## THE PRESUMPTION OF CONSTITUTIONALITY AND THE LAW OF ZONING

*Beaver Gasoline Co. v. Zoning Hearing Board, 1 Pa. Cmwlth. 458, 275 A.2d 702 (1971)**

The Borough Township Zoning Ordinance expressly excluded gasoline stations from the district zoned C, Commercial, in which plaintiff's lot lay. Since the other districts in the township were zoned residential, the Zoning Regulation by implication extended the prohibition to the whole township. Plaintiff requested a permit to build a gasoline station on his lot, but both the Township Borough Council and the Borough Zoning Board denied his application. Plaintiff appealed the denial of the permit to the Court of Common Pleas of Allegheny County on the grounds that the ordinance prohibiting gasoline stations throughout the township was an unconstitutional taking of property without due process of law. The court held that the plaintiff had not presented sufficient evidence to overcome the presumption of constitutional validity attached to a municipal zoning ordinance. The Commonwealth Court of Pennsylvania[1] reversed, holding that after plaintiff demonstrates that a municipal zoning ordinance totally prohibits a legitimate land use, the municipality bears the burden of producing evidence to show that the ordinance bears a substantial relationship to the public health, safety, morals or general welfare.

In the first zoning case decided by the Supreme Court, it was held that a municipality, in enacting zoning laws, acts as a legislative body.[2] A zoning ordinance enacted by a municipality in accordance with state enabling statutes is presumed to be constitutional. The ordinance will be upheld as constitutional unless the provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.[3] A plaintiff who challenges the constitutionality of a zoning ordinance bears the burden of proof that the ordinance lacks a reasonable basis.[4] Under the traditional presumption of constitu-

* The Pennsylvania Supreme Court recently affirmed *Beaver's* holding, but remanded the case to the Zoning Hearing Board to allow the borough to produce additional evidence. Beaver Gasoline Co. v. Zoning Hearing Bd., No. 148 March Term (Pa. Sup. Ct. Dec. 29, 1971).

1. The Commonwealth Court of Pennsylvania was established by the Appellate Jurisdiction Act of 1970 to hear some cases, principally zoning cases, formerly heard by the Supreme Court of Pennsylvania.

2. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

3. *Id.* at 395.

4. *Id.*

tionality, almost all courts[5] have held that a plaintiff who attacks a zoning ordinance has the burden of pleading its invalidity and the burden of negating every reasonable basis upon which the ordinance could be sustained.[6]

In the face of these seemingly conclusive holdings, two courts have recently required a municipality to produce the reasons relating its ordinance to the public health, safety, and welfare, before a plaintiff challenging the constitutionality of the ordinance has attacked its reasonableness.[7] These courts have made a distinction between the burden of persuasion and the burden of production of evidence.[8] The burden of persuading the court of the unconstitutionality of the ordinance rests on the plaintiff throughout the trial. If, however, the plaintiff can show that the effect of the ordinance greatly decreases the value of his land, he can discharge his lesser burden of producing evidence, and can, therefore, require defendant municipality to bring forward evidence relating the ordinance to the public health, safety, and general welfare.[9] This differentiation between two types of burden of proof is beneficial to the plaintiff. He need not try to guess the municipality's reasons for passing the ordinance in order to attack them.[10] Moreover, this approach encourages

5. R. Anderson, 1 AMERICAN LAW OF ZONING § 2-15 (1968) (hereinafter cited as ANDERSON); 101 C.J.S. *Zoning* § 368 (1958).

6. Cole v. City of Osceola, ___ Ia. ___, 179 N.W.2d 524, 528 (1970).

7. Cole-Collister Fire Protection Dist. v. City of Boise, 93 Idaho 558, 468 P.2d 290 (1970); Junar Const. Co. v. Town Bd. of Hampstead, 57 Misc. 2d 727, 293 N.Y.S.2d 358 (Sup. Ct. 1968). This view has apparently been upheld in New York in Sacha v. Smith, 33 App. Div. 2d 835, 306 N.Y.S.2d 551 (App. Div.), *aff'd* 26 N.Y.2d 1005, 259 N.E.2d 738, 311 N.Y.S.2d 306 (1970). *But see* Contino v. Village of Hempstead, 33 App. Div. 2d 1048, 309 N.Y.S.2d 130 (App. Div.), *rev'd* 27 N.Y.2d 701, 262 N.E.2d 221, 314 N.Y.S.2d 15 (1970). A similar analysis has developed in relation to the presumption of administrative regularity when a variance is requested from a zoning board. Fulling v. Palumbo, 21 N.Y.2d 30, 233 N.E.2d 272; 286 N.Y.S.2d 272 (1967).

8. This analysis of burden of proof can be traced to J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 355-64 (1898).

9. "[W]hile the burden of proving unconstitutionality beyond a reasonable doubt remains on the property owner throughout the case, evidence of such injury or loss shifts to the municipality the burden of going forward with the proof that the area restriction bears reasonable relationship to health, welfare, or safety . . ." Junar Const. Co. v. Town Bd. of Hampstead, 57 Misc. 2d 727, 728, 293 N.Y.S.2d 358, 360 (Sup. Ct. 1968). "At the beginning of the trial in the instant case, the plaintiff-respondent (Cole-Collister) bore the 'burden of proof' to show that the zoning ordinance in question was invalid. In order to do this the plaintiff-respondent (Cole-Collister) had to introduce evidence to overcome the presumption of validity attached to the ordinance. Once the presumption of validity was overcome, the burden of proof shifted to Boise City to produce evidence tending to show that the erection of a filling station would in fact interfere with the goals articulated by the regulations in question." Cole-Collister Fire Protection Dist. v. City of Boise, 93 Idaho 558, 568-69, 468 P.2d 290, 301 (1970).

10. 1 Pa. Cmwlth. at ___, 275 A.2d at 706. Roswig, *Local Government*, 21 SYR. L. REV. 495, 501 (1969).

administrative efficiency. In order to provide a complete record for possible judicial review, initial hearings before municipal zoning boards can be restructured to require introduction of evidence in support of the ordinance at that time, rather than waiting until an appeal has been taken to the courts.[11]

Nevertheless, these results are not consistent with the traditional presumption of constitutionality in the law of zoning.[12] The problem lies in the meaning and effect which the courts give to the word "presumption." The ordinary definition of a presumption, adopted by the majority of courts today,[13] simply fixes a burden of producing evidence on one party or the other, and can be overcome on a showing that the contrary is at least rationally probable.[14] These ordinary presumptions can be used by the courts for administrative convenience; they are often employed to require one party to produce evidence peculiarly within his knowledge.[15] But there is another kind of presumption, which, for reasons of public policy or substantive law, places an extraordinary burden on the party moving against it.[16] For example, the presumption of legitimacy of a child born to married parents or the presumption of innocence in criminal trials places a heavy burden on the party against whom the presumption is raised. Such presumptions cannot be overcome by a mere showing of contrary probabilities.[17] The presumption of constitutionality places this sort of extraordinary burden on the plaintiff to show that a zoning ordinance is unreasonable and arbitrary.[18] Most courts in zoning cases require the plaintiff to show unconstitutionality "beyond a reason-

11. Note, *Land Use Control*, 22 SYR. L. REV. 291, 293 (1971).

12. *Id.* at 295.

13. E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 77 (1956).

14. *Id. See also* F. JAMES, JR., CIVIL PROCEDURE 260-61 (1956).

15. F. JAMES, JR., *supra* note 14, at 262.

16. E. MORGAN, *supra* note 13, at 77. Even Thayer was forced to recognize this sort of a presumption. J. THAYER, *supra* note 8, at 336-37. The California Evidence Code has made a clear distinction between the two types:

> A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied.

CAL. EVID. CODE § 603 (Deering 1966).

> A presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied. . . .

CAL. EVID. CODE § 605 (Deering 1966).

17. E. MORGAN, *supra* note 13 at 77. J. THAYER, *supra* note 8, at 336-37.

18. ANDERSON § 2-14.

able doubt,"[19] or by "clear and convincing evidence,"[20] or by similar language.[21]

There are many policy reasons behind the strong presumption of constitutionality traditionally applied to zoning ordinances. A zoning ordinance is a legislative decision, to be accorded the same deference as state or federal legislation.[22] The local municipal governing body ordinarily has more knowledge of local affairs and expertise in fashioning ordinances to suit local conditions.[23] Finally, the presumption acts to protect the municipality from harassing attacks on its zoning plans.[24] It seems hardly justified to discard the traditional presumption of constitutionality simply because it is easier for a plaintiff to challenge the ordinance or because it might be administratively more convenient.

This is not to say, however, that there can never be a justification for discarding the traditional strong presumption of constitutionality surrounding zoning ordinances. In two recent cases, *Appeal of Girsh*[25] and *Appeal of Kit-Mar Builders, Inc.*,[26] the Pennsylvania Supreme Court viewed certain suburban zoning ordinances so skeptically that the court, in effect, placed the burden of persuasion on the municipalities to justify the ordinances.[27] The court decided that these ordinances, which prohibited apartment buildings[28] and established minimum-size building lots,[29] had the effect of keeping inner-city people out of the suburban township by raising housing prices higher than low or medium income families could afford.[30] Therefore, the court held that a zoning ordinance adopted

19. *See, e.g.*, Highway 100 Auto Wreckers, Inc. v. City of West Allis, 6 Wis. 2d 637, 96 N.W.2d 85 (1959).

20. *See, e.g.*, LaSalle Nat. Bank of Chicago v. Cook County, 12 Ill. 2d 40, 145 N.E.2d 65 (1957).

21. *See, e.g.*, E.B. Elliott Adv. Co. v. Metropolitan Dade Co., 294 F. Supp. 412 (S.D. Fla. 1968); City of St. Petersburg v. Aiken, 217 So. 2d 315 (Fla. 1968). *See also* ANDERSON § 2-14.

22. ANDERSON § 2-14.

23. Note, *The Constitutionality of Local Zoning*, 79 YALE L.J. 896, 900 (1970).

24. Cole-Collister Fire Protection Dist. v. City of Boise, 93 Idaho 558, 468 P. 2d 290 (1970) (dissenting opinion).

25. Appeal of Girsh, 437 Pa. 237, 263 A. 2d 395 (1970).

26. Appeal of Kit-Mar Builders, Inc. (also reported as Concord Township Appeal), 439 Pa. 466, 268 A.2d 765 (1970). *See also* National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965).

27. *Symposium: Exclusionary Zoning*, 22 SYR. L. REV. 465, 568 (1971) (hereinafter cited as *Symposium*); Strong, 22 ZONING DIGEST 100a (1970);*Pennsylvania Supreme Court and Exclusionary Zoning: From Bilbar to Girsh—A Decade of Change*, 17 VILL. L. REV. 507 (1971).

28. Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

29. Appeal of Kit-Mar Builders, Inc. (also reported as Concord Township Appeal), 439 Pa. 466, 268 A.2d 765 (1970).

30. Appeal of Girsh, 437 Pa. 237, 242, 263 A.2d 395, 397 (1970); Appeal of Kit-Mar Builders, Inc. (also reported as Concord Township Appeal), 439 Pa. 466, 474, 268 A.2d 765, 768-69 (1970). *See also* National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965); *Symposium* at 519.

for the purpose of impeding growth in the suburbs is unconstitutional,[31] and that the burden is on the municipality to show that the ordinance will not have this result.[32] The Pennsylvania Supreme Court has been congratulated for recognizing the extraterritorial effect a zoning ordinance may have in excluding the urban poor from the suburbs.[33] By protecting the rights of the urban poor to live in the suburbs, the court has, however, discarded the traditional due process formula,[34] which balanced the interests of the landowner in the community against the interests of the municipality in protecting the public health, safety, and general welfare.[35] The court did not, unfortunately, offer a new rationale to include the interests of the urban poor in deciding the constitutionality of local zoning ordinances.[36]

One answer to this problem has been to view exclusionary zoning as a denial of equal protection of the law to those excluded from the suburbs.[37] Reasoning by analogy to recent Supreme Court cases dealing with statutes which discriminate against indigents' rights to criminal appeals,[38] or the franchise,[39] some commentators view exclusionary zoning as discrimination against lower-income people, since it effectively denies them access to decent places to live and work.[40] Although the Supreme Court has not yet ruled on exclusionary zoning, at least one federal court has recognized that the equal protection argument may be applicable.[41] Moreover, if the equal protection argument is accepted by

31. Appeal of Girsh, 437 Pa. 237, 469-70, 263 A.2d 395, 396 (1970). "Thinly veiled justifications of exclusionary zoning will not be countenanced by this court." Appeal of Kit-Mar Buildings, Inc. (also reported as Concord Township Appeal), 439 Pa. 466, 478, 268 A.2d 765, 770 (1970). *See also* Washburn, *Apartments in the Suburbs: In re Appeal of Joseph Girsh*, 74 DICK. L. REV. 634, 650 (1970) (hereinafter cited as Washburn).

32. *Symposium* at 569.

33. *Id.* at 573.

34. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 784 (1969) (hereinafter cited as Sager).

35. Washburn at 649-50.

36. *Id.*

37. Sager at 784-85. Other articles generally favoring an equal protection argument applied to exclusionary zoning include *Symposium*; Washburn; Comment, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971); Note, *The Constitutionality of Local Zoning*, 79 YALE L.J. 896 (1970).

38. Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

39. Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

40. Sager at 785; Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645, 1649-50 (1971).

41. Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291 Cir. 1970). *See also Symposium* at 575.

the courts, it seems likely that the traditional presumption of constitutionality will, as in the Pennsylvania cases,[42] be discarded.[43] The Supreme Court has viewed discrimination based on race or income with such disfavor[44] that it has in such cases required the state to demonstrate a compelling justification for the classification made by the statute.[45]

The *Beaver* court seems to say that an ordinance which prohibits gasoline stations from a municipality has the same discriminatory effect as one that excludes people and should be treated accordingly. The court finds it significant that the ordinance in *Beaver* totally excluded a land use,[46] as did the ordinance in *Appeal of Girsh*,[47] in which the Supreme Court of Pennsylvania overturned the presumption of constitutionality. The *Beaver* court places major reliance, however, on an earlier decision by the Pennsylvania Supreme Court, *Exton Quarries, Inc. v. Zoning Bd. of Adjustment*.[48] The court in *Exton* upheld a municipality's power to selectively prohibit land uses, but held that these prohibitions must bear a "more substantial relationship" to the public health, safety, and general welfare.[49] Although the Pennsylvania Supreme Court in that case specifically reaffirmed the presumption of constitutionality surrounding a zoning ordinance,[50] the *Beaver* court finds in the "more substantial relationship" demanded from a prohibitory ordinance the factor necessary to place on the municipality the burden of justifying the discrimination between excluded businesses and those which "enjoy the blessing of the municipality."[51] The *Beaver* court holds that the township must supply the reasons for its ordinance in order to insure the "equal protection of the prohibited business."[52]

The *Beaver* court's extension of the cases dealing with exclusionary zoning to ordinances which prohibit commercial land uses can be criticized. The court's reliance on *Appeal of Girsh*[53] is misplaced. The Penn-

42. Appeal of Girsh, 437 Pa. 237, 263 A. 2d 395 (1970); Appeal of Kit-Mar Builders, Inc. (also reported as Concord Township Appeal), 439 Pa. 466, 268 A.2d 765 (1970).

43. Sager at 784.

44. *Exclusionary Zoning, supra* note 40, at 1650-51.

45. *Id. See also* Loving v. Virginia, 388 U.S. 1 (1967).

46. 1 Pa. Cmwlth. at ____, 275 A.2d at 702-03.

47. 437 Pa. 237, 263 A.2d 395 (1970).

48. 425 Pa. 43, 228 A.2d 169 (1967).

49. *Id.* at 61, 228 A.2d at 179.

50. *Id.* at 58, 228 A.2d at 178.

51. 1 Pa. Cmwlth. at ____, 275 A.2d at 705.

52. *Id.*

53. 437 Pa. 237, 263 A.2d 395 (1970).

sylvania Supreme Court in that case expressly limited the holding to the right of people to live on land and declared that this was a different proposition from ordinary business uses of land.[54] Equally mistaken is the *Beaver* court's assumption that the presumption of constitutionality should be overturned. Except in cases of statutes which discriminate on grounds of wealth or race,[55] the Supreme Court has held that a plaintiff who challenges a statute as discriminatory has the burden of showing that the classification made by the statute does not rest on a reasonable basis.[56]

The immediate impact of the *Beaver* holding is to make it more difficult for the township to prohibit a land use.[57] The plaintiff need only show that the ordinance is, indeed, prohibitory in order to shift to the municipality the burden of supporting its ordinance.[58] In addition, in order to sustain its ordinance, the municipality must not only show that it is necessary for the public health, safety, and welfare but must also show that the undesirable effects which necessitated the ordinance are not also caused by permitted uses or that they are not amenable to regulation instead of prohibition.[59] Since the township in *Beaver* presented no evidence to support its ordinance, it is not clear exactly how much or what kind of evidence is required.

Still, the *Beaver* court's overturning of the presumption of constitutionality and its placing of the burden on the municipality to defend its ordinance may have even greater significance. The presumption of constitutionality surrounding zoning ordinances rests on the assumption that zoning is best left in local hands.[60] By overthrowing the presumption of constitutionality, the foundation of local control of zoning itself is called into question. The extraterritorial effects of local zoning laws

54. "It is not true that the logical result of our holding today is that a municipality must provide for all types of land use. This case deals with the right of people to *live on land*, a very different problem than whether appellee must allow certain industrial uses within its borders." Appeal of Girsh, 437 Pa. 237, 245-46, 263 A.2d 395, 399 (1970).

55. *See* notes 43 and 44 *supra* and accompanying text.

56. Sager at 768-69. *See also* Williamson v. Lee Optical Co., 348 U.S. 483 (1955). *But cf.* Morey v. Doud, 354 U.S. 457 (1957).

57. Washburn at 660. Washburn argues that reading Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970), and Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 425 Pa. 43, 228 A.2d 169 (1967), together make it difficult for a municipality to exclude any land use whatever. *Beaver*, by extending the overthrow of the presumption of constitutionality, increases the difficulties even more.

58. 1 Pa. Cmwlth. at ____, 275 A.2d at 704.

59. *Id.* at ____, 275 A.2d at 705.

60. *See* notes 22-24 *supra* and accompanying text.

which exclude people from suburban townships are already recognized.[61] As *Beaver* illustrates, other types of zoning ordinances may also have an effect beyond the boundaries of the municipality.[62] Not only did the ordinance ban gasoline stations in the *Beaver* case, it also banned industrial structures, liquor stores, refreshment stands, lunch counters, tea rooms, and restaurants.[63] Since these essentials are required by the people in Borough Township, the prohibition of them makes it necessary for some adjacent municipality to provide these services. Although the courts have been slow to recognize the effects of zoning laws beyond municipal borders,[64] some courts have noted that a municipality may be required to consider regional needs when drawing up commercial zoning ordinances.[65] For example, a local ordinance prohibiting shopping centers in a municipality may not be justified if a location in that municipality best satisfies regional needs.[66]

The *Beaver* court's holding does not deal effectively with the extraterritorial effect of the prohibitory ordinance. The municipality must justify its ordinance in terms of the general welfare, but this general welfare includes only the people in the municipality. Nowhere does the *Beaver* court weigh the interests and capabilities of surrounding townships which must also bear the effect of a prohibitory ordinance. To deal with the extraterritorial effect of ordinances which exclude people, many commentators[67] have suggested metropolitan or regional control of zoning.[68] A similar scheme, or at least a compulsory coordination of zoning plans among adjacent municipalities, may also be the answer to the extraterritorial effects of prohibitory zoning ordinances such as the one in *Beaver*.[69]

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61. *See* notes 27-32 *supra* and accompanying text.

62. Note, *Zoning: Looking Beyond Municipal Borders*, 1965 WASH. U.L.Q. 107.

63. 1 Pa. Cmwlth. at ____, 275 A.2d at 711-12.

64. *Zoning, supra* note 62, at 107.

65. *Zoning, supra* note 62, at 118. *See also* Wrigley Properties, Inc. v. City of Ladue, 369 S.W.2d 397 (Mo. 1963); Fanale v. Borough of Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958).

66. *Zoning, supra* note 62, at 121. *See also* Wrigley Properties, Inc. v. City of Ladue, 369 S.W.2d 397 (Mo. 1963).

67. Note, *The Constitutionality of Local Zoning*, 79 YALE L.J. 896, 924 (1970); *Symposium* at 588-97; Appeal of Kit-Mar Builders, Inc. (also reported as Concord Township Appeal), 439 Pa. 466, 476, 268 A.2d 765, 769 (1970); Vickers v. Township Comm'n, of Gloucester Township, 37 N.J. 232, 254, 181 A.2d 129, 141 (1962) (dissenting opinion).

68. For a discussion of the benefits of local control of zoning, *see* Note, *The Constitutionality of Local Zoning*, 79 YALE L.J. 896, 900 (1970); A. DE TOQUEVILLE, DEMOCRACY IN AMERICA 73-103, ch. V (1835).

69. *Zoning, supra* note 62, at 124-25.