



STERNS & WEINROTH, P.C.
A CAPITAL LAW FIRM

EMPLOYMENT LAW UPDATE

November 1999

Implied Contracts in the Employment Relationship

by Karen A. Confoy



West Windsor Township, which is bisected by Route 1, a major transportation corridor and the hub of development in Mercer County and Central New Jersey, has been targeted for high density in-fill development in the State Development and Redevelopment Plan. During the past six years West Windsor has successfully implemented a two-pronged strategy of encouraging significant non-residential development and discouraging the proliferation of single family detached dwelling units.ⁱⁱ The payoff: by reducing the number of school-aged children the Township eases the strain on its school system, stabilizes the taxes of existing residential taxpayers and maintains "quality education" through growth management. Non-child bearing ratables, in contrast, are encouraged because they buttress the Township's tax base thereby supporting the existing "quality education" for those children fortunate enough to have squatters' rights in the Township. West Windsor's planning goals are not uncommon. The question arises, however, whether the purposeful exclusion of school-aged children runs afoul of the State's Municipal Land Use Law and principles of fair and appropriate land use planning.

Not surprisingly, West Windsor's clearly delineated policy of "growth management" and its vigorous and successful implementation of that policy were the subject of a legal challenge from a local farm owner beginning in 1993. Before the Team for Change's downzoning, his parcel could accommodate approximately sixty-six single family homes without variances or waivers. After the Team for Change had made good on its campaign platform, that number was ultimately reduced to approximately twenty-two. The farm owner challenged the downzoning on several grounds, including that it constituted illegal "fiscal zoning," which

occurs when zoning regulations are improperly enacted for the specific purpose of restricting the number of families with school-aged children in order to reduce education costs and stabilize a municipality's tax base.ⁱⁱⁱ Despite a backdrop in which the public record was replete with statements from the Team For Change^{iv} explaining that their "growth management" plan involved the reduction of new single family homes (and the school-aged children that they bring), and the trial judge's determination that a primary factor in the Township's downzoning scheme was the reduction of child bearing ratables and the proliferation of non-child bearing ratables, the fiscal zoning challenge was rejected. To understand why West Windsor's downzoning scheme has continued unabated, one must understand the presumption of validity that is generally accorded land use zoning ordinances, coupled with the failure of New Jersey courts to shift that presumption under appropriate circumstances.

A majority of jurisdictions address facial constitutional challenges to zoning, including New Jersey, in the context of a presumption of validity that is accorded municipal land use decisions. The presumption of validity operates in two ways. First, it clothes the zoning ordinance with a presumption of rationality and constitutionality. This tenet stems from the landmark United States Supreme Court decision in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), in which the Court held that a legislative judgment (e.g., the enactment of a zoning ordinance) will withstand challenge so long as the validity of the zoning classification is fairly debatable. The second facet of the presumption, as it is practiced in the New Jersey state courts, is that a zoning ordinance will be upheld notwithstanding the fact that it may have

been passed for a number of invalid zoning purposes, so long as a single valid zoning purpose is achieved through that ordinance. E.g., Sod Farm Associates v. Springfield Tp. Planning Bd., 298 N.J. Super. 84 (Law Div. 1995), *aff'd*, 297 N.J. Super. 584 (App. Div. 1996). In Sod Farm, the court noted that where an ordinance has both a valid and an invalid purpose, “courts should not guess which purpose the governing body had in mind.” Sod Farm, 298 N.J. Super. at 97 citing Riggs v. Long Beach Township, 109 N.J. 601, 608-609 (1988). In other words, the presumption of validity operates to sustain an ordinance so long as a reviewing court can find at least one proper zoning purpose that is substantially supported in the record.

The problem lies where, as in the West Windsor downzoning example, the municipality merely pays lip service to a valid zoning purpose only after the initial challenge was waged. In the case of the West Windsor farm owner, the trial judge accepted the Township’s stated rationale that the subject downzoning achieved a legitimate zoning goal of preserving the “rural character” of the southern portion of West Windsor Township. The farm owner argued that the Township’s stated rationale was nothing more than a post-hoc rationalization intended to save the ordinance and shield the actual, improper purpose behind it — the reduction of child-bearing ratables.^v

In this context, which party carries the burden of production and ultimate burden of persuasion is critically important. Where zoning ordinances are clothed with the presumption of validity, virtually all cases will be resolved in favor of the municipalities. This is particularly so where, as in the case of West Windsor, the mere articulation of a single valid zoning purpose, before or after its adoption, will save an ordinance that may in fact have been adopted for any number of invalid purposes.

In contrast, a minority of jurisdictions will shift the presumption of validity when a substantive challenge is made to a land-use restriction, thereby requiring the municipal body to demonstrate that the zoning change “is in conformance with the comprehensive plan as implemented by the ordinance, that there is a public need for the kind of change in question, and that the need is best met by the proposal under consideration.” Fasano v. Board of County Commissioners of Washington County, 507 P.2d 23, 29 (Ore. 1973). In Fasano, the court rejected the proposition that judicial review of the challenged zoning change was limited to a determination of whether the change was arbitrary and capricious. Fasano, 507 P.2d at 27. Likewise, in Board of County Commissioners of Brevard v. Snyder, 627 So.2d 469 (Fla. 1993), the Florida

Supreme Court also explicitly shifted the presumption of validity typically accorded zoning ordinances. Where a land owner seeking to rezone property demonstrates that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance, “the burden shifts to the governmental board to demonstrate that maintaining the existing zoning classification with respect to the property accomplishes a legitimate public purpose.” Snyder, 627 So.2d at 476.

These two leading decisions on presumption shifting are grounded in the characterization of re-zonings as quasi-judicial proceedings. In short, where the municipality is acting in a quasi-judicial fashion, the presumption of validity may be shifted to the municipal body. The court explained the distinction as follows, “generally speaking, legislative action results in a formulation of a general rule of policy, whereas judicial action results in the application of a general rule of policy.” Snyder, 627 So.2d at 474. See also, Chrobuck v. Snohomish County, 480 P.2d 489 (Wash. 1971) (characterizing site-specific re-zonings as quasi-judicial rather than legislative.)^{vi}

Moreover, some courts shift the presumption to remedy perceived defects in the zoning process. Two leading commentators have noted that courts may shift the presumption in downzoning cases to remedy a malfunction in the zoning process:

The courts also shift the presumption in downzoning cases, which are the converse of spot zoning, because the municipality makes a zoning regulation more rather than less restrictive, although the malfunction is different ... Downzoning is often the result of a creation of a new majority that secures a restrictive change in a land-use regulation. Although most courts apply the usual presumption of constitutionality to a downzoning, a few courts restrict the potential for abuse in downzonings by reversing the presumption of constitutionality. [Daniel R. Mandelker and A. Dan Tarlock, Shifting The Presumption Of Constitutionality In Land-Use Law, 24 Urban Lawyer 1, 16 (Winter, 1992).]

New Jersey courts have not, however, adopted the legislative/quasi-judicial distinction in deciding challenges to zoning ordinances. Rather, the presumption of validity prevails and, even where an objector presents sufficient evidence of an improper purpose that might overcome the presumption of validity, the municipality need only demonstrate in response a single valid purpose for the zoning irrespective of whether improper purposes may also have been pursued. Sod Farm, 298 N.J. Super. at 97.

The concept of presumption shifting itself is not alien to the New

Jersey courts.^{vii} Indeed, through legislative enactment the presumption of validity has been altered where municipalities fail to conduct periodic reexamination (at least every 6 years) of their development regulations pursuant to N.J.S.A. 40:55D-89.1. In such cases there arises a “rebuttable presumption that the municipal development regulations are no longer reasonable,” which results in a shift to the municipality of both the burden of going forward and the burden of proof. Lionshead Woods v. Kaplan Bros., 243 N.J. Super. 678, 683 (Law Div. 1990). Interestingly, the court in Lionshead left open the question whether the judicially developed presumption of validity reattaches in the event that the municipality overcomes the rebuttable presumption of invalidity created by operation of N.J.S.A. 40:55D-89.1. *Id.* at 685-686.

In the West Windsor challenge, the Township’s stated rationale (preservation of the Township’s “rural character”) was totally belied by a wealth of evidence to the contrary, including the numerous public statements of the Team for Change, as well as the Township’s corresponding rezoning action permitting a massive commercial development along Route 1 and encouraging other commercial and non-child bearing residential ratables (i.e. age-restricted housing). Indeed, the trial court found that a primary factor in the Township’s downzoning scheme was the reduction of new single family homes and school-aged children. At a minimum, the West Windsor Township farm owner demonstrated a high probability that the zoning achieved by the Team for Change was implemented for an improper zoning purpose. The trial court accepted that much, but it would not unwind that municipal action in the face of the presumption of validity.

Until municipalities are required to bear a heavier burden to justify re-zoning, even the most compelling evidence of an improper zoning objective may fail due to the reluctance of our courts to shift the presumption of validity under appropriate circumstances. Presumption shifting may, however, in appropriate cases, advance the proper goals of the Municipal Land Use Law. As noted recently, “the ability to shift the presumption of justification allows a court to intervene when there is evidence that the process failed, to see if the city can justify its decision.” Two Cheers for Shifting the Presumption of Validity: A Reply to Professor Hoppert, 24 Environmental Affairs 103, 111 (1996). “The issue in disputed land-use cases is the level of justification that the local government must provide.” *Id.*

The presumption of validity generally afforded municipal zoning ordinances and the refusal to shift the presumption in appropriate circumstances must be re-examined. Perhaps the lesson of West

Windsor Township's downzoning policy — clearly enunciated and forcefully implemented by the Team for Change — cautions that the presumption of validity must not insulate municipal action that can be justified by no more than a post-hoc zoning rationale that appears legitimate only through the lenses of rose-colored glasses. Where, as in West Windsor Township, appropriate circumstances are demonstrated that should require greater justification by the municipality, the courts must not refuse a more searching judicial scrutiny of municipal zoning decisions.

i Mr. Petrino is a partner in the Real Estate Practice Group of the Trenton and Atlantic City firm of Sterns & Weinroth. Mr. Hollander is an associate in the Real Estate Practice Group of Sterns & Weinroth.

ii This article will explore West Windsor Township's aggressive and indisputable policy of downzoning to reduce child bearing ratables, which was embarked upon by the self-proclaimed "Team For Change" that was elected in 1993. The Team for Change campaigned on a slogan that read: "Quality Education Through Growth Management." Through the adoption of a downzoning ordinance and timed growth ordinance (later invalidated), the Team For Change has made good on its promise: statistics from the New Jersey Department of Labor, New Jersey Residential Building Permits confirm the dramatic curbing of residential growth in West Windsor. The figure in 1993 when the Team for Change was elected was 251. That figure was steadily reduced to only 82 in 1997. The Team for Change boasted that this was equal to pre-1973 levels of growth.

iii Fiscal zoning is clearly anathema to proper zoning, as demonstrated in Southern Burlington County N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151, 183 (1975) (observing that ordinances designed to restrict the number of families in a municipality having school-age children so as to reduce education costs are "so clearly contrary to the general welfare as not to require further discussion.") See also, Oakwood at Madison, Inc. v. Tp. of Madison, 117 N.J. Super 11 (Law Div. 1971), modified on other grounds and aff'd., 72 N.J. 481 (1977) (holding that the enactment of zoning regulations for the specific purpose of curbing population growth to stabilize a tax rate constitutes an improper zoning consideration); Molino v. Mayor and Council of Bor. of Glassboro, 116 N.J. Super. 195, 201-202 (Law Div. 1971).

iv The following represent a small sample of the public statements made by members of the Team for Change: "To stabilize property taxes, we need to stabilize the growth in the school system and increase business ratables. To maintain and upgrade the quality of

education, we need to control the pace of residential growth." "[West Windsor] must decide whether every year we squeeze the budget tighter and sacrifice quality or manage the types of future growth to increase the ratable base without increasing the number of children."

v The farm owner's position that the Township had merely parroted the "rural character" zoning purpose to safeguard its ordinance was supported by reference to the Township's rezoning in the same timeframe of a Route 1 commercial project of more than 1,000,000 square feet of high traffic volume retail commercial development. In addition, West Windsor encouraged large scale commercial development along both sides of Alexander Road adjacent to the Route 1 corridor.

vi Significantly, one leading expert in the area of land use presumption shifting, Thomas G. Pelham, has suggested that "all rezoning decisions which actually change the land use designation of a tract of property (policy application), regardless of its size and the number of landowners, is quasi-judicial. Only so-called 'rezoning' decisions which amend the comprehensive plan or the general comprehensive zoning ordinance (policy setting) are legislative acts ... [thus] all actual rezonings of property, not just those affecting 'a limited number of persons,' should be characterized as quasi-judicial actions." Thomas G. Pelham, Esq., Quasi-Judicial Rezonings: A Commentary on the Snyder Decision and the Consistency Requirement, 9 Journal of Land Use & Environmental Law 243, 271-72 (Spring, 1994).

vii In Southern Burlington County N.A.A.C.P. v. Tp. of Mount Laurel, 67 N.J. 151, 174 (1975) cert. denied, 423 U.S. 802 (1975), the court held that every municipality must through its land use regulations "presumptively make realistically possible an appropriate variety and choice of housing," and the Court placed that obligation on the municipality unless it "can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do." See also, Home Builders League of So. Jersey, Inc. v. Tp. of Berlin, 81 N.J. 127, 142 (1979) (shifting the presumption of constitutionality against ordinances that require a minimum size for a house.)

