University of Arkansas at Little Rock Law Review

Volume 36 | Issue 2 Article 4

2014

MUNICIPAL LAW—Municipal Police Power & Its Adverse Effects on Small Businesses in Arkansas: A Proposal for Reform

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MUNICIPAL LAW—MUNICIPAL POLICE POWER & ITS ADVERSE EFFECTS ON SMALL BUSINESSES IN ARKANSAS: A PROPOSAL FOR REFORM

I. INTRODUCTION

Imagine that after many years of hard work, you have established a relatively successful small business within your community. You have regular clientele and consistently provide them with quality goods. In addition, you have always operated your business in compliance with federal, state, and local regulations. Recently, the city in which your business is located enacted a series of ordinances as part of an effort to enhance its aesthetic qualities. The first such ordinance restricted the height of commercial signs and required business owners to remove all non-conforming signs from their premises at their own expense. Although this ordinance required you to remove the prominent metal sign from your property, you were not too dismayed by the city's action because you were able to place smaller, temporary signs in strategic locations throughout the premises. Shortly thereafter, however, a similar ordinance was enacted that restricted business owners' display of temporary signs to two nonconsecutive thirty-day periods per year. Aside from ruining your advertising plans, this ordinance also rendered useless the long-term contract you had recently entered into with a commercial sign supplier.

To make matters worse, the city's newest ordinance threatens to affect your business more severely than either of the other ordinances passed thus far. Aimed at protecting the pavement of the most commonly used streets in the city from further damage, this ordinance prohibits businesses from operating trucks larger than a half-ton on the streets. Because your business is located near an affected road and regularly receives shipments of goods from a wholesale supplier, at the very least you will have to pay extra fuel costs for its trucks to use a series of back roads to reach your business. More likely, your supplier will decide to terminate its relationship with you and supply a business located near the unaffected streets. Thus, with your manner of advertising restricted and your relationship with your supplier jeopardized, you fear you will soon lose a significant amount of customers. For these reasons, you retain the services of a local attorney in an effort to challenge these new ordinances.

You file a complaint against the city in court, arguing that the ordinances were enacted in an arbitrary and capricious manner, and as such, violate your due process rights under the state and federal constitutions. In the alternative, you argue that the ordinances must be struck down for vagueness. However, you are dismayed to learn that the court has upheld the

city's actions, holding that the city "acted clearly within its police power . . . in the interest of the public health and safety of its inhabitants."[1] Thus, not only do you face losing a substantial source of income, but the city has no obligation to compensate you for any losses you incur.

Arkansas case law is replete with scenarios similar to the one described above.[2] Under Ark. Code Ann. § 14-55-102, "Municipal corporations shall have [the] power to make and publish bylaws and ordinances . . . to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of . . . [their] inhabitants . . . ."[3] The Arkansas Supreme Court has interpreted this statutory grant of power to mean that a municipality may regulate a lawful business in the interests of public health, safety, and welfare.[4] As long as the municipality has a reasonable basis for the exercise of this power, a court will uphold the action, regardless of its adverse effect on a business.[5] Because this power is considered a police power, a municipality is not required to compensate a small business owner for any losses the business incurs by complying with the ordinance.[6]

This note concerns the power of Arkansas municipalities to regulate small businesses in the interests of public health, safety, and welfare. Because this power is vague, subjects small businesses to unequal treatment, and can cause severe economic consequences for small businesses, this note will argue that Arkansas courts should adopt a measure that offers greater protection to adversely affected small business owners.[7]

This issue is relevant to advocates for small businesses because the level of deference Arkansas courts currently grant to municipal police power is extremely high.[8] Yet, owing to its inherent flexibility, the scope of municipal police power is often unclear.[9] As a result, small business owners are often unprepared for a newly enacted ordinance's adverse effects on their

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1. Springfield v. City of Little Rock, 226 Ark. 462, 464–65, 290 S.W.2d 620, 622 (1956).

2. The above ordinances are based on actual ordinances described in City of Fayetteville v. S & H, Inc., 261 Ark. 148, 547 S.W.2d 94 (1977); City of Hot Springs v. Carter, 310 Ark. 405, 836 S.W.2d 863 (1992); and House v. City of Texarkana, 225 Ark. 162, 279 S.W.2d 831 (1955) respectively. These cases will be discussed in further detail *infra*.

3. ARK. CODE ANN. § 14-55-102 (Repl. 1998).

4. *See* Phillips v. Town of Oak Grove 333 Ark. 183, 191–93, 968 S.W.2d 600, 604–05 (1998).

5. *See id.* at 193, 968 S.W.2d at 605.

6. *See* EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 24:6 (3d ed. 2013).

7. *See infra* Part IV.

8. *See Phillips*, 333 Ark. at 197, 968 S.W.2d at 607.

9. *See* City of Fayetteville v. S & H, Inc., 261 Ark. 148, 158, 547 S.W.2d 94, 99 (1977) (Fogleman, J., dissenting).

businesses.[10] Moreover, because Arkansas courts almost always uphold a municipality's exercise of its police powers, small business owners currently receive little relief from burdensome ordinances.[11] Although the Arkansas Legislature has recently tried to remedy this situation, the method proposed by the Legislature was unsatisfactory, and ultimately failed to be enacted into law.[12]

The first section of this note will discuss the legal basis for municipal police power in Arkansas.[13] This section will then examine the scope of municipal police power in Arkansas, focusing primarily on its use through land use devices such as ordinances.[14] Cases decided throughout the twentieth century established that municipal police power in Arkansas has a very wide scope.[15] Nevertheless, several instances exist where the use of municipal police power is either severely restricted or invalid altogether.[16]

The second section of this note will identify problems that can result when municipal police power is used to regulate small businesses.[17] Because extremely vague language can frustrate a small business owner's attempt to comply with newly enacted regulations, this section will also explore the extremely vague language used in ordinances.[18] It will also analyze ordinances that subject small businesses to unequal treatment.[19] Finally, this section will focus on how small business owners can face economic consequences as a direct result of a newly enacted ordinance.[20]

The final section of this note will consider the value of various judicial and legislative remedies.[21] This section will conclude by acknowledging that although municipal police power is important for the vitality of a community, courts in Arkansas should consider adopting an approach that regards

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10. *See* Op. Ark. Att'y. Gen. No. 129 (2005).
11. *See Phillips*, 333 Ark. at 193, 968 S.W.2d at 605.
12. *See infra* at Part IV.C.
13. *See infra* Part II.A.
14. *See infra* Part II.B.
15. *See* Pierce Oil Corporation v. City of Hope, 248 U.S. 498 (1919); Phillips v. Town of Oak Grove, 333 Ark. 183, 188, 968 S.W.2d 600, 602 (1998); City of Hot Springs v. Carter, 310 Ark. 405, 836 S.W.2d 863 (1992); Hatfield v. City of Fayetteville, 278 Ark. 544, 647 S.W.2d 450 (1983); City of Fayetteville v. McIlroy Bank & Trust Company, 278 Ark. 500, 647 S.W.2d 439 (1983); City of Fayetteville v. S & H, Inc., 261 Ark. 148, 155, 547 S.W.2d 94, 98 (1977); House v. City of Texarkana, 225 Ark. 162, 162−64, 279 S.W.2d 831, 831−32 (1955); Goldman & Co. v. City of N. Little Rock, 220 Ark. 792, 792−94, 249 S.W.2d 961, 961−62 (1952); Reinman v. City of Little Rock, 107 Ark. 174, 155 S.W. 105 (1913) *aff'd*, 237 U.S. 171, 172−78 (1915).
16. *See infra* Part II.B.3.
17. *See infra* Part III.
18. *See infra* Part III.A.
19. *See infra* Part III.B.
20. *See infra* Part III.C.
21. *See infra* Part IV.

small business owners as a protected class in need of special judicial protection from burdensome ordinances.[22]

II. BACKGROUND

A. Legal Basis for Municipal Police Power in Arkansas

Municipalities in Arkansas derive their police powers from a statutory grant of power,[23] which is consistent with a majority of states.[24] The Supreme Court of Arkansas has referred to this power as a "*plenary duty* . . . [to be exercised] in the interest[s] of the public health and safety of its inhabitants."[25] Although this power is regarded as a duty, municipalities are granted broad discretion to determine both whether a need exists for its exercise and how it should be exercised to benefit the public health, safety, and welfare.[26] One way a municipality may exercise its police power to meet these needs is by enacting ordinances.[27] This manifestation of municipal police power will be the primary focus of this note.

Courts in Arkansas generally uphold a municipality's exercise of police power, unless it has been preempted by[28] or conflicts with state or federal law.[29] When municipal police power is validly exercised, courts in Arkansas have stated that "private rights must yield to [the] security [of public health, public safety, and public comfort]."[30] Accordingly, a municipality is under no obligation to compensate a landowner who is adversely affected by municipal police power.[31] Furthermore, no taking under the Fifth or Fourteenth

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22. *See infra* Part IV.D.

23. ARK. CODE ANN. § 14-55-102 (Repl. 1998).

24. *See* MCQUILLIN, *supra* note 6, § 24:36 ("There is no inherent police power in municipal corporations . . . delegation by the state is requisite to the existence of police power in any municipal corporation.").

25. Phillips v. Town of Oak Grove, 333 Ark. 183, 189, 968 S.W.2d 600, 603 (1998) (emphasis added). It is worth noting that *plenary* is defined as "Full; complete; entire." BLACK'S LAW DICTIONARY 1273 (9th ed. 2009). The justice's deliberate choice of this word in the opinion reflects the broad scope of municipal police power in Arkansas.

26. *See* Springfield v. City of Little Rock, 226 Ark. 462, 465, 290 S.W.2d 620, 622 (1956).

27. *See* MCQUILLIN, *supra* note 6, § 24:49 (describing ordinances as "legislative enactments of a municipality to exercise the police power vested in it by the constitution, statutes, or its charter.").

28. *See* Op. Ark. Att'y. Gen. No. 302 (1995).

29. *See* MCQUILLIN, *supra* note 6, § 24:9.

30. Beaty v. Humphrey, 195 Ark. 1008, 1008, 115 S.W.2d 559, 561 (1938).

31. *See* MCQUILLIN, *supra* note 6, § 32:30 ("[U]nder a reasonable and proper exercise of the police power . . . rights in the property may be restricted, impaired or even eliminated without compensation to the owners.").

Amendments occur when municipal police power is exercised legitimately for the public health, safety, and welfare.[32]

B. Scope of Municipal Police Power in Arkansas

As discussed above, municipalities in Arkansas have very broad discretion to use their police powers. A municipality is free to use its police powers to regulate a business activity, as long as it determines that the activity has somehow violated the public welfare, health, or safety.[33] Given the high level of deference afforded to municipal police power in Arkansas, however, a question naturally arises: how do courts in Arkansas determine whether a business activity has violated the public welfare, health, or safety?

1. Public Health and Safety

Early cases tended to focus on the public health and safety elements of municipal police power. During the 1910s, two cases concerning a city's power to curb a business's nuisance-like activity were presented before the Supreme Court of the United States.[34] In *Reinman v. City of Little Rock*,[35] Little Rock enacted an ordinance prohibiting livery stables within certain areas of the city because it had determined that the businesses were "detrimental to the health, interest, and prosperity of the city" on account of their "offensive odors, and . . . [contribution to] disease."[36] The Supreme Court of the United States upheld the city's ordinance as a valid exercise of municipal police power.[37] For similar reasons, in *Pierce Oil Corporation v. City of Hope*,[38] the Supreme Court upheld an ordinance prohibiting the "storing of petroleum, gasoline, [etc.] within three hundred feet of any dwelling."[39] Subsequent cases—which did not reach the Supreme Court of the United States—held that junkyards,[40] waste paper and rag storage,[41] heavy trucks,[42]

32. *Id.* ("[C]onstitutional provision that private property shall not be taken for public use without compensation is not applicable" to valid exercises of police power.).

33. *See* Springfield v. City of Little Rock, 226 Ark. 462, 465, 290 S.W.2d 620, 622 (1956).

34. *See* Robert R. Wright, ZONING LAW IN ARKANSAS: A COMPARATIVE ANALYSIS, 3 U. ARK. LITTLE ROCK L.J. 421 (1980).

35. 237 U.S. 171 (1915).

36. *Id.* at 172−78.

37. *Id.* at 176−77.

38. 248 U.S. 498 (1919).

39. *Id.* at 499.

40. *See* Goldman & Co. v. City of N. Little Rock, 220 Ark. 792, 792−94, 249 S.W.2d 961, 961−62 (1952) (upholding an ordinance that prohibited junkyards and waste paper and rag storage because the city had determined that these business activities were "fire and health hazards and detrimental to the public welfare").

41. *See id.*

flashing signs,[43] and small-scale commercial fowl operations[44] could be regulated under municipal police power, regardless of any detrimental effects to local businesses.

2. Public Welfare

Several cases decided during the latter-half of the twentieth century clarified the scope of municipal police power by focusing on its public welfare element. In his dissent to *City of Fayetteville v. S & H, Incorporated*,[45] Justice Fogelman argued in support of an ordinance providing for the seven year amortization of business signs that failed to conform to height, size, and setback requirements even though the city had determined that the nonconforming signs posed a threat to its scenic resources rather than public health and safety.[46] He stated that the Arkansas Supreme Court had interpreted the term public welfare to include "public convenience and comfort and general prosperity."[47] Accordingly, because the term encompassed such a broad concept, Justice Fogelman argued that "[t]he fact that aesthetic considerations were a significant factor in the exercise of the police power should not invalidate an ordinance."[48] Although these viewpoints first surfaced in a dissenting opinion, the majority adopted them when it considered the same ordinance six years later in *City of Fayetteville v. McIlroy Bank & Trust Company*.[49] There, the court, acknowledging the trend in other jurisdictions, stated that municipalities could use their police power "to make the surroundings in which they live and work more beautiful or more attractive or more charming."[50] Following this decision, the court has regularly upheld

42. *See* House v. City of Texarkana, 225 Ark. 162, 162−64, 279 S.W.2d 831, 831−33 (1955) (upholding an ordinance that prohibited the use of "any motor truck, truck-tractor with semi-trailer or any full trailer" on certain streets because city had determined that the ordinance was "necessary to protect the pavement upon said streets, and for the immediate preservation of the public health, peace and safety.").

43. *See* City of Fayetteville v. S & H, Inc., 261 Ark. 148, 155, 547 S.W.2d 94, 98 (1977) (upholding an ordinance that prohibited blinking signs because it could affect the public health and safety).

44. *See* Phillips v. Town of Oak Grove, 333 Ark. 183, 188, 968 S.W.2d 600, 602 (1998) (upholding ordinance that prohibited commercial fowl operations because town was concerned about the "deleterious effects of commercial broiler activities" on the public health).

45. 261 Ark. 148, 156–71, 547 S.W.2d 94, 98–107 (1977) (Fogelman, J., dissenting).

46. *Id.*

47. *Id.* at 158 n.1, 547 S.W.2d at 100 n.1 (citing Beaty v. Humphrey, 195 Ark. 1008, 115 S.W.2d 559 (1938)).

48. *Id*. at 165, 547 S.W.2d at 102.

49. 278 Ark. 500, 647 S.W.2d 439 (1983).

50. *Id*. at 502–03, 647 S.W.2d at 440; *see also* Buckley W. Bridges, *2010: A Second Odyssey into Arkansas Land-Use Law*, 33 U. ARK. LITTLE ROCK L. REV. 9, 10–13 (2010)

a municipality's regulation of business signs in the interest of public welfare.[51] It remains to be seen whether the court will permit ordinances to regulate other business activities under this expanded notion of the public welfare.

3. Limits

Although municipalities in Arkansas have broad discretion to regulate business activities under their police powers, this power is not without its limits. Several instances exist where the use of municipal police power to regulate a business is either severely restricted or invalid altogether. One such instance occurs when the Arkansas legislature has expressed its intent to regulate an area.[52] The mere presence of a state law governing a similar area as an ordinance does not necessarily indicate preemption, however.[53] Rather, preemption occurs when the State "regulat[es] an area completely so as not to leave reasonable room for local regulation."[54] When this has occurred, a municipality may be entirely preempted from exercising its police powers in that area,[55] or may have to tailor its power to comply with the state's guidelines.[56] A similar instance occurs when a municipality's exercise of its police power actually conflicts with a state statute.[57] Finally, Arkansas courts in the past had invalidated a municipality's use of police power to regulate a business when it exceeded the municipality's statutory grant of power.[58] These decisions, however, were premised on a legal theory that is no longer followed in Arkansas.[59] Thus, with this manner of challenging a

(discussing the two cases and their influence on aesthetics as a valid form of land use regulation in Arkansas).

51. *See, e.g.*, City of Hot Springs v. Carter, 310 Ark. 405, 836 S.W.2d 863 (1992); Hatfield v. City of Fayetteville, 278 Ark. 544, 647 S.W.2d 450 (1983).

52. *See* ARK. CODE ANN. § 14-43-601 (Repl. 2013) (containing list of "state affairs").

53. *See* Op. Ark. Atty. Gen. No. 2005-129 (2005).

54. *Id.*

55. *See* Op. Ark. Atty. Gen. No. 302 (1995).

56. *See id.* (explaining that a municipality may enact ordinances in an area regulated by the State as long as they do not contradict existing state law).

57. *See* ARK. CONST. art. XII, § 4 ("No municipal corporation shall be authorized to pass any laws contrary to the general laws of the state.").

58. *See* Town of Dyess v. Williams, 247 Ark. 155, 444 S.W.2d 701 (1969) (holding that use of municipal police power to require all local businesses to close down from midnight until 4:00 am exceeded municipality's statutory grant of power); City of Morrilton v. Malco Theatres, 202 Ark. 101, 149 S.W.2d 55 (1941) (holding that use of municipal police power to prohibit local movie theaters from showing more than one film exceeded municipality's statutory grant of power); Balesh v. City of Hot Springs, 173 Ark. 661, 293 S.W. 14 (1927) (holding that use of municipal police power to prohibit the sale of goods by auction exceeded municipality's statutory grant of power).

59. *See* Tompos v. City of Fayetteville, 280 Ark. 435, 438, 658 S.W.2d 404, 406 (1983).

municipality's use of police power abrogated, legal challenges to municipal police power have become even more difficult in recent years.

A municipality's use of its police power to regulate a business activity is frequently challenged under the due process clauses of the state and federal constitutions. For instance, municipal police power that is exercised in an arbitrary and capricious manner violates the substantive due process clause of the Fourteenth Amendment of the United States Constitution.[60] If a municipality enacts an ordinance that lacks a reasonable relation to public health, safety, and welfare, then the municipality has acted arbitrarily and capriciously, and the ordinance is invalid as a matter of law.[61] Courts, however, use the rational-basis standard of review when considering these cases, holding that the municipality is in a better position to identify the factors necessitating the ordinance.[62] As a result, courts in Arkansas almost always find that a municipality's exercise of its police powers bears a reasonable relation to public health, safety, and welfare.[63] A municipality's exercise of its police power may also face a due process challenge when the ordinance regulating the business activity is written in vague language.[64] Yet, a challenger making this argument faces a daunting burden: A plaintiff must demonstrate that the "challenged language is vague in all of its applications such that it could never be applied in a valid manner."[65] The difficulty of such a demonstration will be explained in an upcoming section of this note.[66]

Thus, although municipalities are limited in their use of police power to regulate businesses, the power is still extremely broad. Absent a showing that the municipality's use of police power was pre-empted by or conflicts with state or federal law, an ordinance that regulates a business activity is highly unlikely to be overturned in an Arkansas court.

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60. *See* MCQUILLIN, *supra* note 6, § 24:9.

61. *See, e.g.*, McClendon v. City of Hope, 217 Ark. 367, 230 S.W.2d 57 (1950) (ordinance requiring excessive inspection of milk imported from outside of Hope found to be arbitrary and unreasonable as applied to plaintiff because plaintiff produced milk under the same standards required by the ordinance).

62. *See* Johnson v. Sunray Servs., Inc., 306 Ark. 497, 505, 816 S.W.2d 582, 587 (1991) ("We have long subscribed to a lenient rational basis test in Arkansas" in determining whether an ordinance is reasonably related to the public health, safety, and welfare.).

63. *See* Phillips v. Town of Oak Grove, 333 Ark. 183, 193, 968 S.W.2d 600, 605 (1998).

64. *See* MCQUILLIN, *supra* note 6, § 15:22.

65. Craft v. City of Ft. Smith, 335 Ark. 417, 425, 984 S.W.2d 22, 26 (1998).

66. *See infra* Part III.A.

III. MUNICIPAL POLICE POWERS' ADVERSE EFFECTS ON SMALL BUSINESSES

Municipal police power in Arkansas can have far-reaching effects on local businesses by regulating a broad variety of business activities. Furthermore, because municipal police power is exercised for the benefit of the public, a private individual cannot expect to be compensated for any detrimental effects he or she personally experiences.[67] Although larger businesses are often able to shoulder burdensome regulations more effectively, a small business is less likely to be able to do so; it may lack the financial resources to comply with the newly enacted ordinance, or it may lose a significant portion of its business by virtue of the ordinance.[68] This section will explore the various ways in which municipal police power can adversely affect a small business in Arkansas.

A. Municipal Police Power's Vagueness Leaves Small Business Owners Unprepared

Municipal police power is flexible by its nature.[69] Courts in Arkansas have recognized this aspect of municipal police power, stating that it "is admittedly incapable of precise definition and its lines of delimitation are not clearly marked."[70] Although this flexibility is necessary for communities to deal rapidly with changing conditions, it presents a challenge for small businesses: small business owners may not know in advance that their business activities pose a threat to the public health, safety, and welfare. Consequently, when an ordinance is enacted that regulates an activity specific to their business, they are unprepared for any of its detrimental effects on their business. Furthermore, it may be unclear whether an ordinance regulating a business activity has actually been preempted by or conflicts with state or federal law. For example, in an Arkansas Attorney General Opinion, a constituent who questioned the validity of an ordinance regulating smoking in restaurants was informed that resolution of the issue "may ultimately require resort to the courts, as the legislature has not clearly expressed its intent with respect to the exercise of municipal legislative authority in this area."[71] For

67. *See* MCQUILLIN, *supra* note 6, § 24:6.

68. *See* Op. Ark. Att'y. Gen. No. 129 (2005).

69. *See* MCQUILLIN, *supra* note 6, § 24:8 (Police power "is not . . . [limited by] precedents based on conditions of a past era . . . it is sufficiently flexible to meet changing conditions that call for revised or new regulations to promote the public health, safety, morals, or welfare.").

70. City of Fayetteville v. S & H, Inc., 261 Ark. 148, 158, 547 S.W.2d 94, 99 (1977) (Fogelman, J., dissenting).

71. Op. Ark. Atty. Gen. No. 95-302 (1995).

small business owners facing a similar situation, this may not be an option, as resorting to the courtroom to determine the validity of an ordinance would cause them to incur considerable expenses.

In addition to the flexible nature of municipal police power, ordinances regulating business activities are often written in vague or unclear language, making it difficult for small businesses to comply with their terms. For instance, an ordinance enacted by the city of North Little Rock prohibited the storage of combustible matter "*in such a manner* as to endanger from fire any building or structure within the city limits."[72] Although the ordinance did not specify the acts that would violate this phrase, the court upheld the ordinance as a valid exercise of municipal police power.[73] Thus, as this case demonstrates, courts in Arkansas apply a heavy burden for pre-enforcement challenges to ordinances that regulate business activity, regardless of the clarity of the ordinance's language.[74] A plaintiff must demonstrate that the "challenged language is vague in all of its applications such that it could never be applied in a valid manner."[75] Because this burden of proof is so high, a small business is unlikely to prevail against a burdensome ordinance by arguing that the ordinance's vague language made it difficult to comply with the terms.

B. Municipal Police Power Subjects Small Businesses to Unequal Treatment

Small businesses in Arkansas may face unequal treatment when municipal police power is used to classify them in a manner that causes them to be treated inequitably. Under its police powers, a municipality in Arkansas may enact such ordinances as long as there is a rational basis for the distinction.[76] This distinction may be based solely on the activity's commercial qualities, regardless of whether the activity is substantially similar to an unregulated recreational activity. For instance, an ordinance may entirely prohibit small-scale commercial fowl operations even though the ordinance allows for the maintenance of the same amount of fowl kept for personal use.[77] Likewise, an ordinance may restrict business owners' displays of temporary and porta-

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72. Kirkham v. City of N. Little Rock, 227 Ark. 789, 790–91, 301 S.W.2d 559, 560 (1957) (emphasis added).

73. *See id.* at 794–96, 301 S.W.2d at 562–63.

74. *See id.*

75. Craft v. City of Ft. Smith, 335 Ark. 417, 425, 984 S.W.2d 22, 26 (1998).

76. *See id.* at 425, 984 S.W.2d at 27; *see also* Phillips v. Town of Oak Grove, 333 Ark. 183, 195, 968 S.W.2d 600, 606 (1998) ("The issue is not whether the legislation allows difference in treatment of activities generally similar in character, but whether there is a rational basis for the difference.").

77. *See Phillips*, 333 Ark. at 195, 968 S.W.2d at 605.

ble signs on their premises to only "two nonconsecutive periods up to 30 days each, during any calendar year," without imposing the same restrictions on residential landowners.[78] An ordinance may also prohibit business owners from operating large trucks on a main road in coming to and going from their places of business, but allow individuals to do so when coming to and going from their residences.[79] A business's location may also play a substantial role in the basis for the distinction.[80] Thus, a municipality may enact ordinances that prohibit livery stables from operating within certain areas of the city but not sale stables[81] or that impose anti-smoking regulations on businesses that are located "in highly visible areas."[82] A municipality is allowed to use its police power for these purposes even if the municipality could have accomplished its objective through the use of less restrictive regulatory measures.[83] Thus, under the current law in Arkansas, a small business owner has little chance of successfully challenging an ordinance that classifies his or her business in an unfair manner.

Small businesses in Arkansas may face a similar instance of unequal treatment when municipal police power is used to exclude certain businesses from operating within a municipality. Under its police power, a municipality in Arkansas may prohibit a previously lawful business activity.[84] This power may prohibit a business activity that is neither a current threat nor nuisance to the community, as long as its activities pose a risk of future harm to the public health, safety, and welfare.[85] As a direct result of this prohibition, a small business may be effectively excluded from operating its business within a municipality.[86] Although courts in Arkansas had previously stated that "a business, lawful in itself and not a nuisance per se, may be regulated but not prohibited," the Arkansas Supreme Court declared in *Phillips* that it had not applied the rule strictly.[87] Citing the holding from *Pierce Oil*

78. *See* City of Hot Springs v. Carter, 310 Ark. 405, 406, 836 S.W.2d 863, 864 (1992).

79. *See* House v. City of Texarkana, 225 Ark. 162, 279 S.W.2d 831 (1955).

80. *See Craft*, 335 Ark. at 417, 984 S.W.2d at 22.

81. *See* Reinman v. City of Little Rock, 155 S.W. 105 (1913) *aff'd*, 237 U.S. 171, 172–78 (1915).

82. *See* Op. Ark. Att'y. Gen. No. 129 (2005).

83. *See* Phillips v. Town of Oak Grove, 333 Ark. 183, 195, 968 S.W.2d 600, 606 (1998).

84. *See id.* at 191–93, 968 S.W.2d 600, 604–05.

85. *See id.* at 191, 968 S.W.2d at 604 ("[M]ere possibility of a public harm is sufficient basis for the municipality to regulate under its police power.").

86. *See id.*

87. *Id.* at 193, 968 S.W.2d at 605. Justice Glaze strongly disagreed with the court's analysis of Arkansas case law. In his dissent, Justice Glaze argued that the court incorrectly concluded it had not applied the rule strictly because it had "always analyzed ordinances that purport to prohibit lawful businesses under rational-basis review." *See id.* at 199, 968 S.W.2d at 608 (Glaze, J., dissenting). According to Justice Glaze, the cases the court cited in support of its contention were distinguishable from the instant case: In *City of Morrilton*, the court held that municipal police power only included "the right to regulate reasonably . . . [not] the

Corp.,[88] the court held that such ordinances were to be analyzed under a rational-basis standard of review.[89] Thus, under the court's ruling in *Phillips*, a small business owner has little chance of successfully challenging an ordinance that prohibits an activity specific to his or her business, even if the ordinance effectively excludes the business from operating within the municipality.[90]

C. Municipal Police Power Can Cause Severe Economic Consequences for Small Businesses

An obvious adverse effect of municipal police power is the severe economic consequences small businesses may experience following the enactment of an ordinance. One type of economic consequence is the complete shutdown of the business, which occurs when an ordinance has prohibited a business activity that is central to the business's operations. This scenario occurred in *Reinman*,[91] *Pierce Oil Corp*.,[92] and *Phillips*.[93] A similar circumstance can occur when an individual incurs expenses in preparation for a business, only to learn afterwards that a central activity associated with the business is prohibited by ordinance.[94] Fortunately, it appears that this scenario does not occur regularly in Arkansas, as evidenced by the relative dearth of case law on the subject.[95] Another type of economic consequence occurs when the business is forced to expend money to comply with an ordinance. Unlike large corporations, small businesses are often in a position where they lack the financial resources to comply easily with newly enacted ordi-

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power to prohibit . . . [a business] from conducting its lawful business"; in *Piggott State Bank v. State Banking Board*, 242 Ark. 828, 416 S.W.2d 291 (1967), the power to prohibit was specifically supported by statute; in *Goldman & Co.*, the ordinance the court upheld "did not go as far as the one" in the instance case. *See id.*

88. *See id.* at 192, 968 S.W.2d at 605. ("Under our holding in *Pierce Oil Corp*., a lawful business that poses the possibility of harm can be regulated, even if the effect of the ordinance excludes the operation of the business within the city limits.").

89. *See Phillips*, 333 Ark. at 194, 968 S.W.2d at 606. ("[O]ur decisions have made . . . clear our application of the rational-basis test to ordinances that purport to prohibit lawful businesses under the police power.").

90. *See id.*

91. *See* City of Little Rock v. Reinman, 107 Ark. 174, 155 S.W. 105 (1913), *aff'd*, 237 U.S. 171, 172–78 (1915).

92. *See* Pierce Oil Corp v. City of Hope, 127 Ark. 38, 191 S.W. 405 (1917), *aff'd*, 248 U.S. 498 (1919).

93. *See* Phillips v. Town of Oak Grove, 333 Ark. 183, 968 S.W.2d 600 (1998).

94. *See* Goldman & Co. v. City of N. Little Rock, 220 Ark. 792, 792–94, 249 S.W.2d 961, 961–63 (1952) (Individual who worked in the waste paper industry purchased two buildings in North Little Rock with intent of storing waste paper only to find out that city's ordinance prohibited this business activity.).

95. Of course, the lack of case law on the subject may indicate that small business owners who face such a situation typically choose not to waste their resources litigating this issue.

nances. Thus, compliance costs may substantially exhaust a small business's financial resources.

A substantial loss in business is another type of economic consequence that small businesses may experience following the enactment of an ordinance. An ordinance may fundamentally alter the character of a business, resulting in a significant loss of clientele. Examples of regulations that affect the character of a small business include anti-smoking regulations in restaurants[96] and prohibitions against private clubs serving mixed-drinks between 2:00 am and 10:00 am.[97] A small business also may lose business when an ordinance affects its methods of advertising. Examples of these type of regulations includes a prohibition against blinking and flashing signs,[98] a restriction against the continual display of temporary or portable signs,[99] and a mandatory removal of all commercial signs that fail to meet size, height, and setback requirements.[100] These types of regulations make it more difficult for small businesses to attract new customers.

Municipalities are not required to compensate small business owners who experience severe economic consequences following the enactment of an ordinance owing to the nature of police power.[101] As a result, small business owners facing one of the three scenarios described above are effectively punished even if they had previously complied with all federal, state, and local laws.

IV. ARGUMENT

Although municipal police power is essential for the long-term survival of a community, the problems above illustrate that the power can adversely affect small businesses in a number of ways. Accordingly, Arkansas courts should consider adopting judicial measures that are more favorable to small business owners than the court's current rational-basis review standard. By doing so, courts in Arkansas would be advancing the state's interest in promoting small business development. This suggestion is in line with Justice Glaze's dissent in *Phillips*, in which he states that "municipal regulation of industries, businesses, trades, and occupations . . . is limited by public policy

96. *See* Op. Ark. Att'y. Gen. No. 129 (2005) (Restaurant owner estimated a 10% loss in business due to new anti-smoking ordinances.). Such an ordinance is now moot in light of the State's passage of indoor anti-smoking legislation.

97. *See* Tompos v. City of Fayetteville, 280 Ark. 435, 436, 658 S.W.2d 404, 405 (1983).

98. *See* City of Fayetteville v. S & H, Inc., 261 Ark. 148, 150, 547 S.W.2d 94, 95 (1977).

99. *See* City of Hot Springs v. Carter, 310 Ark. 405, 406, 836 S.W.2d 863, 863–64 (1992).

100. *See* City of Fayetteville v. McIlroy Bank & Trust Co., 278 Ark. 500, 501, 647 S.W.2d 439, 439 (1983).

101. MCQUILLIN, *supra* note 6, § 24:6.

to promote the growth of commerce and industry."[102] This section will identify several judicial and legislative measures, explain how they benefit small businesses, weigh their positive and negative aspects, and discuss whether courts in Arkansas should consider adopting one of them.

A. Presumption Against Total Exclusions of Lawful Business Activities

A presumption against ordinances that totally exclude lawful business activities would offer immense protection to small businesses in Arkansas. In Pennsylvania, courts have carved out an exception to the general rule that ordinances are presumptively valid.[103] Where an ordinance excludes "an otherwise legitimate business activity," courts in Pennsylvania will regard the ordinance as an unconstitutional act.[104] Accordingly, the ordinance loses its presumption of validity, and the municipality bears the burden of demonstrating that the exclusion was justified.[105] This presumption does not extend to uses that would pose "clearly deleterious effects upon the general public."[106] No court outside of Pennsylvania has adopted this approach, however.[107]

The Pennsylvania approach clearly is more favorable to small businesses than municipalities. As long as a small business can demonstrate that municipal police power has been used to exclude a lawful business activity, the small business does not have to prove that the municipality acted arbitrarily and capriciously. This means the ordinances prohibiting several of the lawful business activities discussed earlier—heavy trucks, flashing signs, and small-scale commercial fowl operations—would have had a much better chance of being invalidated by the court. In addition, the Pennsylvania approach has the benefit of preventing nearby municipalities from adopting

102. Phillips v. Town of Oak Grove, 333 Ark. 183, 200, 968 S.W.2d 600, 608 (1998) (Glaze, J., dissenting).

103. *See* DANIEL R. MANDELKER, LAND USE LAW § 5.37 (LexisNexis 2003) (quoting Beaver Gas Co. v. Zoning Hearing Bd. of Borough of Osborne, 285 A.2d 501, 504 (Pa. 1971)).

104. *See id.*

105. *See id.*; Jeffrey M. Lehmann, *Reversing Judicial Deference Toward Exclusionary Zoning: A Suggested Approach*, 12 J. AFFORD. HOUS. & COMMUNITY DEV. L. 229, 243 (2003) ("[Municipality] must then bear the burden of demonstrating that the ordinance substantially benefits the health, safety, and welfare of the community.").

106. Beaver Gas Co. v. Zoning Hrg. Bd. of Borough of Osborne, 285 A.2d 501, 504 (Pa. 1971). The court lists several examples of such uses: "[A]ctivit[ies] generally known to give off noxious odors, disturb the tranquility of a large area by making loud noises, [or that] have the obvious potential of poisoning the air or the water of the area." *Id.*

107. EDWARD H. ZIEGLER, JR. ET. AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 22:5 (4th ed. 2012).

similar prohibitions against undesirable business activities;[108] a municipality is less likely to adopt such an ordinance when it would bear an elevated burden of proof in court.[109] Undoubtedly, the adoption of the Pennsylvania approach by courts in Arkansas would substantially promote the State's interest in small business development.

Several factors weigh heavily against the Pennsylvania approach's adoption in Arkansas, however. First, no other state has adopted such an approach.[110] Second, under some circumstances, it may be necessary for a municipality to use its police powers to exclude a lawful business activity.[111] To hold categorically that all ordinances that prohibit a lawful business activity are invalid undermines municipal police power. Finally, because this approach focuses solely on the use rather than the individual, a wide variety of individuals would be able to contest an ordinance prohibiting a lawful business activity. Aside from having a possible chilling effect on a municipality's ability to use its police powers, this approach opens the door to large, sophisticated entities seeking to have such an ordinance overturned for reasons unrelated to those discussed in Section III of this note. For these reasons, a presumption against ordinances that totally exclude a lawful business activity may not be the best method of protection for small businesses against burdensome ordinances.

B. Use Variances

A use variance is a land use device that could potentially provide better protection to adversely affected small businesses in Arkansas. Landowners seek use variances from boards of zoning adjustment for uses that are prohibited by ordinances.[112] As with the majority of states, Arkansas permits a variance to be granted only in instances "where strict enforcement of the ordinance would cause undue hardship due to circumstances unique to the individual property under consideration."[113] By granting a landowner a use variance, the board of zoning adjustment permits the landowner to continue the prohibited use without having to challenge or amend the ordinance.[114]

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108. *See id.* (discussing the Pennsylvania Supreme Court's analysis in Exton Quarries, Inc. v. Zoning Bd. of Adjustment of W. Whiteland Twp., 425 Pa. 43, 59–60, 228 A.2d 169, 179 (1967)).

109. *See id.*

110. *See id.*

111. *See* MCQUILLIN, *supra* note 6, § 24:8.

112. *See* MANDELKER, *supra* note 103, § 6.42.

113. ARK. CODE ANN. § 14-56-416(b)(2)(B)(i)(a) (Repl. 1998). *See also* David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of A Much-Maligned Tool,* 29 COLUM. J. ENVTL. L. 279, 287 (2004) (describing how a majority of states use the same type of language in their enabling statutes).

114. *See* ZIEGLER, ET. AL, *supra* note 107, § 58:1.

However, under current Arkansas law, boards of zoning adjustment are prohibited from granting use variances to landowners;[115] they are limited to granting only area variances.[116] In contrast, the majority of states provide for use variances in their enabling statutes.[117]

Small business owners would have a more suitable avenue for pursuing relief against burdensome ordinances if the Arkansas legislature modified its enabling statute to permit use variances. A clear benefit is a potential reduction in the expenses generated in challenging an ordinance. A small business owner who met the hardship requirements would not have to resort to time-consuming and expensive judicial action to obtain relief; he or she would receive a variance for the contested use, and the ordinance would remain in place.[118] Small businesses that began operating after an ordinance was already in place might benefit from use variances as well.[119] Under current Arkansas law, a business activity that an ordinance prohibits is regarded as a prohibited use and is not entitled to the same protections as a non-conforming use.[120] For a small business to maintain the business activity it must demonstrate that the ordinance itself is unconstitutional; this is extremely difficult to demonstrate. To receive a use variance, however, a small business would only have to prove the existence of a hardship, which is a far less exacting burden.[121] A final benefit for small businesses seeking relief is that boards of zoning adjustment are recognized as quasi-judicial bodies in Arkansas.[122] A landowner who is unsatisfied with the board's denial of a variance is entitled to appeal the denial to a circuit court under a de novo standard of review.[123] Accordingly, the court will not give as great a level of

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115. *See* ARK. CODE ANN. § 14-56-416(b)(2)(B)(i)(b) (Repl. 1998) ("The board shall not permit, as a variance, any use in a zone that is not permitted under the ordinance.").

116. An area variance is typically defined as a variance that "modifies site development requirements for permitted uses, such as lot size, yard, setback, and frontage restrictions[;][it does not] change a prohibited use." MANDELKER, *supra* note 103, § 6.42.

117. *See* MANDELKER, *supra* note 103, § 6.43.

118. *See* Owens, *supra* note 113, at 317 (explaining that the "possibility of granting expeditious administrative relief without the necessity of judicial action" is a reason why zoning variances should be retained).

119. *See* Phillips v. Town of Oak Grove, 333 Ark. 183, 968 S.W.2d 600 (1998).

120. In *City of Harrison v. Wilson*, 248 Ark. 736, 737, 453 S.W.2d 730, 731 (1970), the Arkansas Supreme Court defined a non-conforming use as a "lawful use that existed when the zoning ordinance was adopted and that is permitted by the ordinance to continue." Because of its lawful status, a landowner is entitled to maintain the non-conforming use unless the use is abandoned or destroyed, or a municipality enacts an amortization period for the use. *See* WRIGHT, *supra* note 34, at 17–18.

121. *See infra* text accompanying note 125.

122. *See* Bridges, *supra* note 50, at 30 (explaining how the "Arkansas Supreme Court has recognized the quasi-judicial nature of variances," and that appeals are subject to a de novo standard of review in a trial court.).

123. *See id.*

deference to the board as it would to a municipality under the rational-basis standard reserved for legislative actions.[124] A small business, therefore, would have a slightly better chance of prevailing in this form of judicial proceeding.

The benefits offered by use variances must, however, be balanced against their limitations. Because of the manner in which boards of adjustment are supposed to construe the hardship requirement, even if use variances were allowed in Arkansas, it is possible that few small businesses would meet the requirement.[125] For instance, a small business that began its operations without obtaining a use variance beforehand might not satisfy the hardship requirement.[126] The fact that few small businesses would be permitted to maintain their prohibited uses suggests that use variances would not substantially promote the State's interest in small business development." In addition, although landowners are entitled to a de novo standard of appeal in a circuit court, a court may uphold the board's denial "to implement the judicial policy that variances should be granted 'sparingly.'"[127] Finally, use variances are strongly disfavored by land use law academics, lawyers, and professionals.[128] For these reasons, use variances may not be the best method for assisting adversely affected small businesses in Arkansas.

C. A Substantial Decline in Real Property Value as an Automatic "Taking"

During the Arkansas Spring 2013 Legislative Session, legislators proposed Senate Bill 367—entitled "An Act to Address the Protection of Private Property"—as a possible method of resolving conflicts created by a

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124. *See id.* at 35–36 (referring to the standard of review for quasi-judicial bodies as a "zero-deference standard of review").

125. A hardship typically must result from the physical condition of the land. *See* WRIGHT, *supra* note 34, at 19 (stating that a valid hardship occurs when "the landowner can demonstrate that the peculiar shape of his lot, topographical conditions, subsurface problems or the like render him unable to comply with the requirements of the ordinance"). *But see* Owens, *supra* note 113, at 298–99 (discussing how in practice many boards of adjustment routinely grant a petitioner's request for a variance without any regard to the level of hardship presented).

126. Under such circumstances, a board of adjustment would likely find that the small business owner's actions constitute a self-created hardship—a hardship that the landowner created through his or her voluntary acts, as opposed to a hardship caused by restrictive zoning. Upon such a finding, the board is not supposed to grant the variance. *See* MANDELKER, *supra* note 103, § 6.50; *but see* Owens, *supra* note 113, at 298–99.

127. *See* MANDELKER, *supra* note 103, § 6.52.

128. *See generally* Owens, *supra* note 113, at 320 (arguing that use variances are no longer needed for effective land use planning, and that states should prohibit them in their enabling statutes).

municipality's exercise of police power.[129] It passed the Arkansas Senate, but ultimately failed to pass through the Arkansas House Judicial Committee in May 2013;[130] it remains to be seen whether legislators will attempt to pass the bill or a similar version in the next legislative session. In its most recent form, the bill proposed to regard any local government regulatory action causing a 25% decline in a real property owner's fair-market value as having been "taken for the use of the public."[131] Any real property owner who experienced such a loss would automatically be entitled to compensation from the municipality.[132] As an alternative to compensation, the bill would allow a municipality the option of not enforcing the regulatory action against the adversely affected landowner.[133] The bill broadly defined local government regulatory action as encompassing "any rule, regulation, law, or ordinance that affects the fair market value of real property," and included specific examples of such actions.[134] Although the bill created an exemption for a municipality's use of police power to improve public health and safety,[135] it appeared to allow recovery for losses caused by the use of municipal police to improve the public welfare.[136]

The advantages that SB 367 affords to adversely affected small business owners are apparent. Small business owners would be entitled to automatic compensation from a municipality provided they could demonstrate a

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129. *See* S.B. 367, 89th Gen. Assemb., Reg. Sess. (Ark. 2013). A similar bill was proposed during the 1995 session of the Arkansas General Assembly. For an excellent analysis of that bill, *see generally* Morton Gitelman, *Regulatory Takings and Property Rights in Arkansas*, *in* ARKANSAS POLITICS: A READER 628 (Richard P. Wang & Michael B. Dougan eds., 1997).

130. *To Address the Protection of Private Property*, ARKANSAS STATE LEGISLATURE, http://www.arkleg.state.ar.us/assembly/2013/2013R/Pages/BillInformation.aspx?measureno=SB367 (last visited Aug. 4, 2013).

131. *See* S.B. 367, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

132. *See id.*

133. *See id.*

134. *See id.*

135. *See id.* "Compensation shall not be required under this subchapter if the regulatory program is an exercise of the police power to prevent uses noxious or harmful to the health and safety of the public." Although the bill defines "noxious" as a public nuisance, it does not define "harmful." *Id.* As discussed earlier, under Arkansas case law, the "harmful" element of municipal police power encompasses a wide range of areas. Accordingly, a municipality likely would continue to retain a great level of discretion to regulate in this area under the Act.

136. The bill fails to include the phrase "public welfare" within its reference to police power. *Id.* Indeed, the bill explicitly refers to "aesthetic or scenic districts, environmental districts, overlay districts, [and] green space ordinances" in its definition of the types of regulatory programs subject to its provisions. *Id.* Given that Arkansas case law has held that the "public welfare" element of municipal police power encompasses aesthetics, the bill's explicit references to aesthetic land use ordinances suggest that a municipality's exercise of its police power to improve the public welfare would be subject to the bill's provisions.

25% decline in their property's fair market value. This criterion is not a high burden to satisfy; it is relatively easy to demonstrate a 25% decline in a real property's fair-market value following the enactment of an ordinance.[137] Thus, a small business owner who met that criterion would have no need to waste money litigating the legality of a municipality's exercise of its police power. The bill also benefits small business owners by allowing municipalities the option of not enforcing the ordinance against an individual's land. In this respect, the bill offers a benefit reminiscent of a use variance. Finally, the bill would apply to regulatory actions only when they were actually applied to a landowner's real property. Thus, a small business owner whose business was substantially harmed when a municipality enforced a pre-existing ordinance against him or her—like the Plaintiff in *Phillips*—would be entitled to relief, despite his or her having engaged in a prohibited use.

The bill's disadvantages, however, outweigh the advantages it offers to small business owners. Because the bill exempts a municipality's use of police power to improve public health and safety from its provisions, many small business owners who experienced substantial losses as a direct result of municipal police power would be denied relief. Only those small business owners who were adversely affected by an ordinance enacted pursuant to an aesthetic program would be entitled to aid. As discussed in sections B.1 and B.2 of this note, such a group is not representative of the small business owners typically affected by municipal police power. The bills most significant disadvantage, however, is its potential to severely constrain the ability of local governments to use their regulatory power. Because the bill allows any real property owner to seek compensation, and sets a relatively low burden for demonstrating a "taking," municipalities likely would risk losing a substantial amount of money in either awarding compensation or defending themselves in lawsuits.[138] Although the bill allows a municipality the option of not enforcing the ordinance against the landowner, this option—like a use variance—would undermine a municipality's ability to effectively structure and organize its community.[139] As a consequence of either one of these options, the bill likely would have a chilling effect on municipal regulation.[140] Finally, the bill's broad definition of regulatory action risks invalidating a number of ordinances enacted pursuant to federal or state law rather than

137. *See* Morton Gitelman, *Regulatory Takings and Property Rights in Arkansas*, *in* ARKANSAS POLITICS: A READER 628, 656–57 (Richard P. Wang & Michael B. Dougan eds., 1997) ("For example, an acre of undeveloped land might be worth $20,000 for residential use and $50,000 for commercial use. If the land is currently zoned agricultural and the city decides to rezone the area for residential uses, could the landowner claim a reduction in value of $30,000?").

138. *See id.* at 654–60.

139. *See id.*

140. *See id.* at 659.

municipal police power.[141] Thus, the bill severely curtails a municipality's power, while at the same time not fully resolving the conflicts created by municipal police power. For these reasons, the approach proposed by SB 367 is probably not the best method to resolve this conflict.

D. Small Business Owners as a Protected Class

The recognition of small business owners as a protected class by courts in Arkansas would offer small businesses greater protection from burdensome ordinances. Land use law commentators have argued that courts should consider applying the *Carolene Products* footnote's criteria for presumption-shifting to land use cases.[142] In the *Carolene Products* footnote, the Court indicated it would provide a "more searching judicial inquiry" when "prejudice against 'discrete and insular' minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[143] Bruce Burton, a law professor, has argued that small business owners should qualify as a protected class under the *Carolene Products* footnote's criteria.[144] Accordingly, Burton argues that in cases of an alleged regulatory taking, an adversely affected landowner who can demonstrate that he or she is a small business owner, has experienced losses for a period longer than six months, and has suffered non-incidental damages should be entitled to have the burden of proof shift to the governmental agency to demonstrate that its actions were constitutional.[145] This note argues for a similar approach but within the context of municipal police power.

Under such a revised approach, a small business owner who could demonstrate that he or she has experienced substantial business losses either as a direct or indirect result of an ordinance enacted pursuant to municipal police power would be entitled to have the burden of proof shift to the municipality to demonstrate that its exercise of police power was justified. The municipality would have an opportunity to rebut the facts asserted by the small business owner or to assert that it acted to curtail an activity deleteri-

141. *See* Memorandum from Karla M. Burnett, Pulaski Cnty. Att'y, to Buddy Villines, Cnty Judge/CEO (Mar. 6, 2013), *available at* http://posting.arktimes.com/images/blog images/2013/03/06/1362623189-sb367.pdf.

142. *See* Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 3 (1992).

143. *See id.* (quoting United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938)).

144. *See* Bruce W. Burton, *Predatory Municipal Zoning Practices: Changing the Presumption of Constitutionality in the Wake of the "Takings Trilogy"*, 44 ARK. L. REV. 65, 114–15 (1991) ([S]mall [business] owners may constitute "discreet and insular minorities" . . . in special need of judicial recognition under footnote four of Carolene Products.").

145. *See id.* at 117–19.

ous to the public health, safety, and welfare.[146] In addition, the municipality could argue that its actions did not cause any economic harm to the small business owner or that the small business owner has other viable business uses remaining.[147] If the municipality is unable to meet its burden of proof, it will have to compensate the small business owner for any losses incurred as a result of the contested ordinance.[148]

Several factors indicate that a more stringent form of rational-basis review should be the appropriate standard of review under this analysis. First, this standard has been applied to a land use case involving a non-racially suspect class, namely by the Supreme Court of the United States in *City of Cleburne v. Cleburne Living Center, Incorporated*.[149] Second, this standard would not substantially restrict a municipality's use of its police power. Instead, the municipality would have to offer a justification for its exercise of the power beyond the fact that it bore a reasonable relation to the public health, safety, and welfare.[150] Finally, commentators have suggested that a heightened level of scrutiny is not applicable outside of a rights analysis, which is difficult to develop in a land use case.[151]

The primary benefit of the protected-class approach lies in its balancing of the parties' respective interests. The advantages afforded to small business owners are evident: small business owners are presented with a better opportunity of obtaining relief from a burdensome ordinance. The small business owner would not have to initially attack the ordinance as an arbitrary and capricious decision, or maintain a pre-enforcement challenge against the ordinance's vagueness. In addition, this approach would apply to all types of municipal police power, unlike SB 367, which focused on the public welfare element alone. Finally, this approach would allow *all* small business owners who met the criteria to seek relief; the fact that a small business owner either engaged in a business use that was prohibited by a previously unenforced ordinance or was indirectly harmed by an ordinance would not bar him or her from seeking relief.

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146. *See id.*; Beaver Gas Co. v. Zoning Hrg. Bd. of Borough of Osborne, 285 A.2d 501, 504 (Pa. 1971).

147. Bruce W. Burton, *Predatory Municipal Zoning Practices: Changing the Presumption of Constitutionality in the Wake of the "Takings Trilogy"*, 44 ARK. L. REV. 65, 117–19 (1991).

148. *See id.*

149. *See* Mandelker & Tarlock, *supra* note 142, at 13–14.

150. For instance, a municipality could demonstrate that it conducted detailed studies that indicated the use of police power was necessary to resolve the issue.

151. Daniel R. Mandelker & A. Dan Tarlock, *Two Cheers for Shifting the Presumption of Validity: A Reply to Professor Hopperton*, 24 B.C. Envtl. Aff. L. Rev. 103, 110 (1996) ("Heightened judicial scrutiny is ultimately grounded in constitutional concerns, and thus works best with a rights analysis . . . [;]it is difficult to develop a rights analysis for zoning.").

The advantages afforded to municipalities are less obvious, but substantial nonetheless. Unlike the Pennsylvania approach, the protected class approach gives greater deference to the municipality. Instead of presuming that all ordinances that exclude lawful business activities are unconstitutional, this approach would give the municipality an opportunity to justify its decision with one or all of the defenses mentioned above. Similarly, this approach would avoid the harsh results proposed by SB 367 by restricting the class of plaintiffs to small business owners only and not allowing small business owners to prevail based solely on their having suffered a statutorily determined amount of damage. Further, by limiting relief to compensation only, this approach would not greatly undermine the ability of municipalities to structure and organize their communities through ordinances. Indeed, this approach could benefit municipalities by showing them how to better use their police powers; if a municipality is unable to justify its actions at court, the experience teaches it that it needs to act more prudently before exercising its police powers in the future.[152]

The primary disadvantage of the protected class approach is that no jurisdiction has adopted an approach similar to it. As such, it is uncertain exactly how courts in Arkansas would utilize such an approach. Still, this factor alone should not dissuade courts in Arkansas from adopting it. The advantages afforded to small business owners under this approach would promote the state's interest in small business development. Likewise, this approach would restrain municipal police power from being exercised to the detriment of commerce and industry, which, according to Justice Glaze, should be an aspect of Arkansas's public policy.[153] Finally, the approach reaches a better result for small businesses and municipalities than that proposed by the Arkansas Legislature in SB 367. For the foregoing reasons, the protected class approach may be the best method by which courts in Arkansas could protect small businesses from burdensome ordinances.

V. CONCLUSION

Municipal police power benefits a community by being able to "meet changing conditions that call for revised or new regulations to promote the public health, safety, morals, or welfare."[154] For the most part, a municipality exercises its police power with proper discretion to benefit the public. Yet, as has been demonstrated throughout this note, municipal police power can adversely affect small businesses in a number of ways. Under the cur-

152. *Id.* at 111 ("The use of a presumption shift, imperfect as it is, can . . . "teach" local governments how to [make land use decisions] correctly . . . .").

153. *See* Phillips v. Town of Oak Grove, 333 Ark. 183, 199, 968 S.W.2d 600, 608 (1998) (Glaze, J., dissenting).

154. *See* MCQUILLIN, *supra* note 6, § 24:8.

rent law in Arkansas, small businesses that are adversely affected by ordinances have little opportunity for redress in the courtroom. To improve this situation, courts in Arkansas should consider adopting a judicial approach that regards small businesses as a protected class. This approach would afford small businesses greater protection from burdensome ordinances, while at the same time respecting the interests of municipalities in promoting the public health, safety, and welfare of the community. Thus, by adopting this approach, courts in Arkansas would promote the State's interest in small business development.

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