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Legitimate Use Exclusions Through Zoning Applying a Balancing Test

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NOTES

LEGITIMATE USE EXCLUSIONS THROUGH ZONING: APPLYING A BALANCING TEST

Zoning has emerged in this century as the predominant means of restricting private land use for the benefit of the community.[1] The field of zoning law,[2] however, encompasses a wide range of unanswered questions, largely resulting from the Supreme Court's unwillingness to provide guidance.[3] One of these questions concerns whether a munici-

1 New York City passed the first comprehensive zoning ordinance in this country in 1916 after an extensive six-year study. 1 J. METZENBAUM, LAW OF ZONING 7 (2d ed. 1955). Ten years later the Supreme Court upheld the constitutionality of zoning. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); *see* note 3 *infra*.

Zoning in many ways is merely an outgrowth of the Industrial Revolution. 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING ch. 1, § 1 (1966); E. ROBERTS, LAND-USE PLANNING 3-3 to -7 (1971). The inherent power of municipalities to provide for the health, safety, morals, and general welfare of their citizens provides the legal basis for zoning. Village of Euclid v. Ambler Realty Co., *supra* at 391. The power of municipalities to enact zoning ordinances in the name of the general welfare alone now seems settled, although some judges have strongly condemned zoning on this basis. *See, e.g.*, Vickers v. Township Comm., 37 N.J. 232, 261-62, 181 A.2d 129, 145 (1962) (dissenting opinion), *cert. denied*, 371 U.S. 233 (1963); Bilbar Constr. Co. v. Easttown Township, 393 Pa. 62, 77, 141 A.2d 851, 859 (1958) (dissenting opinion); *see also* Roberts, *The Demise of Property Law*, 57 CORNELL L. REV. 1, 6-20 (1971). For an illustration of how far governing bodies may attempt to push the concept of general welfare, see People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963), where an ordinance prohibited the erection and maintenance of clotheslines in a front or side yard.

One commentator sees the purpose of zoning as twofold: (*1*) to preserve the neighborhood's true character and (*2*) to protect the value of an owner's property. E. YOKELY, ZONING LAW AND PRACTICE 13 (2d ed. 1953). A third purpose might be added: to allow for maximum continuity in a community's growth through effective land-use planning. Although Yokely saw zoning's concern to be preserving neighborhoods and protecting land investments, its more modern concern is to facilitate community development. For an account of zoning as a planning device, see E. ROBERTS, *supra*.

2 Several authors have attempted to cover the entire range of zoning law. *See* 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW ch. 7 (1968); 8-8A E. MCQUILLEN, THE LAW OF MUNICIPAL CORPORATIONS (3d ed. 1965); 1-3 J. METZENBAUM, *supra* note 1; 1-3 A. RATHKOPF, *supra* note 1; 1-2 E. YOKELY, *supra* note 1.

3 In Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Supreme Court declared that zoning, as a valid exercise of the police power, would not constitute a taking that would require compensation under the fifth amendment as long as the ordinance bore a reasonable relationship to the health, safety, morals, or general welfare of the community. (For a first-hand account of the *Euclid* case by a member of the drafting commission who served as the village's counsel throughout the lengthy proceeding, see 1 J. METZENBAUM, *supra* note 1, at 52-65.) Two years after *Euclid*, the Court declared unconstitutional a zoning ordinance which bore no substantial relation to community welfare. Nectow v. City of Cambridge, 277 U.S. 183 (1928).

Since 1928 the Court has declined to consider any cases in the zoning area. Some

pality has the power to prohibit entirely certain legitimate business uses[4] within its boundaries.[5] To determine the validity of prohibitive zoning clauses—often couched within otherwise comprehensive use plans[6]—courts have applied three separate tests.[7] Contrary to established evidentiary rules, the most recent of these tests shifts the burden of presenting evidence to the body enacting the questioned legislation, thereby requiring a new balancing of interests by the court. This test provides an extended degree of judicial flexibility for dealing with the complex problems of land-use planning.

I

VALIDITY TESTS FOR TOTAL USE EXCLUSIONS

A. *The Reasonable Relationship Test*

Most courts, in deciding challenges to the validity of legitimate business use exclusions, have applied the traditional due process test enunciated by the Supreme Court in *Village of Euclid v. Ambler Realty Co.*:[8] whether the ordinance, or in this case the prohibition,

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commentators have argued, however, that in related cases the Court has expanded the power of municipalities to zone. *See, e.g.*, Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953), which upheld a zoning ordinance fixing the minimum size of a dwelling within a residential district, and Berman v. Parker, 348 U.S. 26 (1954), an eminent domain case which upheld the federal government's right to condemn property for aesthetic purposes under the District of Columbia Redevelopment Act of 1945. The Court in *Berman* stated in part:

> It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Id. at 33.

[4] For purposes of this discussion, legitimate business uses will be defined as those uses that have not been held to constitute nuisances and that a court would not be likely to classify as such.

[5] This note will not examine exclusionary or "snob" zoning, in which minimum lot or dwelling size requirements tend to exclude certain economic classes. This area has been examined extensively. *See, e.g.*, R. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES (1966); Aloi, Goldberg & White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule?*, 1969 U. TOLEDO L. REV. 65; *Symposium: Exclusionary Zoning*, 22 SYRACUSE L. REV. 465-626 (1971); Note, *Low-Income Housing and the Equal Protection Clause*, 56 CORNELL L. REV. 343 (1971); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971).

[6] *See* 1 A. RATHKOPF, *supra* note 1, at 15-5.

[7] *See* text accompanying notes 8-60 *infra*.

[8] 272 U.S. 365 (1926). *See* note 3 *supra*.

bears a reasonable relationship to the public health, morals, safety, or general welfare.[9] Since a strong presumption of validity attaches to any zoning enactment,[10] a heavy burden of proof is placed upon the party challenging the ordinance.[11] The attacker is faced with the difficult task of proving a negative—that the regulation bears no reasonable relationship to the general welfare. Considering the broad nature of the concept of the general welfare,[12] such a burden cannot often be met.[13] Under this approach, however, unless the attacker can either actually

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9 *Id.* at 395; *see* Pierro v. Baxendale, 20 N.J. 17, 118 A.2d 401 (1955); New York Cent. R.R. v. Borough of Ridgefield, 84 N.J. Super. 85, 201 A.2d 67 (App. Div. 1964); Newark Milk & Cream Co. v. Parsippany-Troy Hills, 47 N.J. Super. 306, 135 A.2d 682 (Law Div. 1957); Caudill v. Village of Milford, 10 Ohio Misc. 1, 225 N.E.2d 302 (C.P. 1967); Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965).

10 Ann Arbor v. Northwest Park Constr. Corp., 280 F.2d 212 (6th Cir. 1960); Dennis v. Tonka Bay, 156 F.2d 672 (8th Cir. 1946); Scarborough Apartments, Inc. v. Englewood, 9 N.J. 182, 87 A.2d 537 (1952); Islip v. F.E. Summers Coal & Lumber Co., 257 N.Y. 167, 177 N.E. 409 (1931); DiSanto v. Zoning Bd. of Adjustment, 410 Pa. 331, 189 A.2d 135 (1963); *but see* note 14 *infra.*

Close questions as to reasonableness generally are to be decided in favor of the legislative enactment. Goldblatt v. Town of Hempstead, 369 U.S. 590, 595 (1962).

11 Robertson v. Salem, 191 F. Supp. 604 (D. Ore. 1961); Leighton v. Minneapolis, 16 F. Supp. 101 (D. Minn. 1936); Oliva v. City of Garfield, 1 N.J. 184, 62 A.2d 673 (1948); Rodgers v. Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951); DiSanto v. Zoning Bd. of Adjustment, 410 Pa. 331, 189 A.2d 135 (1963).

> 12 [U]nder circumstances of particular cases, public welfare includes public convenience, general prosperity, the greatest welfare of the public, all the great public needs, "what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary," whatever is required for the public good, the suppression of all things hurtful to the comfort and welfare of society, and finally all regulations which promote the general interest and prosperity of the public.

8 E. McQUILLEN, *supra* note 2, § 25.20, at 60, *quoting* Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911).

> 13 One student of the subject, writing in the fall of 1959, [found] that since liberality of application of the principles was stated so strongly . . . , this court has sustained the challenged ordinance in every case but one. . . . And the record has not changed substantially since.

Vickers v. Township Comm., 37 N.J. 232, 259 n.1, 181 A.2d 129, 143-44 n.1 (1962), *citing* Cunningham, *Control of Land Use in New Jersey by Means of Zoning*, 14 RUTGERS L. REV. 37, 48 (1959).

An example of how onerous a burden can be placed upon a plaintiff seeking to challenge a zoning ordinance may be found in Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965). The Supreme Court of Oregon, sitting en banc, held that a legitimate business use, in this case auto wrecking, could be excluded from an entire community if there was any rational basis for such an exclusion. The court found such a basis in community aesthetics, citing People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963). In doing so, the court used as a basis for upholding a total *exclusion* a community interest which is not even entirely accepted as a valid basis for regulation. *Cf.* Berman v. Parker, 348 U.S. 26, 33 (1954); *but cf.* National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965).

overcome the presumption of validity[14] attaching to the zoning ordinance or demonstrate that it is invalid on its face,[15] the ordinance will effectively prohibit his desired land use.

Critical differences between total exclusion provisions and other types of zoning ordinance, however, require that different tests be applied. *Euclid,* although upholding the validity of a comprehensive zoning plan, did not specifically pass upon total use prohibitions.[16] The Supreme Court quoted approvingly a prior Illinois case:

> The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the State, either directly or through some public agency by its sanction, to limit individual activities to a greater extent than formerly. . . .
>
> ". . . The *segregation* of industries commercial pursuits and dwellings to *particular districts* in a city, when exercised reasonably, may bear a rational relation to the health, morals, safety and general welfare of the community. . . ."[17]

Euclid thus upheld zoning as a regulatory rather than exclusionary device. The philosophy of zoning, as the Court defined it, was "not that industrial development shall cease . . . , but that the course of such

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14 [T]he presumption of validity . . . is only a presumption and may be overcome or rebutted not only by clear evidence *aliunde,* but also by a showing on its face or in the light of facts of which judicial notice can be taken, of transgression of constitutional limitation or the bounds of reason.

Moyant v. Paramus, 30 N.J. 528, 535, 154 A.2d 9, 12 (1959); *accord,* Miami Beach v. First Trust Co., 45 So. 2d 681 (Fla. 1949); Thomas v. Town of Bedford, 29 Misc. 2d 861, 214 N.Y.S.2d 145 (Sup. Ct. 1961). *See* text accompanying notes 43 & 61 *infra.*

15 *See* Kielb v. Weinberg Realty Corp., 147 Conn. 677, 165 A.2d 601 (1960); Stemwedel v. Village of Kenilworth, 14 Ill. 2d 470, 153 N.E.2d 79 (1958).

16 Section 7 of the Euclid zoning ordinance enumerated 45 uses entirely prohibited from the village. However, none of these at that time was a legitimate business use as defined *supra* note 4. *See* 3 J. METZENBAUM, *supra* note 1, at 1945.

A valid zoning plan, to promote the general welfare, must be comprehensive. 1 E. YOKELY, *supra* note 1, at 13. A comprehensive zoning plan is one which affects the use of land throughout the entire municipality—one that is an integrated and rational partition of the community, providing uniformly for legitimate uses within specified districts. Ordinarily, the zoning power to forbid a use in one district means relocation of that use in another. *See* 1 C. ANTIEAU, *supra* note 2, at 321; 8 E. MCQUILLEN, *supra* note 2, § 25.119b, at 321. Total use prohibitions can arguably be viewed as instances of partial zoning, thereby violating the comprehensive plan requirement.

Zoning is an attempt to regulate the use of property according to a master plan; nuisance and piecemeal usage regulations—antecedents to modern comprehensive zoning—are distinguishable as constituting the proper means to deal with *particular* harmful uses. *See* note 24 *infra.* Zoning ordinances not only deal with harmful uses, but also regulate all uses throughout the entire community. 1 J. METZENBAUM, *supra* note 1, at 19.

17 272 U.S. at 392, *quoting* Aurora v. Burns, 319 Ill. 84, 93-94, 149 N.E. 784, 788 (1925) (emphasis added).

development shall proceed within definitely fixed lines."[18] Furthermore, the Court did not give municipalities unrestrained license to determine how far zoning ordinances might proceed. Indeed, Mr. Justice Sutherland gave the first indication that a balancing test might be appropriate in determining the validity of a zoning ordinance.[19] In any event, it cannot be unequivocally inferred from *Euclid* that a legitimate use may be entirely barred from a community simply by virtue of the general "reasonable relationship" test used to sustain a mere regulatory ordinance.

This conclusion is supported by the actual language of most zoning ordinances. These ordinances are generally municipal creations, established pursuant to specific grants of power by state legislatures. Most[20] are patterned after the Standard Zoning Enabling Act[21] issued in 1926 by the Department of Commerce, which provides:

> For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to *regulate and restrict* . . . the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.[22]

The purpose of this provision, like the purpose of the ordinance examined in *Euclid*, is "the regulation and restriction of property in particular zones so as to protect such zones."[23] The goal is not exclusion or prohibition of uses; nuisance doctrines are better suited for that purpose.[24] Rather, the aim is regulation of uses. Therefore, total use exclusion is arguably no more authorized by the Standard Zoning Enabling Act than it is by the Supreme Court's holding in *Euclid*.[25]

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18 *Id.* at 389.

19 "It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." *Id.* at 390.

20 *See* ALI MODEL LAND DEVELOPMENT CODE app. A, at 212 (Tent. Draft No. 1, 1968).

21 U.S. DEP'T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926).

22 *Id.* § 1 (emphasis added).

23 1 E. YOKELY, *supra* note 1, at 13.

24 The common law allowed nuisances to be regulated and even prohibited long before the enactment of zoning ordinances. *See, e.g.*, Barnard v. Finkbeiner, 162 App. Div. 319, 147 N.Y.S. 514 (2d Dep't 1914); Bowden v. Edison Elec. Illuminating Co., 29 Misc. 171, 60 N.Y.S. 835 (Sup. Ct. 1895). Other early restrictions on land use included injurious use regulations, fire zones, tenement house codes, building codes, sanitary codes, and height ordinances. *See* 1 J. METZENBAUM, *supra* note 1, at 1-51; note 16 *supra*.

25 The Standard Act, however, contains the following marginal language: "This phrase [restrict and regulate] is considered sufficiently all-embracing. Nothing will be gained by adding such terms as 'exclude,' 'segregate,' 'limit,' 'determine.'" U.S. DEP'T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT n.6 (rev. ed. 1926). Courts have generally

B. *Total Use Exclusions Prohibited*

A number of courts have held that prohibition of a use throughout a community is not a valid exercise of the police power, absent a showing that the use constitutes a nuisance per se.[26] These courts generally reason that zoning must be regulatory rather than exclusionary and that zoning plans must be comprehensive to be valid;[27] they also occasionally rely on the lack of statutory authority[28] or the availability of other control devices,[29] particularly nuisance.[30] In these jurisdictions one who challenges the statute must simply show that the desired use is legitimate and that it is totally barred.[31] The ordinance will then be declared invalid on its face.[32]

There is a serious weakness in this approach, however. Communities today are based heavily upon economic interaction and interrelationships. For practical reasons they should at times have the ability to exclude certain legitimate uses throughout the municipality. Although this power should not be absolute, a complete inability to bar certain otherwise lawful uses might undermine realization of one of zoning's primary goals, the "planning and development of the city in a manner

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refused to accept the argument that the language of the enabling act prevents exclusion of a legitimate use from the entire community.

> We think that the legislature simply intended to indicate the general basis for classifying the zones and that the language was not intended to say one way or the other whether the city could wholly exclude a business from conducting its activities within the city.

Oregon City v. Hartke, 240 Ore. 35, 41, 400 P.2d 255, 259 (1965); *accord,* Gust v. Canton, 342 Mich. 436, 70 N.W.2d 772 (1955); Morris v. Postma, 41 N.J. 354, 196 A.2d 792 (1964); Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 425 Pa. 43, 228 A.2d 169 (1967).

26 These courts place heavy emphasis on the right to property use as long as the use does not interfere with the general welfare in such a way as would constitute a nuisance. Any total prohibition of a use that is not a nuisance is considered confiscatory and requires compensation under the fifth amendment. Lakeside Realty Co. v. Town of Berlin, 20 Conn. Supp. 188, 129 A.2d 628 (Super. Ct. 1956); Awtry & Lowndes Co. v. Atlanta, 78 Ga. App. 390, 50 S.E.2d 868 (1948), *rev'd,* 205 Ga. 296, 53 S.E.2d 358 (1949); Builder's Supply & Lumber Co. v. Northlake, 21 Ill. 2d 14, 170 N.E.2d 597 (1960); People v. Village of Skokie, 408 Ill. 397, 97 N.E.2d 310 (1951); Bzovi v. City of Livonia, 350 Mich. 489, 87 N.W.2d 110 (1957).

27 *See, e.g.,* Johnson v. Huntsville, 249 Ala. 36, 29 So. 2d 342 (1947); Eden v. Town Plan & Zoning Comm'n, 139 Conn. 59, 89 A.2d 746 (1952); McHugh v. Board of Zoning Adjustment, 336 Mass. 682, 147 N.E.2d 761 (1958).

28 *See, e.g.,* People v. Village of Skokie, 408 Ill. 397, 404, 97 N.E.2d 310, 313 (1951).

29 *See, e.g.,* New Jersey Used Car Trade Ass'n v. Magee, 1 N.J. Super. 371, 63 A.2d 751 (Ch. 1948).

30 *See, e.g.,* Cox v. Pocatello, 77 Idaho 225, 291 P.2d 282 (1955).

31 Builder's Supply & Lumber Co. v. Northlake, 21 Ill. 2d 14, 170 N.E.2d 597 (1960).

32 *See* notes 14-15 and accompanying text *supra*; *see also* Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970).

which meets the needs of the community."[33] The key lies in balancing the needs of the community with the property rights of the individual.

C. *Balancing*

Rather than entirely prohibiting total use exclusions or emphasizing the traditionally strong presumption of validity that attaches to zoning ordinances[34] and thereby placing a heavy burden of proof upon the attacker,[35] a few courts have recently shown a degree of judicial invention. They have refrained from giving municipalities carte blanche power to prohibit legitimate uses, which is what they often have in fact under the "reasonable relationship" test, yet at the same time have allowed communities certain regulatory leeway for the ultimate protection of the general welfare. These courts have attempted to achieve this flexibility through shifting the burden of proof in total exclusion cases. Although expressly restating the presumption of validity, these courts have in fact shifted the burden to the municipality, obliging it to demonstrate the relationship between the total use exclusion and the health, safety, morals, or general welfare of its citizens.[36]

A Pennsylvania decision in 1967[37] laid the foundation for a formal shifting of the burden of proof in that state. West Whiteland Township had enacted a comprehensive zoning plan in 1957 which prohibited, *inter alia*, quarrying in any district of the municipality.[38] Exton Quarries, the owner of approximately ninety-nine acres of land in the township, filed an application for a use variance. It was denied. Subsequently the quarry appealed and the court of common pleas held the prohibition unconstitutional.[39] In *Exton Quarries, Inc. v. Zoning Board of Adjustment*,[40] the Supreme Court of Pennsylvania held that the state's enabling act did authorize township-wide bans on selected

33 Oregon City v. Hartke, 240 Ore. 35, 49-50, 400 P.2d 255, 263 (1965). *See also* Duffcon Concrete Prods., Inc. v. Borough of Cresskill, 1 N.J. 509, 514, 64 A.2d 347, 350 (1949), which, in upholding a residential community's total exclusion of heavy industry, took judicial notice of "the residential character of the Borough . . . and the suitability of its location for such development."

34 *See* note 10 and accompanying text *supra*.

35 *See* note 11 and accompanying text *supra*.

36 One New York court declared invalid a zoning ordinance barring all billiard parlors because the municipality could not show a rational relationship between the prohibition and the general welfare. G.B. Billiard Corp. v. Horn, 42 Misc. 2d 673, 248 N.Y.S.2d 757 (Sup. Ct. 1964).

37 Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 425 Pa. 43, 228 A.2d 169 (1967).

38 *Id.* at 46, 228 A.2d at 172.

39 *Id.*, 228 A.2d at 172.

40 425 Pa. 43, 228 A.2d 169 (1967).

uses of land.[41] However, although the court maintained that "[a] challenge to the constitutionality of a zoning ordinance must overcome the presumption of its validity,"[42] the opinion carefully added: "The burden of so doing, though heavy, is maintainable and courts may not make it so 'onerous as to foreclose, for all practical purposes, a landowner's avenue of redress against the infringement of constitutionally protected rights.' "[43]

Thus, although the court was apparently honoring the presumption of validity, it was in fact opening the door to a broader type of judicial review through a reallocation of the traditional burden of proof:

> The constitutionality of zoning ordinances which totally prohibit legitimate businesses such as quarrying from an entire community *should be regarded with particular circumspection*; for unlike the constitutionality of most restrictions on property rights imposed by other ordinances, the constitutionality of total prohibitions of legitimate businesses cannot be premised on the fundamental reasonableness of allocating to each type of activity a particular location in the community. . . . [W]e believe that [such] a zoning ordinance . . . must bear a *more substantial relationship* to the public health, safety, morals and general welfare than an ordinance which merely confines that business to a certain area in the municipality.[44]

If to be valid a total use exclusion must bear a "more substantial relationship" to police power objectives, the attacker arguably meets his burden of proof by showing that the ordinance has only a slight relationship to the general welfare; rather than proving the negative proposition that the ordinance is totally unrelated to police power goals, he wins merely if he can show that the relationship is weak. This burden can be easily met. A sensible inference from this *Exton* language, therefore, is that the burden of proof in cases of total use exclusions shifts to the municipality, which must show a substantial relationship between the ordinance and valid police power objectives to sustain the ordinance's validity. In *Exton*, the court discussed the character of the community and concluded that the showing made by the township was insufficient.[45] Thus, even though the court cited lan-

41 The language of the enabling act was similar to that of the Standard Act in that it contained the phrase "regulate and restrict . . . the location and use of buildings, structures and land." PA. STAT. ANN. tit. 53, § 67001 (1957).

42 425 Pa. at 58, 228 A.2d at 178.

43 *Id.*, 228 A.2d at 178, *quoting* National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 522, 215 A.2d 597, 607 (1965).

44 *Id.* at 59-60, 228 A.2d at 179 (emphasis added).

45 *Id.*, 228 A.2d at 179.

guage placing the burden on the landowner, it subtly but clearly shifted the burden to the township.

Using the *Exton* rationale as a wedge, the Commonwealth Court of Pennsylvania formalized this shifting of the burden in *Beaver Gasoline Co. v Zoning Hearing Board.*[46] Gasoline stations had been entirely excluded from the town of Osborne by a zoning ordinance. Beaver's application for a building permit to erect a station had been denied. The lower court found that Beaver had not met the burden of overcoming the heavy presumption of validity attaching to the ordinance.[47] Facing the issue squarely, the commonwealth court held that the lower court had erred in finding that Beaver had not presented sufficient evidence to overcome the presumption of validity.[48] Citing *Exton* as authority, the *Beaver* court concluded that as to the presumption of validity,

> [t]he discrimination between legitimate businesses by prohibiting only certain ones without identifying with specificity the ends thereof is not supported by . . . a fundamentally reasonable principle. Therefore we cannot hold, nor do we believe the Supreme Court to have held, that such a prohibition must be presumed to be valid.[49]

Beaver required the plaintiff to show only three things to overcome the presumption of validity: (*1*) the legitimacy of the prohibited business use; (*2*) the prohibition's uniformity throughout the municipality; and (*3*) the conformity of the business to all other zoning and building code requirements.[50] The court made no mention of a required showing of unreasonableness. It concluded that Beaver had shown the necessary three facts, and it therefore shifted the burden of proof to the borough and presumed the ordinance to be invalid.[51] Not

46 1 Pa. Cmwlth. 458, 275 A.2d 702, *remanded*, — Pa. —, 285 A.2d 501 (1971). *Accord*, Daikeler v. Zoning Bd. of Adjustment, 1 Pa. Cmwlth. 455, 275 A.2d 696 (1971).

47 *Id.* at —, 275 A.2d at 703.

48 *Id.* at —, 275 A.2d at 704.

49 *Id.* at —, 275 A.2d at 704.

50 *Id.* at —, 275 A.2d at 704-05.

51 Total use prohibitions, such as we find here are inherently discriminatory and therefore in violation of the Constitutional rights of the citizens of the municipality which create them. The courts of this Commonwealth should not and will not permit such an ordinance to exist without clearly substantiated proof of its relationship to the governmental police power.

Id. at —, 275 A.2d at 706.

Such reasoning is particularly compelling when the use prohibited is an important public use such as churches or schools. *See, e.g.*, Board of Cooperative Educ. Servs. v. Gaynor, 33 App. Div. 2d 701, 306 N.Y.S.2d 216 (2d Dep't 1969); Union Free School Dist. v. Hewlett Bay Park, 279 App. Div. 618, 107 N.Y.S.2d 858 (2d Dep't 1951); North Shore Unitarian Soc'y, Inc. v. Village of Plandome, 200 Misc. 524, 109 N.Y.S.2d 803 (Sup. Ct. 1951).

only would the borough have to demonstrate a relationship between the ordinance and the general welfare of the community, but it would also have to demonstrate some reasonable basis for distinguishing between the prohibited use and other uses that might produce the same deleterious effect.[52] The borough would also have to show the absence of alternative means to solve the problem.[53] Not surprisingly, the *Beaver* court found that the borough had failed to meet its burden and declared the ordinance invalid insofar as it prohibited gasoline stations within the entire municipality.

On appeal the Supreme Court of Pennsylvania accepted the commonwealth court's reasoning.[54] The court was, however, careful to limit the rule only to those cases where the total prohibition is of "otherwise legitimate land uses."[55] If the applicant can show, perhaps even by "common experience,"[56] that his proposed land use is in fact legitimate, he has succeeded in meeting his burden and "the municipality must then establish the legitimacy of the prohibition by evidence establishing what public interest is sought to be protected."[57] The court reemphasized the general presumption of statutory validity, but concluded that under the facts presented, "to require a party to prove a negative such as the nonexistence of a proper zoning purpose [would be] to raise difficulty to virtual impossibility."[58] Therefore it becomes the responsibility of the municipality to "establish the validity of a total ban."[59]

Shifting the burden of proof not only removes an onerous burden from the attacker,[60] but also places the burden on the party possessing

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52 We hold that the validity of the ordinance depends upon the finding by the Borough Council that gasoline stations, if established in that Borough would have caused undesirable effects upon the health, safety, morals and general welfare of *that* community, *and* that these undesirable effects are *not caused by other permitted uses nor are they capable of cure by regulation.*

1 Pa. Cmwlth. at —, 275 A.2d at 705 (emphasis in original).

53 *Id.* at —, 275 A.2d at 705.

54 Beaver Gasoline Co. v. Zoning Hearing Bd., — Pa. —, 285 A.2d 501 (1971). The decision of the commonwealth court was vacated; the case was remanded, but only to give the municipality opportunity to prove the validity of the ordinance, since "a reading of the prior law in this field indicates that . . . municipalities were not aware of any duty to come forward with any evidence in order to sustain their zoning ordinances." *Id.* at —, 285 A.2d at 505.

55 *Id.* at —, 285 A.2d at 504-05.

56 *Id.* at —, 285 A.2d at 505.

57 *Id.* at —, 285 A.2d at 504.

58 *Id.*

59 *Id.* at —, 285 A.2d at 505. Justice Jones's concurring opinion reached the same conclusion by considering the risk of nonpersuasion and the burden of producing evidence, two concepts he felt were not properly distinguished by the majority.

60 The time must never come when, because of frustration with concepts foreign to their legal training, courts abdicate their judicial respousibility to protect

the supposed expertise. By prohibiting a legitimate use, a zoning board has demonstrated its belief that the use, although legitimate, would have a significant adverse impact upon public welfare. Placing the burden on the board merely forces it to establish some rational basis for its action. More importantly, it also allows for broader judicial inquiry into the validity of ordinances in the total context of community growth and development. The municipality must come forward with a variety of evidence to prove that its prohibition is valid, and the court must engage in a sophisticated process of weighing this evidence and balancing the interests involved. Although the judicial task will thus be more difficult than under other approaches to total use exclusions, the outcome may be more equitable.

II

Factors in a Balancing Test

Balancing tests applied previously by courts have examined (*1*) the character of the legislative classification in question; (*2*) the relative importance of the rights of the individual in the class discriminated against; and (*3*) the asserted governmental interest supported by the classification.[61] Using these considerations as general guidelines, a court might weigh the following factors in balancing a total prohibition of a legitimate use against the "right of ownership and the concomitant use of property."[62]

A. *The Character of the Community*

Determining the value of preserving the character of the community and the value to the individual of being able to use his property for a legitimate but excluded use is the most important and probably most difficult task for the courts in applying a balancing test. In a 1961 New Jersey case involving a community ordinance that completely excluded trailer parks,[63] the appellate division found the community to be relatively rural and sparsely settled.[64] Because of this fact, the court said,

> the constitutional rights of individual citizens. Thus, the burden of proof imposed upon one who challenges the validity of a zoning regulation must never be made so onerous as to foreclose, for all practical purposes, a landowner's avenue of redress against the infringement of constitutionally protected rights.

National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 522, 215 A.2d 597, 607 (1965).

61 *See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621, 626 (1969).

62 Girsh Appeal, 437 Pa. 237, 246, 263 A.2d 395, 399 (1970) (concurring opinion).

63 Vickers v. Township Comm., 68 N.J. Super. 263, 172 A.2d 218 (App. Div. 1961), *rev'd*, 37 N.J. 232, 181 A.2d 129 (1962).

64 *Id.* at 269, 172 A.2d at 221.

> we find it impossible to reconcile the complete exclusion of trailer parks . . . . Surely, in this vast rural area, there must be some portion in which the operation of trailer parks would be compatible with the scheme of zoning the township has seen fit to select, and yet would not adversely affect existing or future uses of property located anywhere in the township, and however zoned.[65]

Although the New Jersey court thus held that the township could not legitimately exclude trailers, it is possible that the same court would hold the exclusion valid were a small,[66] densely settled, residential community involved. The nature of the community therefore seems to be a significant factor to be considered. The New Jersey Supreme Court in another case, for example, ultimately upheld a total prohibition of heavy industry, using these words:

> There is no constitutional or statutory provision which would lead us to conclude that a municipality in the adoption of a comprehensive zoning scheme is compelled to set apart a portion of its territory for heavy industrial use *without regard to its suitability therefor.*[67]

In addition to size and density, other characteristics of a community might also be judicially considered[68] in determining the validity of a particular exclusion: the strain the use might place upon the availability of water or other natural resources; availability of public utilities; the current condition and potential expansion of transportation facilities; protection of property values; and even aesthetics.[69] Other considerations include the pattern of existing uses in particular zoned districts, the natural contours and topographical features of the land, and the potential effect of drainage and seepage alterations on water and sewage problems.[70] The range of possible community characteristics that may have a bearing is as wide as the spectrum of possible uses that might be excluded. Ultimately the answer lies in a realistic

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65 *Id.* at 270, 172 A.2d at 222.

66 Gloucester Township had an area of 32 square miles. *Id.* at 269, 172 A.2d at 221.

67 Duffcon Concrete Prods., Inc. v. Borough of Cresskill, 1 N.J. 509, 512, 64 A.2d 347, 349 (1949) (emphasis added).

68 Thus it may be said that the *ratio decidendi* is whether the total prohibition bears a reasonable relationship to the purposes of zoning in light of the existing zoning pattern of the township, and the past, present and foreseeable future development of land use within its borders. To these factors must be added, among others, the area of the municipality, the size of its population, and in connection therewith the impact, if any, . . . upon land values and the general public welfare.

Vickers v. Township Comm., 68 N.J. Super. 263, 269, 172 A.2d 218, 221 (App. Div. 1961).

69 *See* Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965).

70 Bogert v. Washington, 25 N.J. 57, 135 A.2d 1 (1957).

appraisal of the community's interests and the character of the prohibited use.

B. *The Availability of Alternative Remedies*

The enacting municipality should show why the use is prohibited and why there are no regulatory alternatives to the enactment of a prohibition. Exclusion, with its accompanying negative economic overtones, is a drastic step. Two alternative remedies already suggested are the nuisance doctrine and regulatory ordinances.[71] A final possibility might be the outright condemnation, with full compensation, of land necessary to the use.

C. *The Hardship on the Attacker*

The interests of the municipality should be balanced against the adverse impact of the restriction upon the individuals involved. While hardship in itself does not make an ordinance invalid,[72] it should be considered in the overall evaluation of the ordinance's validity.[73] In considering hardship, courts should weigh the profit which would accrue to the individual owner were the prohibition rescinded, against the resulting detriment to the public welfare.[74] The court should also consider the potential diminution of neighboring property values were the use allowed.[75]

D. *The Potential for Relocation*

Connected with the hardship factor is the unavailability of other sites for the excluded use. The court in *Exton* reasoned that

> if one municipality may, with only moderate justification, totally prohibit an undesired use of land, it is not unlikely that surrounding municipalities will do the same—thus increasing the distance to an alternative site and the concomitant economic disadvantage.[76]

As the court noted, this reasoning is even more forceful when the prohibited business can only be carried on at a few locations.[77]

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71 Note 24 and accompanying text *supra*.

72 Standard Oil Co. v. Marysville, 279 U.S. 582 (1929); Stoltz v. Ellenstein, 7 N.J. 291, 81 A.2d 476 (1951); Kerr's Appeal, 294 Pa. 246, 144 A. 81 (1928).

73 *See, e.g.*, Martin v. Rockford, 27 Ill. 2d 373, 189 N.E.2d 280 (1963) (increased property values absent zoning restrictions held to be one consideration in deciding whether ordinance is valid).

74 Evanston Best & Co. v. Goodman, 369 Ill. 207, 16 N.E.2d 131 (1938).

75 Elmhurst Nat'l Bank v. Chicago, 22 Ill. 2d 396, 176 N.E.2d 771 (1961); *see also* 8 E. McQUILLEN, *supra* note 2, §§ 25.44-46.

76 425 Pa. at 59-60, 228 A.2d at 179.

77 *E.g.*, the extraction of natural resources. *Id.* at 60, 228 A.2d at 179.

The availability of alternative sites can be of paramount importance. In *Duffcon Concrete Products, Inc. v. Borough of Cresskill*,[78] the court allowed a ban on all heavy industry, reasoning,

> [W]here, as here, there exists a small residential municipality the physical location and circumstances of which are such that it is best suited for continuing residential development and, *separated therefrom but in the same geographical region, there is present a concentration of industry in an area peculiarly adapted to industrial development* . . . , the power of the municipality to restrict its territory to residential purposes . . . is clear.[79]

E. *The Reasonable Relationship Test*

Another consideration in balancing the interests of the community against those of the legitimate user is whether the prohibition in fact does promote the health, safety, morals, or general welfare of the community. In balancing, this would not be determinative but would simply be one factor in the overall evaluative scheme, albeit an important one. A mere showing by the municipality of a reasonable relationship between its prohibition and the public welfare should not, however, automatically preclude an attacker from prevailing, as it would under *Euclid* were a mere regulatory ordinance involved.

F. *The Right of a Community To Plan for the Future*

Courts are split on whether the validity of a zoning ordinance should be judged according to a projected plan of community development[80] or whether an ordinance should be judged in light of the conditions that currently exist.[81] In the area of total use exclusions, the best and most flexible approach would be to consider both the plan for future community development and the actual character of the community. This approach is more certain and less inequitable than allowing municipalities total freedom to zone for the future according to subjective projections of currently desired growth patterns; the alternative solution, to judge a prohibition's validity only with reference to conditions as they currently exist, would deny all administrative flexibility and stifle imaginative planning.

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78 1 N.J. 509, 64 A.2d 347 (1949).

79 *Id.* at 515, 64 A.2d at 351 (emphasis added).

80 *E.g.*, Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965).

81 *E.g.*, Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 425 Pa. 43, 228 A.2d 169 (1967); Beaver Gasoline Co. v. Zoning Hearing Bd., 1 Pa. Cmwlth. 458, 275 A.2d 702, *remanded*, — Pa. —, 285 A.2d 501 (1971).

CONCLUSION

Application of a balancing test to determine the validity of a legitimate business use exclusion eliminates many of the problems inherent in other approaches. An onerous burden of proof[82] is removed from the attacker and is placed upon the municipality, the party with the particular expertise. The courts are given flexibility to proceed beyond presumptions of validity and harsh burden of proof rules towards consideration of the factors involved in specific situations, thus effecting a more equitable reconciliation of the general welfare and the rights of individual landowners.[83]

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82 *I.e.*, proving a negative. *See* text accompanying notes 11-12 *supra*.

83 It has been suggested that the problem of local use exclusions could be eliminated by creation of regional zoning boards. Within a large enough region there would be room for all legitimate uses. Further, the narrow political interest a community has in maintaining its character would be counterbalanced by representation on the board of the interests of the other member communities of the region. Greater flexibility and more imaginative planning could be achieved without abandoning the original purposes of zoning. This was the apparent conclusion of the New Jersey Supreme Court in *Duffcon*:

> What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which the municipality is located and the use to which the land in that region has been or may be put most advantageously. The effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries, often prescribed decades or even centuries ago, and based in many instances on considerations of geography, of commerce, or of politics that are no longer significant with respect to zoning. The direction of growth of residential areas on the one hand and of industrial concentration on the other refuses to be governed by such artificial lines.

Duffcon Concrete Prods., Inc. v. Borough of Cresskill, 1 N.J. 509, 513, 64 A.2d 347, 349-50 (1949).