Duquesne Law Review

Volume 8 | Number 2 Article 9

1970

Zoning - Authority to Determine Situs of Schools

Frederick B. Gieg Jr.

Recent Decisions

ZONING—AUTHORITY TO DETERMINE SITUS OF SCHOOLS—The Pennsylvania Supreme Court has held that a statute investing school districts with the power to choose location of schools precludes townships from applying their zoning regulations to restrict construction of a school on a tract chosen by the school directors.

Pemberton Appeal,[1] 439 Pa. 249, 252 A.2d 597 (1969).

The Pennsylvania Supreme Court was faced with the problem of whether the authority of a school district or that of the township's zoning board should prevail in regard to the location of schools within the confines of the township.

The controversy arose when the school authority acquired a tract of land with the unanimous approval of the school directors and decided to erect an elementary school thereon. The school authority's application for a certificate of occupancy was denied by the building inspector. The School District appealed to the Board of Adjustment where it also requested a variance in the zoning scheme. The Board of Adjustment dismissed the appeal and denied the request for a variance on the basis that the tract was situated in a zoning district that did not permit schools under any conditions.

The lower court held that the township was without authority to regulate the location of public school buildings. In affirming, the Pennsylvania Supreme Court relied on the Public School Code of 1949. Section 702 provides in part:

> The location and amount of any real estate required by any school district for school purposes shall be determined by the board of school directors of such district, by a vote of the majority of all the members of such board.[2]

However, the court was confronted with Section 58103 of the First Class Township Code which grants to townships of the first class the necessary power to enact zoning regulations. Section 58103 provides in part:

> Such regulations shall be in accordance with a comprehensive

1. This case is referred to as *Appeal of Radnor Township Authority* in the Atlantic Reporter.
2. PA. STAT. ANN. tit. 24 § 7-702 (1949).

> plan and designed to lessen congestion in the streets, to secure safety from fire, panic and other dangers, to promote health and general welfare, to provide adequate light and air and to prevent the overcrowding of land to avoid undue concentration of population, to facilitate the adequate provision of transportation, water, sewage, schools, parks and other public requirements.[3]

Radnor Township had enacted its zoning regulations pursuant to these sections.

Justice O'Brien, speaking for the court, found no conflict between these statutes because the power of the Township to regulate schools is a general power while the school district's authority to determine the situs of schools is a specific power. The Court furthermore reasoned that even if a conflict was found to exist, the school district would prevail as a result of Section 63 of the Statutory Construction Act[4] which resolves such conflicts in favor of the specific legislation.

The court considered two cases presented by the township as authority for the proposition that the ultimate power of deciding the location of schools inherently lies within the zoning power of the township.

School District of Philadelphia v. Zoning Board of Adjustment[5] involved the problem of whether the City of Philadelphia had the power to apply its zoning regulations concerning off-street parking to the school district. The court thoroughly considered the Public School Code[6] which places in the School District the discretion of determining the situs upon which schools are to be erected. In interpreting this power the court found that the provisions of the school code by no means give the school districts plenary powers over their physical plants. The school districts, though enjoying some of the attributes of sovereignty of the Commonwealth, have limited powers and these powers do not include the police power. Philadelphia had enacted the zoning legislation pursuant to the Zoning Enabling Act[7] and later pursuant to the First Class City Home Rule Act.[8] As the zoning regulation was reasonable and since the school district lacked the police power, the court saw no reason why the school district should be immune from the zoning ordinance. The court in dictum specifically

3. *Id.*, tit. 53 § 58103.
4. *Id.*, tit. 46 § 563 (1937).
5. 417 Pa. 277, 207 A.2d 864 (1965).
6. PA. STAT. ANN. tit. 24 § 7-702 (1949).
7. *Id.*, tit. 53 § 14752 (1929).
8. *Id.*, § 13131 (1949).

left unanswered the question in *Radnor*, but intimated that the city could probably not "zone out" schools entirely.[9]

The *Radnor* court found little difficulty in distinguishing *Philadelphia*. The court noted that the Philadelphia home rule charter gave to it broader authority than that possessed by first class townships such as Radnor. More importantly, the *Philadelphia* case did not involve zoning regulations purporting to exclude schools from certain areas—the precise question presented in *Radnor*.

In *Wilkinsburg-Penn Joint Water Authority v. Churchhill Borough*[10] plaintiff was a joint municipal authority incorporated under the Municipal Authorities Act.[11] The Water Authority's function was to provide water services for consumption, health, and fire protection. Defendant was a borough regulated by the Borough Code.[12] The Authority, in attempting to better its water service, desired to build an elevated water tank in an area where such structures were prohibited by the zoning board. The water authority argued its immunity from the borough's zoning restrictions based on Section 306 Subdivision B(h) of the Municipal Authorities Act[13] which gave the Authority the power "to determine by itself exclusively the services and improvements required to provide adequate, safe, and reasonable service." In apparent conflict to the water authority's power was Section 3302(a) of the Borough Code which provides:

> For any and all purposes, the council may divide the borough into districts. . . . Within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures, or land.[14]

The court, as in the instant case, was thus faced with resolving two conflicting powers over the same subject matter, *i.e.*, the erection of a water tower on a zoned tract of land. The court examined the Borough Code and found that nowhere is property owned by an Authority expressly excepted from regulation by the boroughs. It reasoned that the property must be subject to the jurisdiction of the zoning authorities unless a different inference could be drawn from the legislation. The water authority thought that the inference to its immunity was

9. 417 Pa. 277, 290, 207 A.2d 864, 871 (1965).
10. 417 Pa. 93, 207 A.2d 905 (1965).
11. PA. STAT. ANN. tit. 53 § 301 (1945).
12. *Id.*, § 45101 (1966).
13. *Id.*, § 306B(h) (1955).
14. *Id.*, § 48202 (1966).

implicit in Section 306 of the Municipal Authorities Act[15] quoted above.

The court attempted to give effect to both statutes and to interpret them so as to attain the legislative objectives. The court recognized that the powers of the two municipal corporations had the same general schemes and proceeded to reconcile the apparent conflict by examining their comprehensiveness and the legislative intent behind each. It found that the provisions of the Borough Code[16] under which Churchill Borough had enacted its zoning regulations were broader and in fact encompassed the initiatives of the water authority. This would indicate that the zoning power must be exercised in due regard to the water authority so as not to hinder the water service. Furthermore, nothing in the Municipal Authorities Act commands that the decisions of the Authority compliment the comprehensive zoning plan of the Borough, and in fact, nothing in the Act would prevent the Authority from acting in direct contradiction to the comprehensive plan. The court therefore concluded that the objectives of both municipal corporations could best be attained only if the Authority's power was subservient to the Borough's zoning power.

The *Radnor* court distinguished *Wilkinsburg* by reference to the enabling legislation. The court stated that the Authority's power "to determine by itself exclusively the services and improvements required to provide adequate, safe, and reasonable service" was not a specific power to locate its services. The provision was so general that no power to locate actually existed. The court contrasted the above provision with Section 702 of the Public School Code[17] which vests specific power in the school districts to locate, determine, and acquire real estate for the purpose of erecting schools. Thus the school district's power was one specifically enumerated whereas the water authority's power was of a general nature.

Two questions must be asked at this point. Did the court adequately deal with the conflict of power issue? What are the possible implications of the court's decision?

Assuming the provisions of the Public School Code to be more specific than those of the Municipal Authorities Act, it is believed that

15. *Id.*, § 306B(h) (1955).
16. *Id.*, § 48203 (1966).
Such regulations shall be made in accordance with a comprehensive plan, and designed to lessen congestion in the streets, to secure safety from fire, panic and other dangers, to promote health and general welfare.
17. *Id.*, tit. 24 § 7-702 (1949).

the statutory construction utilized by the instant court is simply not responsive to the analysis of the *Wilkinsburg* case. The *Wilkinsburg* court was not concerned with which statute was more specific,[18] but rather attempted to focus in on the very nature of the statutory provisions and the legislative intent behind each. By concluding that the objectives of the zoning regulations were more comprehensive and that the water authority was only one segment of the overall zoning scheme, the court was recognizing and placing great relevance upon the comprehensive plan.

It is submitted that this line of reasoning is equally applicable to the instant decision. The court might well have concluded that the township's power to enact zoning regulations is more comprehensive than the school district's power to locate schools. Proceeding with the rationale of *Wilkinsburg*, the court might have reasonably found that in order to preserve the comprehensive plan, the school district's authority must be subordinate to the township's.

The *Radnor* decision seems to indicate a departure from the customary approach to the zoning dilemma. Previously, there was a presumption in favor of the validity of a zoning ordinance[19] so long as the regulation is necessary for the preservation of public health, safety, morals, or general welfare and is not unjustly discriminatory or arbitrary.[20] However, at no point in the *Radnor* litigation was the reasonableness of the township's zoning plan in question.

There are several approaches in determining the question of whether or not a zoning board's regulation should prevail against competing municipal corporation's interests.

This article will proceed to examine these approaches as they apply specifically to school districts and further how they apply to other municipal corporations.

One approach concludes that schools are immune from legislation

---

18. *Id.*, tit. 53 § 48201 (1966). It seems apparent that if the *Radnor* court was concerned with specificity, section 48201 should have met the requirement. Section 48201 provides that:

> For the purpose of promoting health, safety, morals or the general welfare, councils of boroughs are hereby empowered to regulate and restrict the height, number of stories, and size of buildings, structures and land for trade, industry, residence or other purposes, and also to establish and maintain building lines upon any or all streets.

19. Whitpain Township v. Bodine, 372 Pa. 509, 94 A.2d 737 (1953); Schmalz v. Buckingham Township Board of Adjustment, 389 Pa. 295, 132 A.2d 233 (1957); Cleaver v. Board of Adjustment, 414 Pa. 367, 200 A.2d 408 (1964); National Land and Investment Company v. Eastown Township Board of Adjustment, 419 Pa. 504, 215 A.2d 597, (1965).

20. Lord Appeal, 368 Pa. 121, 81 A.2d 533 (1951).

in regard to locating the schools. This conclusion is reached by accepting as a basic premise that the school district is the official body responsible for educating the youth of the municipality and the zoning board cannot disrupt the school district from carrying out the function entrusted to it by the state.[21]

A similar result may be reached by applying agency principles. In *Town of Atherton v. Superior Court*[22] the court looked upon the school district as an agent of the sovereign. The school district in acquiring beneficial ownership of property is only acting in the capacity of an agent and ultimate beneficial ownership rests with the principal, the state. Therefore, when the school district asserts authority it is acting in behalf of its sovereign. The zoning board not being in the agency relationship with the state must yield to the school district's authority.

A governmental-proprietary test has been applied by a number of jurisdictions to determine whether a municipal corporation is immune or not. Governmental functions are those required by legislative mandate and involving a direct benefit to the general public, while an activity conferring private advantages pursuant to permissive legislation is proprietary. If the agency in question falls within the governmental framework, it is deemed to be immune.[23]

In *Lauderdale County Board of Education v. Alexander*[24] the construction and operation of a county barn to store buses and school supplies was deemed a governmental function and hence not subject to a city zoning ordinance.

Hall v. City of Taft[25] typifies another line of reasoning in regard to the predicament of school authority versus the power of the zoning board. The issue confronting the court was whether a building code was applicable to the construction of the school. The court reasoned that the state had completely occupied the field of regulating public

21. In Union Free School District v. Village of Hewlitt Bay Park, 102 N.Y.S.2d 81, 198 Misc. 932 (1950), a village ordinance sought to exclude public high schools from certain residential areas. In invalidating the ordinance, the court found that the school is an official body of the state and that the zoning board may not obstruct the school in carrying out its function. *See also*: Buck v. State, 96 N.Y.S.2d 667, 198 Misc. 575 (1950): "Public education is a state, and not a municipal, function."

22. 169 Cal. 2d 417, 324 P.2d 328 (1958).

23. City of Bloomfield v. Davis County Community School District, 254 Iowa 900, 119 N.W.2d 909 (1963), (locating bulk gasoline tank was governmental); Davidson County v. Harmur, 200 Tenn. 575, 292 S.W.2d 777 (1956), (construction of hospital is governmental).

24. 269 Ala. 79, 110 So. 2d 911 (1959).

25. 47 Cal. 2d 177, 302 P.2d 574 (1956).

school building construction, and therefore schools are not subject to the building regulations of the municipal corporation.

This decision, however, can only be read accurately in light of *Pasadena School District v. City of Pasadena.*[26] In that decision the court recognized that the local school officials had the power to locate, plan and construct buildings but gave overriding importance to the protections which only existing zoning standards could assure. However, the court alluded that:

> the state undoubtedly might provide for a complete system of regulation for the protection of the public health, safety and comfort in erection of school buildings. But this it has not done.[27]

The legislature of California apparently in reaction to the court's suggestion passed the following: "The Division of Architecture shall pass upon and approve or reject all plans for the construction or alteration (or addition to) any school building."[28] Without this comprehensive legislation to support the preemption of the schools it is submitted *Hall v. City of Taft* could not stand. The danger is that other courts may apply the decision without the prerequisite legislation.

The enabling legislation of the school district in the *Radnor* case was very similar to the legislation of the *Pasadena* case. Should not the legislation conferring the powers to the school districts or similar municipal corporations be very persuasive before the court overrides the zoning power of the municipality?

Perhaps the most widely accepted approach until recent years was to rely on formal presumptions when an overlap resulted between city and school authority. These decisions gave greatest weight to the local police power because by its very nature it is pervasive and survives unless an explicit statute circumvents the presumption.[29] This rationale is dependent on construing the city and school district as subdivisions of equal status.

If the immunity could be limited to school districts, the zoning boards might be able to adequately cope with a paucity of exceptions. The perplexing problem is that these principles are readily applicable to other municipal corporations. At the point these theories are transferred to the other municipal corporations the sanctity of the comprehensive plan is at stake.

26. 166 Cal.7, 134 P. 985 (1913).
27. *Id.* at 8, 135 P. at 986.
28. 47 Cal. 2d 177, 183, 302 P.2d 574, 580 (1956).
29. 109 U. OF PA. L. REV. 903 (1961).

The theory that an organization which is carrying out the function of the state is immune was applied to an institution erected for the care of the blind. In *Kentucky Institution for Education of the Blind v. City of Louisville*,[30] the court ruled that the city could not apply its zoning ordinance relating to fire escapes because the institution was an instrument of the state government and therefore was completely under state control.

Decisions like this are expanding the immunity doctrine to include organizations which the devisers of the naked theories could not have envisioned to include. The fact that a building for the blind is built under the auspices of the state should not lead to the conclusion *carte blanche* that all aspects including safety factors (fire escapes) are beyond zoning legislation.

The agency principle can often lead to unjustifiable results as the case of *C. J. Kubach Company v. McGuire*[31] points out. In that case the board of public works directed their president to sign a contract for the erection of a new city hall building. The president refused to do so because the plans for the building called for its elevation to be two hundred feet, a violation of the city's charter which limited the height to one hundred fifty feet. The court, however, stated that the charter of the city is not only the organic law of the city, but it is also a law of the state. The court went on to conclude that the city by reason of acquiring the charter became an agent of the state. The city therefore should not be subject to its own restrictions.

The court has concluded that the city, being an agent of the sovereign, is completely unbridled in regard to its building decisions. The inequities are readily apparent. The comprehensive plan sought to be achieved by the charter regulations is made nugatory because the state declares a city to be its agent. With only a few nonconforming state agencies the entire cities development plans are frustrated.

The *Hall v. City of Taft*[32] type approach can easily be extended to include all state organizations because the very nature of being state oriented may imply preemption. Once this step is taken, the area of preemption must necessarily be broad in scope because the state's activities are so wide and diversified. This kind of thinking has overflowed in other state functions.[33]

30. 123 Kentucky 767, 97 S.W. 402 (1906).
31. 199 Cal. 215, 248 P.676 (1926).
32. 47 Cal. 2d 177, 302 P.2d 574 (1956).
33. DiMidio Appeal, 11 Chest. 406, 411 (1963): "a municipality may not . . . attempt

The governmental-proprietary test, by its very nature, results in a variety of municipal corporations being classified as governmental and therefore receiving immunity treatment. For example the erection and operation of a county jail by the county was classified as governmental in *Green County v. City of Monroe*,[34] the result being that the zoning board had no say as to its location or construction. This approach has been highly criticized by a number of sources.[35]

Perhaps a more favorable result was reached in *City of Richmond v. Board of Supervisors*.[36] The dispute in that case also involved the locating of a jail in violaton of a city zoning ordinance. The court did not apply the governmental-proprietary test, but instead noted that the statutes giving the city the right to establish a jail do not expressly or impliedly authorize the city to establish a penal institution in violation of the zoning ordinances. Instead the statutes conferring power to enact zoning provisions and those authorizing another municipal corporation to pursue another activity should be interpreted to give full force and effect to both statutes. If the conflict cannot be resolved, the zoning ordinance should control.

What the *Richmond* court did was to apply the presumption in favor of the zoning board when the conflict could not be decided otherwise. This approach had been given most favorable treatment by the courts until its recent decline in the past years. Part of the reason may be due to the court's recognition that the zoning power was abused by local authorities. Also the deviation may be the result of the present tendency for local power to flow back to the sovereign. Furthermore there is no doubt that certain state functions to be effectively administered, must be free of local restraint.

This brief survey makes clear that the court today is faced with a variety of approaches to diminish the zoning power of municipalities. The *Radnor* decision seems to be adding another mode of assault by which municipal corporations can challenge the local zoning power. All that is required is to produce an enabling statute that is more specific than the corresponding zoning legislation. Obviously, the *Radnor* decision cannot be limited to the narrow issue of locating schools.

For example, section 306 B(u) of the Municipal Authorities Act[37]

to control through zoning the business of dispensing liquor, that field being preempted by the Commonwealth. . . ." The court cited *Appeal of Sawdey*, 269 Pa. 19, 112 A.120 (1951).

34. 3 Wisc. 2d 196, 87 N.W.2d 827 (1958).

35. Note, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936).

36. 199 Va. 679, 101 S.E.2d 641 (1958).

37. PA. STAT. ANN. tit. 53 § 306B(u) (1955):

provides the Public Utility Commission with specific powers. This legislation would seem to be more specific than the zoning board's and why should not the Public Utility Commission be able to operate free of zoning restrictions? But the immunity need not necessarily stop with this organization. Redevelopment and parking authorities, sewage treatment plants, and other municipal corporations might be able to introduce similar statutes thereby placing the comprehensive zoning plan at the whim of other municipal corporations. Beyond this, the *Radnor* decision encourages conflicts among municipal authorities which are ideally presumed to be working for a common goal—the orderly development of the cities. Conflicts are certain to result if municipal coporations are aware that they can achieve immunity by challenging the board with more specific legislation. A multiplicity of lawsuits testing respective legislation is also a strong possibility. The case seemingly destroys what vestiges of the comprehensive plan remained and offers no substitute.

The zoning problem is critical. As illustrated by the synopses of theories applicable to zoning, if one applies the governmental-proprietary test and then applies the presumption test, divergent results are reached.

Solutions to the dilemma are necessarily difficult. Perhaps part of the difficulty lies in the ineptness of the legislature to clearly define the individual powers of the municipal corporations. Additional amendments might alleviate some of the conflicts, but the ultimate decision still remains with the court. Only by interpreting statutes in a manner prescribed to give as much credence as possible to both conflicting statutes can the courts adequately deal with the problem. The recently-enacted Municipal Planning Code[38] may be the legislation the courts need to revitalize the comprehensive zoning plan. The Municipal Planning Code provides that:

> Following the adoption of a comprehensive plan or any part thereof by a county, pursuant to a public notice, any proposed action of the governing body within the county relating to (i) the location, opening, vacation, extension, widening, narrowing or enlargement of any street, public ground, pierhead or watercourse; (ii) the location, erection, demolition or sale of any public structure

Subject to the approval of the Public Utility Commission before which an authority may institute proper proceedings to construct tunnels, bridges, viaducts, underpasses or other structures and relocate the facilities of public service companies to effect or permit the abolition of a grade crossing or grade crossings. . . .

38. *Id.*, § 10101 (1969).

> located within the municipality; or (iii) the adoption, amendment or repeal of any official map, subdivision or land ordinance, zoning ordinance or planned residential development ordinance shall be submitted to the county planning agency for its recommendations. The recommendation of the planning agency shall be made to the governing body of the municipality within thirty days.[39]

In relation to school districts the Code also provides that:

> Any proposed action of the governing body of any school district located within the municipality or county relating to the location, demolition, removal or sale of any school district structure shall be submitted to the municipal or county planning agency for its recommendations.[40]

It is proposed that the practical solution is to allow the zoning power to rest predominantly with the zoning board who are best equipped and qualified to plan for the orderly development of the cities. The courts should only circumvent the zoning authority when the opposing municipal corporation can: (1) establish that the zoning legislation is not reasonably related to the health, safety and morals of the community; or (2) demonstrate that the legislation upon which it bases its authority is so comprehensive that it rebuts the presumption in favor of the zoning board's authority.

Frederick B. Gieg, Jr.

LABOR LAW—DECERTIFICATION—UNION DISCIPLINE—The National Labor Relations Board has held that the union commits an unfair labor practice under Section 8(b)(1)(A) of National Labor Relations Act when it fines a member who is attempting to institute decertification proceedings against it, because the fine is not only a punitive measure which inhibits access by the member to the processes of the Board but is also an ineffective deterrent to decertification.

International Molders and Allied Workers Union, Local 125, AFL-CIO (Blackhawk Tanning Co., Inc.). 178 N.L.R.B. No. 25, 72 L.R.R.M. 1049 (1969).

Approximately one year after the incumbent union was certified, several of its members began canvassing their fellow employees to seek enough support to petition for a decertification election. The union

39. *Id.*
40. *Id.*