

## BURDEN OF PROOF IN "SPECIAL EXCEPTION" CASES

More than just another gas station zoning case, *Appeal of Facciolo*<sup>1</sup> makes a departure from the traditional burden of proof requirements in "special exception" service station cases. In that case, the plaintiff, Facciolo, requested a "special exception" from the board of adjustment before constructing a gasoline station on his commercially zoned lot. Since the board found that another station would greatly increase the traffic problems in the area,<sup>2</sup> it denied Facciolo's request on the grounds that the station would be detrimental to public safety and general welfare of the community. Following the general rule that the zoning authority has broad discretion in matters of opinion and policy,<sup>3</sup> the trial court upheld the board's ruling. Facciolo appealed to the Supreme Court of Pennsylvania.

Agreeing with the decision of the lower court, the Supreme Court of Pennsylvania refused to overturn the board's decision.<sup>4</sup> Although the controversy, to that point, appeared to be a typical gasoline station case, the court's reasoning rested on a premise which could potentially impair the board's power in zoning for land use controls:

When there is an application for a special exception, *the burden is on those who would deny the exception to show that the granting of such exception would be adverse to the public interest.*<sup>5</sup>  
(Emphasis added)

This appears to be quite a departure from the majority of the opinions which have traditionally placed the burden of proof upon the party contesting the regulation,<sup>6</sup> at least in regard to a potentially noxious use, such as a gasoline station.

It is important to note that the *Facciolo* case involved a request for a special exception rather than a hardship variance. Although the

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1. 440 Pa. 508, 269 A.2d 699 (1970).

2. See generally Fonoroff and Terrill, *Controlling Traffic Through Zoning*, 21 SYRACUSE L. REV. 857 (1970).

3. Williams, *The Numbers Game: Gasoline Service Stations and Land Use Controls*, 1969 URBAN L. ANN. 26 [hereinafter cited as Williams]; *Adler v. City of Baltimore*, 220 Md. 623, 155 A.2d 504 (1959).

4. 440 Pa. 508, 269 A.2d 699 (1970).

5. *Id.* at 511, 269 A.2d at 701.

6. Williams at 26.

plaintiff need not demonstrate unusual hardship in order to obtain an exception,<sup>7</sup> the board will not grant one as a matter of right. The exception is still considered "a privilege, not . . . [a] right, assuming that the requisite facts and conditions in the ordinance are found to exist."<sup>8</sup> Numerous cases in other jurisdictions have either expressly or implicitly placed the burden of proof on the applicant in gasoline station decisions. However, the degrees of the burden vary among different jurisdictions.

Some courts have placed a seemingly light burden on the plaintiff, such as a recent Maryland case, *Rockville Fuel and Feed Co. v. Board of Appeals*,<sup>9</sup> which held that "the applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements."<sup>10</sup> Apparently this was the only burden the court placed upon the plaintiff, but the implications of such a decision would, of course, depend greatly upon the standards which the board had developed.

Although the Maryland decision reflects the more modern approach, some cases, such as *Monforte v. Zoning Board of Review*,<sup>11</sup> have placed an extremely heavy burden of proof upon the plaintiff. In *Monforte* the court upheld the board's refusal to grant a special exception because it found that "the applicant had failed to establish that the public welfare and convenience would be substantially served by a grant of the exception . . . ."<sup>12</sup> This places a very heavy burden of proof on the plaintiff, because surely it would be most difficult to prove that another service station would substantially serve the convenience and welfare of the public.

Other decisions have imposed a burden upon the applicant which is somewhat greater than that in *Rockville* yet lighter than that in *Monforte*. As early as 1952, *Executive Television Corporation v. Zoning Board of Appeals*,<sup>13</sup> for example, required the plaintiff to show only that the board acted arbitrarily and unreasonably. The court defined reasonableness as acting "fairly or within proper motives or

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7. See Note, *The Use and Abuse of the Special Permit in Zoning Law*, 35 BROOKLYN L. REV. 258, 260 (1969).

8. *Blair v. Board of Adjustment*, 403 Pa. 105, 169 A.2d 49 (1961).

9. 257 Md. 183, 262 A.2d 499 (1970).

10. *Id.* at 190, 262 A.2d at 503.

11. 93 R.I. 447, 176 A.2d 726 (1962).

12. *Id.* at 449, 176 A.2d at 727.

13. 138 Conn. 452, 85 A.2d 904 (1952).

## BURDEN OF PROOF

upon valid reasons."<sup>14</sup> However, it noted that the board possesses wide discretion in denying and granting a special exception. Another middle-of-the-road position was followed in a 1969 Connecticut case,<sup>15</sup> which denied the plaintiff's request for a special exception because it had failed to meet the burden of proving that the station would not be detrimental to the public safety.

Thus, although the burden of proof in service station cases has traditionally fallen upon the applicant for the exception, the degree of the burden will depend on the interpretations of the particular state courts. Nevertheless, the trend points towards a lighter burden. The Supreme Court of Minnesota,<sup>16</sup> for example, only required the plaintiff to show that the board acted arbitrarily, but went on to explain that "the failure of the council to record any legally sufficient basis for its determination at the time it acted made a prima facie showing of arbitrariness . . ." <sup>17</sup> Such a decision seems to come very close to shifting the burden of proof to the board.

In spite of the movement towards lessening the burden, no cases have gone as far as the Pennsylvania decisions, in the absence of a statute.<sup>18</sup> In the *Facciolo* case, not only did the court shift the burden of proof to the township, it placed a *heavy* factual burden upon it:

We feel the record indicates the Township did meet its *heavy burden* of establishing that the increased traffic and abnormal traffic patterns resulting from turns into and out of the station had a high degree of probability of causing serious detriment to the community.<sup>19</sup> (Emphasis added)

In reaching such a conclusion, the court followed two earlier Pennsylvania decisions which had also placed the burden of proof upon the city. However, these cases involved a grant for a church<sup>20</sup> and a college.<sup>21</sup> In the latter case, the court found that the board abused its

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14. *Id.* at 455, 85 A.2d at 905.

15. *Etzel v. Zoning Bd. of Appeals*, 155 Conn. 539, 235 A.2d 647 (1967).

16. *Zylka v. City of Crystal*, 283 Minn. 192, 167 N.W.2d 45 (1969).

17. *Id.* at 198, 167 N.W.2d at 50.

18. *Syosset Holding Corp. v. Schlimm*, 15 Misc. 2d 10, 159 N.Y.S.2d 88 (Sup. Ct. 1956). While the court found that the plaintiff had the burden to show that it had met the requirements, the New York statute required that once this was demonstrated, the board had a duty to issue the exception.

19. 440 Pa. at 515 n.3, 269 A.2d at 703 n.3.

20. *Jacobi v. Zoning Bd. of Adjustment*, 413 Pa. 286, 196 A.2d 742 (1964).

21. *Appeal of Delaware Community College*, 435 Pa. 264, 254 A.2d 641 (1969).

discretion in denying the permit on the grounds of density, sewage, and traffic problems, and said, "[W]here there is an application for a legislatively provided special exception, the burden is on those who would deny the exception to prove that it is detrimental to the health, safety, welfare and morals of the community."<sup>22</sup>

Nevertheless, this rule is easier to apply to a public institution, such as a school or church, than to a potentially noisy and odorous private, commercial use like a gasoline station. For example, in *Appeal of Archbishop O'Hara*,<sup>23</sup> the court said that the burden was *not* on the plaintiff to show that the use would not have an adverse effect upon the community, but the decision later noted the court's historical reluctance to exclude schools from residential areas.

Thus, *Facciolo* may have interpreted the previous Pennsylvania decisions too broadly in extending them to service stations. On the other hand, the character of such a use would automatically place a lighter burden on the city, at least as compared to schools and churches, because "it is comparatively easy for the zoning board of adjustment to refuse a special exception for a gasoline station . . ."<sup>24</sup> With traffic problems,<sup>25</sup> a tendency to depreciate surrounding property,<sup>26</sup> existing stations in the area,<sup>27</sup> and proximity to schools and churches,<sup>28</sup> the board is already armed with some powerful ammunition to kill a proposed station in certain areas.

How *Facciolo* will affect the power of the zoning board of appeals to control service stations remains to be seen. A late 1970 Pennsylvania decision, *Appeal of Stefonick*,<sup>29</sup> chose to follow the line of cases in that state which agree with *Facciolo* that "the burden is on the Board to prove that the grant of the exception *would* be injurious."<sup>30</sup>

Although the court in *Stefonick* accepted that rule, it admitted that it might be an illogical one. In this respect it recognized the strong

22. *Id.* at 268, 254 A.2d at 643.

23. 389 Pa. 35, 131 A.2d 587 (1957).

24. Michie, *The Special Exception in Zoning in Pennsylvania—1963*, 36 TEMP. L.Q. 298, 309 (1963).

25. *See Elliot v. Joyce*, 233 Md. 76, 195 A.2d 254 (1963).

26. *See Gordon v. Plonski*, 11 App. Div. 2d 693, 204 N.Y.S.2d 590 (1960).

27. *See Center Realty Corp. v. Zoning Bd. of Review*, 96 R.I. 482, 194 A.2d 671 (1963).

28. *See Esso Standard Oil Co. v. Zoning Bd. of Appeals*, 148 Conn. 507, 172 A.2d 607 (1961).

29. 1 Pa. Commw. Ct. 13, 271 A.2d 707 (1970).

30. *Id.* at ———, 271 A.2d at 708.

## BURDEN OF PROOF

criticism of Chief Justice Bell, who has consistently opposed the reasoning of the Pennsylvania Supreme Court even when the burden fell upon the city in a case involving a church:

Since zoning is justifiable and Constitutional only if it is reasonably necessary to protect public health or safety or morals and general welfare, *isn't it logical* to hold that one who asks for an exception to a presumptively valid and Constitutional Act or Ordinance has the two-fold burden of proving that his proposed building or proposed use (1) falls within a legislatively *excepted* permissible building or use, and (2) that it is not detrimental to public health or safety or morals or general welfare!<sup>31</sup>

One writer<sup>32</sup> has suggested that by placing a heavy burden upon the board, the presumption of validity might sustain a regulation the wisdom of which is debatable. However, it seems to this author that by continuing to allow the board to exercise its broad discretion and keeping the burden of proof on the applicant for a special exception, zoning, as a land use control, can be more effective.

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31. *Jacobi v. Zoning Bd. of Adjustment*, 413 Pa. 286, 293, 196 A.2d 742, 746 (1964) (concurring opinion).

32. *Williams* at 29.

