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Downzoning in Oklahoma: A Preview of Judicial Review

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DOWNZONING IN OKLAHOMA: A PREVIEW OF JUDICIAL REVIEW

I. INTRODUCTION

The situation is not uncommon: the landowner's homesite is a parcel bound on three sides by a business district, a shopping center, and a major traffic artery. Zoned for commercial use, the property is worth $250,000. Upon being rezoned by the town board to a residential classification, however, the parcel's market value plummets to $35,000. One decision by the town board has cost the landowner $215,000.[1] Such rezoning to limit the intensity or amount of permitted uses of land is called downzoning.[2]

As the word implies, downzoning occurs after an area has already been zoned.[3] It, therefore, differs from typical zoning legislation where a comprehensive plan is implemented for the first time. As a result of this difference, the landowner who purchased the lot under the impression that, along with the deed, he had acquired a vested right to property values under the present zoning classification, may be sorrowfully mistaken.[4] That is, as the use of his land becomes more restricted, its value decreases.

Because downzoning can cause sharp and unexpected decreases in land value, courts require that such legislation have a rational basis.[5] Courts may, however, apply various tests to decide whether, in a specific instance, downzoning legislation has such a rational basis.[6] While downzoning standards vary from state to state, within any single state, only one test is applied. Generally, state courts have derived downzon-

1. *See, e.g.*, Stevens v. Town of Huntington, 260 N.Y.S.2d 96 (Sup. Ct. 1965), *modified*, 272 N.Y.S.2d 713, *appeal denied*, 18 N.Y.2d 853, 275 N.Y.S.2d 856, 222 N.E.2d 614 (1966).

2. *See generally* Linowes & Delaney, *Downzoning—And How the Landowner May Fight It*, 5 REAL EST. L.J. 311 (1977).

3. *Id.*

4. That [the landowner] is not completely happy residing in a house pretty well surrounded by businesses and a shopping center does not *ipso facto* mean that the Town has breached a duty, or broken a promise to him, implied or otherwise. The existence of a *degree* of hardship on [the landowner's] part, as contrasted with an *absolute* hardship, is not sufficient to sustain his severe burden of proof in this action.

Stevens v. Town of Huntington, 260 N.Y.S.2d 96, 99 (Sup. Ct. 1965).

5. *See* note 21 *infra* and accompanying text.

6. *See* notes 21-43 *infra* and accompanying text.

ing standards from those used in upzoning disputes.[7]

An upzoning dispute typically arises when a landowner seeks to have his property rezoned to permit a greater number of uses. Thus downzoning creates greater use restrictions on the land, and upzoning removes use restrictions.

Oklahoma courts have resolved upzoning disputes,[8] but they have not yet been faced with a downzoning dispute. The thesis of this comment is that the Oklahoma courts, when faced with downzoning disputes, will derive downzoning standards from those they have applied in upzoning actions. This thesis is based on two premises. First, the purposes and effects of downzoning are the same as the purposes and effects of refusal to upzone. Second, other states have resolved downzoning disputes by use of the same standards that they have found applicable to refusals to upzone. To support these premises and the conclusion,[9] public policy factors of downzoning are surveyed,[10] and factors comprising the tests for valid downzoning are discussed.[11] Then, upzoning is analogized to downzoning by a demonstration of the similarity of the purposes and effects of refusal to upzone and those of downzoning.[12] In addition, the tests and factors involved in refusal to upzone cases in foreign state courts are shown to be the same tests and controlling factors those courts have applied in downzoning cases.[13] Finally, the judicial test and controlling factors for Oklahoma refusal to upzone cases are set forth.[14] Thus, this comment demonstrates that Oklahoma courts can reasonably be expected to apply their refusal to upzone standards when faced with a downzoning dispute.

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7. Commenting on judicial review of downzoning disputes, one author has concluded: "The courts have proved generally consistent in applying the same rationale for deciding downzoning cases as in deciding other rezoning matters, but they appear to worry more about the former." Staples, *Downzoning—Is It Legal and Is It Right?*, 1976 PLAN. ZONING & EMINENT DOMAIN INST. 119.

8. Lakewood Dev. Co. v. Oklahoma City, 534 P.2d 23 (Okla. Ct. App. 1974), illustrates a typical zoning dispute before it is taken into a court. A shopping center owner sought to have adjoining land upzoned in order to expand his business. The owner applied to the city council for a rezoning classification from a single family dwelling district to a local commercial district. First, the application was channeled to the city planning commission. After studying the relevant physical and economic characteristics of the surrounding neighborhood, the commission recommended approval of the application. Despite this unanimous recommendation by the planning commission, the city council rejected the application, resulting in a court action brought by the landowner to contest the refusal to upzone his property.

9. *See* notes 15-58 *infra* and accompanying text.

10. *See* notes 15-20 *infra* and accompanying text.

11. *See* notes 21-58 *infra* and accompanying text.

12. *See* note 59 *infra* and accompanying text.

13. *See* note 60 *infra* and accompanying text.

14. *See* notes 61-89 *infra* and accompanying text.

II. AN ANALYSIS OF DOWNZONING

A. *The Public Policies of Downzoning*

Municipalities use their downzoning power[15] to direct, to control, and often to curtail growth and development. Moreover, towns use downzoning to achieve these purposes in many ways. Assume, for example, that a town board passes an ordinance which provides for automatic downzoning of all land to be taken by eminent domain. Because the fair market value that the town pays the landowner will be based on a downzoned classification, that value may be less than the owner paid for the property, and if so he will suffer a loss on the condemnation. Thus, the town can exercise great latitude in compensating private landowners for property taken for municipal development. At least one court has viewed such downzoning as an unlawful confiscation of property.[16]

In lieu of downzoning a tract concurrently with condemnation as a means of controlling growth and development, the downzoning may also be done in anticipation of taking the tract for public use. In one case, for example, the county council downzoned a tract in order to depress its value in the event that the town ever wished to acquire the tract for incorporation into a public park, and the court upheld the downzoning as legal.[17] Moreover, rather than downzone one tract of land for some narrow purpose, such as park development, a municipality may downzone as part of a comprehensive controlled growth plan.[18] Balanced community planning is accomplished in several states through such master plans that detail the pattern of municipal growth and development.[19] Finally, downzoning may occur with no purpose more specific than to lock the downzoned area into a pattern of nongrowth until the town board is ready to permit development. The validity of such a moratorium on growth and development is usually

15. *See* note 21 *infra* and accompanying text for limitations of this power.

16. Department of Pub. Works & Bldgs. v. Exchange Nat'l Bank, 31 Ill. App. 3d 88, 334 N.E.2d 810 (1975) (condemnee was successful in attacking the validity of the zoning ordinance in the eminent domain action such that his property was freed of downzoned restrictions).

17. County Council v. District Land Corp., 274 Md. 691, 337 A.2d 712 (1975) (downzoning upheld because evidence of planner's purpose being future acquisition for a public park held inadmissible).

18. *See, e.g.*, Golden v. Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972) (phased growth plan was found to be within the ambit of zoning enabling legislation authorizing regulation of building height and placement).

19. For a survey of existing and proposed controlled growth ordinances, *see generally* Landman, *No Mr. Bosselman, the Town of Ramapo Cannot Pass a Law to Bind the Rights of the Whole World: A Reply (Part I)*, 10 TULSA L.J. 169 (1974).

determined by the reasonableness of its purpose, its severity, and its duration.[20]

B. Judicial Tests for Downzoning Validity

Euclid v. Ambler Realty[21] established a municipality's right to make zoning classifications under its police powers. The *Euclid* standard requires that, to be invalid, a zoning ordinance must be clearly arbitrary and unreasonable and be without substantial relation to public health, safety, morals, or general welfare.[22] Obviously, downzoning is a type of zoning; therefore, such legislation is subject to *Euclid*.

Courts have consistently applied the *Euclid* rationale, but they have done so by means of a variety of tests. In other words, some courts have used *Euclid* as a backdrop to another more definite test in downzoning disputes; other courts have directly applied *Euclid*. Tests that courts have applied in resolving downzoning disputes include: the mistake, or change of conditions, test; the all beneficial use test; and the discrimination test. These tests, as well as the direct application of *Euclid*, will now be discussed.

1. Mistake, or Change of Conditions, Test

One test that courts have used to measure a municipality's conformance with the *Euclid* standard of rationality is the mistake, or change of conditions, test. A Virginia court used this test in nullifying a piecemeal downzoning ordinance.[23] The court held that where a landowner makes a prima facie showing that his property was downzoned without either a mistake in the original zoning scheme or a change in circumstances, the burden of proof shifts to the municipality to show otherwise.[24]

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20. *See, e.g.*, Westwood Forest Estates, Inc. v. Village of South Myack, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969) (downzoning which barred new construction of multiple dwellings throughout the municipality and which was not limited to any period of time, was invalid as it prevented the landowner from using the land for any purpose to which the land was reasonably adapted and therefore constituted a taking which is only permissible through the exercise of the power of eminent domain).

21. 272 U.S. 365 (1926).

22. *Id.* at 395.

23. Board of Supervisors v. Snell Constr. Corp., 214 Va. 665, 202 S.E.2d 889 (1974) (election of a new board of supervisors did not constitute a change of conditions as to justify adoption of piecemeal downzoning).

24. *Id.* at __, 202 S.E.2d at 893.

2. All Beneficial Use Test

Another test courts have used to measure a municipality's conformance with the *Euclid* standard is based on whether the rezoning deprives the owner of all beneficial use of his land. A classification which substantially renders the land useless for all reasonable purposes will not be found to meet *Euclid's* standard of reasonableness.[25] As this test applies to downzoning cases, the modifier "substantially" may be particularly important in terms of how restrictively the land may be zoned. It would seem that land could be rezoned to a more restrictive classification without rendering the land substantially useless.[26] This downzoning could, nevertheless, produce drastic economic consequences for the landowner. If the property, for example, was zoned for heavy industrial use initially, downzoning to allow only light industrial use does not deprive the landowner of all beneficial use of the parcel such that it has been rendered substantially useless for all reasonable purposes.[27] This downzoning could, however, produce drastic economic consequences for the owner who, after holding the property for years in order to sell it to an industrial developer, learns that the land has been downzoned with a resulting drastic diminution in market value.

For this reason, courts may often look at the peculiar suitability of a tract for a specific purpose.[28] This approach was taken in an action where the landowner challenged the downzoning of a triangular parcel from a light industrial to a residential classification.[29] The court held the downzoning void, stating that "an effort to create a no man's land or buffer zone in property of the appellees for the benefit of others by preventing the appellees from using their property for any of the purposes for which it is peculiarly suitable . . . is not permissible."[30]

25. Buhler v. Racine County, 33 Wis. 2d 137, 146 N.W.2d 403 (1966) (downzoning found to be constitutional unless it practically or substantially rendered the land useless for all reasonable purposes).

26. *Id.* at __, 146 N.W.2d at 406.

27. *See, e.g.*, Dustin v. Mayor of Rockville, 23 Md. App. 389, 328 A.2d 748 (1974) (downzoning which prevents residents from using the tract as a recreation area was upheld as not depriving them of all beneficial use of the land).

28. *Id.*

29. *Id.*

30. *Id.* at __, 328 A.2d at 768 (quoting Mayor of Rockville v. Cotler, 230 Md. 335, 340, 187 A.2d 94, 97 (1963) (citations omitted)).

3. Discrimination Test

A third test that courts have used to apply the *Euclid* standard of rationality is the discrimination test. Zoning which favors one landowner over another will be invalid as discriminatory if it merely serves a private purpose.[31] Even where the downzoning results in a public benefit, however, the discrimination test may nullify the ordinance if it causes severe harm to an individual.[32] That is, if the harm to the individual outweighs any public benefit resulting from the downzoning, that downzoning may be invalid. When a downzoning ordinance resulted in a landowner's parcel being reduced to a public-parking classification, for example, the New York Court of Appeals nullified the ordinance as placing an undue, uncompensated burden on the individual landowner for the benefit of the public.[33]

4. The Direct *Euclid* Test

In determining the validity of a downzoning ordinance, some courts[34] have applied the general *Euclid* standard directly.[35] Hence, no liaison test is applied to the facts of a downzoning case to implement the general *Euclid* standard by which these facts are to be judged.[36] Again, *Euclid* requires that a zoning ordinance be reasonable, not arbitrary, and be substantially related to public health, safety, morals, or general welfare.

The Supreme Court of Colorado, for example, used the direct *Euclid* test in deciding that downzoning of land from suburban business district to multi-family residential, after it had been annexed by the municipality, was not unreasonable.[37] Adding gloss to the direct *Eu-*

31. *See* Linowes & Delaney, *supra* note 2, at 318.

32. *Id.*

33. Vernon Park Realty, Inc. v. City of Mt. Vernon, 307 N.Y. 493, __, 121 N.E.2d 517, 519 (1954): "However compelling and acute the community traffic problem may be, its solution does not lie in placing an undue and uncompensated burden on the individual owner . . . in the guise of regulation, even for a public purpose."

34. *E.g.*, Bird v. City of Colorado Springs, 489 P.2d 324 (Colo. 1971); Weibrecht v. City of Chicago, 14 Ill. App. 3d 1062, 304 N.E.2d 9 (1973).

35. *See* notes 21-22 *supra* and accompanying text.

36. *But see* notes 41-42 *infra* and accompanying text.

37. The court held:

> Zoning ordinances or regulations will not be declared unreasonable and arbitrary unless plainly and palpably so, or if enforced the consequent restrictions will preclude the use of the property for any purpose to which it is reasonably adapted, and if the unreasonableness thereof is fairly debatable such ordinance must be upheld.

Bird v. City of Colorado Springs, 489 P.2d 324, 327 (Colo. 1971) (quoting Baum v. City of Denver, 363 P.2d 688, 694 (Colo. 1971)).

clid test, the court said that not only must the aggrieved landowners show that the action of the municipality was unreasonable, arbitrary, or capricious (the *Euclid* standard),[38] but the landowners must also prove this proposition beyond a reasonable doubt.[39] Thus, in Colorado, downzoning is entitled to a presumption of validity once it has been enacted. The landowner then bears the burden of overcoming that presumption.[40]

5. The Fair Debate Test

Finally, the direct *Euclid* test (as well as the mistake, or change of conditions, test) has been modified at times by a fair debate test.[41] This test is used with the direct *Euclid* standard to decide whether the aggrieved landowner has proven that the disputed downzoning is arbitrary and capricious beyond the realm of fair debate.[42] Likewise, the fair debate rule has been coupled with the mistake, or change of conditions, test. Because the municipality has the burden of proof under this latter test,[43] it must produce evidence of mistake or change of conditions which makes the reasonableness of the downzoning grounds for fair debate.

C. *Controlling Factors in Downzoning Disputes: Economic and Physical*

Regardless of which of the above tests is applied to resolve the ultimate issue of whether a downzoning ordinance meets the *Euclid* standard, a court will weigh the controlling factors that are peculiar to whichever test that court uses. Although the particular factors are unique in each controversy, they generally comprise two categories. First, the courts have examined the pecuniary loss of the aggrieved landowner. Second, the courts have considered those physical factors

38. *See* notes 21-22 *supra* and accompanying text.

39. 489 P.2d at 326.

40. *Id.* at 325.

41. *See, e.g.*, Tilley v. Rogers, 405 S.W.2d 220 (Tex. 1966) (courts have no authority to interfere with a downzoning ordinance if the reasonableness of the change is evidenced by fact issues which are fairly debatable).

42. A Texas court has defined "fairly debatable" as the "issuable facts" rule of evidence, meaning anyone attacking a zoning ordinance has the burden of showing that no controversial facts or conditions existed which would authorize the zoning, and if reasonable minds could differ, the zoning is valid. City of Waxahachie v. Watkins, 154 Tex. 206, 275 S.W.2d 477 (1955). This rule may now be limited solely to original zonings unless there is a change of conditions. Thompson v. City of Palestine, 510 S.W.2d 579 (Tex. 1974).

43. Board of Supervisors v. Snell Constr. Corp., 214 Va. 665, __, 202 S.E.2d 889, 893 (1974).

relevant to the downzoned parcel. Several examples will demonstrate judicial approaches to these factors in downzoning actions.

1. Controlling Economic Factors

Judicial focus on pecuniary considerations in downzoning cases was demonstrated in *Town of Hempstead v. Lynne*.[44] A group of developers planned construction of a shopping center on a tract zoned for business use, going to great expense to prepare the area for development.[45] To prevent the proposed construction, the town board downzoned the parcel from a business classification to a residential classification. The result was a $90,000 reduction in the market value of that parcel. The court held that, in determining the reasonableness of this residential development, economic feasibility is one of the vital elements to be considered.[46] In considering this vital element, the court said that the mere lessening of profits does not render a zoning ordinance confiscatory.[47] Nevertheless, the court held that where the only choice offered the landowner was either to leave his land or to develop it for the more restricted use at a substantial loss of his actual investment, the downzoning scheme was not reasonably adapted to the use.[48]

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44. 32 Misc. 2d 312, 222 N.Y.S.2d 526 (1961).

45. The court found:

> Taxes were paid on the capital gain realized and there is nothing in the record which indicates that the price paid was at variance with true value. The sum actually paid, then, i.e., $177,600, must be considered as the defendant's investment.
>
> To this figure must be added the following sums:
>
> (1) $140,000, cost of 151,000 cubic yards of hydraulic fill to bring the grade to elevation 8-1/2, the minimum grade required by the Town's building code for business development, which was actually expended by defendant between June 1960 and April 1961.
>
> (2) $8,440, cost to defendant of additional soil tests to comply with Town's requirements before the building permit could be issued.
>
> (3) $9,000, cost of engineering and development plans for the proposed shopping center.
>
> (4) $16,300, cost of widening Hungry Harbor Road attributable to the 11.1-acre parcel. (In this connection the court holds that the widening of the road was of direct benefit not only to this 11.1-acre parcel, but also to 70.4 additional acres representing the total acreage shown on nine maps filed by the defendant with the County Planning Commission on which the widened road was delineated. Thus, 11/81sts. of the stipulated cost of $120,000 for the road widening is found to be a direct investment in the parcel.)
>
> Considering the initial investment and the foregoing expenditures already incurred, it is found that the defendant's total present investment in the 11.1-acre parcel amounts to $351,340.

Id. at __, 222 N.Y.S.2d at 533.

46. *Id.* at __, 222 N.Y.S.2d at 532.

47. *Compare* Stevens v. Town of Huntington, 260 N.Y.S.2d 96 (Sup. Ct. 1965), *modified*, 272 N.Y.S.2d 713, *appeal denied*, 18 N.Y.2d 853, 275 N.Y.S.2d 856, 222 N.E.2d 614 (1966) *with* Morse v. County of San Luis Obispo, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967).

48. 32 Misc. 2d at __, 222 N.Y.S.2d at 532.

Spotlighting the importance of pecuniary loss to the landowner in a downzoning situation, the *Lynne* court related it to the reasonableness requirement[49] of the *Euclid* standard.[50]

2. Controlling Physical Factors

To determine whether a downzoning ordinance satisfies the *Euclid* requirement of substantial relationship to public health, safety, morals, or general welfare,[51] courts have looked at the second major group of determinants, those physical factors relevant to the downzoned parcel.

Shellburne, Inc. v. Conner,[52] for example, involved a fact situation similar to that in *Lynne*. The landowner, a corporation, purchased property in anticipation of eventual development as a neighborhood shopping center. The tract was zoned for business use. Shortly after the landowner obtained a building permit, the county council downzoned the land to a residential classification. The owner attacked the downzoning as invalid, claiming that the action was arbitrary and capricious[53] and hence not substantially related to public health, safety, morals, or general welfare.[54] Without ignoring the economic factors of lost profits and a decreased market value resulting from the downzoning,[55] the court's principal focus was on the ramifications that the downzoning would have on the surrounding neighborhood.[56] To discern what this impact would be, the court applied the direct *Euclid* test[57] to those physical factors relevant to the downzoning ordinance. These factors included: the surrounding property; the shape of the parcel in regard to potential parking problems; the potential problems of allowing commercial ventures to be near area schools; the availability of alternative shopping in the area; and the potential lack of control over future planned development if construction of the shopping center was permitted.[58]

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49. *Id.*
50. *See* notes 21-22 *supra* and accompanying text.
51. *Id.*
52. 315 A.2d 620 (Del. Ch. 1974), *aff'd*, 336 A.2d 568 (Del. 1975).
53. *Id.* at 621.
54. *See* notes 21-22 *supra* and accompanying text.
55. 315 A.2d at 624.
56. *Id.* at 623-24.
57. *See* notes 34-43 *supra* and accompanying text.
58. The court found the following to be the basis for the recommendation to rezone:

The subject property is surrounded by residential-type development and is across the street from a school and church complex.

The shape of the parcel is rectangular, thereby creating a difficult design problem

Thus far the purposes, the judicial tests, and the controlling factors of downzoning have been analyzed. This analysis is based on non-Oklahoma downzoning cases since Oklahoma has yet to face a downzoning dispute. Again, the conclusion of this comment is that Oklahoma courts should apply the same standards to downzoning as they have applied to refusal to upzone cases. The first premise from which this conclusion is drawn is that the purposes and effects of downzoning are the same as those underlying refusal to upzone. To establish this premise, refusal to upzone must be analyzed.

III. AN ANALYSIS OF REFUSAL TO UPZONE

A. The Public Policies Behind Upzoning Standards

Refusal to upzone is illustrated by the situation where a parcel is zoned for single family residential use, but it is located in an evolving area where the character of the land has become clearly more suited for a light industrial classification. If the town board refuses to upzone the parcel for light industrial use, it has placed an artificial restriction on the full value of that land.[59] Here, as in downzoning, the landowner is prevented from realizing a part of his land's value. Refusal to upzone land in such areas has an impact which parallels the results of downzoning. First, the policies behind refusal to upzone are the same as those behind downzoning. That is, both types of zoning ordinances are directed toward controlling development. Second, the effect of refusal to upzone and of downzoning on the landowner is the same. This is true because in either instance the owner of the land would be de-

for access, parking, and siting of buildings so as to minimize impact, if it is developed commercially.

Presumably, if commercial use is developed, it will probably cater in part to that element of the market represented by school children, thereby drawing children back and forth across Shipley Road who would otherwise have no occasion to cross the heavily traveled artery. Furthermore, the mixture of commercial and educational land uses in general should not be encouraged as an acceptable planning concept.

The subject property is between an elementary school and the service area of the school—thereby contributing to a potential conflict between school uses and commercial oriented vehicles, school children and other pedestrians.

There is no control over the shape or placement of the commercial use relative to the surrounding land uses—that is, there is only one place for the development to occur with no opportunity for planned development.

Existing commercial development serving the full-range of consumer needs is conveniently located within several minutes of the subject property, e.g., Merchandise Mart, Gaylords, Graylyn Shopping Center.

315 A.2d at 623.

59. "Full value" is used here to represent what a buyer would reasonably pay for a tract in accordance with "the basic physical facts." *See generally* Village v. McCown, 446 P.2d 380 (Okla. 1968).

prived of a portion of the full former value of his land measured prior to the zoning action.

B. Judicial Tests for Refusal to Upzone

Because the purposes and effects of downzoning and refusal to upzone can be equated, it is reasonable to assume that the judicial test for these two types of zoning will be the same. This conclusion is borne out by the fact (the second premise of this comment) that in states where both types of zoning have been litigated, the same judicial test has been used.[60] In other words, the mistake, or change of conditions, test, the all beneficial use test, the discrimination test, and the direct *Euclid* test are upzoning tests as well as downzoning tests. Thus, whichever of these tests a state uses, it will use that test for both types of zoning cases.

C. Controlling Factors in Upzoning Disputes: Economic and Physical

The conclusion that states apply the same judicial test to resolve both upzoning and downzoning disputes implies that the same physical and economic factors comprising that judicial test will control in both types of cases. In fact, the Oklahoma upzoning cases about to be discussed demonstrate the similar role of economic and physical factors in resolving both downzoning and upzoning disputes.

IV. UPZONING CASES IN OKLAHOMA

Again, the point of this comment is to predict what test Oklahoma courts will apply in downzoning disputes. Since non-Oklahoma courts have derived downzoning tests from tests used in upzoning disputes, Oklahoma downzoning actions will probably be resolved under the same standards which have been applied in upzoning disputes. Therefore, to predict the Oklahoma downzoning test, the Oklahoma upzoning standard must be established.

In short, the following analysis of Oklahoma upzoning cases will demonstrate that Oklahoma applies the direct *Euclid* test as modified by the fair debate rule. Recall that under this test and rule, the zoning will be struck down if it is arbitrary and capricious beyond the realm of fair debate. Hence, this comment predicts that Oklahoma courts will

60. *See, e.g.*, Dustin v. Mayor of Rockville, 23 Md. App. 389, 328 A.2d 748 (1974) (where the all beneficial use test was applied to a downzoning dispute).

apply the direct *Euclid* test as modified by the fair debate rule to downzoning disputes. For purposes of analysis, the Oklahoma cases have been distinguished on the basis of whether physical or economic factors controlled the outcome of that particular case.

A. Controlling Physical Factors

Physical factors were the court's primary concern in *City of Tulsa v. Nicholas*.[61] That case involved an owner's application to the planning commission to have his land upzoned so that he could practice medicine in a home/office. The area was traversed by 16,000 vehicles per day and included a four lane, heavily occupied street, a school, a church, and a restaurant. Faced with these facts, the court granted the owner's request. The court used the direct *Euclid* test,[62] relying especially on the second part of the test which requires a substantial relationship to public health, safety, morals, or general welfare.[63] In conformance with the second part of the test, the court gave particular attention to the physical factors relevant to the upzoning. The judge, in fact, found that the import of these factors merited his personally viewing the involved area.[64] The court candidly said: "This court has previously given approval to judicial relaxation of restrictions on property, originally residential, where conditions have changed, and such restrictions . . . have failed to preserve an area's comparative value for residential use".[65] As in many downzoning decisions,[66] *Nicholas* demonstrated the importance of the physical characteristics of the surrounding neighborhood in resolving the matter.

Physical factors were also given substantial weight in *City of Tulsa*

61. 415 P.2d 917 (Okla. 1966).
62. *See* notes 34-43 *supra* and accompanying text.
63. 415 P.2d at 923.
64. *Id.* at 920.
65. *Id.* at 923. The court examined each physical factor in detail:

> Many employees of the American Air Lines and the Douglas Aircraft Plant, which are in a northerly direction from the subject area, use Sheridan in going to and from their work. On this Street's segment . . . there are electric traffic control lights at its intersections with 11th Street, Admiral Place, and Fourth Place, which latter is also a 4-lane, heavily traveled street, but is only 44 feet in width. North of Second Street, on Sheridan, there is a large drive-in restaurant, as well as a Texaco Filling Station. There are other stations of that character on Sheridan, between Fifth Place and Seventh Street, and at Sheridan's intersections with 7th and 11th Streets. Between Seventh and Ninth Streets, there is an apartment building on Sheridan's west side. North of Third Street, along Sheridan's west side, is a combined elementary and junior high school, with adjacent play grounds, including an outdoor basket ball [*sic*] court.

Id. at 921.
66. *See, e.g.*, Shellburne Inc. v. Conner, 315 A.2d 620 (Del. Ch. 1974), *aff'd*, 336 A.2d 568 (Del. 1975).

v. Mobley[67] where property owners sought unsuccessfully to have their land upzoned in order to construct a supermarket. The record reflected that the tract was bound by a four-lane, heavily traveled highway. The area, which had a ten story building standing and a thirty story building under construction, had been given a multi-family classification. There was a group of businesses four blocks away to the north and a large urban renewal area to the west.[68] Taking note of these determinants, the court coupled the fairly debatable rule[69] with the direct *Euclid* test.[70] The court held that the basic physical facts[71] relevant to the refusal to upzone were evidence that the zoning commission had acted arbitrarily and capriciously in denying the landowner's application.[72] Because this finding was not even fairly debatable, according to the court, the ordinance was held to be invalid.[73] In taking note of the nature of the tract, the surrounding property, recent expansive trends in the area, and adjoining zoning ordinances,[74] the *Mobley* court thus considered the same and similar physical factors to be determinative as have the courts in their downzoning disputes.[75]

B. Controlling Economic Factors

More recently, *Lakewood Development Co. v. Oklahoma City*[76] gave considerable attention to the court's other major area of concern: economic hardship endured by a landowner whose request for upzoning is denied. There the owner had purchased six houses next to its shopping center and had sought to have the parcels upzoned from residential to commercial use. One city witness, a professional real estate appraiser, stated that from the standpoint of pure economics the best

67. 454 P.2d 901 (Okla. 1969).
68. *Id.* at 903.
69. *See* notes 41-43 *supra* and accompanying text.
70. *See* notes 34-43 *supra* and accompanying text.
71. 454 P.2d at 904.
72. *Id.*
73. The trial court undoubtedly considered all of the basic physical facts, including, the nature of the subject property and surrounding property, the use to which each has been put, recent trends of development, the zoning of the adjoining block for commercial purposes, the urban renewal project to the west, the construction of large apartment complexes in the surrounding area, and the need for commercial facilities. On the contents of the record and on the fact of the trial court's findings it appears that the judgment rezoning the subject property has a reasonable basis and was justified.

Id.

74. *Id.*
75. *See, e.g.*, Shellburne Inc. v. Conner, 315 A.2d 620 (Del. Ch. 1974), *aff'd*, 336 A.2d 568 (Del. 1975).
76. 534 P.2d 23 (Okla. Ct. App. 1974).

use of the property was for commercial purposes.[77] The property was appraised for commercial purposes at $217,000 as compared with a value of $28,319 for residential use—a difference of $188,681.[78] The court stated that these economic considerations were among the pertinent facts which evidenced the unreasonableness of the refusal to upzone.[79]

Similarly, in *Tulsa Rock Co. v. Board of County Commissioners*,[80] the court appeared to give great weight to whether the landowner would suffer unpreventable economic hardship[81] as a result of the municipality's refusal to upzone the parcel to a classification of "mining."[82] The court reasoned that, although the refusal to upzone did not allow the property owner to realize the full value[83] of the parcel, the value of the land under the more restrictive classification (after the refusal to upzone) was still higher than the owner's original investment.[84] In addition, the court took notice of the fact that economic operations on the land until the upzoning request was denied had produced sufficient profit to compensate the landowner for the value lost due to the refusal.[85] Having examined these factors, the court held that the refusal to upzone was neither arbitrary nor capricious,[86] as the reasonableness of the economic considerations was at least fairly debatable.[87] The language of this case thus demonstrated that, like foreign state courts that have faced zoning disputes,[88] Oklahoma courts consider ec-

77. *Id.* at 26.

78. *Id.*

79. After examining the potential commercial obsolescence which the refusal to rezone from residential to commercial use would cause to surrounding properties, the court concluded:

> We hold as did the trial court that the city council's action "enforcing the 'A' Single Family Dwelling ordinance was arbitrary and capricious," because the facts support but one non-debatable conclusion—that the refusal to rezone the plaintiff's lot to "E" local commercial was unreasonable.

Id. at 27.

80. 531 P.2d 351 (Okla. Ct. App. 1974).

81. *Id.* at 358.

82. *Id.*

83. *See* note 59 *supra* and accompanying text.

84. 531 P.2d at 358.

85. *Id.* Although this case involved a situation where the landowner was requesting a rezoning to a less restrictive classification, it is nevertheless similar to a downzoning situation since the land which was unzoned when the purchaser acquired it for mining use was subsequently zoned for agricultural use.

86. *Id.*

87. *Id.* at 358-59.

88. *See, e.g.*, Town of Hempstead v. Lynne, 32 Misc. 2d 312, 222 N.Y.S.2d 526 (1961). The court went into great detail in weighing the economic considerations.

> Against the investment must be compared the present value of the land as zoned for residential purposes. The court finds that the 11.1-acre parcel will yield 47 plots of 6,000

onomic loss to the landowner to be a controlling factor in deciding the reasonableness of a municipality's refusal to upzone.[89]

V. CONCLUSION

This comment has shown that Oklahoma courts will probably apply the same standards to downzoning actions, when they arise, as they have applied to upzoning disputes. This conclusion has been shown to follow from two premises. First, the purposes and effects of downzoning are the same as those of refusal to upzone, as illustrated by a comparison of upzoning and downzoning actions.[90] Second, other states have applied upzoning tests to resolve downzoning disputes.[91]

An analysis of Oklahoma upzoning cases has revealed that the *Euclid* rationality test has been applied,[92] as modified by the fair debate rule. Hence, this author predicts that the Oklahoma courts will apply the direct *Euclid* test when faced with a downzoning dispute. That is, the courts will ask whether downzoning is clearly arbitrary and capricious and without substantial relationship to public health, safety, morals, or general welfare.[93] If the answer to this question is affirmative beyond the realm of fair debate,[94] then the downzoning ordinance will be invalid. This ability to arrive at a reasonable prediction of judicial behavior is important in itself as well. "Such stability and predictability in the law serve the interest of both the landowner and the public."[95]

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square feet each. Each plot has a market value of approximately $6,000. Thus, the total market value of the parcel zoned for residential purposes is $282,000. However, in order to bring the property into marketable condition, the entire parcel must be filled with approximately 11,000 cubic yards of additional fill in order to bring the elevation to grade 9, the minimum elevation required for residential construction. The cost of this additional fill, inclusive of incidental survey and engineering plans, is in the vicinity of $22,000, which figure must be deducted from the foregoing valuation to arrive at the true net market value of the 11.1-acre parcel, which is $260,000.

Id. at __, 222 N.Y.S.2d at 533.

89. 531 P.2d at 358.

90. *See* notes 59-60 *supra* and accompanying text.

91. *See* note 7 *supra* and accompanying text.

92. *See* notes 61-89 *supra* and accompanying text.

93. *See* notes 34-43 *supra* and accompanying text.

94. *See* notes 41-42 *supra* and accompanying text.

95. Board of Supervisors v. Snell Constr. Corp., 214 Va. 665, __, 202 S.E.2d 889, 893 (1974).