

An Overview of Common Zoning Validity Challenges and Methods for Improving the Defensibility of Zoning Ordinances.



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OVERVIEW

On June 4, 2015, the Centre Regional Planning Agency hosted a peer-to-peer regional planning seminar which focused on zoning validity challenges in the context of multi-municipal planning. The main presentation at the seminar was provided by Lancaster based land use attorney, Matthew J. Creme, Jr. The purpose of the seminar was to provide an opportunity for municipal planning commission members from across the Centre Region to learn about and discuss the various types of zoning validity challenges that exist as well as ways to avoid such challenges within the context of the Centre Region Comprehensive Plan.

At the first peer-to-peer seminar held in October of 2014, attendees provided feedback on potential future seminar topics, one of which included intergovernmental cooperative agreements. Sharing land uses across municipal corporate boundaries is permitted by the Municipalities Planning Code, however, this provision has only been utilized by a handful of municipalities that participate in a multi-municipal plan. The session was intended to provide a background on the types of zoning validity challenges that exist, case law from previous cases, and ways that challenges can be abated through increased intergovernmental cooperation.

This report provides an overview of the topics covered at the June 2015 regional planning seminar and is meant to act as a general guide on the subject of zoning validity challenges. This report is for informational purposes only and should not be used in place of legal advice from a qualified solicitor.

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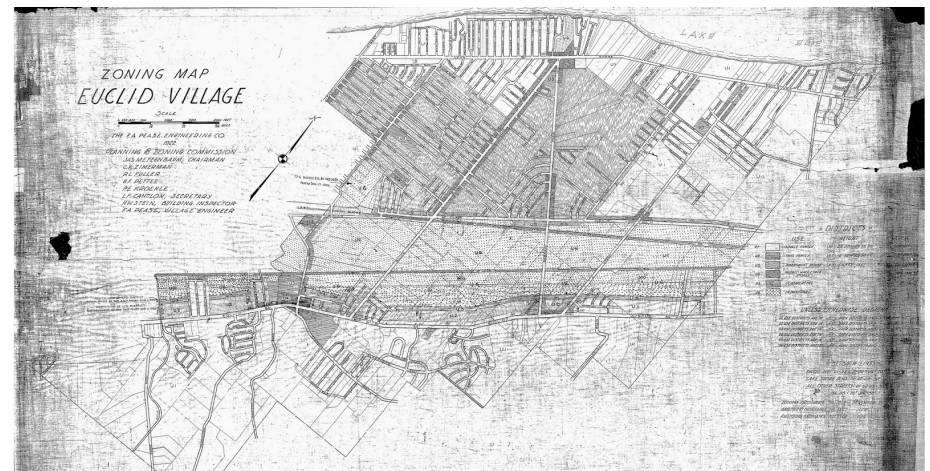
THE PURPOSE OF ZONING

The Pennsylvania Municipalities Planning Code (PaMPC) defines the purposes of zoning ordinances within the State of Pennsylvania. Section 604 of the PaMPC provides the framework by which zoning ordinances can be created, which includes protection of public health, safety, and general welfare. This section of the MPC goes on to provide specific purposes for zoning ordinances, as follows:

1. *To promote, protect and facilitate any or all of the following: the public health, safety, morals, and the general welfare; coordinated and practical community development and proper density of population; emergency management preparedness and operations, airports, and national defense facilities, the provisions of adequate light and air, access to incident solar energy, ollice protection, vehicle parking and loading space, transportation, water, sewerage, schools, recreational facilities, public grounds, the provision of a safe, reliable and adequate water supply for domestic, commercial, agricultural or industrial use, and other public requirements; as well as preservation of the natural, scenic and historic values in the environment and preservation of forests, wetlands, aquifers and floodplains.*
2. *To prevent one or more of the following: overcrowding of land, blight, danger and congestion in traveland transportation, loss of health, life or property from fire, flood, panic or other dangers.*
3. *To preserve prime agriculture and farmland considering topography, soil type and classification, and present use.*
4. *To provide for the use of land within the municipality for residential housing of various dwelling types encompassing all basic forms of housing, including single-family and two-family dwellings, and a reasonable range of multifamily dwellings in various arrangements, mobile homes and mobile home parks, provided, however, that no zoning ordinance shall be deemed invalid for the failure to provide for any other specific dwelling type.*
5. *To accommodate reasonable overall community growth, including population and employment growth, and opportunities for development of a variety of residential dwelling types and nonresidential uses.*

WHAT IS A ZONING VALIDITY CHALLENGE?

In 1926, the United States Supreme Court ruled in the landmark case of the *City of Euclid, Ohio v. Amber Realty Co.* that zoning ordinances, regulations and laws are a legitimate use of a community's police powers so long as the regulations provide a benefit to public welfare. While zoning was ruled by the Supreme Court to be an appropriate use a community's policing power, the validity of any zoning ordinances can be subjected to legal challenges. Common validity challenges, which are described further in this report, include spot zoning, fair share, exclusionary, substantive due process, irrationality, and equal protection.



Euclid Zoning Map

PRESUMPTION OF VALIDITY

In Pennsylvania, the courts treat zoning as a legislative act and accord land use regulations with them a presumption of validity. A zoning ordinance is presumed valid once enacted and the burden lies with the challenger, who must provide prima facie evidence that the ordinance is exclusionary, unreasonable or not substantially related to the police power interest the ordinance is meant to serve. If a challenger is successful in meeting this burden, the burden of proof then shifts to the municipality to show that the validity of the zoning or rezoning is fairly debatable. "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. (*Village of Euclid v. Ambler Realty Company, United States Supreme Court, 1926*)

DUE PROCESS

Amendment V of the U.S. Constitution provides, in part, that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." This mandate applies to the State and local governments through the Fourteenth Amendment, which provides in part: "... nor shall any state deprive any person of life, liberty, or property without due process of law. This clause of the Constitution has come to protect individuals from arbitrary governmental action, no matter what level of government is acting.

There are two types of due process afforded by the constitution, procedural and substantive. Procedural due process in regard to land use regulations requires a fair and open process. Procedural due process ensures that decisions are reached in a fundamentally fair manner. The PaMPC specifies the actions that municipalities must take in order to adopt or amend land use regulations, including public notices and hearings. Following these steps helps to ensure that procedural due process was provided to property owners in a municipality. In addition to meeting the minimum requirements of the PaMPC, providing opportunities for public comment, presenting of evidence, barring ex-parte contact, keeping a written record, and other common practices helps ensure that procedural due process is provided.

In regard to zoning, the courts have interpreted substantive due process to mean that land use controls must advance legitimate governmental interests that serve the public health, safety, morals, and general welfare.

Substantive due process requires that:

1. There is a valid public purpose for the regulation;
2. The means adopted to achieve that purpose is substantially related to it; and,
3. The impact of the regulation upon the individual not be unduly harsh.

Determining whether the regulation serves the general welfare of the community is the primary issue to consider in regard to substantive due process.



EQUAL PROTECTION

The 14th amendment of the United States Constitution provides, in part, that “no State shall...deny to any person within its jurisdiction the equal protection of the laws.” Equal protection does not imply that everyone is treated the same, but means that any law should treat similarly situated persons similarly. There are numerous examples of cases in Pennsylvania where the courts found that zoning violated the equal protection clause. In ***Hopewell Township Board of Supervisors v. Golla (1982)***, the Pennsylvania Supreme Court found that the Township’s agricultural zoning ordinance violated the equal protection clause since it treated owners of large lots less favorably than owners of small lots.



REQUIREMENTS OF PROVIDING FOR LAND USES IN MUNICIPAL ZONING ORDINANCES

Municipalities are required by the PaMPC to provide for all land uses within their corporate boundaries. This includes all housing, commercial, and industrial uses. Municipalities cannot exclude particular land uses from their community. All land uses must be accommodated somewhere in a municipality (e.g. industrial, landfills, cell phone towers, adult uses, and penal institutions). Not providing for a particular land use can result in a zoning validity challenge, such as a claim that the zoning ordinance is exclusionary.

Municipalities are not required to provide for all land uses within their corporate boundaries if they participate in a multi-municipal plan. This exemption is provided in Section 1103 (4) of the PaMPC, which reads as follows:

Plan for the accommodation of all categories of uses within the area of the plan, provided, however, that all uses need not be provided in every municipality, but shall be planned and provided for within a reasonable geographic area of the plan.

Based upon this section of the MPC, municipalities that participate in a multi-municipal comprehensive plan, like the Centre Region Comprehensive Plan, can rely upon land uses being provided within other municipalities that also participate in the multi-municipal comprehensive plan.

Ensuring that zoning ordinances provide for all land uses can help municipalities avoid exclusionary zoning challenges. Municipalities should review ordinances on a regular basis to verify that all uses are provided for. Sharing land uses with multi-municipal planning partners and adding a process for permitting undefined uses are potential methods for providing for all land uses.

USES NOT PROVIDED FOR

As noted above, municipalities within the State of Pennsylvania are required to provide for all land uses within their corporate boundaries. This is typically done by providing lists of permitted uses, whether by right, condition, or special exception, within the zoning ordinance. Identifying all conceivable uses in a zoning ordinance is not only impractical but also nearly impossible. To address uses that are not explicitly provided for within the zoning ordinance, some municipalities include a clause in their ordinances that identifies a process for permitting a use when proposed. This provides a method of avoiding exclusionary zoning challenges. Examples of these clauses are provided below:

Lititz Borough, Lancaster County, Section 205 – *Whenever a use is not specifically permitted under the provisions of this Ordinance, the Zoning Officer shall refer the matter to the Zoning Hearing Board to hear and decide such use as a special exception request. The party seeking the use determination is required to file a special exception request with the Board. The Board shall have the authority to permit the use or deny the use in accordance with the standards governing special exception applications. The use may be permitted if it is similar to and compatible with the permitted uses in the zoning district, and in no way is in conflict with the general purposes and intent and the Supplementary Regulations of this Ordinance, and is not in conflict with the Form-Based Code Regulations of Article VIII. The burden of proof shall be upon the applicant to demonstrate that the proposed use would not be detrimental to the public health, safety and welfare of the neighborhood. No zoning permit shall be issued by the Zoning Officer for any such unspecified use until this determination has been made by the Zoning Hearing Board.*

Smithfield Township, Monroe County, Division 41-030 – If a use is clearly not provided for in this chapter, whether as a permitted use as of right or by conditional use or as a use by special exception within any zoning district within the municipality, then the Zoning Officer(s) may make a determination as to whether the use not specifically provided for is similar to a use permitted by conditional use or similar to a use permitted by special exception. Once this determination is made by the Zoning Officer, the applicant must satisfy certain conditions to the appropriate board as set forth herein.

A. *Similar to a use permitted by special exception. If the Zoning Officer determines that a use not specifically provided for is similar to another use permitted by special exception under this chapter, then the proposed use may also be permitted by special exception if the applicant proves to the satisfaction of the Zoning Hearing Board that the following conditions can and shall be met:*

- (1) The proposed use would be no more intensive with respect to external impacts and nuisances than uses that are permitted by right or by special exception within the district;*
- (2) The proposed use would be closely similar in impact and character to uses permitted by right or by special exception within that district; and*
- (3) The proposed use would meet all of the standards that would apply to the use to which the proposed use is most similar.*

B. *Similar to a use permitted as a conditional use. If the Zoning Officer determines that a use not specifically provided for is similar to another use permitted as a conditional use under this chapter, then the proposed use may also be permitted as a conditional use if the applicant proves to the satisfaction of the governing body that the following conditions can and shall be met:*

- (1) The proposed use would be no more intensive with respect to external impacts and nuisances than uses that are permitted by conditional use within the district;*
- (2) The proposed use would be closely similar in impact and character to uses permitted by conditional use within the district; and*
- (3) The proposed use would meet all of the standards that would apply to the conditional use to which the proposed use is most similar.*

EXCLUSIONARY ZONING

Exclusionary zoning is the utilization of zoning ordinances to exclude certain uses, whether entirely or in part. Exclusionary zoning challenges typically result from the exclusion of specific types of housing, but can also include the exclusion of non-residential uses as well. Two types of exclusions exist.

De jure or total exclusion is where a zoning ordinance prohibits or fails to make provisions for a particular use. In this circumstance, a land use is not permitted by a municipality which is an example of unlawful exclusion.

De facto or partial exclusion is when an ordinance permits a specific use but fails to provide sufficient land or negates the practical development of that use. This type of exclusion typically relies upon the “fair share” doctrine. If a municipality provides too little land to accommodate a land use for which demand is forecast, the zoning ordinance could be considered exclusionary. If a municipality permits a land use but through its regulations prohibits the practical development of that use, it could also be considered exclusionary.

There are several examples of unlawful exclusion case law within the State of Pennsylvania on the following page.



The PaMPC not only requires zoning ordinances to provide for all land uses, ordinances cannot be too restrictive as to prevent the development of any land use. This doesn't mean that vacant land needs to be provided for all types of land uses, but regulations cannot effectively make the establishment of any use impossible. Adult businesses, for example, often have additional regulations that might overly restrict their ability to be developed in a municipality. While additional standards may provide safeguards, it is important to analyze those standards to ensure that the zoning ordinance is not de facto exclusionary.



Municipalities must also allow for a variety of basic housing types. This ensures that a diversity of housing types can be established within a municipality's boundaries.

Girsh Appeal (1970); Township of Wiliston v. Chesterdale Farms Inc. (1975)

Both the Girsh appeal and Chesterdale case specifically dealt with the exclusion of apartments and other multi-family housing from a municipality. In 1970, the courts determined in the Girsh case that zoning that did not permit apartments anywhere in a municipality was exclusionary.

The Township of Wiliston v. Chesterdale Farms Inc. case was similar in nature, except that Wilistown Township permitted apartments within one zoning district that encompassed only 80 acres within the Township. Chesterdale Farms Inc. contended that permitting apartments on only 80 acres out of the Township's 11,589 was tokenism. The courts ruled in favor of Chesterdale Farms Inc, stating the following:

"Our review of this record convinces us that the township zoning ordinance which provides for apartment construction in only 80 acres out of a total of 11,589 acres in the township continues to be "exclusionary" in that it does not provide for a fair share of the township acreage for apartment construction.

Nor are we convinced by Willistown's argument that Chesterdale's development plans would overburden its municipal services. Suburban municipalities within the area of urban outpour must meet the problems of population expansion into its borders by increasing municipal services, and not by the practice of exclusionary zoning."

Abraham Atiyeh v. Board of Commissioners of the Township of Bethlehem (2011)

Abraham Atiyeh (appellant) owned property in the General Industrial District in Bethlehem Township and requested permission to build a prison upon the property. The Bethlehem Township zoning ordinance did not permit prisons in any zoning district and the appellant challenged the ordinance claiming that it was de jure exclusionary and therefore unconstitutional.

The Bethlehem Township Board of Commissioners rejected the challenge, finding that a "treatment center", which was a permitted use under the ordinance, included prisons despite the fact that the definition for a treatment center specifically excluded prisons. The complete exclusion of a use could be considered constitutional if the municipality could prove that its exclusion was substantially related to the promotion of public health, safety, and welfare. The court held that because the ordinance doesn't specifically provide for prisons within the Township and that there was no evidence that the Appellant's plans for the prison would be injurious to the public health, safety, morals or general welfare. The court concluded that the ordinance was de jure exclusionary and entitled the Appellant to site specific relief.

SEE ALSO:

- ***National Land and Investment Company v. Easttown Township Board of Adjustment (1965)***
- ***Jim Thorpe Area School District v. Kidder Township Zoning Hearing Board (1999)***

“FAIR SHARE”

Not only are municipalities required to provide for all land uses within their corporate boundaries, but they must also provide for their “fair share” of a use. Fair share implies that municipalities provide enough land to accommodate their portion of the demand in a given area. This doesn’t imply vacant land, but rather land that can support growth. Fair share challenges are typically in regards to residential uses, but non-residential uses can also be the subject of a fair share challenge.

In the case of **Surrick v. Upper Providence Township (1974)**, in what is now recognized as a landmark decision for determining whether a zoning ordinance disproportionately and unconstitutionally precludes multi-family dwellings, the Pennsylvania Supreme Court set forth a three-step multi-factor test as well as the scope of judicial review for claims alleging this defect. That three-step multi-factor test is as follows:

1. A review is made to determine if the community is a logical area for development and population growth, including a consideration of the community’s proximity to a large urban area and the region’s population growth.
2. After establishing that the community is in the path of growth, the present level of development within the community is examined.
3. In deciding whether a community has met its “fair share” obligations, the court is to review a number of factors, including:
 - a. Current population growth and pressures within the community and region;
 - b. The percentage of land available under the zoning ordinance for the use in question;
 - c. The amount and percentage of undeveloped land in the particular community; and
 - d. The extend of such use that can be accommodated under the existing zoning ordinance

A benefit of participating in a multi-municipal plan is that land uses are planned for at the multi-municipal scale, allowing for the region to assume its “fair share” of a land use within then entire planning area as opposed to individual municipalities. There are a number of examples of cases where municipalities were challenged on whether or not they provided their “fair share” of a land use, several of which are summarized on the following page.



Municipalities should ensure that sufficient land area is available to provide a variety of housing options to accommodate projected population growth. Within a multi-municipal comprehensive planning area, future population growth and housing types can be accommodated throughout the entirety of the planning area as opposed to within an individual municipality.

Surrick v. Zoning Hearing Board of Upper Providence Township (1974)

Seeking to build apartments and townhouses on a 16.25-acre tract zoned A-1 Residential (single-family residences on 1-acre minimum lots), a developer applied for a variance from the zoning hearing board and simultaneously challenged the substantive validity of the ordinance. The developer argued that the ordinance unconstitutionally excluded multi-family dwellings from the Township because the Township had only 1.14% of total acreage available for multi-family dwellings, and within these areas, multi-family dwellings competed with many other (mostly commercial) uses. The Township denied the variance.

Through its “fair share” analysis, the Supreme Court held that a partial exclusion is unconstitutional when the amount of land zoned for multi-family use is “disproportionately small” relative to the overall regional growth pressures and the amount of undeveloped land in the community available for multi-family dwellings.

Macioce v. ZHB of the Borough of Baldwin (2004)

A landowner and AT&T wireless claimed that the Borough was impermissibly prohibiting them from erecting a wireless tower where less than 1% of the land in the township could support a tower under the current zoning scheme. The test to determine if there is a de facto taking when a plaintiff alleges that the township is not allowing its “fair share” of a certain use is that there must be a very small area zoned for the particular use and the needs of the residents are not being adequately served.

While the landowner showed that the available land to erect wireless towers was small, he did not satisfy their burden of proving that the needs of the residents for wireless communication were not being met. AT&T wanted to build this tower because this was an area of “unreliable service.” But there were, in fact, already two towers in the township. There was nothing else on the record to determine the needs of the resident in the township.

SEE ALSO:

- ***Hanson Aggregates Pennsylvania, Inc. v. College Township Council (2006)***

SPOT ZONING

Spot zoning was defined by the Pennsylvania Department of Community and Economic Development as “a singling out of one lot or small area for different treatment from that accorded to similar surrounding land from which it is indistinguishable in character for the economic benefit (or detriment) of the property owners.” Another key element of spot zoning is that it is usually at odds with a community’s comprehensive plan. Spot zoning may be ruled invalid as an “arbitrary, capricious and unreasonable treatment” of a limited parcel of land by a local zoning ordinance.

In their decision for **Township of Plymouth v. County of Montgomery (1987)**, the Court stated the following regarding spot zoning:

“The key point when a municipal governing body puts on blinders and confines its vision to just one isolated place or problem within the community, disregarding a community-wide perspective, that body is not engaged in lawful zoning, which necessarily requires that the picture of the whole community be kept in mind while dividing it into compatibly related zones by ordinance enactments. In other words, legislation as to a spot is the antithesis of zoning, which necessarily functions within a community-wide framework. Zoning, to be valid, must be in accordance with a rational and well-considered approach to promote safety, health and morals and a coordinated development of the whole municipality.”

The size of a parcel or parcels within a particular zoning district does not determine whether or not spot zoning has occurred. Spot zoning can more easily be measured by the benefit provided to a particular property owner or set of owners to the detriment of comprehensive plan or public goals. If a rezoning provides special benefits to a property owner while creating negative impacts to surrounding property, spot zoning likely occurred. Simply put, spot zoning is zoning adopted in the absence of good planning.

Zoning a property differently than its surroundings doesn’t necessarily qualify as spot zoning. Examples where this might occur is when a small portion of a residential area, perhaps at the intersection of two major roadways, is zoned commercial. Providing a limited amount of commercial uses near residential development is typically considered good planning practice and can be justified based on the need for nearby services.

Is it Spot Zoning?

Although a Planning Commission is not qualified to make a legal determination of spot zoning, it should review any zoning amendment with scrutiny to identify whether or not such an issue may exist. The following questions should be considered when reviewing any zoning amendment to help identify whether or not it may constitute spot zoning:

- *Is the requested amendment consistent with the Comprehensive Plan?*
- *Is the requested use or zoning district significantly different from the surrounding area?*
- *Will the use or district benefit a few landowners while creating negative impacts to surrounding landowners?*
- *Will the amendment affect a small area and provide private, rather than public benefit?*

Cavanaugh v. Fayette County Zoning Hearing Board (1997)

Property owners petitioned the Fayette County Commissioners to rezone approximately 12 acres of their 33 acre property, which was agriculturally and residentially zoned, to a commercial zoning designation. The Commission approved their request and the property owner began to construct a truck shop, at which time an adjacent property owner challenged the zoning permit for the truck shop, claiming that the property had been spot zoned. The Fayette County Zoning Hearing Board heard the case and agreed with the surrounding property owners, finding that the property had been spot zoned. The Zoning Hearing Board noted that the property was not indistinguishable from surrounding properties, that the Comprehensive Plan showed future use of the property as residential rather than commercial, that the rezoning was for the sole benefit of the property owners, and that the ordinance bears no reasonable relationship to health, safety, morals, and general welfare of the Community. The property owners appealed the Zoning Hearing Board decision, which the Commonwealth Court of Pennsylvania affirmed, finding that the rezoning was spot zoning.

Baker v. Chartiers Township Zoning Hearing Board (1996)

In 1992, Chartiers Township rezoned a 221 acre piece of property from agricultural to industrial. A neighboring property owner challenged the Township's actions on procedural grounds, since the Township failed to submit the proposed rezoning to the County Planning Commission for review as required by the Municipalities Planning Code. While acknowledging that such a failure invalidated the rezoning per se, the Court held that such an irregularity in procedure could be considered along with other factors in determining whether the rezoning was arbitrary and unjustifiably discriminatory. The Court also noted that while not required, the absence of any expert witness to discuss the environmental concerns evident in this case supports the "arbitrary" argument raised by the objectors. Inconsistency with the comprehensive plan was also a factor in the Courts decision to overturn the rezoning. The Court found the procedure used by the Township in adopting the rezoning; the speed; the lack of expert testimony; the failure to comply with required Planning Commission review requirements of the MPC; and the "peninsula" effect caused by the rezoning, to conclusively support the argument that spot zoning had occurred.

TAKINGS

A taking typically occurs with government physically uses or occupies private property without providing compensation to the owner. Since zoning does not deal directly with the physical occupation of property but rather regulates the way it can be used, zoning is sometimes referred to in legal challenges as a regulatory taking. Court rulings on takings have evolved over the past century, resulting in new methods of interpreting and analyzing regulations to determine if a taking occurred.

A regulatory taking is when government regulation limits the uses of private property to such a degree that the regulation effectively deprives the property owners of economically reasonable use or value of their property. In the State of Pennsylvania, courts have ruled that a taking has only occurred if 100% of the value or ability to use the property was taken. While some regulations have been classified as takings in Pennsylvania, there are no known examples where the Pennsylvania courts have recognized zoning as a taking.

Property owners may claim that a “taking” occurred whenever zoning amendments are made that resulted in the removal of land uses or modifications to permitted densities. Typically, these claims are based on the occurrence of a downzoning, where a property owner may perceive that their property has lost value since it can no longer be developed at higher densities. While decreasing the lot density permitted within an area may be politically unpopular with land owners, a taking would not have occurred so long as the land can still be used for an economically reasonable use. Municipalities are required to provide for a reasonable use of land, not the highest and best use.

A “taking” occurs when government takes or occupies private property without providing just compensation. If a roadway is widened and an adjacent property owner can no longer access or use their property to the widening but were not compensated, a taking has occurred. Zoning is at times referred to as a regulatory taking in legal challenges, however, there are no known examples where Pennsylvania Courts have recognized zoning as a taking.



Pennsylvania Coal Co. v. Mahon (1922)

This case established the doctrine of regulatory taking. The case involved State Regulations (the Kohler act) that prohibited the mining of coal under land that was inhabited. Justice Holmes, in writing for the majority, stated that “[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” In this case, the Supreme Court found that the law was unconstitutional in that it forbade the mining of all coal, which in their view constituted a taking.

Agins v. City of Tiburon, California (1980)

*This case established that land use regulations constitute a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of the land. This “substantial advancement of a state interest” portion of this ruling was later overruled in ***Lingle v. Chevron U.S.A., Inc. (2005)****

Miller and Son Paving, Inc. v. Plumstead Township, Bucks County (1998)

This case involved a property owner who sought to establish a quarry in Plumstead Township, which did not permit quarries in any zoning district. Miller filed for a curative amendment but the Township failed to provide site specific relief and the case was further appealed by Miller. The courts eventually ruled that the ordinance was unconstitutional because it did not permit a quarry use in any zoning district. Miller also claimed that the ordinance resulted in a de facto taking since he was unable to establish or operate a quarry use between his initial request to establish the use and the court’s decision on the constitutionality of the ordinance. The courts found that no taking occurred, since Miller was not deprived total use of his property but was merely prohibited from establishing a quarry use.

DOWNZONING

Downzoning can be simply defined as rezoning land to a less intensive use. An example of this would be rezoning a property from commercial to residential uses. The results of downzoning can be that existing uses become non-conforming or that formerly permitted uses can no longer be established. While some states have specific provisions relating to downzoning, Pennsylvania does not.

Downzoning land has become more prevalent in recent years as more communities have begun instituting “smart growth” efforts. These efforts are typically meant to address the loss of prime agricultural farmland and also as a means of controlling unplanned suburban growth. Communities will typically “downzone” rural land to prevent dense development. The prohibition of dense development is often seen as a way to preserve agricultural soils, permit the development of agricultural uses, and avoid nuisances.

Downzoning properties should only be done after thorough planning efforts and by establishing that the change in zoning is based on legitimate and rational reasons. Ensuring that the proposed downzoning is for a legitimate public interest, that the action will help further that interest, and that property owners are still provided with an economically reasonable use of land will help ensure that the courts will uphold a downzoning.



Section 603 of the PaMPC states that zoning ordinances can contain provisions to preserve prime agricultural land and agricultural activities. This provision has been cited by the Courts when upholding numerous legal challenges where property owners or developers challenged ordinances that had large lot size requirements.

Street, L.P. v. East Lampeter Township Zoning Hearing Bd. (2014)

The Pennsylvania Commonwealth Court upheld that a zoning ordinance limiting development to one lot per 25 acres on lots that are greater than 10 acres in size is a legitimate use of police powers to further agricultural property.

Martin v. Township of Millcreek (1980)

The Pennsylvania Commonwealth Court held that where the challenged zoning ordinance requires the minimum lot size in excess of two acres for single-family homes, “extraordinary justification” for such requirement must be shown.

Corstiaan Van Vugt v. Zoning Hearing Board of Springfield Township (1983)

Springfield Township permitted residential development in its agricultural zoning district but did so at a sliding scale, where the number of lots permitted on land decreased as lot size increased. Van Vugt challenged the validity of this provision of the ordinance. The Court of Common Pleas of York County, in a unanimous opinion, dismissed the challenge, stating that the requirement bears a rational relationship to the avowed purpose of preserving prime agricultural land in the Township.

Henley v. Zoning Hearing Board of West Fallowfield Township (1993)

The owner of nineteen-acre tract of land containing prime agricultural soils challenged the validity of the ten-acre minimum lot size requirement in the AR-Agricultural Residential zoning district. The owner proposed to subdivide the land into fifteen lots for single-family homes, ranging in size from 1.1 to 1.6 acres. In upholding the validity of the minimum lot size, the Court stated that the purpose of the minimum lot size was to preserve productive agricultural lands and to foster condition favorable to a continued agricultural use in the township, and that the minimum lot size requirement cannot be considered arbitrary because the MPC itself directs the township to enact the zoning ordinances to preserve land for agricultural uses and permits the classification of the prime agricultural soils as a means of preserving the agricultural lands.

SEE ALSO:

- ***Boundary Drive Associates vs. Shrewsbury Township (1984)***
- ***Codorus Township v. Rogers et al. (1984)***
- ***Hock v. The Board of Supervisors of Mount Pleasant Township (1993)***
- ***C & M Developers, Inc. vs. Bedminster Township Zoning Hearing Board (2001)***

ZONING VALIDITY CHALLENGES IN THE CONTEXT OF MULTI-MUNICIPAL PLANNING

Participating in a multi-municipal comprehensive plan provides numerous benefits to municipalities in regards to zoning validity challenges. Since 1968, the PaMPC has permitted municipalities to coordinate land use planning efforts by creating multi-municipal comprehensive plans. Over the years, additional acts of the Pennsylvania Legislature have permitted increased opportunities for cooperation amongst neighboring municipalities. In 2000, the Pennsylvania Legislature passed Acts 67 and 68 which amended the PaMPC, broadening the benefits of multi-municipal planning.

One of the legal benefits of participating in a multi-municipal comprehensive plan is that participating municipalities may address judicial mandates to provide for all reasonable land uses on a regional, not municipal basis. This allows municipalities to work cooperatively to provide for all land uses, both residential (of varying densities) and non-residential, in the most appropriate locations at a regional scale. This allows municipalities to avoid exclusionary zoning challenges as well as “fair share” challenges, since any challenge would need to consider the entirety of the planning area rather than the municipal corporate boundary. The ability to plan for uses at the regional level is stated in Section 1103 (a) (4) of the PaMPC, which states:

[County or multi-municipal comprehensive plans may] plan for the accommodation of all categories of uses within the area of the plan, provided, however that all uses need not be provided in every municipality but shall be provided for within a reasonable geographic area of the plan.

Although not explicitly required by the PaMPC, municipalities participating in a multi-municipal plan can formalize the sharing of land uses through a Comprehensive Plan Implementation Agreement. Implementation agreements help participating municipalities to obtain the full legal benefits of a multi-municipal comprehensive plan. Implementation agreements can vary in complexity and scale, but can ultimately articulate which uses will be accommodated by particular municipalities based upon the multi-municipal comprehensive plan. This implementation agreement provides additional clarification on how land uses are being shared across the plan area and may provide additional review and analysis criteria should related ordinance amendments be proposed.

College and Patton Townships entered into an Inter-municipal Zoning Implementation Agreement in 2005 which shares multi-family residential and industrial land uses between the two municipalities. Patton Township has an excess of land zoned for multi-family uses but limited land for industrial uses while College Township has an excess of land for industrial uses but limited land for multi-family uses. Patton Township and College Township entered into the agreement to share the following multi-family and industrial zoning districts:

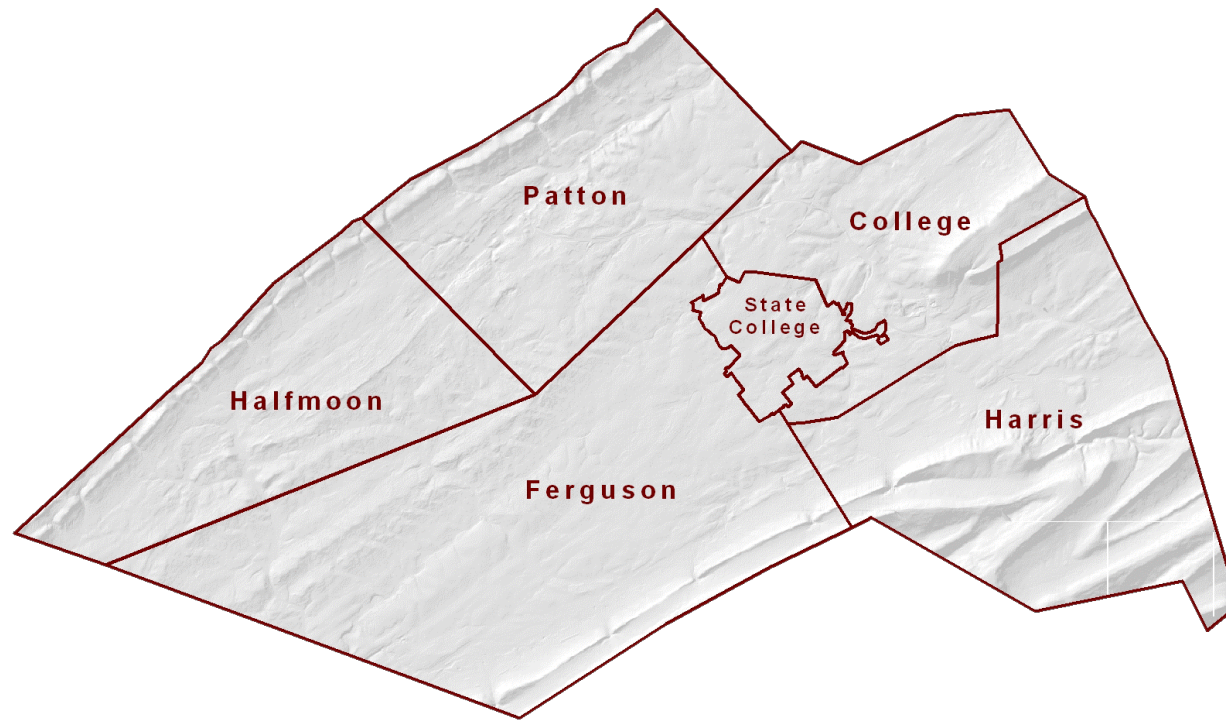
Patton Township Zoning Districts

Medium Density Residential District (R-3)
Planned Community District (PC)
Planned Airport District (PAD)
Industrial District (I-1)

College Township Zoning Districts

Multi-Family Residential District (R-3) Planned
General Industrial District (I-1)
Rural Residential District (R-R)

In addition to specifying which zoning districts are shared, the agreement also includes provisions for reviewing ordinance amendments. While this agreement serves as a local example of formalizing the location of land uses in a multi-municipal context, additional examples are available which illustrate how land uses can be shared amongst several municipalities through a single agreement.



Because the six Centre Region municipalities participate in a multi-municipal plan, land uses can be planned for at the regional level. Participating in a multi-municipal plan provides additional protections against exclusionary and “fair share” challenges. These protections can be strengthened by the establishment of Comprehensive Plan Implementation Agreements which establish which municipalities agree to provide for specific land uses.

ACKNOWLEDGEMENT



The main presentation for the June 2015 Peer-to-Peer Regional Planning Seminar was provided by Matthew J. Creme Jr. of the law firm of Nikolaus and Hohenadel, LLC, which is located in Lancaster, Pennsylvania. Mr. Creme has worked in the field of land use law for over 35 years, representing both municipalities and developers. Mr. Creme serves as the solicitor for several municipalities in south central Pennsylvania and also frequently serves as special counsel on real estate and legal matters. He is the past president of the Pennsylvania Bar Association and is a current member of the American, Pennsylvania, Lancaster and Berks County Bar Associations. In addition to his professional work, Mr. Creme is also active in numerous non-profit organizations including the American Red Cross and the National Multiple Sclerosis Society.

DEFINITIONS

De Jure – according to rightful entitlement or claim; by right.

De Facto - in fact, or in effect, whether by right or not.

Prima Facie - based on the first impression; accepted as correct until proved otherwise.

For more information, or questions, contact:



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