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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 760552

CITY OF VIRGINIA BEACH,

Appellant,

v.

WILLIAM S. HOTALING and
MARGARET T. HOTALING,

Appellees.

JOINT APPENDIX

J. Dale Bimson
City Attorney
Charles M. Salle'
Assistant City Attorney
Arthur Bergman
Assistant City Attorney
Municipal Center
Virginia Beach, VA 23456

Counsel for Appellant

Richard G. Brydges
A. Andrew Ege, Jr.
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Burt & O'Brien
1369 Laskin Road
Virginia Beach, VA 23451

Counsel for Appellees

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TABLE OF CONTENTS

	PAGE
BILL OF COMPLAINT	1
ANSWER AND GROUNDS OF DEFENSE	2
TEMPORARY INJUNCTION	4
STATEMENT OF FACTS, TESTIMONY AND OTHER INCIDENTS OF THE CASE	5
PLAINTIFF'S EXHIBIT NO. 1	6
FINAL ORDER	8
COURT'S LETTER OPINION	9
NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR	14
TRANSCRIPT OF HEARING (11/6/75)	15

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

CITY OF VIRGINIA BEACH, VIRGINIA, a municipal corporation,	]	
Complainant,	]	
v.	]	IN CHANCERY NO. C-75-975A
WILLIAM S. HOTALING and MARGRET T. HOTALING 744 Little Neck Road Virginia Beach, Virginia,	]	
Defendants.	]	

BILL OF COMPLAINT

TO THE HONORABLE JUDGES OF THE AFORESAID COURT:

Your complainant, by its counsel, respectfully represents as follows:

1. That the complainant is a municipal corporation of the Commonwealth of Virginia.

2. That the defendants are the owners and occupants of a certain parcel of land and residence thereon located within the City of Virginia Beach designated as 744 Little Neck Road which property is zoned R-5, Residential District, under the Comprehensive Zoning Ordinance of the City of Virginia Beach.

3. That on or about May 15, 1975, and continuing thereafter the defendants have parked and stored an approximately 20' Winnebago major recreational equipment vehicle owned by them on the above property. Said vehicle is not parked and stored within a building or behind the nearest portion of a building adjacent to a public street and is, therefore, parked and stored in violation of the Comprehensive Zoning Ordinance.

4. That the defendants were advised by the Zoning Officer that the above vehicle was illegally parked and stored, but the defendants stated that they will continue to refuse to comply with the Zoning Ordinance even though their property is such that the defendants could easily comply with the ordinance if they so desired.

5. That the City of Virginia Beach is empowered by Section 103 of the Comprehensive Zoning Ordinance and by Sections 15.1-491 and 15.1-905 of the Code of Virginia, 1950, as amended, to petition for injunctive relief to restrain the violation of its ordinances.

WHEREFORE, your complainant prays that decrees be issued temporarily and permanently enjoining and restraining the defendants from parking and storing their major recreational equipment vehicle on the property designated as 744 Little Neck Road, Virginia Beach, in violation of the Comprehensive Zoning Ordinance of the City of Virginia Beach and that the complainant may have such other relief as in equity may seem proper.

CITY OF VIRGINIA BEACH

By_____
Assistant City Attorney

Charles M. Salle'
Assistant City Attorney
Municipal Center
Virginia Beach, Virginia 23456

CITY OF VIRGINIA BEACH, VIRGINIA a municipal corporation	:	
Complainant	:	
v.	:	CHANCERY NO._____
WILLIAM S. HOTALING, et al,	:	
Defendant	:	

ANSWER AND GROUNDS OF DEFENSE

NOW COME the defendants and each of them and in answer to a Bill of Complaint exhibited against them, answer and says as follows:

1. That the allegations contained in paragraph one of the Bill of Complaint appear to be true.

2. That the allegations contained in paragraph two of the Bill of Complaint appear to be true also but strict proof is called for to support this allegation.

3. That the allegations contained in paragraph three of the Bill of Complaint are neither affirmed nor denied, but strict proof is called for to support the allegations contained therein.

4. That the allegations contained in paragraph four of the Bill of Complaint are neither affirmed nor denied and strict proof is called for to support each and every allegation contained therein.

5. That the allegations contained in paragraph five of the Bill of Complaint are expressly denied and strict proof is called for to support each and every allegation contained therein.

6. For further answer to the said Bill of Complaint, your defendants and each of them, respectfully submit that the ordinance under which the City of Virginia Beach purports to enforce restrictions on parking of recreational vehicles is invalid, and improper use of the police power of the City of Virginia Beach, Virginia, is discriminatory, denies the defendants and each of them equal protection of the laws under the Constitution of the United States, that it is illegal and unconstitutional under both the State and Federal constitutions.

NOW, HAVING FULLY ANSWERED, your defendants and each of them pray that this Honorable Court will dismiss the Bill of Complaint exhibited against them and rule that the ordinance under which the City seeks to enforce restrictions on parking of recreational vehicles and the context of the comprehensive zoning ordinance be declared unconstitutional.

RYDGES & HUDGINS
ATTORNEYS AT LAW

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

CITY OF VIRGINIA BEACH, VIRGINIA, a municipal corporation,	]	
Complainant,	]	
v.	]	IN CHANCERY NO. C-75-975A
WILLIAM S. HOTALING and MARGARET T. HOTALING	]	
Defendants.	]	

TEMPORARY INJUNCTION

This cause came on July 18, 1975, upon the motion of the complainant for a temporary injunction restraining the defendants from parking and storing a major recreational equipment vehicle in violation of Article 2, Section 205 of the Comprehensive Zoning Ordinance of the City of Virginia Beach and upon the motion of the defendants for a temporary injunction restraining the complainant from enforcing said zoning ordinance pending the trial of this matter on its merits.

UPON CONSIDERATION WHEREOF, The Court having considered the arguments and stipulation of counsel and it appearing to the Court that Article 2, Section 205 of the Comprehensive Zoning Ordinance is presumed in law to be valid and that the defendants will not suffer irreparable injury by complying with said ordinance it is therefore, ADJUDGED, ORDERED AND DECREED that the defendants motion for a temporary injunction is hereby denied and that the complainant's motion for a temporary injunction restraining the defendants from violating said ordinance is hereby granted and the defendants are enjoined from violating said ordinance until further order of this Court.

Enter: _____
Judge

CITY OF VIRGINIA BEACH, VIRGINIA,
a Municipal Corporation,

Complainant,

v.

IN CHANCERY NO. C-76-975A

WILLIAM S. HOTALING
and
MARGARET T. HOTALING

Defendants.

STATEMENT OF FACTS, TESTIMONY
AND OTHER INCIDENTS OF THE CASE

This Cause Came on July 18, 1975, upon the motion of the complainant for a temporary injunction restraining the defendants from parking and storing a major recreational equipment vehicle in violation of Article 2, Section 205 of the Comprehensive Zoning Ordinance of the City of Virginia Beach and upon the motion of the defendants for a temporary injunction restraining the complainant from enforcing said zoning ordinance pending the trial of this matter on its merits.

The matter was argued by counsel upon the stipulation of fact as to the existence and content of Article 2, Section 205 of the Comprehensive Zoning Ordinance of the City of Virginia Beach, Virginia, the ownership by the defendants of a twenty foot Winnebago Motor Home classified as major recreational equipment under said ordinance and the fact that said vehicle was parked and stored on the defendant's property in violation of said ordinance.

The Court having heard the stipulation of fact and argument of counsel for the granting of a temporary injunction ORDERED that the defendants' motion for a temporary injunction be denied and that the plaintiff's motion be granted and the defendants were temporarily enjoined from violating said zoning ordinance until further order of the Court.

This State of Facts Testimony and Other Incidents of trial is submitted as a statement of the events occurring at the hearing in this matter held on July 18, 1975. and is filed in addition to the transcript of the trial of this matter heard on November 6, 1975.

ORDINANCE NO. 576

AN ORDINANCE TO AMEND AND REORDAIN
ARTICLE 1, SECTION 111 OF THE
COMPREHENSIVE ZONING ORDINANCE OF
THE CITY OF VIRGINIA BEACH RELATING
TO DEFINITIONS

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF VIRGINIA BEACH, VIRGINIA:

That Article 1, Section 111 of the Comprehensive Zoning Ordinance relating to Definitions is amended and reordained as follows:

Major Recreational Equipment. For purposes of this ordinance, major recreational equipment includes travel trailers, pickup campers or coaches, motorized dwellings, tent trailers, converted buses or similar devices intended for use as portable recreational housing, boats and boat trailers, amphibious houseboats and the like, and cases or boxes used for transporting recreational equipment, whether occupied by such equipment or not.

Adopted by the Council of the City of Virginia Beach, Virginia on the 7th day of April, 1975.

Certified to be a true excerpt from the minutes of the City Council of the City of Virginia Beach, Virginia, adopted April 7, 1975

Diane M. Davis

Diane M. Davis, Deputy City Clerk

AN ORDINANCE TO AMEND AND REORDAIN
ARTICLE 2, TO INCLUDE SECTION 205
OF THE COMPREHENSIVE ZONING ORDINANCE
OF THE CITY OF VIRGINIA BEACH REGARDING
MAJOR RECREATIONAL EQUIPMENT

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF VIRGINIA BEACH, VIRGINIA:

That Article 2 of the Comprehensive Zoning Ordinance is amended and reordained to include Section 205 as follows:

205. Major Recreational Equipment

(a) No major recreational equipment shall be parked in any public street or public right-of-way for more than three hours.

(b) No such equipment shall be used for living, sleeping or housekeeping purposes except in locations lawfully established for such use.

(c) In AG-1 Districts, no such equipment shall be parked or stored in any required yard adjacent to a street nor closer than 3 feet to any lot line.

(d) Where the principal use of a building is residential, major recreational equipment shall be stored only as a use accessory to a permitted principal use, and subject to the following limitations:

No such equipment shall be parked or stored on any lot except within a building or behind the nearest portion of a building adjacent to a public street, provided, however, such equipment may be parked anywhere on the premises for a period not to exceed 24 hours during loading or unloading.

(e) Where the principal use of a building is commercial, business or industrial, major recreational equipment may be parked or stored as accessory uses provided limitations and requirements of the District are met.

This ordinance shall be effective 30 days from date of its adoption.

Adopted by the Council of the City of Virginia Beach on the 14th day of April, 1975.

FINAL ORDER

THIS CAUSE came on this day to be heard upon the Bill of Complaint filed by the City of Virginia Beach, Virginia and upon the answer filed by the defendants, William S. Hotaling and Margaret T. Hotaling, upon briefs filed by both parties and the matter was heard upon the evidence submitted by the complainant and was argued by counsel.

AND it appearing to the Court for the reasons stated in its letter opinion dated December 10, 1975, and made a part hereof that the injunction requested by the City of Virginia Beach against the said defendants should be denied on the grounds that Section 205(d) of Article II of the Comprehensive Zoning Ordinance, upon which the requested relief was based, is hereby declared to be unconstitutional, and that Section 111 of Article I, containing the definition of Major Recreational Equipment, is unconstitutional as it applies to the case, to which action of the Court the complainant duly objects and excepts.

Enter:

Commonwealth of Virginia

ROBERT S. WAHAB, JR.
PAUL W. ACKISS
PHILIP L. RUSSO
AUSTIN E. OWEN
HENRY L. LAM
RESIDENT JUDGES
CIRCUIT COURT
CITY OF VIRGINIA BEACH
PRINCESS ANNE
VIRGINIA BEACH, VIRGINIA 23456

SECOND JUDICIAL CIRCUIT

N. WESCOTT JACOB
RESIDENT JUDGE
CIRCUIT COURTS
ACCOMACK COUNTY
NORTHAMPTON COUNTY
ONANCOCK, VIRGINIA 23417

December 10, 1975

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DEPT. OF LAW

Charles M. Salle, Esquire
Assistant City Attorney
Municipal Center
Virginia Beach, Virginia 23456

Richard G. Brydges, Esquire
Post Office Box 625
Virginia Beach, Virginia 23451

Re: City of Virginia Beach
vs.
William S. Hotaling, et al.
Chancery No. C-75-975-A

Gentlemen:

This cause came before the court on the Complaint of the City seeking to enjoin the defendants, husband and wife, from violation of City ordinances restricting the parking of recreational vehicles.

The defendants' response seeks to have the court deny the injunctive relief prayed for, bottoming their plea on the grounds that the City ordinance is unconstitutional.

Without detailing same, it has been agreed by counsel that a controversy does exist, and that the present posture of this case is to test the validity of the City ordinances involved.

In evidence, there has been introduced "Plaintiff's Exhibit No. 1"; the ordinance in issue, setting forth section 205 - "Major Recreational Equipment" found on page 31 of the City Code, and a definition of Major Recreational Equipment found on page 18 of the City Code.

In this case, the only portion of the ordinance at issue are sub-sections "(d)", found on page 31, and the definition previously referred to, found on page 18.

The position of the defendants is that they have a legal right to park recreational equipment, on their own (residential) property, located at 744 Little Neck Road, Virginia Beach, Virginia.

In keeping with earlier requests of the court, and the desire of counsel, legal briefs in support of their respective positions have heretofore been filed with the court.

Both sides in this case accept and agree on the following:

1. That the proceedings do not arise on any complaint by the City that the defendants "use" of the property constitutes a nuisance per-se, or a common law nuisance, and;

2. That if the City has the authority to so restrict the defendants, such arises under its general police powers, pursuant to the aforementioned ordinance.

Police powers, enumerated and restated in so many Virginia cases, are that such regulations are valid if they bear a reasonable relationship to the public health, safety, morals, or general welfare.

It was conceded by the City that the present use bore no relationship to public health or morals, and that if there be a basis for such restriction it must lie elsewhere in the City's exercise of its police powers for safety or the general welfare. Though a question of "safety" might arise with regards to the provision against parking on City streets, no real factual question of the public safety was envisioned, nor presented in evidence where the vehicle was parked upon one's private property. Furthermore, the ordinance itself would seem to eliminate any problem with "safety" since sub-section "(c)" allows the parking or storage of such equipment in "AG-1 Districts".

The only basis remaining to the City for such restriction must necessarily turn toward promoting the "public welfare", and if not openly agreed to, it became obvious to the court that "aesthetic considerations" constituted the sole consideration for enactment of this ordinance.

My research into this subject, to-wit; zoning based upon aesthetic considerations, indicates that there is a division of authority, stated as follows. Is the zoning based solely or predominantly on aesthetic considerations, or are such considerations merely an additional or incidental motive for the enactment of an ordinance? This distinction is of more than theoretical importance since all of the cases agree that in the latter situation the validity of a zoning ordinance cannot be effectively attacked on the grounds that it is based partly or incidentally on aesthetic considerations. The modern trend is toward fostering, under the police power, the aesthetic side of municipal development. Even here, however, if one should adopt the "modern view", such an ordinance would not be upheld if it were discriminatory in its application to particular circumstances.

I have found only two reported Virginia cases that deal with the question of aesthetic consideration; the earliest, West Bros. v. Alexandria, 169 Va. 271, and the later Peck vs. Kennedy, 210 Va. 60.

In the West Bros. case the court is quoted thus: "the Legislature may in the exercise of the police power, restrict personal and property rights in the interest of public health, public safety, and for the promotion of the general welfare." And further, that this "power is not limited to regulations designed to promote public health, public morals or public safety, or to the suppression of what is offensive, disorderly or unsanitary, but extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity." It concludes, however, that though they should be considered, "aesthetic considerations" alone are not enough.

Dealing again with "aesthetic considerations" our court in Peck vs. Kennedy, 210 Va. 60, stated: "aesthetic considerations are not wholly without weight and need not be disregarded in adopting legislation to promote the general welfare", and further that "there is a generally accepted rule that a state, municipality or county cannot limit or restrict the use which a person may make of his property under the guise of its police powers where the exercise of such powers would be justified solely on aesthetic considerations."

Virginia then, holds to the view that an ordinance predicated solely or predominantly upon aesthetic considerations is not a valid exercise of its police power.

The Virginia Beach ordinance includes equipment ranging in size from "travel trailers, pickup campers or coaches, motorized dwellings" to "cases or boxes used for transporting recreational equipment". The definition necessarily includes, among others, all of those myriad vehicles commonly designated as "vans" and pickup trucks, with some form of camper body, such as are produced by most manufacturers of vehicles, both domestic and foreign. The Court would use as an example, the fact that a van such as those produced by any of the big three American manufacturers, of an exact given size and shape, can be found to be marketed for business use (the carrying of supplies, boxes, electrical and plumbing equipment, etc.), as buses, as ambulances, as a family stationwagon, and as a motorized camper intended primarily to serve for recreational purposes. Excluding a business use, restricted by another section of the City Code, this ordinance thus would allow one person to legitimately park his van, but prohibit his neighbor from parking an identical vehicle, where the latter vehicle has been manufactured primarily for recreational use.

Where such can and is done, then there is no legal basis for disallowing the parking of one such vehicle, because it contravenes the public welfare, yet to allow the parking of an exteriorly identical vehicle, suggesting it does not interfere with the public welfare.

In this regulation we have without argument, a clear restriction upon one's freedom to use and enjoy one's property. Such use and enjoyment is fundamental and is guaranteed by Article I, Section I of the Virginia Constitution.

Further, Article I, Section XV of the Virginia Constitution states, "that no free government, nor the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue; by frequent recurrence to fundamental principles;..."

With the ordinance in issue, there is a presumption of validity, so long as it is not unreasonable or arbitrary; and though the courts will not substitute their judgment for that of a legislative body, "the exercise of police power is subject to the constitutional guarantee that no property shall be taken without due process of law, and where the police power conflicts with the Constitution the latter is supreme, but courts will not restrain the exercise of such power except when the conflict is clear." Southern R.R. vs. Richmond, 205 Va. 699.

I, therefore, find that the pertinent and contested parts of the ordinance in question contravene the Constitution of Virginia, are unconstitutional, and therefore void.

Respectfully, Sirs, I am
Your Obedient and Humble
Servant, Sirs,

Henry L. Lam

pt

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

CITY OF VIRGINIA BEACH, Complainant, v. WILLIAM S. HOTALING and MARGARET T. HOTALING, Defendants.	:	CHANCERY NO. 75-975A

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Complainant, City of Virginia Beach, hereby files with the Clerk pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia, its notice of appeal from the final judgment decree entered herein on January 5, 1976, entering judgment for the defendants, and assigns the following errors:

1. The Court erred in declaring Section 205(d) of Article 2 of the Comprehensive Zoning Ordinance of the City of Virginia Beach unconstitutional.

2. The Court erred in declaring the definition of major recreational equipment contained in Section 111 of Article I of the Comprehensive Zoning Ordinance unconstitutional.

3. The Court erred in its ruling by applying the following erroneous principles of law:

(a) By holding that the burden of showing the unconstitutionality of an ordinance does not rest upon he who assails it; and

(b) By holding that an ordinance is not presumed constitutional.

4. The Court erred in reaching the following findings without the defendant having presented any evidence:

(a) That the ordinance was unconstitutionally vague; and

(b) That the ordinance was based solely on aesthetics.

A transcript of the hearings herein, and a statement of facts, and all incidents of the cause, shall be hereafter filed with the Clerk of the

Circuit Court pursuant to Rule 5:9 of the Rules of the Supreme Court of Virginia.

CITY OF VIRGINIA BEACH

By_____

By_____

Charles M. Salle
Assistant City Attorney

Arthur Bergman
Assistant City Attorney

Municipal Center
Virginia Beach, VA 23456

[TR. 2]

(The court reporter was sworn.)

THE COURT: The case before the Court this morning is the case of the City of Virginia Beach versus -- Mr. Brydges, is that Hotaling?

MR. BRYDGES: It is pronounced H-o-t-a-l-i-n-g.

THE COURT: And this is a continuance of a short proceeding that we started on July 18 of this year. At the time we proceeded on an injunction, is that correct?

MR. SALLE: That's correct.

THE COURT: Actual injunction. Now, you are the moving party, Mr. Salle. Are you ready?

MR. SALLE: Yes.

THE COURT: Mr. Brydges?

MR. BRYDGES: Yes, we are ready, your Honor.

THE COURT: Now, will you have the witnesses stand for the purpose of being sworn?

MR. SALLE: I don't propose to put on any witnesses. The facts are not really in dispute.

THE COURT: Of course, you are not required to call any witnesses.

MR. SALLE: The witnesses will be on call for rebuttal primarily and if the defense is not going to call any witnesses we won't call any.

THE COURT: You think it is purely a matter of law?

MR. SALLE: We have some exhibits, but other than that --

MR. BRYDGES: Without any question I think it is.

* * *

[4] 15 MR. BRYDGES: I think we can stipu-
16 late to the Court in this instance that
17 the reason for the injunction filing was
18 that we did park the vehicle in question
19 on a certain day and rather than go
20 through the criminal procedure --
21 THE COURT: To test the case?
22 MR. BRYDGES: Yes, sir.

* * *

[7] 5 MR. SALLE: Yes, sir. For the
6 record I would like to state what has
occurred briefly in this case. We did
8 appear here on motion for both sides
9 for a temporary restraining order.
10 The Court granted the City the right
11 to temporarily restrain the defendant
12 from violating the Ordinance. At the
13 time and it is my understanding also,
at that time it was stipulated that the
15 Ordinance did in fact exist prohibiting
16 the parking of recreational vehicles
17 in front yards or an area beyond the
18 furthest point of the front of a building
next to the street. The existence of that
ordinance was stipulated. It was also
21 stipulated that the defendants have
22 a Winnebago motor home which was parked
23 in a residential area on his property
24 in violation of that Ordinance. Now,
25 at this time I would like to ask the

Court to admit as City's Exhibits One and Two certified copies of the Ordinance of the City of Norfolk and the Ordinance of the City of Hampton which relate to recreational vehicles and to the same degree as the Ordinance of the City of Virginia Beach.

THE COURT: Any objection, Mr. Brydges?

MR. BRYDGES: No, sir. I have no objection, your Honor.

THE COURT: The Norfolk Ordinance will be introduced. This is your first exhibit, is it not?

MR. SALLE: Yes.

THE COURT: None from the prior proceeding?

MR. BRYDGES: I have not read those throughout. I assume they are parallel.

MR. SALLE: Essentially they do.

THE COURT: The Norfolk Ordinance will be introduced as Plaintiff's Exhibit Number One. Plaintiff's Exhibit Number Two will be the Hampton Ordinance. Now, there is your own Ordinance involved, and I have a copy. Was that introduced previously?

MR. SALLE: That perhaps could be stipulated, too, but perhaps if you have it --

MR. BRYDGES: 205.

THE COURT: Will you look at that?

(The document was examined by the Assistant City Attorney.)

MR. SALLE: Yes, sir. This is the Ordinance.

THE COURT: All right. Did you show this to Mr. Brydges?

MR. BRYDGES: I think I know what the Ordinance says, your Honor.

THE COURT: We will renumber these. I think probably we should mark the Virginia Beach Ordinance as Number One. The City of Norfolk as Exhibit Two and the Hampton Ordinance as Number Three.

(The Ordinance of the City of Virginia Beach was received and marked into evidence by the Court as Plaintiff's Exhibit Number One. The Ordinance of the City of Norfolk was received and marked into evidence by the Court as Plaintiff's Exhibit Number Two. The Ordinance of the City of Hampton was received and marked into evidence by the Court as Plaintiff's Exhibit Number Three.)

* * *

[12] MR. SALLE: Your Honor, since we filed the Bill of Complaint asking for an injunction to prevent the defendants from violating the City Ordinance, we have the evidence before the Court that there is an ordinance that the defendant

is violating. I think that is the burden of proof that we are required

[14] to carry. * * * At this point I think the City has carried the burden. There is an Ordinance and a violation by the defendants and on its face the Ordinance is presumed to be valid. I think it is the burden of the defendants to show, if they can, that the Ordinance is not valid.

MR. BRYDGES: You mean I've got the ball and the burden?

MR. SALLE: And the burden.

MR. BRYDGES: And the burden.

THE COURT: All right. Let me ask some basic questions that you may address yourselves to. I think you are dealing in niceties. Relate somewhat to the obligation in the legal matter to move forward. Would you hold to the position

that any enactment of the government is valid simply because it is enacted and not because it is not enacted -- whatever the case may be? But, you run into at

1 least the basic principals -- if we
2 get back to the fundamental law of
3 our land that the major government is
4 so constructed and designed essentially
5 here to pursue those basic principals
6 of life, liberty and the pursuit of
7 happiness and anything that would
8 restrict us in any of those things that
9 may be at least tainted and subject to
10 suspicion -- when you say presumption
11 of validity? By the same token isn't
12 the basic constitution that we operate
13 under and which we refer to as our
14 fundamental law, aren't they enacted?
15 Isn't there any delineation from those
16 principals set forth therein? Wouldn't
17 it be suspicious on the face of it if
18 it continued to restrict a man's freedom
19 or liberty?
20 MR. SALLE: No, sir. I think the
law, and this is the same in mostly
21 every state especially dealing with
22 zoning ordinances, that the legislature
23 which is also a branch of the govern-
24 ment is going to act reasonably when it

enacts an ordinance. The law presumes that it does, and the law places a burden upon the person who thinks that such law may be unconstitutional to prove that it is. The courts have held that the legislative branch of the government is presumed in law to act in accordance with the law and that their actions are presumed to be valid.

THE COURT: All right. Let me pin you down a little bit closer. Suppose that either the State or the City should pass a statute or ordinance that said that no longer could you own and hold title to real estate. You are telling me now that if that was done say in the next session of the legislature that I should just sit here unless I could see something arbitrary or capricious. Or, suppose it is a matter of nonfeasance or misfeasance that it slipped through, and things do sometime in the rush of the legislature, saying to the Court I should not inquire into those things and assume they are

right.

MR. BRYDGES: Your Honor, I understand what he said. I followed it through his brief. When they pass legislation or enact an ordinance, it is good. They have the right to do that. It stays there even if it is an affront to the Constitution until somebody comes along and questions it. They have no obligation once they enact the legislation even though it is understood to be arbitrary to the rights of individuals it is going to be the law and presumed to be the law until somebody comes along like the defendants and calls the Court's attention to it. That is the thrust of what he is saying. It is throughout his brief.

THE COURT: I agree with you. I feel like I want to inquire about these things. I want to know how far we can go on this. If you take the example I gave you -- I am going to be anxious to see you work your way out of this. On the face it should. A law should

substantiate the property rights. I will take that as an immediate example where the Constitution is loaded with the right to hold property and so forth. Would you say that on the face of it it is presumed to be valid and then it cannot be knocked out unless it was proved to be capricious or arbitrary?

MR. SALLE: Your Honor, I think you start with the fact that when the legislature enacts a law it is then valid unless it is brought into court. I mean there has to be in this country a judicial action to bring the review of that law before the Court.

THE COURT: All right. Now, we are in the Court.

MR. SALLE: Now, we are before the Court. Now, if the Court reads an ordinance or a statute and it is so clearly unconstitutional on its face according to the words on the paper, then the Court can look at it and on its own declare it to be unconstitutional. But, that is not the kind of case we have

before us. There is nothing in this ordinance that you can look at that I think anybody can reach out and say that the law is unconstitutional.

THE COURT: I think maybe what I am asking -- I was trying to work from the bottom up to find out from what point you draw it. Finish your argument. I think you have laws to substantiate it by the governing body. It is presumed to be valid on the face, is that correct?

MR. SALLE: Yes, sir.

THE COURT: And the next step the Court should so hold it valid unless we rise to the point that we find that it was enacted capriciously, arbitrarily and unreasonably.

MR. SALLE: Yes, sir.

THE COURT: I think there is one other phrase, "And that it bears no reasonable or substantial relation to the public health, safety, morals or welfare." I think that is the further intention. And I simply ask you that

do we not have this in an ordinance? If we are going to bear on this presumption, wouldn't your Constitution which is your fundamental law, doesn't that also bear the respectability that if you have change -- essentially if you delineate any of the rights given to people it is an affront to that particular document and does this same thing bear on that? We have to raise to the point that an affront was done capriciously or arbitrarily or must we simply find that on the face of it if it appears to be derogating from the rights of people granted to them under the Constitution that the presumption should be that it is not valid until proved invalid? These are things that essentially come to my mind in looking at this particular matter that is before the Court.