seeking relief in state zoning cases have been permitted their "day in court." Zoning litigants have had little difficulty during these years in entering county court houses to present their grievances, usually by the traditional means of injunctive relief. But new rules recently announced by the Oklahoma Supreme Court may have effectively closed the doors of the court-houses throughout the state and, practically speaking, eliminated any judicial review of zoning controversies. Attorneys handling real estate matters should be cognizant of the new developments in this field.

While not always victorious, zoning litigants have customarily been afforded access to judicial review from deci-

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¹ Oklahoma adopted zoning laws in 1923, only seven years after the adoption of America's first zoning law by New York. The Oklahoma Buildings and Zoning Act, OKLA. STAT. tit. 11, §§ 401-10 (1961) has remained virtually unchanged since its first writing. Later zoning laws can be found in other statutes. See City Planning Commissions Act, OKLA. STAT. tit. 11, §§ 421-25 (1961); Regional Planning Commissions Act., OKLA. STAT. tit. 11, §§ 431-37 (1961); Regional Planning Commissions Act, OKLA. STAT. tit. 19, §§ 854 1.9 (1961); Counties Containing City of 180,000 to 240,000 Population Act, OKLA. STAT. tit. 19, §§ 863. 1 to 5.23 (1961); and City-County Planning and Zoning Act, OKLA. STAT. tit. 19, §§ 866.1-34 (1961).

sions of city councils in the courts. The Oklahoma Supreme Court has not hesitated to entertain zoning actions since the opportunity first presented itself in 1928,² and it has written over eighty zoning case opinions since that time.³ While this number is not exceptionally large, the frequency of attack upon local zoning practices has been on the increase as urban areas continue to grow both in size and population.⁴

Yet, the Oklahoma Supreme Court has recently set forth new guidelines for the judicial review of zoning cases originating in Oklahoma municipalities and carried to the local district courts. These new rules are discussed in this article. They deviate from former practices by eliminating original court proceedings to set aside decisions of city councils in zoning matters, while substituting a direct "appeal" process for zoning cases.

² This is contrary to the experience of the United States Supreme Court which has entertained only one other case involving zoning facts since its landmark decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). In that case, *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the Supreme Court cautioned state courts to look closely at the facts in every case. The Court empowered the lower courts to inquire into the reasonableness of a particular local zoning ordinance and, where necessary, declare the ordinance invalid if confiscatory when applied to a specific tract of land.

³ A complete list of Oklahoma zoning cases is published by the Zoning Committee of the Tulsa County Bar Association, Beacon Building, Fourth and Boulder, Tulsa, Oklahoma.

⁴ Professor Charles M. Haar, formerly of Harvard Law School, notes that urban growth and the Supreme Court's upholding of legislation to deal with resulting problems contrasts with the earlier pronouncements of Blackstone who wrote in the nineteenth century:

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.

BLACKSTONE, COMMENTARIES *139, quoted, in HAAR, LAND USE PLANNING 410 (1959).

Until recently, state law has never known a zoning "appeal." Nor have zoning matters, leading to the ultimate adoption or rejection of a municipal zoning ordinance, been considered anything other than "legislative" in character. Today, however, the person who looks upon such hearings as informal administrative or legislative proceedings runs afoul of what may clearly be a new chapter in the judicial review of zoning cases, for the Supreme Court of Oklahoma has recently declared such hearings to be a "judicial" function, subject to "appeal" to the district courts, without an evidentiary hearing.

What are the new rules? More importantly, are they permanent? If permanent, is legislative reform needed? Answers to these questions are suggested here.

*City of Sand Springs v. Colliver*⁵

A strangely worded and legally disturbing recent decision by the Oklahoma Supreme Court may have abandoned the concept that city councils, in acting upon zoning ordinances, are "law-making" and not "judicial" tribunals. The language of the opinion leaves little doubt that a change has occurred. In the 1967 decision of *City of Sand Springs v. Colliver* the court said:

When city commission exercises *judicial function* in hearing and denying application for change in zoning classification of plaintiff's property, appeal from such order of the commission to the district court is authorized under 12 O.S. 1961, §951.⁶

The supreme court went further in the *Sand Springs* case, however, in an apparent attempt to establish a new set of rules to guide the trial courts in entertaining and reviewing zoning controversies. Once having determined that city councils are acting in a "judicial" capacity in deciding whether to adopt or reject a zoning ordinance, while failing ex-

⁵ 434 P.2d 186 (Okla. 1967).

⁶ *Id.* at 187 (court syllabus; emphasis added).

pressly to reverse numerous Oklahoma zoning cases inconsistent with this view,⁷ the court held that “. . . an appeal authorized under §951 . . . is not a trial de novo and the district court is limited to appellate consideration of the case.”⁸

Relying upon an earlier Oklahoma decision in which a direct appeal from a local administrative board exercising quasi-judicial functions, and not legislative functions, was taken to the district court,⁹ the court then stated that zoning “appeals” should henceforth be restricted in the following manner: (1) the appeal is perfected upon the filing of a complete transcript of the proceedings, including transcript of evidence; (2) the statute does not provide trial de novo in the district court; (3) the district court sits as an appeal tribunal with jurisdiction limited to the transcript and argument thereon; (4) determination on appeal is limited to consideration of errors of law and whether the findings ap-

⁷ Until the *Sand Springs* case, the adoption of zoning laws had uniformly been cited as a “legislative” function of city councils. See *DeLano v. City of Tulsa*, 26 F.2d 640 (8th Cir. 1928); *Preston v. City of Stillwater*, 428 P.2d 215 (Okla. 1967); *Bothchlett v. City of Bethany*, 416 P.2d 613 (Okla. 1966); *City of Tulsa v. Nicholas*, 415 P.2d 917 (Okla. 1966); *Clouser v. City of Norman*, 393 P.2d 827 (Okla. 1964); *City of Tulsa v. Swanson*, 366 P.2d 629 (Okla. 1961); *Higginbotham v. City of The Village*, 361 P.2d 191 (Okla. 1961); *Oklahoma City v. Barclay*, 359 P.2d 237 (Okla. 1960); *Voight v. Saunders*, 243 P.2d 654 (Okla. 1952); *Keaton v. Oklahoma City*, 187 Okla. 593, 102 P.2d 938 (1940); *Hubbard v. Oklahoma City* 177 Okla. 263, 58 P.2d 547 (1936); *Weaver v. Bishop*, 174 Okla. 492, 52 P.2d 853 (1935); *State ex. rel. Hunzicker v. Pulliam*, 168 Okla. 632, 37 P.2d 417 (1934); *Beveridge v. Harper & Turner Oil Trust*, 168 Okla. 609, 35 P.2d 435 (1934); *In re Dawson*, 136 Okla. 113, 277 P.2d 1928).

⁸ 434 P.2d at 187 (court syllabus).

⁹ Reliance is placed on statements set forth in *In re White*, 335 P.2d 404 (Okla. 1960), a case involving the question whether an “appeal” would lie from the order of a civil service commission dismissing a police officer.

pealed from are supported by the evidence introduced before the inferior tribunal; (5) where the decision of the inferior tribunal is contrary to law, or the clear weight of the evidence, the district court may render the decision which should have been rendered.¹⁰

As if to erase all doubt of its intentions and continuing to treat the matter at hand as a "judicial" act and thus appealable to the courts under section 951, the court said: "The right extended plaintiff to appeal to the district court from the City's denial of his application for change of zoning classification cannot be questioned."¹¹

Once having announced these new rules, the supreme court proceeded to decide the facts of the case in favor of the plaintiff landowner, who was seeking to use a tract of land in the City of Sand Springs for construction of a retail liquor store, and it sustained the decision of the trial court which issued a "mandatory injunction"¹² prohibiting city officials from interfering with plaintiff's intended use of his property. City officials had first told plaintiff that a zoning change would be adopted if he would grant a waterline easement to the public across his land, but later rejected the requested zoning change ordinance though the easement was given. On the merits, one can hardly quarrel with the ultimate result.

The road traveled by the supreme court to afford equitable relief in the *Sand Springs* case seems, at the very least, a dubious route for zoning proceedings. If allowed to stand unchallenged or unchanged, the new rules will effectively close the courthouse doors to zoning litigants.

A Curious Statute

Plaintiff's attorney in the *Sand Springs* case elected to proceed under the provisions of section 951—a unique deci-

¹⁰ 434 P.2d at 191.

¹¹ *Id.*

¹² OKLA. STAT. tit. 12, §951 (1961).

sion. No other zoning case has ever reached the supreme court by this method. The correctness of counsel's decision, however, can no longer be questioned, in view of the court's holding that the statutory "appeal" method was proper. The correctness of the court's decision in this regard is another matter and is questionable in view of the language and history of the statute. The statute provides:

A judgment rendered, or final order made, by any tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court except where an appeal to some other court is provided by law.¹³

A noted authority in the field of constitutional law has taken the supreme court to task for its application of this statute to a zoning proceeding. Writing for the Oklahoma Association of Municipal Attorneys, Dr. Maurice H. Merrill of the University of Oklahoma, examined the *Sand Springs* case in the following manner:

City of Sand Springs v. Colliver . . . is a most interesting case, in its disregard of the most elementary principles of the separation of powers. . . .

For some strange reason, the petitioner's attorney took an appeal from the City Commissioner's refusal to rezone under 12 O.S. 1961. . . .

The contention that this was the proper procedure seems upheld by the Supreme Court's ruling that the evidence introduced by the city before the District Court is not to be considered in determining whether the court's judgment was correct. This is put on the ground that review under 12 O.S. 1961, §951 is not de novo but is upon the record before the tribunal below. . . .

This, of course, is good law, but the puzzling question, to me, is how the legislative decision not to amend the zoning ordinance gets transmitted into a "judgment rendered, or final order made" by a "tri-

¹³ *Id.*

bunal, board or officer exercising *judicial functions*. ” Surely, this is a remarkable decision in the area of the distribution of powers governmental. The ultimate result seems correct, but the method by which it is reached may rise to plaque our judges many times.¹⁴ (emphasis added).

It should be noted that Dr. Merrill views the result reached by the supreme court as correct, but the reasoning on the remedial methods utilized erroneous. He found that there was “very strong cornfield equity in favor of the owner and, besides, it very well may have been that the zoning was, as to his (plaintiff) property, unconstitutional since it deprived the property of all useful value. . . .”¹⁵ Dr. Merrill concludes his commentary:

[H]ad the action been one to enjoin the enforcement of the ordinance against this property, the established method of relief against unconstitutional acts, no objection could have been registered against the trial court’s grant of relief and the Supreme Court’s affirmation. . . .¹⁶

It seems doubtful that the statute in question was ever intended to apply to zoning decisions of city councils. Traditionally, such matters have not been labeled as “judicial” functions nor are city councils “inferior in jurisdiction to the district court” when passing upon legislation, any more so than the House and Senate of the Oklahoma Legislature are engaged in “judicial” conduct in consideration of legislative proposals. Fortunately, the latter situation has not yet come before the supreme court for inspection under the microscopic eyes of section 951.

Historical analysis of the “appeal” statute, which has remained unchanged since its adoption in 1910, shows it was

¹⁴ Merrill, *Significant Recent Decisions Affecting Oklahoma Municipalities*, Oklahoma Ass’n of Municipal Attorneys 16-17 (1968).

¹⁵ *Id.* at 17.

¹⁶ *Id.*

intended as a "catch-all" remedy, providing a direct appeal to the district courts from lower courts when no other statutory remedy existed. Until the *Sand Springs* case, it had never been used to review a decision of a city council in a zoning change matter. Borrowed from the Kansas statutes after the turn of this century, it has never been applied in that state to allow the review of a purely legislative function.¹⁷

In Oklahoma the statute has been used most often to appeal errors of law occurring in a justice of the peace court to the district courts. In *Bohart v. Anderson*,¹⁸ the Oklahoma Supreme Court strongly intimated that the statute was designed to exclude all other proceedings by which judicial review could be obtained from the decision of these "inferior" tribunals.

In addition to appeals from justice of the peace courts, other historically judicial functions have been appealed under the provisions of this statute, including proceedings before a tax equalization board,¹⁹ the dismissal of public employees by city boards²⁰ and an order of a local board granting a pension to a police officer.²¹

Zoning Is Not a Judicial Function

Is the supreme court correct in defining the action of a city council ". . . in hearing and denying application for change in zoning classification . . ." ²² as the exercise of a "judicial function?" The answer to this question is the crux of the problem discussed in this article, for, if such matters

¹⁷ KAN. STAT. ANN. §60-2101 (1963).

¹⁸ 26 Okla. 782, 110 P. 760 (1910).

¹⁹ *Baldwin v. Board of Tax-Roll Corrections*, 331 P.2d 412 (Okla. 1958).

²⁰ *In re White*, 355 P.2d 404 (Okla. 1960); *Kutch v. Cosner*, 202 Okla. 470, 215 P.2d 300 (1950).

²¹ *City of Tulsa v. Board of Trustees*, 387 P.2d 255 (Okla. 1963); *In re Gruber*, 89 Okla. 148, 214 P. 690 (1923).

²² See note 6 *supra*.

are not "judicial functions" within the contemplation of section 951, then the court has clearly erred.

Traditionally, city councils, in the consideration of ordinances generally, have been adjudged by the Oklahoma Supreme Court to be engaged in their "law-making" or "legislative" role delegated to them by state law, and not engaged in a "judicial function" in this endeavor. This is particularly true in the field of zoning law. The court has in numerous decisions, enunciated the rule that zoning laws are adopted pursuant to the legislative powers delegated to cities and towns as an adjunct of the police power and by the Oklahoma Zoning Act.²³ In zoning matters, municipalities act as the arm of the state government.²⁴ Zoning laws amount to a legislative classification of a particular parcel of land and the uses to which it can be put.²⁵ The rule is aptly stated in *Beveridge v. Harper & Turner Oil Trust*²⁶ as follows:

The municipalities of this state have been specifically clothed with the power to zone by *legislative* enactment. The proper exercise by municipalities of the police power through zoning ordinances has received the approval of this court. . . .

While jealously guarding their own authority to review the use of power involved, courts at all times recognize that their *review* is judicial in character, and that the application of the police power to a particular situation is in the first instance a problem for the *legislative* branch of the government. . . .²⁷

What is a "judicial function," as used within the contemplation of section 951?

In *In re Discharge of Earl White*,²⁸ the Oklahoma Su-

²³ See *id.* at 187 n.7, for a list of sixteen Oklahoma cases supporting this rule.

²⁴ *In re Dawson*, 136 Okla. 113, 277 P. 226 (1928).

²⁵ *Keaton v. Oklahoma City*, 187 Okla. 593, 102 P.2d 938 (1940).

²⁶ 168 Okla. 609, 35 P.2d 435 (1934).

²⁷ *Id.* at 613, 35 P.2d at 439-440 (emphasis added).

²⁸ 355 P.2d 404 (Okla. 1960).

preme Court took this question under consideration in a proceeding to review a city civil service commission order. Holding that the judicial "appeal" statute allowed a review of this commission's findings, the court set forth the elements required of a "judicial" function:

Where a Civil Service Commission, created by amendment to a city charter, holds a hearing to determine whether a city employee should be discharged by a department head, swears witnesses, hears oral testimony, receives stipulations made by the respective attorneys, passes on objections to the admissibility of testimony (sic) admits exhibits in evidence, passes upon offers of proof, hears argument of counsel for both parties and submits written findings of facts and enters judgment thereon, the Commission in conducting such hearing exercised a *judicial* rather than an executive or administrative function.²⁹

It would seem that the removal of public officers under such circumstances is correctly classified as a "judicial" function. The problem of deciding what constitutes a "judicial" function is not a new era of inquiry, nor is it peculiar to Oklahoma. Kansas, from which our direct appeal statute was taken, has also been concerned with the problem under a similar law.³⁰ The Kansas courts have never conclusively de-

²⁹ *Id.* at 404 (court syllabus; emphasis added).

³⁰ Kansas, from which the Oklahoma judicial appeal statute was modeled, is in accord. See KAN. STAT. ANN. §60-2101 (1963), which reads as follows:

District courts. A judgment rendered or final order made by a court or any other tribunal, board or officer exercising judicial or quasi judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court. If no other means for perfecting such an appeal is provided by law, it shall be sufficient for an aggrieved party to file a notice that he is appealing from such judgment or order with such court, tribunal, board, or officer within thirty thirty (30) days of its entry, and then causing true

fined the expression but have discussed it in some noteworthy cases, none of which involve the argument that the adoption or rejection of a city ordinance is a judicial function. Apparently this thought has not yet occurred in our sister state.

The meaning of the term "judicial" was discussed by the Kansas court in *State ex rel. Brewster v. Mohler*,³¹ where it considered whether an act of the legislature conferred "judicial power" on the Secretary of the State Board of Agriculture. "Judicial power" said the court, "is the power to hear, consider, and determine controversies between rival litigants as to their personal or property rights, and must be regularly invoked at the instigation of one of the litigants."³² No such power was conferred upon the Secretary, ruled the court.

copies of all pertinent proceedings before such court, tribunal, board or officer to be prepared and filed with the clerk of the district court of the county in which such judgment or order was entered. The clerk shall thereupon docket the same as an action in the district court, which court shall then proceed to review the same, either with or without additional pleadings and evidence, and enter such order or judgment as justice shall require. A deposit as security for costs shall be required by the clerk of the district court as in the filing of an original action. When an action is filed in the district court on appeal or removal from an inferior court the jurisdiction of the district court shall not be limited to only such matters as were within the jurisdiction of the lower court, and the district court may by order permit the issues to be enlarged in the same manner and to the same extent as if the action had been originally commenced in the district court.

See also prefatory note to § 60-2101, which gives detailed discussion of the history of the new statute.

³¹ 98 Kan. 465, 158 P. 408 (1916), *aff'd sub nom.* Payne v. Kansas *ex rel.* Brewster, 248 U.S. 112 (1918).

³² *Id.* at 471, 158 P. at 410.

Another test was stated in *Shawnee County Commissioners v. Wright*,³³ where the same court considered unmeritorious a claim that the state tax commission acted judicially in making an order. In ruling against the plaintiff, the court said: "At any rate, what was done by the tax commission was not judicial. Its order does not have the effect of a judgment."³⁴

While there is considerable authority defining the words "judicial function", it would seem that the general American rule is that the adoption or rejection of municipal ordinances is clearly "legislative" in character.³⁵ The writer concurs in this view.

"Appeal" — An Unfortunate Term

Laymen speak of zoning controversies lodged in the courts as being an "appeal" from a decision of the city council. The term should, in this writer's opinion, never be used in this sense by attorneys even for the sake of convenience, unless specific reference to the type of proceeding in the *Sand Springs* case is intended. The term does not adequately describe what is in reality an original or collateral proceeding in the district courts for specific and extraordinary relief, i.e., injunction, mandamus, etc. The so-called zoning "appeal" referred to by the layman is a direct attack upon a law-making decision.

The term "appeal" has apparently found its way into the field of zoning law by continued reference to the type of judicial review allowed in board of adjustment cases, where direct appeals are specifically provided by statute.³⁶ These boards are quasi-judicial tribunals, and their actions and orders should not be confused with the enactment of zoning

³³ 153 Kan. 19, 109 P.2d 184 (1941).

³⁴ *Id.* at 34, 109 P.2d at 194.

³⁵ 8 E. McQUILLAN, *THE LAW OF MUNICIPAL CORPORATIONS* §25.54 (3d ed. 1965).

³⁶ OKLA. STAT. tit. 11, § 408 (1961).

laws, which only city councils are empowered to adopt. Appeals to the district courts from orders and decisions of zoning boards of adjustment are taken in the manner prescribed by statute, by serving upon the city officers involved a notice of appeal which serves as the beginning of the review process. In addition a copy³⁷ is always filed in the district court. The statute providing for these appeals must be meticulously followed to perfect an appeal in cases of alleged hardship or when errors of law are asserted. Failure to comply with statutory procedure deprives the courts of jurisdiction to entertain the appeal.³⁸

The Oklahoma Zoning Act,³⁹ however, is silent on the question of judicial review of decisions of city councils adopting or rejecting zoning changes. For this reason alone, the term "appeal" should not be used when referring to such matters.⁴⁰ Normally, the action will be to enjoin city officials from acting in a manner alleged to be arbitrary, unreasonable or capricious, either in refusing to adopt a zoning change or in refusing to reject a zoning amendment. In either case, constitutional problems of due process, equal protection of the law or variances from procedural requirements are commonly found in the cases on the subject.

Traditional Remedies

A number of difficult, albeit traditional, remedies have been used to plead zoning cases since the adoption of the Oklahoma Zoning Act in 1923.

³⁷ *Id.*

³⁸ *Jefferson v. British Am. Oil Prod. Co.*, 193 Okla. 599, 145 P.2d 387 (1943).

³⁹ *Buildings and Zoning Act*, OKLA. STAT. tit. 11, §§401-10 (1961).

⁴⁰ *See City of Tulsa v. Board of Trustees* 387 P.2d 255, 258 (Okla. 1963):

"[T]he word 'appeal', like the term 'law suit', usually connotes an adversary proceeding in, and of itself, connotes a bilateral disagreement, as distinguished from a unilateral matter."

Injunction: Suits have frequently been brought in the courts to enjoin, restrain and prohibit local officials or zoning agencies from enforcing the provisions of an act or conduct alleged to be unconstitutional, and the remedy of injunction is the one most commonly pleaded by petitioners seeking relief in this case. Thus, the remedy of injunction has been allowed to prohibit city officials from interfering with a restaurant located upon land zoned for homes where the zoning was adopted under an invalid law,⁴¹ to prohibit issuance of a building permit for construction of a shopping center under a city ordinance changing the zoning classification of particular property from residential to business use,⁴² to enjoin city officials from enforcing certain zoning ordinances prohibiting the sale of non-intoxicating beverages of 3.2% alcoholic content where these ordinances were in conflict with state laws regulating the sale thereof,⁴³ to abate the sale of fruits and vegetables upon land zoned for residential purposes,⁴⁴ and to enjoin a city from prohibiting the use of property on a major street for a gasoline filling station.⁴⁵ Other cases in which injunctions were sought, but denied on their facts by the supreme court, are abundantly cited in the reports of Oklahoma decisions.⁴⁶

Mandamus: The remedy of mandamus has also been sought in zoning cases, normally to obtain issuance of a building permit for the construction of a building in an area inconsistently zoned. In the cases the petitioner generally attacks the zoning ordinance as being unconstitutional. In *Magnolia Petro-*

⁴¹ *Elias v. City of Tulsa*, 408 P.2d 517 (Okla. 1965).

⁴² *Higginbotham v. City of The Village*, 361 P.2d 191 (Okla. 1961).

⁴³ *7-Eleven, Inc. v. McClain*, 422 P.2d 455 (Okla. 1967).

⁴⁴ *Suter v. City of Okmulgee*, 373 P.2d 527 (Okla. 1962).

⁴⁵ *City of Tulsa v. Swanson*, 366 P.2d 629 (Okla. 1961).

⁴⁶ See *Oklahoma City v. Barclay*, 359 P.2d 237 (Okla. 1960); *Shaw v. Calvary Baptist Church*, 184 Okla. 454, 88 P.2d 327 (1939); *Royal Baking Co. v. Oklahoma City*, 182 Okla. 45, 75 P.2d 1105 (1938).

leum Co. v. City of Tonkawa,⁴⁷ petitioner successfully alleged it was entitled to a building permit for a gasoline filling station upon land zoned for business buildings within the city limits against the contention by city officials that the ordinance permitting that use had been lawfully repealed, and the court said:

The record discloses that the plans and specifications for the proposed addition to the plaintiff's filling station met all of the requirements prescribed by ordinance . . . that same were submitted to the City Clerk and the required fees paid; that under the terms of such ordinance, the City Clerk and the Mayor must issue the building permit, when the provisions thereof are complied with, they being granted no discretionary powers thereunder. Since the property is located in an area zoned for business buildings, and since the plaintiff has complied with all the provisions of said ordinance, the issuance of the permit is purely a ministerial act. Therefore, the plaintiff is entitled to such building permit as a matter of right. . . .⁴⁸

Petitioners in at least two other Oklahoma zoning cases have failed to obtain a building permit through the remedy of mandamus, either because the ordinance under which the permit was sought was declared invalid,⁴⁹ or because the zoning change permitting the requested use was not adopted by the city council.⁵⁰

Habeas Corpus: Once arrested for the violation of a city zoning ordinance, may a petitioner seek his release from jail by means of the extraordinary writ of habeas corpus? At least one Oklahoma case indicates that he may attempt this route. He may attack the constitutionality of the zoning ordinance in the proceeding, even, as in the instance referred

⁴⁷ 189 Okla. 125, 114 P.2d 474 (1941).

⁴⁸ *Id.* at 126, 114 P.2d at 475.

⁴⁹ *Voight v. Saunders*, 206 Okla. 318, 243 P.2d 654 (Okla. 1952).

⁵⁰ *Shanbour v. Oklahoma City*, 422 P.2d 444 (Okla. 1967).

to here, where the complainant is unsuccessful in gaining his release.⁵¹

If the new rules announced in *City of Sand Springs v. Colliver* are to become the law in this jurisdiction, actions for injunction, mandamus or other extraordinary relief may be a relic of the past in the review of zoning cases. The irony of the new rules is that they are set forth in a decision in which both the trial court and the supreme court directed the issuance of a "mandatory injunction" prohibiting city officials from interfering with the construction by plaintiff of a retail liquor store upon his land.⁵² Did the court really intend to do violence to the separation of powers doctrine?⁵³

Exclusive Remedy?

As set-forth earlier, the customary method for relief in zoning litigation has been injunction. Thus, the typical plea is for a decree enjoining the enforcement by city officials of an invalid zoning ordinance, particularly as it may apply to a landowner's specific property.⁵⁴ Injunction is a popular remedy in the United States and is commonly found in most jurisdictions which have adopted the provisions of the Standard Zoning Enabling Act, first proposed by the federal Department of Commerce in 1926. In addition to the aforementioned customary remedy, mandamus, declaratory judgment and certiorari, when otherwise permitted by statute, are also existent remedies available to petitioners in most states.

The language of the *Sand Springs* case, however, suggests that any of these original proceedings brought to test a city council zoning decision is a remedy no longer avail-

⁵¹ *In re Reynolds*, 328 P.2d 441 (Okla. Crim. 1958).

⁵² 434 P.2d at 187.

⁵³ The writer of this article has had the opportunity to read appellate briefs submitted to the supreme court in the *Sand Springs* case. Significantly, the question whether zoning involves an exercise of "law-making" or "judicial" power was not raised in these briefs.

⁵⁴ Cases cited note 50 *supra*.

able in Oklahoma. Has injunction, mandamus, declaratory judgment or habeas corpus been ruled out? The true and correct remedy, implies the court, is that of an "appeal" under the provisions of section 951. The appeal must be taken by filing a "complete transcript,"⁵⁶ cannot be "de novo," and the determination of the examining magistrate is "limited to consideration of errors of law."⁵⁸ Only the written transcript is reviewable, and no new evidence may be admitted for the courts consideration.⁵⁹ Implied, but not stated, is the rule that a demurrer or other preliminary motion attacking the sufficiency of a cause of action not alleging existence of a transcript of evidence taken at the city council level will be sustained upon jurisdiction grounds.

An inevitable query is raised by these statements. Is the device of judicial "appeal" exclusive under the new doctrines?

The Oklahoma Supreme Court has not affirmed this view explicitly, nor is the question presented for argument in *City of Sand Springs v. Colliver*. Nevertheless, trial courts throughout the state are beginning to interpret the language of the case in this manner, and with some justification.⁶⁰ Summary judgments in zoning cases, absent transcripts of evidence below, are becoming commonplace. In at least one recent trial court judgment a specific finding to this effect was entered.⁶¹

⁵⁵ Buildings and Zoning Act, OKLA. STAT. tit. 11, §§ 401-10 (1961).

⁵⁶ 434 P.2d at 191.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ The supreme court stated in the *Sand Springs* case: "[T]he proceeding is not a trial *de novo* and the district court is limited to appellate consideration of the case." 434 P.2d at 187 (court syllabus; emphasis added.)

⁶¹ *O'Rourke v. City of Tulsa*, No. 115173 (Dist. Ct., Tulsa County, Okla. Dec. 26, 1967).

Current Confusion

Assuming the permanency of the rulings in the *Sand Springs* case, city councils must conduct evidentiary hearings, either through the use of special masters or longer meetings which will be time-consuming, costly and, to say the least, novel. Whatever the new procedures devised for these administrative hearings, ultimate decisions must eventually be made by the city council on zoning changes, for it and not the courts has the power to adopt ordinances.⁶² This function is specifically delegated to city councils by the Oklahoma Zoning Act.⁶³

Either solution mentioned here will meet opposition on the local scene. City councils neither desire to pose as judges nor are they normally qualified to rule upon hearsay expositions or objections made at other evidentiary disclosures. They are elected to legislate, not adjudicate. In some cases, city councils will refuse to comply with the new rules, fearing that heretofore informal hearings will soon be converted to adversary proceedings for which no established procedures exist, and which will require every applicant for a zoning change to employ an attorney familiar with the rules of evidence.

At least one city in Oklahoma, Tulsa, has appealed to the judges of the district court to forestall additional zoning hearings until new appeals can be perfected to the supreme court to clarify the *Sand Springs* case. As an alternative, the city attorney has suggested informal agreements among attorneys for zoning litigants, or stipulations to allow zoning review by means of the traditional remedy of injunction.⁶⁴ At best it seems that such a solution is a temporary device, and unduly permissive.

Most cities have simply ignored the problem in hopes

⁶² OKLA. STAT. tit. 11, § 401 (1961).

⁶³ *Id.*

⁶⁴ See Tulsa Tribune, June 27, 1968, § 1, at 12, col. 1.

that it does not really exist or that it will soon evaporate. If the zoning cases in the Tulsa area are examples,⁶⁵ then neither of these escapes has much merit.

CONCLUSION

The new rules guiding judicial review in zoning, if not changed by the supreme court in subsequent decisions or by curative legislation, will be difficult for cities and towns in Oklahoma to observe. The possibility that classification of zoning decisions as judicial rather than legislative in scope could easily be extended to the consideration of city ordinances in other fields, is a rather inappropriate result and not one to be desired. Clarification is greatly needed.

In the interim, city council discussion of zoning items should be accompanied with transcribed records for preservation as court evidence, rulings on competency and admissibility having to await proper objection should a judicial review develop. Witnesses should be sworn and petitions should be verified, for a "judicial function" is being exercised by the city council.

EDITOR'S NOTE: Shortly before publication of this article, the Oklahoma Supreme Court decided *O'Rourke v. City of Tulsa*, (1969). The O'Rourke case specifically overrules *Sand Springs v. Colliver*, 434 P.2d 186 (1968), and returns zoning activities of municipalities to their former status as legislative rather than judicial functions. Mr. Levy's arguments against the *Sand Springs* position now have judicial backing from Oklahoma's highest court.

⁶⁵ Local courts in the Tulsa area refuse to entertain judicial review in zoning cases today unless the requirements of *City of Sand Springs v. Colliver*, 434 P.2d 186 (Okla. 1967) are strictly followed, an impossible task under current procedures prevailing in city council meetings, where no sworn testimony exists and a legally competent "evidentiary" record or transcript cannot be made.