ZONING, SUBDIVISION AND LAND DEVELOPMENT LAW IN PENNSYLVANIA

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by:

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Concentrating in Land Use, Environmental, and Municipal Law

A. APPLICABLE STATUTES – THE "WHAT" AND "WHERE" OF ZONING AND SALD REGULATION

1. Pennsylvania Municipalities Planning Code

a. Zoning

The Pennsylvania Municipalities Planning Code ("MPC") is the enabling legislation that authorizes municipalities to enact, amend and repeal zoning ordinances.[1] There is no requirement that a municipality must enact a zoning ordinance.[2] However, where a municipality enacts a zoning ordinance, no part of the municipality may be left unzoned.[3]

A zoning ordinance may "permit, prohibit, regulate, restrict and determine, to the extent not superseded or preempted by certain state acts:

- uses of land, watercourses, and other bodies of water;
- size, height, bulk, location, erection, construction, repair, maintenance, alteration, razing, removal and use of structures;
- areas and dimensions of land and bodies of water to be occupied by uses and structures and open spaces;
- density;
- intensity of use; and
- protection and preservation of natural resources and agricultural land and activities.

A zoning ordinance may also contain provisions for special exceptions, variances, conditional uses, transferable development rights and planned residential developments; provisions encouraging innovation and promoting flexibility, economy and ingenuity; provisions

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[1] 53 P.S. § 10602.

[2] Counties are empowered to enact zoning ordinances only with respect to municipalities that have no zoning ordinance

[3] 53 P.S. § 10605.

for sewer and adequate water supplies; and provisions for administration, implementation and enforcement of the ordinance.

b. Subdivision and Land Development

Article V of the MPC provides authority for the regulation of subdivision and land development. Subdivision and land development ("SALD") is the exclusive prerogative of the governing body.[4]

SALDOs may include:

- Provisions for the submittal of plats, including the charging of review fees;[5]
- Specifications for plats, including certification as to the accuracy of plats;
- Provisions for preliminary and final approval, and for processing of final approval by stages or sections of development;[6]
- Provisions for excluding certain uses from the definition of land development;[7]
- Provisions for insuring that the layout conforms to the comprehensive plant, that streets are of such widths and grades as deemed necessary for traffic and fire protection, that adequate easements are provided for stormwater and utilities, that reservations for public grounds are adequate for their uses, and that land subject to flooding, subsidence or underground fires is made safe for the purpose for which the land will be used;

[4] 53 P.S. § 10501.

[5] Review fees "may include reasonable and necessary charges by the municipality's professional consultants for review and report thereon to the municipality." The review fees must be based upon a schedule established by ordinance or resolution. They must also be "reasonable and in accordance with the ordinary and customary charges for similar service in the community." 53 P.S. §§ 10503(1), (1)(i) – (iii).

[6] 53 P.S. § 10503(1)

[7] 53 P.S. § 10503(1.1)

- Provisions governing standards by which streets, walkways, curbs, gutters, street lights, water and sewage facilities shall be designed and installed;

- Provisions which take into account phased land development;

- Provisions regulating minimum setback lines and minimum lot sizes which are based upon the availability of water and sewer;

- Provisions for encouraging and promoting flexibility, economy and ingenuity in the layout and design of subdivisions and land developments;

- Provisions for encouraging the use of renewable energy systems and energy-conserving building design;

- Provisions for administering waivers to the minimum standards of the ordinance;

- Provisions for the approval of a plat, subject to conditions acceptable to the applicant and a procedure for the applicant's acceptance or rejection of any conditions;

- Provisions and standards for insuring that new developments incorporate adequate provisions for a reliable, safe and adequate water supply;

- Provisions requiring the public dedication of land suitable for the use intended and, upon agreement with the developer, the construction of recreational facilities, the payment of fees in lieu thereof, the private reservation of land, or a combination.

Section 107 of the MPC defines what constitutes "subdivision" and "land development:"

> **Subdivision** – the division or redivision of a lot, tract or parcel of land by any means into two or more lots, tracts, parcels or other divisions of land including changes in existing lot lines for the purpose, whether immediate or future, of lease, partition by the court for distribution to heirs or devisees, transfer of ownership or building or lot development: Provided, however, that the subdivision by lease of land for agricultural purposes into parcels of more than ten acres, not involving any new street or easement of access or any residential dwelling, shall be exempted.
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> **Land Development –** Any of the following activities:

(1) The improvement of one lot or two or more contiguous lots, tracts or parcels of land for any purpose involving:

(i) A group of two or more residential or nonresidential buildings, whether proposed initially or cumulatively, or a single nonresidential building on a lot or lots regardless of the number of occupants or tenure; or
(ii) The division or allocation of land or space, whether initially or cumulatively, between or among two or more existing or prospective occupants by means of, or for the purpose of streets, common areas, leaseholds, condominiums, building groups or other features.

(2) A subdivision of land;

(3) Development in accordance with section 503(1.1).

c. Comprehensive Plan & Joint Planning

Zoning ordinances must be "generally consistent" with municipal comprehensive plans or, if none exists, with the statement of community development objectives and the county comprehensive plan.[8] However, Section 303(c) of the MPC expressly provides that "no action by the governing body of a municipality shall be invalid nor shall the same be subject to challenge or appeal on the basis that such action is inconsistent with, or fails to comply with, the provision of a comprehensive plan."[9] Further, the courts consistently have held that, where there is a conflict between the comprehensive plan and a zoning ordinance, the zoning ordinance prevails on the grounds that it is regulatory in nature while the comprehensive plan is merely recommendatory.[10]

[8] 53 P.S. § 10603(j).

[9] 53 P.S. § 10603(c).

[10] *In re Realen Valley Forge Greenes Asso.,* 799 A.2d 938 (Pa. Cmwlth. 2002); *Blue Ridge Realty & Development Corp. v. Lower Paxton Twp.,* 414 A.2d 737 (1980).

Article VIII-A of the MPC authorizes joint zoning and planning by two or more municipalities. A statutory prerequisite for a joint municipal zoning ordinance is an adopted joint municipal comprehensive plan.[11]

B. ZONING AND SALD PROCEDURES – THE "HOW" AND "WHO" AND ZONING AND SALD REGULATION

1. The Governing Body

Section 909.1(b) of the MPC lists those matters for which the governing body of the municipality has exclusive jurisdiction to hear and render a decision. These include:

- Applications for planned residential developments;
- Applications for subdivision and land development unless the ordinance vests authority in the planning commission;
- Applications for conditional use;
- Applications for curative amendment;
- Petitions for amendments to land use ordinances; and
- Appeals from the determination of the zoning officer or municipal engineer in the administration of any land use ordinance with reference to sedimentation and erosion control and storm water management insofar as they relate to an Article V or Article VIII application, unless the ordinance vests final jurisdiction in the planning agency.[12]

The governing body also has exclusive authority to appoint the members of the zoning hearing board and the zoning officer.

2. The Zoning Hearing Board

The MPC mandates that, where a municipality has enacted a zoning ordinance, the

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[11] 53 P.S. § 10801 A(b).

[12] 53 P.S. § 10301(6).

governing body shall create a zoning hearing board.[13] Section 909.1(a) of the MPC sets forth the jurisdiction of the zoning hearing board. The zoning hearing board's jurisdiction includes:

i. Substantive challenges to the validity of any land use ordinance, except those brought before the governing body pursuant to Sections 609.1 (curative amendments) and 916.1(a)(2) (validity challenges);

ii. [Repealed by Act 39 of 2008, procedural validity challenges taken directly to Court of Common Pleas]

iii. Appeals from the determination of the zoning officer;

iv. Appeals from the determination of the municipal engineer or zoning officer with reference to the administration of a floodplain or flood hazard ordinance or such provisions within a land use ordinance;

v. Applications for variances;

vi. Applications for special exceptions;

vii. Appeals from the determination of any officer or agency charged with the administration of any transfers of development rights or performance density provisions of the Zoning Ordinance;

viii. Appeals from the zoning officer's determination under Section 916.2 (procedure to obtain preliminary opinion); or

ix. Appeals from the determination of the zoning officer or municipal engineer in the administration of any land use ordinance or provision thereof with reference to sedimentation and erosion control and stormwater management, not involving Articles 5 or 7 applications.

A zoning hearing board must conduct hearings and make decisions in accordance with the requirements of Section 908 of the MPC.

3. The Zoning Officer

Section 614 of the MPC provides for the administration of a zoning ordinance by an

[13] 53 P.S. § 10901.

appointed zoning officer, who "shall administer the zoning ordinance in accordance with its literal terms, and shall not have the power to permit any construction or any use or change of use which does not conform to the zoning ordinance."[14]

4. Zoning Hearings

Hearings before the Zoning Hearing Board, or before the governing body, must comply with Section 908 of the MPC[15]

a. Public Notice

Public notice of a hearing must be given by publication once a week for two successive weeks in a newspaper of general circulation. The first notice must not be earlier than 30 days prior to the hearing, and the second notice must not be later than 7 days prior to the hearing.[16] Written notice must also be given to the applicant, the zoning officer, such other persons as the governing body shall designate by Ordinance and to any person who has made timely request for the same. The written notice should comply with any timing and substance requirements contained in the zoning ordinance or the rules of the zoning hearing board.[17] In addition to written notice, notice of the hearing must be conspicuously posted on the affected tract of land at least one week prior to the hearing.[18]

b. Commencement and Continuation

The first hearing must be commenced within sixty (60) days from the date of receipt of the application unless the applicant has agreed in writing to an extension. Each subsequent hearing must be held within 45 days of the prior hearing unless otherwise agreed to by the

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[14] 53 P.S. § 10614.

[15] 53 P.S. § 10908.

[16] 53 P.S. § 10107.

[17] 53 P.S. § 10908(1).

[18] 53 P.S. § 10908(1).

applicant in writing or on the record. An applicant shall complete the presentation of his case within 100 days of the first hearing. Persons opposed to the application shall complete the presentation of their opposition within 100 days of the first hearing held after the completion of the applicant's case in chief.

c. Decisions

Section 908 of the MPC sets forth substantive and procedural requirements for the issuance of a decision by the zoning hearing board. An applicant or appellant may, prior to the decision, waive a decision or findings by the board and accept those of a hearing officer as final.

The zoning hearing board must render a decision within 45 days after the last hearing.[19] In *Gaster v. Township of Nether Providence*,[20] the Commonwealth Court held that a "hearing" as contemplated by Section 908(5) is not limited to the presentation of evidence, but includes oral argument, even when the board officially closed the evidentiary record before receiving oral argument. In *Wistuk v. Lower Mt. Bethel Township Zoning Hearing Board,*[21] the Commonwealth Court further construed this provision to include within the concept of "hearing" the submission of written memoranda or briefs submitted after the close of the evidentiary record, even when the board forbade oral argument.

Where a zoning hearing board fails to render a decision within this time period, or conduct or complete the required hearings as previously mentioned, the decision shall be deemed to be rendered in favor of the applicant unless the applicant has agreed in writing to an extension of time ("deemed approval" or "statutory deemed").[22] Where an applicant has agreed to an

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[19] 53 P.S. §10908(9).

[20] 556 A.2d 947 (Pa. Cmwlth. 1989).

[21] 887 A.2d 343 (Pa. Cmwlth. 2005).

[22] 53 P.S. § 10908(9).

extension of time, a deemed approval arises if the board fails to issue a written decision by the date specified in the extension of time. Note that an applicant can waive his right to a deemed approval by affirmative on-the-record conduct.[23]

In the event of a deemed approval because of the failure of the zoning hearing board to render a decision or otherwise meet, the zoning hearing board shall give public notice of said decision within ten (10) days from the last day it could have met to render a decision. If the zoning hearing board fails to provide the notice, the applicant may do so. Notwithstanding a deemed approval, a third party opposing the application may appeal the merits of the deemed approval. However, a 30-day period for a third party to file such an appeal does not begin to run until such time as the zoning hearing board or the applicant provides the required notice of the deemed approval.[24]

When an application is contested or denied, each decision must be accompanied by findings of fact and conclusions based thereon together with the reasons.

A copy of the final decision must be delivered to the applicant personally or mailed to him not later than the day following its date. To all other persons who have submitted their names and addresses to the zoning hearing board not later than the last day of the hearing, the zoning hearing board is required to provide by mail or otherwise a notice of the decision.

d. Enforcement

Zoning officers have authority to file civil enforcement proceedings where authorized by the municipality to do so. Authority should be provided in the zoning ordinance itself.

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[23] *Southeastern Chester County Refuse Authority v. Board of Supervisors of London Grove Township*, 954 A.2d 732 (Pa. Cmwlth. 2008) (deemed approval right waived) and *compare Nextel Partners, Inc. v. Clark Summit Borough,* 958 A.2d 587 (Pa. Cmwlth. 2008). *Nextel Partners and WeCare Organics, LLC v. Zoning Hearing Board of Schuylkill County*, 939 A.2d 985 (Pa. Cmwlth. 2008) further addressed the question of good faith and unclean hands in matters of an asserted deemed approval.

[24] *Magyar v. Zoning Hearing Board of Lewis Township*, 885 A.2d 123 (Pa. Cmwlth. 2005).

The primary means of enforcement is the use of an enforcement notice as provided in Section 616.1 of the MPC.[25] The enforcement notice should follow that provision strictly. The enforcement notice must:

- Be sent to the owner of record of the parcel on which the violation has occurred or to any other person who has filed a written request to receive such enforcement notices and to any other person interested requested in writing by the owner of record;
- State at least the name of the owner of record and any other person against who the municipality intends to take action;
- State the location of the property;
- Identify the specific violation, describe the requirements of the zoning ordinance that have not been met, and cite to the specific provisions of the zoning ordinance;
- Indicate the date before which the steps for compliance must be commenced and completed;
- Inform the recipient of the right of appeal to the zoning hearing board within a prescribed period of time, and that failure to comply with the notice, unless extended by appeal to the zoning hearing board, constitutes a violation with possible sanctions clearly described.

In an appeal from an enforcement notice, the municipality has the burden of presenting its evidence first.

5. SALD Proceedings

Sections 508 through 511 of the MPC provide the procedures for subdivision and land development approval, including the completion of improvements. No public hearing on a subdivision and land development plan is required.[26] A governing body must, however, render a decision in writing and communicate it to the applicant not later than 90 days following the date of the regular meeting of the governing body (or planning agency) following the date the

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[25] 53 P.S. § 10616.1.

[26] A public hearing is discretionary. 53 P.S. § 10508(5).

application is filed.[27] The written decision must be mailed to or communicated to the applicant not later than 15 days following the date on which the decision is made.[28] If the plan is rejected, the written decision must "specify the defects found in the application and describe the requirements that have not been met."[29] If the Board fails to satisfy these requirements, the applicant's plan is deemed approved.[30]

C. SPECIAL CATEGORIES OF USES

1. Accessory Uses

A zoning ordinance typically permits uses in a district that are "accessory" to a permitted use. To be an "accessory use," the use must be "customary and incidental" to the primary use.[31]

2. Special Exceptions and Conditional Uses

A zoning ordinance classifies uses in a given zoning district as "permitted uses as of right" or "prohibited uses." At its discretion, the municipality may classify certain uses as permitted by special exception, or as conditional uses.[32] In classifying a use as a special exception[33] or conditional use, the municipal governing board makes a legislative decision that

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[27] 53 P.S. § 10508.

[28] 53 P.S. § 10508(1).

[29] 53 P.S. § 10508(2).

[30] 53 P.S. § 10508(3).

[31] *Tink-Wig Mountain Lake Forest Property Owners Ass'n v. Lackawaxon Twp. Zoning Hearing Bd.,* 986 A.2d 935 (Pa. Cmwlth. 2009) (55-foot individual wind turbine an accessory use to a residence); *Lancaster Twp. v. Zoning Hearing Bd. of Lancaster Twp*., 6 A.3d 1032 (Pa. Cmwlth. 2010) (tractor trailers used in interstate trucking business not accessory to residential use); *Sky's the Limit, Inc. v. Zoning Hearing Bd. of Smithfield Twp*., 18 A.3d 409 (Pa. Cmwlth. 2011) (camping not accessory to an airport use).

[32] 53 P.S. §10603(c)(1) [special exception], (2) [conditional use].

[33] The term "special exception" is a misnomer. A special exception is a use envisioned by the ordinance and, if the express standards and criteria established by the ordinance are met, the use is one permitted by the ordinance.

the use is a permissible and legitimate use of property within a given zoning district and not adverse to the public interest *per se*.[34]

a. Special Exceptions v. Conditional Uses

Special exceptions and conditional uses are the same creature in the eyes of the law.[35] Consequently, the requirements and burdens applicable to a conditional use application are identical to those established under Pennsylvania law for a special exception application.[36]

The principal distinction between a conditional use and a special exception is that the governing board hears and decides on an application for conditional use[37] and a zoning hearing board hears and decides on an application for special exception.[38]

In their consideration of either a conditional use or special exception, the relevant municipal board is acting in a quasi-judicial capacity. In such capacity, the function of either board is to determine whether the application is consistent with the public interest as defined in specific standards established in the ordinance and would not prove injurious to the public interest.

Special exceptions and conditional uses are typically reserved for land uses that the governing board, in enacting the zoning ordinance, determined deserve closer examination and protections than may be afforded under a standard zoning permit. Typically, such land uses are

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[34] *Perkasie v. Moulton Builders, Inc.,* 850 A.2d 778 (Pa. Cmwlth. 2004); *Bailey v. Upper Southampton Twp.*, 690 A.2d 1324 (Pa. Cmwlth. 1997).

[35] *Perkasie, supra* n. 34*; Bailey, supra* n. 34.

[36] *Sheetz, Inc. v. Phoenixville Borough Council,* 804 A.2d 113 (Pa. Cmwlth. 2002); *White Advertising Metro, Inc. v. Susquehanna Twp. Zoning Hearing Bd.,* 453 A.2d 29 (Pa. Cmwlth. 1982).

[37] 53 P.S. §§ 10603(c)(2), 10913.2.

[38] 53 P.S. §§ 10603(c)(1), 10912.1.

those that have a significant impact on the zoning district or the municipality as a whole, or which necessitate more control or additional safeguards.[39]

b. Review and Approval Process

Applications for both conditional use and special exception require a timely-commenced public hearing conducted by the municipal board acting in a quasi-judicial capacity, and the issuance by the municipal board of a written decision containing findings of fact, conclusions and reasons. While the procedural requirements for conditional uses and special exceptions are similar, there are differences (not specifically discussed here). Section 913.2 of the MPC sets forth the procedural requirements for conditional uses.[40] Section 908 of the MPC sets forth the procedural requirements for special exceptions.[41]

Failure by either municipal board to render a decision within the time periods set in the MPC or failure to conduct the required hearing in the manner provided by the MPC will result in a decision deemed to have been rendered in favor of the application.[42] Notice of such deemed approval must be provided in accordance with the provisions of the MPC.

c. Standard of Review and Burdens of Proof

A zoning ordinance classifying uses as special exceptions and conditional uses properly must set forth in the zoning ordinance the standards for such uses. These standards may be objective or subjective in character.

[39] Some commentors suggest that a special exception is appropriate for uses that have a localized impact or impact within a given zoning district and that a conditional use is appropriate for uses that have a community or municipal-wide impact.

[40] 53 P.S. § 10913.2.a.

[41] 53 P.S. § 10908.

[42] 53 P.S. § 10908(9); 53 P.S. §10913.2.b(2).

An applicant for a conditional use or special exception is required to demonstrate compliance with the objective criteria of the zoning ordinance.[43] Objective criteria include: (1) the kind of use (i.e., the threshold definition of what is authorized as a conditional use); (2) specific requirements or standards applicable to a particular conditional use (e.g., special setbacks); and (3) specific requirements generally applicable to such a use (e.g., parking requirements).[44] An application for a conditional use or special exception must include information sufficient for the governing body to determine whether or not the proposed use will comply with the objective criteria as set forth in the ordinance.[45] Once the applicant has provided such information, and the information demonstrates compliance with the objective requirements of the zoning ordinance, the applicant is entitled to approval because the use is presumed to be consistent with the public health, safety and welfare.[46]

The governing body may disapprove the application only if parties that object to the proposal demonstrate with sufficiently particularized evidence:[47] (i) that it does not meet the subjective criteria of the zoning ordinance or (ii) that there is a high degree of probability that the

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[43] *Bray v. Zoning Bd. of Adjustment*, 410 A.2d 909 (Pa. Cmwlth. 1980).

[44] *Bray,* 410 A.2d at 911.

[45] *In re Brickstone Realty Corp,* 789 A.2d 333 (Pa. Cmwlth. 2001). Compare *Elizabethtown Mt. Joy Assocs. v. Mt. Joy Twp. Zoning Hearing Bd.,* 934 A.2d 759 (Pa. Cmwlth. 2007) *with Joseph v. North Whitehall Twp. Bd. of Supervisors,* 16 A.3d 1209 (Pa. Cmwlth. 2011) for discussion of whether specific uses need to be identified in a special exception application.

[46] *Perkasie, supra* n. 34 ("When…an applicant for a conditional use makes a *prima facie* case with respect to a provision of an ordinance, the application must be granted unless those opposing the application present sufficient evidence that the use would present a substantial threat to the community."); *See also Bray, supra,* n. 43.

[47] Speculative or generalized evidence is not sufficient to deny an application. *See, e.g. Marquise Inv., Inc. v. City of Pittsburgh,* 11 A.3d 607 (Pa. Cmwlth. 2010).

use would have effects greater than those normally generated by that type of use *and* those effects will pose a substantial threat to the health and safety of the community.[48]

d. Conditions of Approval

In granting a special exception or conditional use, the municipal board may attach "such reasonable conditions and safeguards, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of the [MPC] and the zoning ordinance."[49] As amended by Act 68 of 2000, Section 603 provides that the governing board may attach conditions "*other than those related to offsite transportation or road improvements.*"[50]

In making a decision to grant or deny a special exception, the municipal board, at a minimum, must determine whether the applicant has complied with the objective standards as set forth in the ordinance. The municipal board generally may not attach a condition of approval intended to secure the applicant's compliance with objective standards as set forth in the ordinance. The municipal board generally may not attach a condition of approval intended to secure the applicant's compliance with objective standards at some future date.[51]

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[48] *Brickstone*, 789 A.2d at 341-42; *Bailey, supra* n. 34. For example, generalized traffic concerns cannot be a basis for denial of a special exception application. *Joseph, supra* n. 45.

[49] 53 P.S. §§ 10912.1, 10913.2.

[50] 53 P.S. § 10913.2. This provision acknowledges Act 209 of 1999, as codified at Section 503-A(c) of the MPC: No municipality shall have the power to require as a condition for approval of a land development or subdivision application the construction, dedication or payment of any offsite improvements or capital expenditures of any nature whatsoever or impose any contribution in lieu thereof, exaction fee, or any connection, tapping or similar fee except as may be specifically authorized under this act.

[51] *Edgmont Twp. v. Springton Lake Montessori School,* 622 A.2d 418 (Pa. Cmwlth. 1993). *Contrast In Re: Appeal of Edwin R. Thompson, et al.*, 896 A.2d 659 (Pa. Cmwlth. 2006) (court opined that special exceptions and conditional uses involve only the proposed use of land, and not the particular details of the design of the proposed development and further concluded that where criteria are generally applicable in a given zoning district, conditions requiring correction of deficiencies at the subdivision stage are proper); *see also Broussard v. Zoning Bd. of Adjustment of the City of Pittsburgh*, 907 A.2d 494 (Pa. 2006) (reversing Commonwealth Court's denial where plan "reasonably shows" that the property owner would be able to fulfill the requirements for special exception).

An applicant for special exception or conditional use is bound by any imposed condition that he does not object to or appeal from. A condition cannot be personal to the applicant.

e. Enforcement

A violation of a condition attached to the grant of a special exception or conditional use is a violation of the ordinance. The zoning officer is charged with enforcement of the condition. The zoning officer should order compliance or issue a notice of revocation of the approval for noncompliance with the condition. Alternatively, a municipality may initiate an equity action (injunction) under Section 617 of the MPC to bring the use into compliance with the condition of approval.

f. Subdivision and Land Development

An applicant that successfully obtains conditional use or special exception approval must still obtain subdivision and land development approval and secure building and occupancy permits for the project. The MPC does not mandate that an application for special exception or conditional use be secured in advance of subdivision and/or land development approval.

Section 917 of the MPC provides that, if an application for conditional use or special exception will require a land development or subdivision:

> [N]o change or amendment of the zoning, subdivision or other governing ordinance or plans shall affect the decision on such application adversely to the applicant, and the applicant shall be entitled to a decision in accordance with the provisions of the governing ordinances or plans as they stood at the time the application was duly filed.[52]

Section 917 of the MPC further provides that within six months of obtaining special exception of land development approval, the applicant is entitled to have subdivision and land

[52] 53 P.S. § 10917.

development plans processed under the terms of the ordinance as existed on the date of the filing for the special exception or conditional use.[53]

3. Non-Conforming Uses and Structures

a. Statutory Framework

The MPC recognizes the concept of nonconformity for purposes of zoning regulation:

> In any municipality, other than a county, which enacts a zoning ordinance, no part of such municipality shall be left unzoned. The provisions of all zoning ordinances may be classified so that different provisions may be applied to different classes of situations, uses and structures…where zoning districts are created, all provisions shall be uniform for each class of uses or structures, within each district…
> (1.1) [f]or the purpose of regulating nonconforming uses and structures.[54]

For this purpose, the MPC provides the following definitions:

> Nonconforming lot – a lot or the area or dimension of which was lawful prior to the adoption or amendment of a zoning ordinance, but which fails to conform to the requirements of the zoning district in which it is located by reasons of such adoption or amendment.
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> Nonconforming structure – a structure or part of a structure manifestly not designed to comply with the applicable use or extent of use provisions in a zoning ordinance or amendment heretofore or hereafter enacted, where such structure lawfully existed prior to the enactment of such ordinance or amendment or prior to the application of such ordinance or amendment to its location by reason of annexation. Such nonconforming structures include, but are not limited to, nonconforming signs.
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> Nonconforming use – a use, whether of land or of structure, which does not comply with the applicable use provisions in a zoning ordinance or amendment heretofore or hereafter enacted, where such use was lawfully in existence prior to the enactment of such ordinance or amendment, or prior to the application of such ordinance or amendment to its location by reason of annexation.[55]

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[53] 53 P.S. § 10917.

[54] 53 P.S. § 10107.

[55] 53 P.S. Section 10101.

b. Establishing Nonconforming Status

The property owner seeking the protections of a nonconforming status bears the burden of establishing the facts supporting such attribution.[56] And, he must do so through objective evidence.[57]

c. Effect of Nonconforming Status

A property owner has a constitutional right to continue a nonconforming condition until abandoned (see later discussion of abandonment).[58] A preexisting nonconforming condition creates a vested property right in the owner of the property. The nonconforming condition runs with the land, not the owner.[59]

d. Nonconforming Lots

A nonconforming lot enjoys the protections afforded by such attribution. However, such protections extend only to the nonconforming condition. Improvement of a nonconforming lot cannot otherwise violate other dimensional requirements or increase the existing nonconformity without grant of a variance.[60]

e. Expansion of Nonconforming Structure

Generally, a structure that is nonconforming may be expanded so long as the expansion

[56] *Little v. Zoning Hearing Board of Abington Township,* 357 A.2d 266 (Pa. Cmwlth. 1976).

[57] *Cook v. Bensalem Twp. Zoning Hearing Bd. of Adjustment*, 196 A.2d 327 (Pa. 1963).

[58] *Little v. Zoning Hearing Bd. of Abington Township,* 357 A.2d 266 (Pa. Cmwlth. 1976) (doctrine does not apply where lot did not comply with a public street frontage requirement).

[59] *Compton v. Zoning Hearing Bd. of Pennsbury Twp.,* 708 A.2d 871 (Pa. Cmwlth. 1998); *Appeal of Gemstar/Ski Brothers of Springfield Twp. Zoning Hearing Bd.,* 574 A.2d 1201 (Pa. Cmwlth. 1990); *Clanton v. London Grove Twp. Zoning Hearing Bd.,*743 A.2d 995 (Pa. Cmwlth. 2000).

[60] *See Hawk v. City of Pittsburgh Zoning Bd. of Adjustment,* 2012 WL 29195 (Pa. Cmwlth. Jan. 5, 2012).

does not create a new dimensional nonconformity or worsen an existing dimensional nonconformity.

In *In Re Yocum*,[61] the Court held that a vertical extension of a nonconforming building footprint is permitted as it does not extend or increase the nonconformity.[62] However, the *Yocum* doctrine does not apply if the municipal zoning ordinance specifies that yard regulations apply to subsequently added stories.[63]

The doctrine of natural expansion (discussed below) is not applicable to nonconforming structures.[64]

f. Reconstruction of Nonconforming Structures or Structures Containing Nonconforming Uses

The provisions of a zoning ordinance determine whether a nonconforming structure that has been partially damaged or destroyed may be rebuilt. An ordinance may bar reconstruction in the interests of public health, safety and welfare.[65] However, if there is no restriction against rebuilding set forth in the zoning ordinance, a landowner has a right to raze and rebuild.[66]

g. Expansion of a Nonconforming Use and the Doctrine of Natural Expansion

A nonconforming commercial use may be expanded under the doctrine of natural

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[61] 141 A.2d 601 (Pa. 1958).

[62] *In Re Yocum; Nettleton v. Samuel Land Co. v. Zoning Bd. of Adjustment of the City of Pittsburgh, et al.,* 828 A.2d (Pa. 2003).

[63] C*hacona v. Zoning Board of Adjustment*, 599 A.2d 255 (Pa. Cmwlth. 1991). However, the *Yocum* doctrine applies only to building permits, not variance applications. *Yocum, supra* n. 62*; Nettleton, supra* n. 62*; but contrast Angle v. Zoning Hearing Bd. of the Borough of Dormont*, 475 A.2d 1371 (Pa. Cmwlth. 1984); *Appeal of Kline*, 148 A.2d 915 (Pa. 1959).

[64] *Nettleton, supra* n. 62*; Fagan v. Philadelphia Zoning Bd. of Adjustment,* 132 A.2d 279 (Pa. 1957); *Miller & Son Paving, Inc. v. Wrightstown Twp.,* 451 A.2d 1002 (Pa. 1982).

[65]*Antonini v. Zoning Hearing Bd. of Marple Twp.* 505 A.2d 1076 (Pa. Cmwlth. 1986), *appeal den'd*, 531 A.2d 781 (Pa. 1987).

[66] *Trettel v. Zoning Hearing Bd. of Harrison Twp.,* 658 A.2d 741 (Pa. 1995); *Zeiders v. Zoning Hearing Bd. of Adjustment of West Hanover Twp.,* 397 A.2d 20 (Pa. Cmwlth. 1979).

expansion. This doctrine recognizes that the right to expand a nonconforming commercial use to provide for the natural expansion and accommodation of increased trade is a constitutional right protected by the due process clause.[67] The expansion or modernization must be a matter of necessity for the business, rather than merely to take advantage of an increase in business.[68] A nonconforming nonresidential use may be expanded to increase the number of users.[69] The expansion must be the minimum necessary to support the business.

The right to expand a commercial use under the doctrine of natural expansion is not unrestricted.[70] Limitations on this right occur when the expansion is inconsistent with the public interest because detrimental to the public health, safety and welfare;[71] where the proposed expansion is in actuality not an expansion of the old use, but the addition of a new use; or in order to prevent excessive expansion.[72] However, the fact that an expansion is sizeable does not make it unreasonable per se.[73]

Municipal ordinances often contain a provision expressly permitting an expansion of a nonconforming use, but limiting such expansions to a total percentage increase of the nonconforming condition that existed as of a particular point in time.[74] A property owner may

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[67] *Jenkintown Towing Service v. Zoning Hearing Bd.,* 446 A.2d 716 (Pa. Cmwlth. 1982) *quoting Silver v. Zoning Hearing Bd. of Adjustment*, 255 A.2d 506, 507 (Pa. 1969); *Baer v. Zoning Hearing Bd. of Quincy Twp.,* 782 A.2d 597 (Pa. Cmwlth. 2001); *Hitz v. Zoning Hearing Bd. of South Annville Twp.*, 734 A.2d 60 (Pa. Cmwlth. 1999).

[68] *Jenkintown, supra n.* 67.

[69] *Limley v. Zoning Hearing Bd. of Port Vue Borough*, 625 A.2d 54 (Pa. 1993).

[70] *Jenkintown, supra n.* 67*; Chartiers Twp. v. Williams H. Martin, Inc.*, 542 A.2d 985 (Pa. 1998).

[71] *Twp. of Lower Yoder v. Weinzierl*, 275 A.2d 579 (Pa. Cmwlth. 1971).

[72] *Whitpain Twp. Bd. of Supervisors v. Whitpain Twp. Zoning Hearing Bd.* 550 A.2d 1366 (Pa. Cmwlth. 1988).

[73] *Whitpain, supra* n. 72.

[74] *Finnegan v. Bd. of Supervisors of Earl Twp.,* 726 A.2d 76 (Pa. Cmwlth. 2003).

seek a variance from the percentage limitation. In *Larsen v. Zoning Board of Adjustment*,[75] the Pennsylvania Supreme Court established four factors for the grant of such variance:

> (1) That an unnecessary hardship exists which is not created by the party seeking the variance and which is caused by unique physical circumstances of the property for which the variance is sought;
>
> (2) That a variance is needed to enable the party's reasonable use of the property;
>
> (3) That the variance will not alter the essential character of the district or neighborhood, or substantially or permanently impair the use or development of the adjacent property such that it is detrimental to the public's welfare; and
>
> (4) That the variance will afford the least intrusive solution.

The Courts have permitted expansions beyond a percentage limitation.[76] In *Domeisen v. Zoning Hearing Board of O'Hara Township*[77] the Court permitted an expansion of 129%, substantially exceeding the zoning ordinance limitation to 25%, on the basis that business necessity had been established. However, in *West Central Germantown Neighbors,*[78] the Court denied a variance for a 167% expansion from the requirement permitting a 10% expansion, even though business necessity was undisputed, where the expansion was 2 ½ time the size of an existing structure located in an historic district.

The doctrine of natural expansion is not applicable to residential uses.[79]

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[75] 672 A.2d 286 (Pa. 1996).

[76] *Twp. of Birmingham v. Chadds Ford Tavern, Inc.*, 572 A.2d 855 (Pa. Cmwlth. 1990); *compare Domeisen v. Zoning Hearing Bd. of O'Hara Twp.*, 814 A.2d 851 (Pa. Cmwlth. 2003) (granting structural variance where business necessity established) and *West Central Germantown Neighbors v. Zoning Bd. of Adjustment of the City of Philadelphia, et al.,* 827 A.2d 1283 (Pa. Cmwlth. 2003), *appeal den'd*, 844 A.2d 555 (Pa. 2004) (structural variance denied even though business necessity undisputed).

[77] 814 A.2d 851 (Pa. Cmwlth. 2003).

[78] 827 A.2d 1283 (Pa. Cmwlth. 2003), *appeal den'd*, 844 A.2d 555 (Pa. 2004).

[79] *Patullo v. Zoning Hearing Bd. of the Twp. of Middletown*, 701 A.2d 295 (Pa. Cmwlth. 1997); *Tantlinger v. Zoning Hearing Bd. of South Union Twp.,* 519 A.2d 1071 (Pa. Cmwlth. 1987); *Sico v. Indiana Twp. Zoning Hearing Bd.,* 646 A.2d 655 (Pa. Cmwlth. 1995).

h. Change of Nonconforming Uses

There is no constitutionally protected right to change one nonconforming use to another.[80] However, a municipal ordinance may expressly allow for such change in use.

In determining whether a modification of a nonconforming use is a new or changed use, it is necessary to review the classifications in the zoning ordinance. The nature of a nonconforming use is determined from the actual use to which the property is put, rather than from the identity of the users.[81] A proposed use need not be identical to the current use. It need only be sufficiently similar to the nonconforming use so as to not constitute a new or different use.[82] A change in technology is a continuation of the use. A change in the intensity of a use is a continuation of the use.[83] A change in use necessitated for compliance with a state law is not an expansion.[84]

i. Nonconforming Use of Abandonment

Under longstanding Pennsylvania law, a property owner may continue to operate under the protections of a nonconforming status until such time as the use has been abandoned.[85] The municipality bears the burden of proving abandonment. The burden of proving abandonment is two-pronged: (1) intent to abandon[86] and (2) actual abandonment.[87]

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[80] *Hanna v. Bd. of Adjustment*, 183 A.2d 539 (Pa. 1962).

[81] *Limley, supra* n. 69.

[82] *Limley, supra* n. 69*; Austin v. Zoning Hearing Bd.,* 496 A.2d 1367 (Pa. Cmwlth. 1985); *Pappas v. Zoning Hearing Bd.,* 589 A.2d 675 (Pa. 1991); *Lench v. Zoning Bd. of Adjustment of the City of Pittsburgh*, 852 A.2d 442 (Pa. Cmwlth. 2004); *Watson v. Zoning Hearing Bd. of West Hanover Twp.*, 496 A.2d 878 (Pa. Cmwlth. 1985).

[83] *Foreman v. Union Twp. Zoning Hearing Bd.*, 787 A.2d 1099 (Pa. Cmwlth. 2001).

[84] *Lench, supra* n. 82 (where Liquor Code requires a business serving alcoholic beverages to the public to provide food service, an expansion of the existing nonconforming use to include service of alcoholic beverages to the public could occur only with the addition of food service).

[85] *Haller,* ___________.

A municipality may establish a presumption of intent to abandon by incorporating a discontinuance provision in its zoning ordinance that provides that the lapse of a designated period of time is sufficient to establish the intent to abandon the nonconforming use.[88] Once the intent to abandon is established pursuant to this provision, the burden of persuasion moves to the party challenging the claim of abandonment. If the challenger introduces evidence of contrary intent, presumption is rebutted and burden of persuasion shifts back to party claiming abandonment.[89]

Actual abandonment cannot be "inferred from or established by a period of nonuse alone. It must be shown by the owner['s]…overt acts or failure to act.[90]

Additionally, when a use is discontinued for reasons beyond the landowner's control, courts generally refuse to find actual abandonment.[91]

4. Variances

A municipal zoning ordinance divides land within a municipality into zones or districts, and establishes regulations that apply both generally within the municipality and specifically in the individual zones or districts. However, no ordinance is flawless or contemplates every

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[86] Intent to abandon is not established merely because owner is willing to sell to a buyer who intends a different use. *Heichel v. Springfield Twp. Zoning Hearing Bd.*, 830 A.2d 1081 (Pa. Cmwlth. 2003).

[87] *Pappas v. Zoning Bd. of Adjustment*, 589 A.2d 675 (Pa. 1991); *Zitelli v. Zoning Hearing Bd. of borough of Munhall*, 850 A.2d 769 (Pa. Cmwlth. 2004). *But see Keebler v. Zoning Bd. of Adjustment of Pittsburgh,* 998 A.2d 670 (Pa. Cmwlth. 2010) (where nonconforming building razed by the owner, the owner had "physically changed the building…in such a way as to clearly indicate a change in use or activity to something other than the conforming use.")

[88] *Zitelli, supra* n. 87*; Latrobe Speedway, Inc. v. Zoning Hearing Bd. of Unity Twp.*, 533 Pa. 583, 720 A.2d 127 (1998).

[89] *Latrobe Speedway, supra* n. 88*; Zitelli, supra* n. 87.

[90] *Zitelli, supra* n. 87*, citing Estate of Barbagallo v. Zoning Hearing Bd. of Ingram Borough,* 574 A.2d 1771 (Pa. Cmwlth. 1990).

[91] *Metzger v. Bensalem Twp. Zoning Hearing Bd.,* 645 A.2d 369 (Pa. Cmwlth. 1994); *Zitelli, supra* n. 87.

conceivable circumstance or situation. The variance serves as a relief valve from the literal or strict application of those regulations to a particular property. A variance runs with the land and may not be made personal to the applicant.[92]

The zoning hearing board has the exclusive jurisdiction to grant variances from the zoning ordinance.

a. Statutory Standards for Grant of Variance

In granting a variance, the board must make certain findings, *as relevant in a given application.*[93] The MPC sets forth the standards for the grant of a variance:

1. That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or condition generally created by the provision of the zoning ordinance in the neighborhood or district in which the property is located.[94]

2. That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provision of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.[95]

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[92] *Zappala Group, Inc. v. Zoning Hearing Bd. of the Town of McCandless*, 810 A.2d 708 (Pa. Cmwlth. 2002).

[93] 53 P.S. § 10910.2; *see Sweeney v. Zoning Hearing Bd. of Lower Merion Twp.,* 626 A.2d 1147 (Pa. 1993) (acknowledging that Zoning Hearing Board justified variance on findings under three of the five traditional zoning criteria, Supreme Court remanded only for finding as to "unique physical circumstances"); *In re Appeal of Holtz,* 8 A.3d 375 (Pa. Cmwlth. 2010); *compare Doris Terry Revocable Living Trust v. Zoning Board of Adjustment of the City of Pittsburgh*, 873 A.2d57 (Pa. Cmwlth. 2005) (no exception where language of code applicable in Pittsburgh (non-MPC municipality) requires that "all" of the listed criteria be satisfied).

[94] A variance, whether labeled dimensional or use, is appropriate only where the property, not the person, is subject to hardship. *Zappala, supra* n. 92.

[95] Where the property is already being used for a permitted use, or could effectively be used for a permitted use, a use variance is not appropriate. *Lamar Advantage GP Co. v. Zoning Hearing Bd. of Pittsburgh,* 997 A.2d 423 (Pa. Cmwlth. 2010); *Shomaker v. Zoning Hearing Bd. of Franklin Park Borough,* 994 A.2d 1196 (Pa. Cmwlth. 2010); *Oxford Corp. v. Zoning Hearing Bd. of Oxford Borough,* 2011 WL 5599663 (Pa. Cmwlth. Nov. 18, 2011).

3. That such unnecessary hardship has not been created by the appellant.[96]

4. That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, not substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

5. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

In granting a variance, the board has the power to attach reasonable conditions and safeguards "as it may deemed necessary to implement the purposes of the [MPC] and the zoning ordinance."[97]

A variance is not appropriate to correct a violation of the ordinance, regardless of whether the violation arose because of mistake or intentional act.[98]

b. Types of Variances

There is more than one type of variance recognized in Pennsylvania, and the courts have articulated varying standards or requirements for each. These include: dimensional variance; use variance; use variance for expansion of a nonconforming use; validity variance; *de minimis* variance; and variance by estoppel.

i. Dimensional Variance

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[96] A property owner cannot knowingly place obstacles in way of meeting requirements, and then seek a variance. *Goldstein v. Zoning Hearing Bd. of Lower Merion Twp.,* 19 A.3d 565 (Pa. Cmwlth. 2011); *POA Co. v. Findlay Twp. Zoning Hearing Bd.*, 679 A.2d 1342 (Pa. Cmwlth. 1996). However, the mere fact that applicant may have known of zoning restriction at time of purchase, without more, cannot support a finding that the hardship was self-inflicted. *Mitchell v. Zoning Hearing Bd. of the Borough of Mount Penn*, 838 A.2d 819 (Pa. Cmwlth. 2003); *Manayunk Neighborhood Council v. Zoning Hearing Bd. of Adjustment of the City of Philadelphia,* 815 A.2d 652 (Pa. Cmwlth. 2002).

[97] 53 P.S. § 10910.2.

[98] *Appletree Land Development v. Zoning Hearing Bd. of York Twp.*, 834 A.2d 1214 (Pa. Cmwlth. 2003) (*de minimis* variance application denied where model home's porch intruded 1.19 feet into setback); *Goldstein, supra* n. 96.

The dimensional variance is the most common of the types of variance requested. As formulated in *Hertzberg v. Zoning Hearing Board of Adjustment of the City of Pittsburgh*,[99] a dimensional variance is considered under a relaxed standard. As described in *Hertzberg*:

> To justify the grant of dimensional variances, courts may consider multiple factors, including "the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood." In determining whether unnecessary hardship has been proven, a court may consider whether "(1) the physical features of the property are such that it cannot be used for a permitted purpose; or (2) that the property can be conformed for a permitted use only at a prohibitive expense; or (3) that the property has no value for any purpose permitted by the zoning ordinance.

The Commonwealth Court in *Yeager v. Zoning Hearing Board of the City of Allentown*[100] sought to circumscribe the reach of *Hertzberg*. The Court stated that:

> *Hertzberg* articulated the principle that unreasonable economic burden may be considered in determining the presence of unnecessary hardship. It may also have somewhat relaxed the degree of hardship that will justify a dimensional variance. However, it did not alter the principle that a substantial burden must attend all dimensionally compliant uses of the property, not just the particular use the owner chooses. This well-established principle, unchanged by *Hertzberg*, bears emphasizing in the present case. A variance, whether labeled dimensional or use, is appropriate, "only where the property, no the person, is subject to hardship."

The courts consistently conclude that an applicant is not entitled to a variance where the application merely seeks to maximize the economic value of the property or enterprise.[101]

ii. Use Variance

[99] 721 A.2d 43 (Pa. 1998).

[100] 779 A.2d 595 (Pa. Cmwlth. 2001).

[101] *See, e.g., Singer v. Philadelphia Zoning Bd. of Adjustment,* 29 A.3d 144 (Pa. Cmwlth. 2011); *Ken-Med Associates v. Bd. of Twp. Supers. of Kennedy Twp.,* 900 A.2d 460 (Pa. Cmwlth. 2006).

A use variance provides relief from the restrictions as to the use of a property. Use variances are often sought in lieu of an application for rezoning, curative amendment, or validity challenge or variance. A use variance requires demonstration that: (i) the physical features of the property are such that it cannot be used for a permitted purpose; or (ii) the property can be conformed for a permitted use only at a prohibitive expense; or (iii) the property has no value for any purpose permitted by the zoning ordinance.[102]

iii. Validity Variance

The purpose of granting a validity variance is to prevent the operation of municipal regulation on a parcel of property such that the property is in effect confiscated, and to permit the proposed use of the land where such use is reasonable.[103] Therefore, a validity variance requires that the applicant establish that:

1. The effect of the regulations complained of are unique to the Applicant's property and not merely a difficulty common to other lands in the neighborhood; and

2. The regulation deprives the owner of the use of the property.[104]

The applicant bears the burden of proof on both elements.[105]

The courts have found a validity variance to be appropriate when a property owner shows "that the land has no value or only distressed value as a result of the regulation."[106] This

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[102] *Hertzberg* citing *Allegheny West Civic Council, Inc. v Zoning Bd. of Adjustment of the City of Pittsburgh,* 689 A.2d 225 (Pa. 1997). *See In re: Appeal of Jones,* 29 A.3d 60 (Pa. Cmwlth. 2011) (granting use variance).

[103] *Hersh v. Zoning Hearing Bd. of Marlborough Twp.*, 493 A.2d 807 (Pa. Cmwlth. 1985); *Shohola Falls Trails End Property Owners Asso., Inc. v. Zoning Hearing Bd. of Shohola Township, Pike County*, 679 A.2d 1335 (Pa. Cmwlth. 1996).

[104] *Hersh, supra* n. ____*; accord Chrin Brothers, Inc. v. Williams Twp. Zoning Hearing Bd.,* 815 A.2d 1179 (Pa. Cmwlth. 2003); *Shohola Falls; East Torresdale Civic Ass'n v. Zoning Bd. of Adjustment of Phila.,* 481 A.2d 976 (Pa. Cmwlth. 1984), *aff'd,* 499 A.2d 1064 (Pa. 1985).

[105] *Hersh, supra* n. 103.

[106] *Hersh, supra* n. 103.

includes proof that either: (1) the physical features of the property are such that it cannot be used for a permitted purpose; (2) the property can be conformed for a permitted use only at a prohibitive expense; or (3) that the property has no value for any purpose permitted by the zoning ordinance.[107] That incompatible uses virtually surround a residentially zoned property satisfies the element of relating to "reasonable use."[108]

The Commonwealth Court has also concluded that an applicant for validity variance must also demonstrate compliance with the traditional variance standards.[109]

iv. *De Minimis* Variance

A *de minimis* variance grants a minimal reduction of a dimensional zoning requirement. Because such variance does not affect the public interest, it may be granted even though the traditional statutory grounds for a variance have not been established. The grant of a variance requires two findings:

1. That only a minor deviation from the dimensional uses of a zoning ordinance is sought; and

2. That rigid compliance with the zoning ordinance is not necessary to protect the public policy concerns inherent in the ordinance.[110]

De minimis variances are granted according to the particular circumstances of each case.[111]

v. Variance by Estoppel

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[107] *Allegheny West, supra* n. 102 For an applicant to prove that the property has "no value" for any purpose permitted by the zoning ordinance, the applicant is not required to introduce evidence regarding the market value and marketability of the property. *Valley View, supra* n. 108.

[108] *Valley View* (property zoned residential is entitled to a validity variance to permit the use of the property for commercial purposes where "the subject property is virtually surrounded by dissimilar and disharmonious commercial and industrial uses").

[109] *Laurel Point Assocs. v. Susquehanna Twp. Zoning Hearing Bd.,* 887 A.2d 796 (Pa. Cmwlth. 2005).

[110] *Appletree, supra* n. 98.

[111] *Lench v. Zoning Bd. of Adjustment of Pittsburgh*, _____ (Pa. Cmwlth. 2011); *Hawk v. City of Pittsburgh Zoning Bd. of Adjustment,* 2012 WL 29195 (Pa. Cmwlth. Jan. 5, 2012)

A variance by estoppel arises where a property owner establishes that municipal inaction has amounted to active acquiescence in an illegal use. This claim in equity is distinct from a claim to a vested right.

A claim to a variance by estoppel arises where the property owner establishes all of the following:

1. A long period of municipal failure to enforce the law, when the municipality knew or should have known of the violation, in conjunction with some form of active acquiescence in the illegal use;

2. The landowner acted in good faith and relied innocently upon the validity of the use throughout the proceeding;

3. The landowner made substantial expenditures in reliance upon his belief that his use was permitted; and

4. The denial of the variance would impose an unnecessary hardship on the applicant.[112]

a. Expiration of Variances

A zoning ordinance may provide for the automatic expiration (and extension thereof) of a variance within a reasonable period of time unless a building permit has been obtained and construction commenced in reliance on the variance. Alternatively, an expiration period may be set by a condition to the approval of the variance. In either case, a variance runs with the land and may not be made personal to the applicant.

5. Curative Amendments and Validity Challenges

a. Curative Amendments

Section 609.1 of the MPC permits a validity challenge in the nature of a curative amendment to be heard and decided upon by the governing body of the municipality.[113] The

[112] *Borough of Dormont v. Zoning Hearing Bd. of Borough of Dormont*, 850 A.2d 826 (Pa. Cmwlth. 2004).

applicant for a curative amendment must be the landowner as defined in Section 107 of the MPC.[114]

A curative amendment must be accompanied by a written request that the challenge and proposed amendment be heard and decided as provided in Section 916.1 of the MPC (validity challenges). The request must state: (i) the challenge to substantive validity of the zoning ordinance and (ii) the suggested ordinance amendment by which the alleged deficiency can be "cured." In considering the curative amendment and accompanying plan, the governing body must also consider: (i) the impact of the proposal upon roads and other infrastructure; (ii) the impact of regional housing needs and whether the proposal is actually available and affordable by classes otherwise excluded by the challenged ordinance; (iii) the physical suitability of the site; (iv) the impact of the proposed use on the physical site; and (v) the impact of the proposal on the preservation of agricultural and "other land uses which are essential to public health and welfare." The governing board may deny the request, or accept the curative amendment with or without revision, or adopt an alternative amendment to "cure" the invalidity. The zoning validity challenge is deemed denied when the governing body adopts an alternative zoning amendment that is unacceptable to the applicant for curative amendment. A municipality's prospective amendment does not foreclose relief to a successful challenger.[115]

In Crystal Forest Associates, LP v. Buckingham Township Supervisors,[116] the Commonwealth Court denied a validity challenge and rejected a curative amendment application

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[113] 53 P.S. § 10609.1.

[114] 53 P.S. § 10107.1.

[115] *Allegheny Energy Supply Co., LLC v. Twp. of Blaine,* 829 A.2d 1254 (Pa. Cmwlth. 2003); *Appeal of Miller and Son Paving, Inc.,*636 A.2d 274 (Pa. Cmwlth. 1993); *Casey v. Zoning Hearing Bd. of Warwick Twp.,* 328 A.2d 464 (Pa. 1974).

[116] 872 A.2d 206 (Pa. Cmwlth. 2005).

relating to a mobile home park. Crystal Forest owned a fully built-out mobile home park and sought conditional approval for mobile home park as a conditional use in an agricultural (AG-1) zoning district. Crystal Forest argued that the requirements in the AG-1 district were unduly restrictive and made development of the mobile home park economically infeasible. Dissenting Judge Leavitt opined that the provisions of the ordinances as to the mobile home park use created economic infeasibility. She also opined that such regulation was in the nature of "illusory zoning," where the restrictions for mobile home parks were more burdensome than those applied to other uses permitted in the AG-1 district and where development of the other uses as permitted by the restrictions for those uses would not preserve agricultural land or open space.

b. Substantive Validity Challenges

Section 909.1 of the MPC provides for the zoning hearing board to hear substantive validity challenges.[117] Such challenges include, but are not limited to:

- Spot zoning (special legislation) – singling out property indistinguishable in character from surrounding property for the economic benefit or to the economic detriment of the owner;[118]

- Fair share[119] - tripartite analysis includes: (i) is the community a logical area for development and growth?; (ii) what is the present level of development?; and (iii) does the zoning ordinance create the result or is there evidence of a primary purpose to "zone out" the use?;[120]

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[117] 53 P.S. § 10909.1.

[118] Realen Valley Forge….; *Atherton Dev. Co. v. Ferguson Twp.,* 29 A.3d 1197 (Pa. Cmwlth. 2011).

[119] "Fair share" arguments relate to residential uses. With respect to commercial uses, the courts have opined that a municipality is not required to provide for every business model and may not be required to replenish lands zoned for such use, but now occupied whether by the desired commercial use or some other permitted use. *Montgomery Crossing Assoc. v. Twp. of Lower Gwynedd,* 758 A.2d 285 (Pa. Cmwlth. 2000); *Stahl v. Upper Southampton Twp. Zoning Hearing Bd.,* 606 A.2d 960 (Pa. Cmwlth. 1992); *Heritage Building Group, Inc. v. Plumstead Twp. Bd. of Supervisors,* 833 A.2d 1205 (Pa. Cmwlth. 2003).

[120] *Surrick v. Zoning Hearing Bd. of Upper Providence Twp.,* 382 A.2d 185 (Pa. 1977). For purposes of the analysis, the courts have characterized agricultural land as "developed" land. *Heritage Building Group, supra* n. 119.

- *De facto*[121] or *de jure*[122] exclusion;
- Lack of standards;[123]
- *Ultra vires* – not authorized by law or preempted by law;[124] and
- Irrationality.

Underlying all substantive validity challenges is the premise that an ordinance must bear a substantial relationship to the health, safety, morals or general welfare. As illustration, an exclusionary or unduly restrictive zoning technique does not have the requisite substantial relationship to the general welfare.[125]

With limited exceptions, common to substantive validity challenges is the relief afforded a successful challenger. A successful validity challenger receives site-specific relief in the nature of an approval of his proposed plan of development accompanying the challenge.[126]

6. Uses Not Provided For

All zoning ordinances contain provisions for permitted uses, either as of right or by special exception or conditional use. For a zoning ordinance to specifically identify and provide for all conceivable uses is a near impossibility. However, a municipality runs the risk of a claim

[121] *Hammermill Paper Co. v. Green Twp.,* 395 A.2d 618 (Pa. Cmwlth. 1970).

[122] *Fernley v. Bd. of Supervisors of Schuylkill Twp.,* 502 A.2d 585 (Pa. 1985); *Thomason v. Zoning Hearing Bd. of Radnor Twp.,* 26 A.3d 562 (Pa. Cmwlth. 2011).

[123] *Norate Corp. v. Zoning Hearing Bd. of Upper Moreland Twp.,* 207 A.2d 890 (Pa. 1990).

[124] *Main Street Dev. Group, Inc. v. Tinicum Twp.,* 19 A.3d 21 (Pa. Cmwlth. 2011)

[125] *Surrick, supra* n. 120.

[126] *See, e.g., Casey, supra* n. 115.

that its zoning ordinance is constitutionally infirm where a particular use has not been provided for and, therefore, has been unlawfully "excluded."[127]

To avoid a claim of exclusion, a zoning ordinance should include a provision that addresses uses not otherwise specifically provided for. As illustration, an ordinance may contain a provision that authorizes the zoning officer to make a determination that the proposed use is "similar to" a permitted use.[128]

7. Particular Uses

a. Public Utilities

Section 619 of the MPC provides that zoning is not applicable to any building used or to be used by a "public utility corporation," if, upon petition and after public hearing, the Pennsylvania Public Utility Commission decides that the building is "reasonably necessary for the convenience or welfare of the public."[129] The courts have construed this provision to further exempt public utility *facilities and structures* from zoning regulation.

b. Abortion Clinics & Adult Establishments

Abortion clinics and adult establishments, despite their diverse nature, share in common a heightened level of community interest and companion regulatory requirements premised, primarily, on moral values. The failure of such uses to succeed often arises from statutory requirements found in state laws.[130]

[127127] *Girsh Appeal*, 263 A.2d 395 (Pa. 1970); *Exton Quarries, Inc. v. Zoning Bd. of Adjustment of West Whiteland Twp.* 228 A.2d 169 (Pa. 1967).

[128] It is debatable whether this authority extends beyond a use permitted as of right to a use permitted only as a special exception or conditional use.

[129] 53 P.S. § 10619.

[130] *See, e.g. Marquise Investment, Inc.v. City of Pittsburgh,* 11 A.3d 607 (Pa. Cmwlth. 2010) (adult cabaret entitled to conditional use)

c. Agriculture

The MPC contains several provisions protective of commercial agricultural uses. Section 603(b) expressly recognizes the preemption of municipal regulation of agriculture by the Nutrient Management Act,[131] Agricultural Area Security Law,[132] the "Right to Farm" law,[133] and other state and federal laws.[134]

Section 603(h) further provides that "[z]oning ordinances may not restrict agricultural operations or changes to or expansions of agricultural operations in geographic areas where agriculture has traditionally been present unless the agricultural operation will have a direct adverse effect on the public health and safety."[135] Section 603(h) also again prohibits zoning regulation otherwise preempted by state and federal law.

In addition, in 2005, Pennsylvania enacted the Agriculture, Communities, and Rural Environment Initiative ("ACRE") amending Title 3 (Agriculture).[136] ACRE prohibits municipalities from adopting an "unauthorized local ordinance," defined to include an ordinance that: (i) prohibits or limits a normal agricultural operation (as defined under the "Right to Farm" law), unless the municipality has express or implied authority under state law and the ordinance

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[131] 3 P.S. § 717; *see, e.g., Burkholder v. Zoning Hearing Bd. of Richmond Twp.,* 902 A.2d 1006 (Pa. Cmwlth. 2006) (1500 foot setback requirement expressed n zoning ordinance preempted by Nutrient Management Act and its implementing regulations providing for 300 foot setback).

[132] 3 P.S. § 911(b).

[133] 3 P.S. § 951 *et seq.*

[134] 53 P.S. § 10603(b); *see, e.g., Liverpool Twp. v. Stephens,* 900 A.2d 1030 (Pa. Cmwlth. 2006) (enforcement of municipal ordinance regulating the land application of treated sewage enjoined because preempted by the Solid Waste Management Act).

[135] 53 P.S. Section 10603(h).

[136] Act 38 of 2005, codified at 3 Pa. C.S. §§ 311 – 318.

is not otherwise prohibited or preempted; and (ii) restricts/limits the ownership structure of a normal agricultural operation.[137]

ACRE streamlines the process for obtaining judicial review of a validity challenge to a municipal ordinance regulating agricultural operations. The state attorney general may, upon request, review an ordinance and, at her discretion, bring an action in the Commonwealth Court challenging the validity of the ordinance (Sections 314 and 315(a)). In the event the attorney general declines to take such action, an aggrieved farmer may bring the action (Section 315(b)).

d. Billboards

The regulation of billboards through zoning has long been held as within the police power of a municipality.[138] While a municipality may not have a blanket prohibition on billboards throughout the municipality without justification,[139] a municipality may regulate billboard size and prohibit or regulate signage within districts "whose character is not consistent with that use."[140] In addition to being hazards to the travelling public, the courts have recognized several attributes of billboards that justify their regulation:

> (1) Billboards being temporary structures are liable to be blown down and thus injure pedestrians; (2) they gather refuse and paper which may tend to spread conflagrations; (3) they are uses as dumping places for dirt, filth and refuse, and as public privies; (4) they serve as hiding places for criminals; and (5) they are put to use by disorderly person for immoral purposes. Moreover, as is well known, billboards placed at certain locations, as at corners or curves, may obstruct the vision of drivers and thereby constitute a traffic menace, and the promotion of safety on public highways

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[137] 3 Pa. C.S. § 312. *See Commonwealth of Pennsylvania, Office of Attorney General v. Richmond Twp.,* 2 A.3d 678 (Pa. Cmwlth. 2010) (striking down ordinance definition of "intensive agriculture," a 1,500 foot setback requirement, limitation on on-site composting, and requirement of daily disposal of waste).

[138] *Norate Corp. v. Zoning Hearing Bd. of Adjustment of Upper Moreland Twp.,* 207 A.2d 890 (Pa. 1965).

[139] *Daikeler v. Zoning Bd. of Adjustment of Montgomery County Twp.,* 275 A.2d 696 (Pa. Cmwlth. 1971)

[140] *Norate*, *supra* n. 138.

> certainly is justification for a billboard regulations reasonably related thereto.[141]

Both the Commonwealth Court and the Supreme Court have been particularly active in recent years in regards to billboard regulation, with mixed results. The Supreme Court has held that a 25-square foot size limit on billboards amounts to a *de facto* exclusion of billboards, although the Court noted that the industry standard for sizing is not binding on whether an ordinance containing size limitations is invalid.[142] Commonwealth Court, on the other hand, has upheld a 160-square foot size limitation against challenge.[143] In a victory for the billboard industry, the Supreme Court has held that construction of billboards does not constitute "land development" within the meaning of the MPC.[144] Accordingly, billboard construction does not require land development approval.

e. Big Box Stores

The proliferation of the "big box" retail store, its appearance in suburban and rural areas, and actual and perceived impacts generated by such uses has met a regulatory response that both limits the location of such uses and requires that such uses obtain special exception or conditional use approval.

As with any special exception or conditional use, if the applicant demonstrates that the proposed use is, in fact, permitted by the ordinance and that the use meets the objective requirements of the ordinance (both those generally applicable and those specific to the proposed

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[141] *Norate, supra* n. 138.

[142] *Township of Exeter v. Zoning Hearing Bd. of Exeter Twp.,* 962 A.2d 653 (Pa. 2009)

[143] *Lamar Advertising of Penn, LLC v. Zoning Hearing Bd. of Deer Lake*, 915 A.2d 705 (Pa. Cmwlth. 2007). Note that in *Deer Lake,* Commonwealth Court relied upon its decision in *Township of Exeter v. Zoning Hearing Bd. of Exeter Twp.,* 911 A.2d 201 (Pa. Cmwlth. 2006) which was reversed by the Supreme Court.

[144] *Upper Southampton Twp. v. Upper Southampton Zoning Hearing Bd.,* 934 A.2d 1162 (Pa. 2007).

use), the application is entitled to approval of the application, unless those opposing the application present sufficient record evidence that the use harms the public interest. The burden is high – the threshold standard is an impact greater than that normally associated with a use of this type. Nonetheless, the stricter the municipal ordinance requirements, the higher the bar for a big box store applicant's demonstration of compliance and the greater the opportunity for objectors to underscore noncompliance.

There remains no definitive judicial statement on whether a municipality can completely exclude big box uses from a municipality, notwithstanding that the courts have opined that a municipality is not required to provide for each and every form of a particular business use.[145]

f. Cellular Towers & Wind Turbines[146]

Prior to advances in modern communications technology and the onset of competition in the industry, municipalities and the courts alike afforded great deference to the construction and use of structures and facilities by traditional utilities, including telephone companies. However, the widespread and rapid appearance of the telecommunications tower on the horizon and the companion exclusion of cellular communications services from the definition of "public utility" for purposes of the jurisdiction of the Pennsylvania Public Utility Commission marked a watershed in the regulatory and judicial landscape. Ultimately, the Pennsylvania courts held that telecommunications towers enjoy no exemption from zoning regulation under Section 619 of the MPC.[147] Within the framework of the judicial decisions, telecommunications towers are often

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[145] *Montgomery Crossing Assocs. v. Lower Gwynned Twp.,* 758 A.2d 285 (Pa. Cmwlth. 2000).

[146] While the courts' decisions generally involve cellular telecommunications towers, the principles set forth in these decisions arguably are applicable to radio towers. *See, however*, *Tu-Way* (no abuse of discretion in distinguishing television/radio broadcast tower as involving broadcast for private commercial use and not general public use).

[147] *Duquesne Light Co. v. Upper St. Clair Township, et al*, 377 Pa. 323, 105 A.2d 287 (Pa. 1954) (exempting buildings used or to be used by a utility regulated by the Public Utility Commission;

permitted only as special exceptions or conditional uses. However, the Commonwealth Court's decision in *Tu-Way Tower Company v. Zoning Hearing Board of the Township of Salisbury*[148] is relied on as authority for the proposition that a municipality is foreclosed from applying subdivision and land development regulations to telecommunications towers.[149]

Regulation of wireless communications facilities may run afoul of the Telecommunications Act of 1996 ("TCA").[150] The TCA prohibits the regulation of the placement, construction or modification of wireless facilities where such regulation "unreasonably discriminates among providers of functionally equivalent services" or "prohibits or [has] the effect of prohibiting the provision of personal wireless services."[151] The TCA also imposes the obligation on municipalities considering requests to place or construct such facilities to act on the request "within a reasonable period of time" and issue a decision "in writing and supported by substantial evidence."[152] A municipality may not regulate the proposed facility or deny approval to the facility on the basis of perceived environmental effects from radio frequencies.[153]

Cellular towers are no longer alone in their occupation of the horizon. In recent years there has been a fast-moving commercial interest in Pennsylvania's ridge tops for the placement

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exemption extended by caselaw to utility structures and facilities, *see e.g. South Coventry Twp. v. Philadelphia Elec. Co*., 504 A.2d 368 (Pa. Cmwlth. 1998) (exempting siren alert system).

[148] 688 A.2d 744 (1997).

[149] The *Tu-Way* decision clearly is framed by the underlying pending ordinance doctrine issue and reveals the court's deference to that judicial construct. This has spawned debate whether *Tu-Way* is conclusive authority on the question of the exemption of telecommunications towers from land development regulations

[150] 47 U.S.C. § 332(c).

[151] 47 U.S.C. § 332(c)(7)(B)(i)(I) – (II).

[152] 47 U.S.C. § 332(c)(7)(B)(ii), (iii).

[153] 47 U.S.C. § 332(c)(7)(B)(iv).

of wind turbine projects. These projects generally span several miles and involve dozens of multi-ton structures several hundred feet tall with a planned life of 20 years or more. However, because of the recent appearance of wind projects in the eastern United States generally, and Pennsylvania specifically, these projects are being proposed and reviewed without benefit of municipal and state standards relating to site design and turbine placement. As a result, the recipient municipalities and nearby communities risk exposure to projects unfettered by traditional regulatory limitations directed at minimizing environmental and community impacts. Indeed, one Pennsylvania court has commented:

> Both the federal and state governments acknowledge candidly that there are many as yet unanswered questions as to the best practices for siting and operating wind-power "farms." … Because of these questions, local zoning governing bodies, and their appointed zoning hearing boards, lack the information that would allow them to make ideal decisions about location and operational conditions for wind power facilities.[154]

Issues raised by projects proposed or recently constructed in other areas in the eastern United States (degradation of Vermont's mountain vistas, spoliation of marine environments in New England, destruction of protected bat species in West Virginia) as well as experience with the western Pennsylvania wind projects (noise and visual impacts) have offered opponents fuel and opportunity to challenge the projects in the course of the municipal approval process, notwithstanding the current favorable political climate. So far, wind power developers have met with mixed success in attempting to obtain zoning permits (where it is questionable whether

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[154] *PPM Atlantic Renewable v. Fayette County Zoning Hearing Bd.*, 13 Pa. D. & C. 5th 458 (Fayette C.C.P. 2010)

wind farms are a permitted use), special exceptions, and dimensional variances from such requirements as setbacks and height limitations.[155]

g. Forestry

Section 603(f) provides that a zoning ordinance may not "unreasonably restrict forestry activities."[156] It further provides that forestry activities "shall be a permitted use by right in all zoning districts in every municipality."

h. Gaming

Act 71 ("Gaming Act"), approved July 5, 2004, which authorizes gaming, included a "local land use preemption" section (Section 1506). Section 1506 provided that the conduct of gaming, including the physical location of a licensed facility (and extending to racetrack activities and facilities) "shall not be prohibited or otherwise regulated by any ordinance…that relates to zoning or land use to the extent that the licensed facility has been approved by the [PA Gaming Control] Board." In *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth of PA*,[157] the Supreme Court held that Section 1506 violated the requirement of Article II, Section 1 because it does not provide the Gaming Control Board with constitutionally adequate standards, policies and limitations to administer that section. Notably, the Court expressly acknowledged that Section 1506 reflects the legislative intent to preempt local zoning

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[155] *See In re: Broad Mountain Dev. Co., LLC,* 17 A.3d 434 (Pa. Cmwlth. 2011) (upholding revocation of zoning permit to wind developer where use not permitted); *Plaxton v. Lycoming County Zoning Hearing Bd.,* 986 A.2d 199 (Pa. Cmwlth. 2009) (noting previous dispute between parties as to whether wind facility would qualify as "public service use," and upholding subsequent amendment to zoning ordinance that permitted wind facilities by right); *Picccolella v. Lycoming County Zoning Hearing Board,* 984 A.2d 1046 (Pa. Cmwlth. 2009) (wind developer's application for zoning permit complete; details challenge did not need to be presented until land development stage); *Tioga Preservation Group v. Tioga Planning Commission,* 970 A.2d 1200 (Pa. Cmwlth. 2009) (wind facility entitled to waiver of screening requirement).

[156] 53 P.S. § 10603(f).

[157] 877 A.2d 383 (Pa. 2005).

(citing *Olon* where it found that the General Assembly overrode local zoning ordinances that prohibited use of property for a correctional facility) and commented that the preemption inquiry issue was separate from the inquiry presented and addressed in the decision.

i. Group Homes and Age-Restricted Housing

Both the Federal Fair Housing Act [158] and the Pennsylvania Human Relations Act[159] prohibit discrimination against individuals with physical or mental disabilities. Discrimination includes a refusal to make "reasonable accommodations" in rules, policies and practices as may be necessary to afford an individual equal opportunity to use and enjoy a dwelling.[160] Municipal ordinances and their enforcement are subject to the structures of these Acts.[161]

Both the Federal Fair Housing Act and the Pennsylvania Human Relations Act prohibit discrimination in the sale or rental of housing based on familial status.[162] Both Acts exempt from this prohibition on discrimination "housing for older persons" as defined by the Acts.[163]

j. Mineral Extraction

Section 603(b) expressly recognizes preemption by state and federal mining laws of municipal regulation through zoning of mineral extraction.[164] Section 603(i) provides that a zoning ordinance "shall provide for the reasonable development of minerals in each municipality."[165]

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[158] 42 U.S.C. § 3601 *et seq.*

[159] Act of October 27, 1955, P.L. 744, *as amended*, 43 P.S. §§ 951-963.

[160] 42 U.S.C. Section 3604(3)(B).

[161] *See Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Scotch Plains Twp.*, 284 F.3d 442 (3d Cir. 2002).

[162] 42 U.S.C. § 3604(a) – (e), 43 P.S. § 955(h); 43 P.S. § 955(h)(1), (3), (5), (8).

[163] 42 U.S.C. § 3607(b)(1); 43 P.S. § 955(h)(9).

[164] 53 P.S. § 10603(b).

[165] 53 P.S. § 10603(i).

In *Larock, et. Al. v. Board of Supervisors of Sugarloaf Township (Larock I)*,[166] the Commonwealth Court addressed a request for curative amendment for a new "mineral recovery district" to permit quarrying in an area currently zoned conservation district. The Court first stated a fair share argument under *Surrick* is not the controlling question; rather, Section 603, read in its entirety, requires a "balancing of interests." The court concluded that the trial court failed to consider "where, *as a whole*, the ordinance is reasonable – that it reflects the [enumerated criteria of Section 603]." In *Larock II*,[167] the Court reversed grant of the curative amendment on argument that the area zoned for mining had been depleted, holding that the issue was whether extraction was impacted by an ordinance that was *de facto* exclusionary.

k. No impact home-based businesses

Section 603(l) of the MPC requires zoning ordinances to permit no-impact home based businesses (as defined in Section 102) as uses permitted by right in all residential zones, except where there is a deed restriction or covenant or controlling master plan for common interest ownership community.[168]

l. Oil & Gas Wells

The proliferation of development in the Marcellus Shale has brought attendant disputes over whether local municipalities can, and to what extent, regulate oil and gas wells. In two companion cases, the Pennsylvania Supreme Court rejected blanket preemption of gas extraction facilities under the Oil and Gas Act, but affirmed that municipalities cannot regulate the operational aspects of a well that are under the jurisdiction of the Pennsylvania Department of

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[166] 866 A.2d 1208 (Pa. Cmwlth. 2005).

[167] 961 A.2d 916 (Pa. Cmwlth. 2008).

[168] 53 P.S. § 10603(l).

Environmental Protection.[169] Municipalities can regulate, however, the traditional "land use" aspects of oil and gas wells, such as location.[170]

m. Religious Institutions

Municipal zoning regulations may run afoul of the federal Religious Land Use and Institutionalized Persons Act of 2000[171] ("RLUIPA") and the Pennsylvania Religious Freedom Protection Act[172] ("RFPA").

In relevant part, RLUIPA provides that: "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution – (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling government interest."[173] "Religious exercise" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief. The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." By express provision, RLUIPA applies where a substantial burden is imposed in the implementation of land use regulation or a system of land use regulation, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

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[169] *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont, et. al,* 964 A.2d 855 (Pa. 2009); *Range Resources – Appalachia, LLC v. Salem Township*, 964 A.2d 869 (Pa. 2009). The

[170] *Penneco Oil Co., Inc. v. Fayette County,* 4 A.3d 772 (Pa. Cmwlth. 2010)

[171] 42 U.S.C.A. § 2000cc *et seq.*

[172] Act No. 214, December 9, 2002, 71 P.S. § 2401 *et seq.*

[173] 42 U.S.C.A. § 2000cc(a)(l).

RLUIPA also provides that: “No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination (42 U.S.C.A. Section 2000cc(b)(3)).

In *Congregation Kol Ami v. twp. of Abington*,[174] the Court of Appeals for the Third Circuit held that municipalities may prohibit religious uses in zoning districts designed for family and residential uses, because such zoning restrictions are rationally related to permissible governmental objectives. The Court rejected the companion concepts that religious uses are inherently compatible with family and residential uses and should get a preference. It vacated and remanded the District Court’s decision that the township had violated a Jewish congregation’s equal protection rights when it denied its request to locate a place for worship in an area zoned R-1. Emphasizing local control over land use, the court rejected the conclusion of the District Court that the zoning ordinance was discriminatory merely because it did not provide for places of worship in residential areas, because such a “blanket determination that, as a category, places of worship cannot be excluded from residential districts…strip[s] of any real meaning the authority bestowed upon municipalities to zone since the broad power to zone carries with it the corollary authority to discriminate against a host of uses….”

In a subsequent decision, the district court addressed the Congregation’s claim that the Township’s conduct had substantially burdened religious exercise under RLUIPA. In *Congregation Kol Ami v. Abington Township*[175] the Court observed that, in enacting RLUIPA, the Congress had expanded the concept of “religious exercise.” The court then found that the Township’s conduct – an ordinance eliminating all uses except single-family detached dwellings in the V-Residence Zoning District and a denial of a use variance – had substantially burdened

[174]309 F.3d 120 (3d Cir. 2002).

[175] 2004 WL 1837037 (E.D. Pa., August 17, 2004).

the Congregation's religious exercise. The Court stated: "This case is precisely the type of case contemplated by the drafters in their definition of free exercise under the RLUIPA. Under the statute, developing and operating a place of worship at 1980 Robert Road *is* free exercise." By contrast, the Court concluded that the burden was insufficient to raise a violation under the Free Exercise Clause of the First Amendment.

RFPA's state purpose is: "Act protecting the free exercise of religion and prescribing conditions under which government may substantially burden a person's free exercise of religion. By its provisions, it circumscribes prohibited conduct as follows:

> An agency shall not substantially burden a person's free exercise of religion, except where it proves, by a preponderance of evidence, that the burden is:
>
> (1) In furtherance of a compelling interest of the agency; and
> (2) The least restrictive means of furthering the compelling interest.

RFPA defines "free exercise of religion" to be "the practice or observance of religion under Section 3 of Article I of the Constitution of Pennsylvania. It further defines "substantially burden" as follows:

> (1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs;
>
> (2) Significantly curtails a person's ability to express adherence to the person's religious faith;
>
> (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion; or
>
> (4) Compels conduct or expression which violates a specific tenet of a person's religious faith.

There is no decisional law applying RFPA.[176]

[176] The Pennsylvania courts have applied the law of accessory uses to a church. See, e.g., *Noah's Ark Christian Child Care Center, Inc., et al. v. Zoning Hearing Board of West Mifflin*, 851 A.2d 831, (Pa. 2004) (day care operation is a use customarily found in connection with a church).