



McNees Wallace & Nurick LLC
attorneys at law

Guideposts for Decision Making: Ethics and Land Use Law

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Land Use Law
Charles Courtney

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I. ZONING AND PLANNING

(By Charles M. Courtney and Jonathan D. Andrews)¹

A. Challenges to Procedural Validity of Zoning Ordinances & Decisions

1. Deadline for Procedural Challenges

a. Background

i. Glen-Gery Corp. v. Zoning Hearing Bd. of Dover

Twp., 907 A.2d 1033 (Pa. 2006). On May 17, 2002, the landowner filed a challenge to the procedural validity of the zoning ordinance and subdivision ordinance, which had been adopted on September 8, 1997 and February 13, 1995, respectively. The Pennsylvania Supreme Court reversed a 2004 decision of the Commonwealth Court, *Glen-Gery Corp. v. Zoning Hearing Bd. of Dover Twp.*, 856 A.2d 884 (Pa. Commw. Ct. 2004). The Court held that procedural challenges to the enactment of ordinances are not summarily dismissed as time-barred by the plain language of Section 909.1(a)(2) of the MPC and Section 5571(c)(5) of the Judicial Code where the underlying procedural defect involves constitutional due process concerns that, if proven, would render the ordinance void *ab initio*. The Court stated that, "if the ordinance or statute is procedurally defective, it is as if it had never been enacted" and that such a "defect in the enactment renders any time bar null and void as the statute is, in its entirety, void *ab initio*." The Court went on to state that the addition of "intended" before the term "effective date" in the amended version of Section 5571(c)(5) of

¹ Charles M. Courtney and Jonathan D. Andrews are attorneys with McNees Wallace & Nurick LLC in Harrisburg, Pennsylvania. They are members of the firm's Real Estate Group and focus their practices on land use matters.

the Judicial Code "cannot bar a challenge to a procedurally defective statute because the date simply fails to exist should the statute have been enacted improperly."

ii. **Luke v. Cataldi, 932 A.2d 45 (Pa. 2007)**, the Pennsylvania Supreme Court extended its reasoning in *Glen-Gery* to the deadline for procedural challenges to conditional use decisions. Neighboring landowners challenged the conditional use approval for a mining operation where the Township failed to provide adequate notice for the public hearing under Section 913.2 of the MPC. The Court permitted the challenge, although it was filed well after the thirty-day appeal period in Section 1002-A of the MPC, because the alleged underlying procedural defect involved constitutional due process concerns that, if proven, would render the decision void *ab initio*. The Court reasoned that the procedural safeguards afforded to neighboring landowners and the general public by the MPC, grounded in underlying principles of due process, apply with equal force to situations involving either a procedurally defective zoning ordinance or a conditional use permit granted in violation of statutory procedural requirements.

b. Legislative Responses to *Glen-Gery* & *Luke*

i. **Act 39 of 2008**. In response to the uncertainty created by the *Glen-Gery* and *Luke* decisions, the General Assembly passed Acts 39 and 40 of 2008. Act 39 added Section 108 to the MPC. Section 108 provides a process for publishing an optional notice of an ordinance or decision (conditional use, special exception, etc.). Under Section 108, the governing body of the municipality or any resident (in the case of an ordinance) or the applicant (in the case of a decision) may publish notice of the ordinance or decision. The notice must be published in successive weeks in a newspaper of general circulation in the municipality. The notice must contain certain basic information, including a brief description of the content of the ordinance or nature of the decision. The

notice also must contain a statement that the notice is intended to begin a 30-day period (from the date of the second publication) for any challenges to the procedural validity of the ordinance or decision.

Challenges filed within the 30-day period now go directly to the Court of Common Pleas (rather than the Zoning Hearing Board). Challenges filed after the 30-day period are to be dismissed, with prejudice, as untimely. However, given the constitutional due process principles described in *Glen-Gery* and *Luke*, a due process exemption necessarily was included in the act. Challenges are exempt from the 30-day time limitation where the challenger establishes that application of the 30-day time period would result in an unconstitutional deprivation of due process. Therefore, if the alleged underlying procedural defect is a due process violation (i.e., improper notice), the optional notice under Section 108 of the MPC might not provide any greater protection or certainty to an ordinance or decision.

Section 1002-A of the MPC was amended to outline the standards of appeal for procedural challenges to decisions. Challenges filed beyond the 30-day appeal period are permitted only where the challenger did not receive actual or constructive notice and application of the time limitation would result in an impermissible deprivation of constitutional rights. Appeals can be filed only by aggrieved persons who can establish that reliance on the validity of the decision could directly affect that person's substantive property rights.

When a challenge is filed within the 30-day time limitation, the challenger must prove that there was a failure to comply strictly with required procedures. Comparatively, when a challenge is filed beyond the 30-day time limitation, the challenger must prove that the public was denied notice sufficient to permit participation in the proceedings or those whose substantive property rights could be affected were denied participation. Substantial

compliance with the notice of a hearing is sufficient to establish the notice necessary to permit participation at the proceedings. Finally, in the event a decision is deemed void from inception, such an adjudication has no effect on any previously acquired rights of property owners who have exercised good faith reliance on the validity of the decision.

Act 39 also amended Section 603(C)(2) of the MPC in regard to the procedural requirements for conditional use hearings. Public notice of conditional use hearings now must be provided in accordance with Section 908(1) of the MPC and notice of the decision must be provided in accordance with Section 908(10) of the MPC.

ii. **Act 40 of 2008.** In conjunction with Act 39, the General Assembly passed Act 40 of 2008 to amend the Judicial Code. Act 40 amended Section 5571 of the Judicial Code in regard to appeals from ordinances. All appeals must be filed within 30 days of the intended effective date of the ordinance. However, appeals filed beyond the 30-day time limitation are permitted where application of the time limit would result in an impermissible deprivation of constitutional rights.

Where an appeal is filed more than two years after the ordinance's intended effective date, there is a presumption that the municipality, landowners and residents substantially relied upon the validity of the ordinance. When an appeal is filed within the 30-day time limitation, the appellant must prove that there was a failure to comply strictly with required procedures. When an appeal is filed beyond the 30-day period, the appellant must prove: (1) there was a failure to comply strictly with required statutory procedure; (2) failure to comply substantially with the statutory requirements left the public without adequate notice to comment on the ordinance; and (3) there are facts that exist to rebut the presumption that the municipality, landowners and residents have relied upon the validity of the ordinance. Finally, in the event an ordinance is deemed void from inception, such an adjudication has

no effect on any previously acquired rights of property owners who have exercised good faith reliance on the validity of the ordinance.

2. Mootness. In *Kasper, et al. v. Southampton Twp.*, Unreported Opinion (Pa. Commw. Ct. 2008), the Township went through the process of forming a municipal planning agency and adopting a zoning ordinance for the first time. Following adoption, several Township residents filed a challenge to the zoning ordinance, alleging defects in the adoption process (i.e., failure to send a changed version of the zoning ordinance to the county planning agency before adoption and failure to send an attested copy of the proposed zoning ordinance to the law library). The Commonwealth Court dismissed the challengers' appeals because while the challenge was pending, the Township repealed the zoning ordinance and adopted a new zoning ordinance. The Commonwealth Court dismissed the challenge as moot following the repeal and the adoption of the new zoning ordinance.

3. Personal Notice of Hearing. In *In Re: The Appeal of LVGC Partners, LP, et al.*, 950 A.2d 353 (Pa. Commw. Ct. 2008), the developer challenged the procedural validity of a Township ordinance that rezoned the developer's property. The Township held a public hearing, pursuant to public notice required under Section 609 of the MPC, on December 4, 2006. The Township adopted the ordinance, at a meeting advertised pursuant to Section 610 of the MPC, on December 18, 2006. The developer argued that the Township should have provided personal notice to him, pursuant to Section 609(b)(2)(i) of the MPC, prior to the December 18 adoption meeting. The Commonwealth Court held that the Township was not required to provide personal notice, under Section 609(b)(2)(i) of the MPC, prior to the adoption meeting. The Commonwealth Court reasoned that Section 609 applied specifically to the public hearing held on December 4 and Section 610 applied to the adoption meeting held on December 18.

B. Challenges to Substantive Validity of Zoning Ordinances

1. **Standing.** In *Laughman v. Zoning Hearing Bd. of Newberry Twp., et al.*, 964 A.2d 19 (Pa. Commw. Ct. 2009), the appellant challenged a zoning ordinance amendment that created a new district. The challenger alleged that the zoning amendment, which created a district that permitted flea markets, would have an adverse effect on his properties, located 0.8 and 2 miles away from the new district. The Commonwealth Court held that the distance between the new district and the challenger's properties was too far for him to be in the "close proximity" required to establish standing; therefore, the challenger was required to demonstrate that he is a "person aggrieved."

2. De Facto Exclusion

a. **Density Restrictions.** In *Keinath v. Twp. of Edgmont*, 964 A.2d 458 (Pa. Commw. Ct. 2009), the landowners challenged the substantive validity of a density provision affecting their proposed development. The Zoning Ordinance required applicants proposing open space developments to set aside at least fifty percent of the property for open space (not more than fifty percent of which could be wetlands, flood plains and other natural and environmental resources). The remaining fifty percent of the property could be developed with a density of one unit per acre. Accordingly, the landowners were limited to developing twelve lots on their 24.7 acre property. The landowners challenged the ordinance on the basis that the density restriction (i) was irrational and (ii) constituted *de facto* exclusionary zoning.

The Commonwealth Court upheld the ordinance and reasoned that the density provision was consistent with the purposes established for that zoning district. The landowners' only basis for the challenge was that the density provision limited the amount of money the landowners could make by developing the property. The Commonwealth Court

concluded that economic gain is not a proper basis for a substantive validity challenge. It was also held that the density restriction did not constitute *de facto* exclusionary zoning because other zoning districts permitted densities at one unit per acre.

b. Billboards. In *Twp. of Exeter v. Zoning Hearing Bd. of Exeter Twp., et al.*, 962 A.2d 653 (Pa. 2009), the Pennsylvania Supreme Court held that the Township's maximum sign size limitation of 25 square feet for all off-premise advertising signs amounted to a *de facto* exclusion of billboards. The Supreme Court held that the challenger's evidence that the industry-standard size of billboards is either 300 or 672 square feet was instructive in determining whether the 25-square foot restriction was *de facto* exclusionary. The Supreme Court cautioned, however, that industry standards are not automatically controlling in determining what size sign restrictions can be deemed *de facto* exclusionary.

c. Extractive Industries. In *Larock, et al. v. Bd. of Supervisors of Sugarloaf Twp.*, 961 A.2d 916 (Pa. Commw. Ct. 2008), landowners filed a curative amendment alleging that the Township's Zoning Ordinance impermissibly excluded extractive industries. The landowners provided evidence that the Industrial District, which was the only district in which extractive industries were permitted, was almost entirely depleted of minerals after years of mining. The Commonwealth Court held that the depletion of minerals in the Industrial District did not render the Zoning Ordinance exclusionary. It was the effect of depletion, rather than the terms of the Zoning Ordinance, that effectively excluded the use. The Commonwealth Court rejected the landowners' theory, reasoning that under the landowners' theory, a quarry could slowly increase in size as it continued to deplete the land of minerals because the district permitting the quarry would gradually contain fewer minerals.

3. Limitation on Number of Domestic Pets. In *Woll v. Monaghan Twp., et al.*, 948 A.2d 933 (Pa. Commw. Ct. 2008), the property owner appealed an enforcement notice regarding the illegal keeping of too many dogs on the property. Under the Township's Zoning Ordinance, up to six domestic animals could be kept as an accessory use. The property owner alleged that the ordinance's limitation of six was vague and arbitrary. But, at the hearing, the property owner offered no testimony or evidence regarding why the limitation was unrelated to health, safety or general welfare. The Commonwealth Court rejected the appeal and held that the property owner failed to shoulder its burden of demonstrating that the limitation was unrelated to the health and general welfare of the community. The Commonwealth Court reiterated its longstanding principle that ordinances are presumed valid. Moreover, the Township did not have to affirmatively establish that the limitation was enacted based on empirical, factual evidence.

C. Conditional Uses & Special Exceptions

1. Basis for Denial.

a. Objective Standards Must be Specific. In *Walters Oxford, LP v. Bd. of Supervisors of East Nottingham Twp.*, Unreported Opinion (Pa. Commw. Ct. 2008), the Township denied developer's conditional use application for a retained open space development. The Township denied the application because the developer failed to demonstrate compliance with certain general standards. The Commonwealth Court affirmed the trial court's reversal of the Township's decision. The Commonwealth Court found that these general standards do not contain a sufficient amount of specificity and are, therefore, subjective, and the burden of proof for those standards is on objectors.

b. Compliance with All Objective Criteria. In *Gibbel, et al. v. Warwick Twp. Zoning Hearing Bd., et al.*, Unreported Opinion (Pa. Commw. Ct. 2009),

objectors appealed the ZHB's approval of a special exception application for a mini-warehouse for storage units. The Commonwealth Court held that where the general standards for all special exceptions require the applicant to demonstrate "compliance with all other applicable provisions of the Ordinance," the applicant must do more than demonstrate compliance with the general special exception standards and the use standards that apply only to mini-warehouse storage units. The applicant also has the burden to demonstrate compliance with all other applicable objective requirements (i.e., district requirements, parking standards, etc.). When the general special exception standards do not include that language, the applicant need only prove compliance with the applicable use standards and offer evidence of compliance with the general (and objective) special exception standards.

2. Unreasonable Conditions of Approval. In *Coal Gas Recovery, L.P., et al. v. Franklin Twp. Zoning Hearing Bd.*, 944 A.2d 832 (Pa. Commw. Ct. 2008), the developer appealed a condition that was imposed on its special exception approval for a methane gas compressor. At the hearing, the developer demonstrated compliance with all of the special exception standards and offered evidence of noise tests conducted at the site and at the property's boundaries. The noise test results were 20-25 decibels below the Zoning Ordinance's maximum permitted noise levels.

The Zoning Hearing Board, in granting the special exception, attached a condition requiring a building to be constructed around the compressor. The condition was imposed to appease concerns expressed by neighbors at the hearing that the compressor would cause too much noise and be unsightly. The Commonwealth Court rejected the condition. Conditions must be reasonable and find support in the record. The Commonwealth Court reasoned that the only concrete evidence at the hearing was that the compressor would comply fully with the Zoning Ordinance's noise limits.

D. Variances

1. Use or Dimensional: Deforestation Restriction. In *Plumstead Twp., et al. v. Plumstead Twp. Zoning Hearing Bd.*, Unreported Opinion (Pa. Commw. Ct. 2008), the landowner owned property that was entirely covered by woodlands and subject to a Township environmental protection standard that required 60 percent of the land to remain forested. The landowner applied for variances from the rear yard setback, lot area and forest preservation requirements in order to construct a commercial building on the property. The Zoning Hearing Board treated all three variances as dimensional variance requests and, after applying the *Hertzberg* standard, granted each variance. The Commonwealth Court reversed, ruling that the request to preserve less than 60 percent of the forest amounted to a request for a use variance. The Commonwealth Court focused on the character and purpose of the regulation, rather than whether the regulation involved a degree of protection easily quantified. The Commonwealth Court held that the requested variance was substantially different than a variance from a set back or building area limitation.

2. Variance by Estoppel. In *Vaughn v. Zoning Hearing Bd. of the Twp. of Shaler, et al.*, 947 A.2d 218 (Pa. Commw. Ct. 2008), the property owner met with Township officials on four separate occasions to determine whether a permit would be required for the construction of a retaining wall. The Township repeatedly determined, and memorialized in an e-mail and letter, that no permit would be required and that the wall could be built up to the property line without any zoning relief. Just before construction of the wall was complete, neighbors appealed the zoning officer's determination that no permit or zoning relief was required. After a series of back-and-forth proceedings, the trial court reversed the Zoning Hearing Board's ruling that the property owner was entitled to a

variance by estoppel. The trial court ruled that the MPC did not give the Zoning Hearing Board the authority to grant such equitable relief.

The Commonwealth Court reversed the trial court, ruling that the Zoning Hearing Board had the authority to grant traditional forms of equitable relief in zoning matters (i.e., variance by estoppel, vested rights, etc.). Moreover, the Commonwealth Court ruled that the Zoning Hearing Board properly granted the variance by estoppel under the facts of the case. The property owner had relied on the Township officials' repeated representations that no permit was required; made substantial expenditures (e.g., ~\$32,000 to construct the wall) based on that reliance; innocently believed they could rely on the Township officials' representations; and would suffer unnecessary hardship if required to comply with the applicable ordinances (e.g., it would cost \$20,000 to remove the wall).

E. Accessory Uses

1. Relative Size is not Determinative. In *Tennyson v. Zoning Hearing Bd. of West Bradford Twp., et al.*, 952 A.2d 739 (Pa. Commw. Ct. 2008), a neighbor appealed the Zoning Hearing Board's grant of a special exception for a horse stable and accessory facilities, including a riding arena or ring. The Commonwealth Court upheld the approval. At issue was whether a 16,000 square foot riding ring could be accessory to a 7,776 square foot stable. The Commonwealth Court rejected the neighbor's argument that the dimension and scope of an accessory use is the controlling factor in determining whether a use is accessory. The Commonwealth Court reasoned that size is one of several factors to consider in determining whether a use is accessory. The Commonwealth Court agreed with the Zoning Hearing Board's finding that the riding ring necessarily must be larger than the stable because the stable simply houses the horses, but the riding ring is used for the horses' exercise.

2. Accessory Sex. In *MAJ Entm't, Inc. v. Zoning Bd. of Adj. of the City of Philadelphia, et al.*, 947 A.2d 841 (Pa. Commw. Ct.), the Commonwealth Court ruled that sex is not an accessory use to a restaurant. In this case, the landowner operated a restaurant where patrons paid an admission fee that included a buffet and access to rooms where they could view or participate in sexual activities with other patrons. The Commonwealth Court held that the sexual activities were not customary and incidental to the restaurant use. The Commonwealth Court reasoned that sexual activities were not incidental because the patrons paid primarily for admission to the "party" and not for the buffet.

Most importantly, the Commonwealth Court revisited the Pennsylvania Supreme Court's holding in *Southco, Inc. v. Concord Twp.*, 713 A.2d 607 (Pa. 1998). The Commonwealth Court rejected the landowner's reliance on *Southco* for the proposition that novel uses can be accessory, noting that in *Southco* there was legislation (i.e., the Race Horse Industry Reform Act) that required off-track wagering facilities to offer fine dining. The Commonwealth Court found no similar legislation suggesting sexual activities are customary to a restaurant. This opinion could limit landowners' reliance on *Southco* as a case opening the door for novel accessory uses.

3. Motor Cross Track. In *Gyrych v. Zoning Hearing Bd. of Ferguson Twp.*, Unreported Opinion (Pa. Commw. Ct. 2008), the landowners received an enforcement notice after constructing and utilizing a motor cross track on their property. The property was zoned agricultural and was used for farming. The property included a residence, farm buildings and a one-half to one mile wide motor cross track used by the landowners' sons for recreation and for practice as professional motor cross riders. The track was not full size and was not open to the public.

The Commonwealth Court held that the motor cross track is logically incidental to a motor cross enthusiast's residence and therefore, a permitted accessory use. Similarly, a swimmer often has a pool and a tennis player often has a tennis court. The Commonwealth Court reasoned that when determining whether an accessory use is usually found with the principal use, the true nature of the community and surrounding area should be examined. In this case, the surrounding area is comprised of large rural properties upon which farming operations and gardens exist. Additionally, testimony at trial demonstrated that other property owners in the area use their properties for recreational motor cross riding. Therefore, it is not uncommon for property owners in this area to use their property for motor cross riding.

F. Merger of Nonconforming Lots

1. Who Has the Burden of Proving Merger? In *Cottone, et al. v. Zoning Hearing Bd. of Polk Twp.*, 954 A.2d 1271 (Pa. Commw. Ct. 2008), the landowner owned two adjacent lots. The lots were held in common ownership by a prior owner from 1966 to 2003. In 1986, the Township amended the Zoning Ordinance's minimum lot size requirements rendering each lot undersized. Landowner purchased the two lots by separate deed in 2003. Landowner was denied a permit to construct a dwelling on one of the lots due to the lot's failure to comply with the minimum lot requirement.

The Commonwealth Court ruled that because the lots were under common ownership when the minimum lot size requirement was amended in 1986, the lots had merged. The Commonwealth Court reasoned that when common ownership exists at the time of the zoning amendment, merger occurs and the burden is on the property owner to prove there was intent to keep the lots separate. On the other hand, when the lots are not in common ownership when the zoning ordinance is amended, but later come under

common ownership, then the burden is on the municipality to prove that the subsequent owner intended to merge the lots. In regard to the landowner's burden of proving the intent to keep the lots separate, the Commonwealth Court ruled that the landowner must produce evidence of some overt or physical manifestations of the intent to keep the lots separate. In this case, the fact that the lots were shown separately on an approved subdivision plan and described separately in deeds was not enough. A physical manifestation of the intention to keep the adjoining lots separate and distinct consists of a line of trees, a fence or a wall separating the lots.

2. Evidence of Landowner's Intent. In *Begies v. Upper Nazareth Twp. Zoning Hearing Bd.*, Unreported Opinion (Pa. Commw. Ct. 2008), the common landowner of three contiguous parcels (each under separate ownership) sought nonconforming status for one lot so as to permit the construction of a single-family dwelling on a lot that did not comply with minimum lot area and lot width requirements. The Commonwealth Court held that the Township failed to meet its burden of proving that the landowner's intent, as evidence by overt, physical manifestations, was to merge the lot. The Commonwealth Court reasoned that the separate ownership (a trust in the landowner's name owned one lot and the landowner and her husband owned the other two lots) was evidence of the landowner's intent *not* to merge the lots.

G. Deemed Approval

1. What is a Hearing? In *WeCare Organics, LLC v. Zoning Hearing Bd. of Schuylkill County*, 954 A.2d 684 (Pa. Commw. Ct. 2008), the applicant sought a special exception for a biosolids processing facility. The Zoning Hearing Board (the "ZHB") held four hearings on the application. At the conclusion of the last hearing (Nov. 18, 2003), the ZHB announced that it would meet on December 4, 2003 to announce its decision. The

ZHB left the record open for the parties to submit proposed findings of fact and conclusions of law. Subsequently, counsel for all parties exchanged various correspondence concerning the timeframe for issuing a written decision. The ZHB's written decision was issued on Jan. 8, 2004, which was 51 days after the Nov. 8, 2003 hearing. The applicant sought mandamus relief for a deemed approval because the written decision was not issued within 45 days of what the applicant alleged was the last hearing (MPC Section 908(9)).

The Commonwealth Court, in light of the Pennsylvania Supreme Court's ruling in *Wistuk v. Lower Mt. Bethel Township Zoning Hearing Bd.*, 925 A.2d 768 (Pa. 2007), ruled that the applicant was entitled to a deemed approval. The Commonwealth Court reasoned that in light of *Wistuk*, the December 4, 2003, ZHB meeting did not constitute a hearing. The record reflected that the only event occurring at that meeting was a vote by the ZHB (with no opportunity to present evidence or argument). Therefore, the 45-day period for the written decision began to run on Nov. 18, 2003; thus, the written decision was not issued timely. The Commonwealth Court also reasoned that the correspondence between the parties, which was inconclusive at best, did not constitute the kind of on-the-record, affirmative consent to an extension of time that the Supreme Court discussed in *Wistuk*.

2. Non-Explicit Waiver by Active Participation. In *SECCRA v. Bd. of Supervisors of London Grove Twp.*, 954 A.2d 732 (Pa. Commw. Ct. 2008), SECCRA applied for a conditional use to permit an expansion of an existing landfill. The Township held the first hearing 70 days after the application was filed. The Township then held 23 hearings, some of which were more than 45 days apart. SECCRA participated in each of the hearings, offering testimony and evidence, cross-examining Township witnesses and challenging Township evidence. After the Township denied the conditional use, SECCRA

appealed to the trial court, alleging a deemed approval for violation of MPC Section 908(1.2) for failure to hold the first hearing within 60 days of the application filing date and for holding subsequent hearings more than 45 days apart.

The Commonwealth Court held that SECCRA had waived its right to a deemed approval. In *Wistuk*, the Supreme Court ruled that waiver of a deemed approval can only result from an affirmative statement in writing or on the record. The Commonwealth Court reasoned that SECCRA's continued and active participation throughout the 23 hearings constituted the kind of on-the-record, affirmative consent the Supreme Court was discussing in *Wistuk*. The Commonwealth Court noted that the agreement to a hearing schedule need not be explicit, but may be evidenced by manifestations or circumstances created by the parties other than verbal statements. SECCRA had taken actions plainly inconsistent with any intention to stand on its right to a deemed approval.

H. Preemption

1. Oil & Gas Act. In *Huntley & Huntley v. Boro. Council of the Boro. of Oakmont, et al.*, 964 A.2d 855 (Pa. 2009) and *Range Res. – Appalachia, LLC, et al. v. Salem Twp., et al.*, 964 A.2d 869 (Pa. 2009), the Pennsylvania Supreme Court issued companion decisions addressing whether the Oil & Gas Act preempts municipalities from adopting zoning ordinance or SALDO provisions that regulate oil and gas drilling. In both cases, the local municipality adopted and enforced ordinances that regulated various aspects of oil and gas drilling (i.e., location of wells, permitting, bonding, etc.). The Court held that the Oil & Gas Act does not completely preempt local regulation. Specifically, the Court adopted a "how-versus-where" analysis that permits municipalities to regulate where oil and gas wells may be located, but not to regulate the technical aspects of the wells function and matters ancillary thereto (i.e., how they work). In *Huntley*, the local regulation

was upheld because it sought only to regulate the location of wells. In comparison, the local regulations in *Range Resources* were preempted because they established an all-inclusive regulatory scheme.

2. Nutrient Management Act. In *Walck v. Lower Towamensing Twp. Zoning Hearing Bd.*, 942 A.2d 200 (Pa. Commw. Ct. 2008), the landowner appealed an enforcement notice requiring him to cease the long-term storage and stockpiling of a large quantity of sewage sludge for a farming operation. The Zoning Ordinance prohibited "intensive agricultural operations," including operations that necessitate raw material of liquid and solid wastes, in the landowner's zoning district. The Zoning Ordinance also prohibited agricultural activities that create health and safety issues.

Under the Nutrient Management Act (the "NMA"), the landowner was not required to file a plan or permit application for storage of the waste. But, the Commonwealth Court held that the NMA did not preempt the local zoning ordinance provisions. The Commonwealth Court stated that local zoning regulations are not preempted so long as the regulations are not inconsistent with or more stringent than the NMA or its regulations. Nothing in the NMA demonstrates intent to entirely preempt local regulation of nutrient storage on farms. To hold otherwise would subject the municipality to tolerate long-term storage of large quantities of waste with no proof of review from any governmental authority.

3. Animal Welfare Act & Domestic Animal Law. In *Good v. Zoning Hearing Bd. of Heidelberg Twp., et al.*, ___ A.2d ___, 2009 WL 51448 (Pa. Commw. Ct. 2009), the landowners sought and obtained a special exception to operate a dog kennel on their property. In granting the special exception, the Zoning Hearing Board imposed 28 conditions on the approval. The Commonwealth Court rejected the landowners' arguments that the conditions were preempted by the Animal Welfare Act (a federal statute) and the

Domestic Animal Law (a state statute). The Commonwealth Court reasoned that the statutes did not provide for express or field preemption of the local regulations (in the form of the conditions). Moreover, the Commonwealth Court reasoned that the conditions did not conflict with either of the statutes or the accompanying regulatory schemes because the conditions did not create obstacles to the enforcement of the statutes.

II. SUBDIVISION AND LAND DEVELOPMENT

A. Creation of Planned Community Units as Subdivision and Land

Development. In *Frank N. Shaffer Family, LP, et al. v. Zoning Hearing Bd. of Chanceford Twp., et al.*, 964 A.2d 23 (Pa. Commw. Ct. 2008), the landowners appealed an enforcement notice alleging that their creation and conveyance of planned community units constituted a land development and subdivision that required Township approval. The Commonwealth Court held that the Uniform Planned Community Act ("UPCA") does not preempt local regulation of planned communities. Rather, the UPCA only prohibits discrimination of planned communities. The Commonwealth Court held that the creation of planned community units constituted a division or change in the property's lot lines. This division and consequent conveyance required Township approval of a subdivision plan. The Commonwealth Court rejected the landowners' reliance on Section 5106(c) of the UPCA, which only provides that the creation of a planned community alone does not create a subdivision.

B. Plan Review Fees Not a De Facto Taking. In *Tobin v. Centre Twp.*, 954 A.2d 751 (Pa. Commw. Ct. 2008), the developer petitioned for a board of viewers under the Eminent Domain Code to determine the value of damages for an alleged *de facto* taking resulting from the Township-imposed fees for a land development plan submission. After

significant opposition arose during the review of a sketch plan for a residential development, the Township amended its plan review fee schedule by significantly increasing the fees. The Commonwealth Court held that the fees alone could not constitute a regulatory taking where the developer still could use the property in other ways. Losing one of several uses of land (or the most profitable use) does not constitute a regulatory taking.

C. What Ordinances Apply?

1. **Ordinance In Effect at Time of Plan Submission.** In *Hellam Twp. v. Hellam Twp. Zoning Hearing Bd.*, 941 A.2d 746 (Pa. Commw. Ct. 2008), the developer appealed the Zoning Officer's determination that the 2001 "resubmission" of a 1996 subdivision plan, following litigation, was subject to land use ordinances in effect in 2001. In 1996, the developer submitted a subdivision plan for the residential and agricultural development of its property. The Township rejected the plan because a moratorium on development was in place. Following a series of challenges, the Pennsylvania Supreme Court ultimately ruled that the moratorium was illegal, and the subdivision plan should be reviewed in accordance with land use ordinances in effect in 1996. *Naylor v. Twp. of Hellam*, 773 A.2d 770 (Pa. 2001). Shortly after the Court's decision, the developer re-submitted a plan that it claimed was "identical to the plan" originally submitted in 1996. For a period of four years the Township reviewed the plan under the 1996 land use ordinances. In 2005, after ownership of the property changed, the Township's Zoning Officer sent a letter to the new owner informing him that the pending plan was to be reviewed under the 2001 land use ordinances because the 2001 plan substantially differed from the 1996 plan.

The Commonwealth Court ruled that the 2001 resubmitted plan was substantially similar to or the same as, but not identical to, the 1996 plan. The Commonwealth Court reasoned that the developer had a "vested right" in the 1996 land use ordinances. The

Commonwealth Court rejected the Township's argument that the developer failed to show good faith, an element of all vested rights claims, because the 2001 plan was not "identical to" the 1996 plan, as claimed when the 2001 plan was submitted. The Commonwealth Court focused on the fact that the developer had not acted in bad faith or intentionally misled the Township.

2. Pending Ordinance. In *LVGC Partners, LP v. Jackson Twp. Bd. of Supervisors, et al.*, Unreported Opinion (Pa. Commw. Ct. 2008), the developer submitted a preliminary land development plan proposing townhomes and garden apartments the day before the developer's property was rezoned. Under the existing zoning ordinance, the townhomes and garden apartments were permitted by special exception. Under the revised zoning classification, the townhomes and garden apartments would not be permitted. The developer did not apply for or obtain a special exception prior to filing the preliminary plan.

The Commonwealth Court rejected the developer's argument that the Board's denial was based on a misapplication of the revised zoning classification. The Commonwealth Court reasoned that the Board's decision denying the plan, when read in its entirety, exhibited the Board's understanding that the prior zoning classification applied. Regardless, the developer never obtained the special exception approval it needed for its proposed uses under the prior zoning classification. More importantly, under the Court's prior ruling in *Dep't of Gen. Serv. v. Bd. of Supervisors of Cumberland Twp.*, 792 A.2d 728 (Pa. Commw. Ct. 2002), the pending ordinance doctrine applied, and the plan should have been reviewed under the revised zoning classification.

D. Plan Review and Action

1. Bases for Denial

a. Outside Agency Approval – Private Request. In *McGrath Constr., Inc. v. Upper Saucon Twp. Bd. of Supervisors, et al.*, 952 A.2d 718 (Pa. Commw. Ct. 2008), the developer's preliminary land development plan for a 124-unit residential development was denied. The Township's SALDO required the developer to provide a certification of available sewer capacity for the project because the developer proposed public sewer. However, there was a sewer moratorium in the Township. Moreover, the developer's proposed solution to sewer capacity issues was to amend the Township's Act 537 Plan, which the Township did not agree to. The Commonwealth Court rejected the developer's argument that this was similar to the facts in *CACO III, Inc. v. Bd. of Supervisors of Huntingdon Twp.*, 845 A.2d 991 (Pa. Commw. Ct. 2004) and *Kohr v. Lower Windsor Twp. Bd. of Supervisors*, 910 A.2d 152 (Pa. Commw. Ct. 2006), where the Commonwealth Court ruled that a preliminary plan should be conditionally approved, rather than denied, when outside agency permit approval has not yet been obtained. In this case, the developer was not simply waiting on a routine outside agency permit approval. Rather, the developer needed to institute litigation (private request before DEP) against the Township to amend the Act 537 Plan and circumvent the moratorium in order to obtain the certification of available sewer capacity.

b. Submission of Sewer Planning Module. In *Cornerstone Develop. Group v. Bd. of Supervisors of Butler Twp.*, Unreported Opinion (Pa. Commw. Ct. 2008), the Township denied the developer's preliminary plan for failure to comply with a SALDO provision that required the developer to include a sewer planning module, as required by DEP. The Commonwealth Court ruled that the Township properly denied the

plan. The Commonwealth Court rejected the developer's argument that the plan should have been conditionally approved, in accordance with principles set forth in the *CACO III* and *Kohr* decisions. In *CACO III* and *Kohr*, the preliminary plans should have been conditionally approved because the developer had applied for outside agency permits and those permit approvals were pending. In this case, developer failed to submit the required plan revision module with the plan. The developer was not waiting for an outside agency permit that had been applied for and was pending.

2. Final Plan Substantially Similar to Approved Preliminary Plan. In *Rickert v. Latimore Twp.*, 960 A.2d 912 (Pa. Commw. Ct. 2008) and *Weiser v. Latimore Twp.*, 960 A.2d 924 (Pa. Commw. Ct. 2008), the developers sought approvals of final land development plans that were substantially similar to preliminary plans that had been deemed approved. The plans depicted or proposed possible uses that were not permitted in the property's current zoning classification (that had been amended after the preliminary plan was filed). The Zoning Officer's review of the final plans did not include any concerns regarding the use of the property in relation to the Zoning Ordinance. The County Planning Commission raised concerns with the zoning issues. The Board of Supervisors approved the plans with conditions regarding the zoning issues. The developers rejected the conditional approvals. The Board then denied the plans because of the inconsistency with the Zoning Ordinance.

The Commonwealth Court reviewed the cases under its prior ruling in *Annand v. Bd. of Supervisors of Franklin Twp.*, 634 A.2d 1159 (Pa. Commw. Ct. 1993), in which the Commonwealth Court held that a preliminary plan, whether approved by vote or by statutory deemer, relates only to subdivision and land development matters and not to zoning matters. The Commonwealth Court went on to reason that the question of whether zoning approvals must be obtained as part of the land development approval is governed by the

terms of the SALDO. In this instance, the Township's SALDO made no reference to zoning matters other than to suggest the developer consult the zoning requirements when preparing a preliminary plan. The Commonwealth Court held that the final plans should have been approved because they were substantially similar to the deemed approved preliminary plans, regardless of any perceived zoning issues.

E. Deemed Approval – Submission of Inconsistent Plans. In *Philomeno & Salamone v. Bd. of Supervisors of Upper Merion Twp., et al.*, ___ A.2d ___, 2009 WL 692610 (Pa. 2009), the Commonwealth Court held that a pending subdivision plan is not withdrawn by virtue of the submission of an inconsistent conditional use application. Therefore, the Board's failure to render a decision on the subdivision plan within 90 days of its submission rendered the plan deemed approved. As long as applicants are acting in good faith, with no intent of confusing the Township, the statutory periods for considering and acting on plans are not rendered inapplicable.

III. Appeal Issues

A. Standing of Associations. In *SCRUB v. Zoning Hearing Bd. of Adj. of the City of Philadelphia, et al.*, 951 A.2d 398 (Pa. Commw. Ct. 2008), SCRUB appealed the trial court's order that SCRUB lacked standing to appeal the Zoning Board's grant of a variance to permit a 2,400 square foot billboard. The Commonwealth Court upheld the trial court's order, ruling that the association was not an "aggrieved person" that was "detrimentally harmed by the decision of the zoning hearing board." The Commonwealth Court reasoned that SCRUB failed to show it had a direct, immediate or substantial interest that was adversely affected by the grant of the variance. The fact that SCRUB's mission is to

oppose illegal signs was not enough to grant standing to SCRUB. *Moreover, SCRUB did not have standing merely because it appeared at the hearing and participated.*

B. Waiver of Objection to Standing. In *Thompson v. Zoning Hearing Bd. of Horsham Twp., et al.*, 963 A.2d 622 (Pa. Commw. Ct. 2009), the landowner moved to quash an appeal filed by objectors. The landowner applied for variances to permit an office building in an airport hazard district. At the hearing, the objector appeared, was granted party status and presented testimony. The Zoning Hearing Board granted the variances. On appeal to the trial court, the landowner moved to quash the appeal because the objector allegedly lacked standing. At a hearing on the motion, the objector was unable to offer any evidence of a direct, immediate, substantial or pecuniary interest in the subject matter of the litigation. Nevertheless, the Commonwealth Court upheld the trial court's denial of the motion. The Commonwealth Court agreed with the trial court that the landowner waived the objection to standing when he failed to make that objection at the Zoning Hearing Board hearing. Because the objector appeared and participated at the Zoning Hearing Board hearing as a party, the objector necessarily was aggrieved by the adverse decision and had standing to appeal.

C. Appellate Jurisdiction. In *The Proposed Subdivision Application of Robert D. Harman for the Robert D. Harman Subdivision v. Forest County Conservation District, et al.*, 950 A.2d 1117 (Pa. Commw. Ct. 2008), adjoining owners appealed the approval of a minor subdivision plan for a lot consolidation that provided for an access drive abutting the adjoining owners' property. The minor subdivision plan was administratively approved by the subdivision administrator. The trial court quashed the adjoining owners appeal, ruling that the trial court lacked jurisdiction and that the adjoining owners should have appealed to the Zoning Hearing Board. The Commonwealth Court reversed, ruling that the subdivision administrator's

decision represented a final adjudication by the governing body. Therefore, the adjoiners properly appealed to the trial court.

IV. Miscellaneous

A. Who is an "Applicant?" In *Tioga Pres. Group, et al. v. Tioga County Planning Comm'n*, ___ A.2d ___, 2009 WL 510827 (Pa. Commw. Ct. 2009), the Commonwealth Court held that an option to lease the subject premises in the future sufficiently provided the ownership interest necessary to be a landowner, and therefore an applicant, under the MPC. The Commonwealth Court reasoned that the terms of the option agreements gave the option holder a present interest in the land that constituted a "proprietary" interest.

B. Due Process and Notice

1. Notice of De Novo Hearing Before Trial Court. In *Panzone v. Fayette County Zoning Hearing Bd.*, 944 A.2d 817 (Pa. Commw. Ct. 2008), the Zoning Hearing Board appealed the trial court's order sustaining the landowner's land use appeal after the Zoning Hearing Board's counsel did not receive notice of the trial court's *de novo* hearing on the land use appeal. The landowner had received an enforcement notice to cease keeping horses on his property. The Zoning Hearing Board denied the landowner's appeal of the notice. The landowner appeal to the trial court, which held a *de novo* hearing and granted the landowner's appeal. The Zoning Hearing Board's counsel did not appear at the hearing.

The Zoning Hearing Board appealed the trial court's ruling, arguing that it never received notice of the *de novo* hearing. The prothonotary sent the order scheduling the *de novo* hearing to the County's solicitor, rather than to the Zoning Hearing Board's counsel.

The Commonwealth Court reversed the trial court's ruling, noting that the attorney of record, who was the Zoning Hearing Board's counsel, must receive notice of hearings. The Commonwealth Court noted that its ruling was consistent with the Pennsylvania Supreme Court's recent trend toward due process concerns over finality. See *Luke v. Cataldi*, 932 A.2d 45 (Pa. 2007) and *Glen-Gery Corp. v. Zoning Hearing Bd. of Dover Twp.*, 907 A.2d 1033 (Pa. 2006).

C. What is a Kennel? In *Ruley v. West Nantmeal Twp. Zoning Hearing Bd., et al.*, 948 A.2d 265 (Pa. Commw. Ct. 2008), the Township issued a cease and desist order against a landowner for operating a kennel without the required special exception. The Zoning Hearing Board and trial court upheld the order and imposed nearly \$18,000 in fines and attorney's fees. The Commonwealth Court, in reversing the trial court, ruled that the landowner's operation did not constitute a "kennel" under the terms of the Zoning Ordinance. The Township's Zoning Ordinance defined a "kennel" as "an establishment under the Pennsylvania Dog Law [3 P.S. §459-101 – 459-1205] operated for the purpose of trading, breeding, boarding, training, or grooming customary household pets for compensation." The Zoning Hearing Board found that the landowners keeping of dogs and acceptance of donations amounted to the boarding of dogs for compensation. The Commonwealth Court focused instead on the "purpose" of the landowner's operation. The Commonwealth Court noted that the landowner's operation was intended to save injured dogs until the dogs could be adopted. The purpose was not to board the dogs for compensation.

V. Pending Legislation

A. H.B. 780. Under House Bill 780, which currently is pending before the House Appropriations Committee, Section 909.1(B)(3) of the MPC would be amended to give governing bodies (i.e., board of commissioners, board of supervisors, borough council, etc.) authority to "consider requested relief in the nature of a variance, related and subordinate to the use for which conditional use approval is sought."

House Bill 780 also would add Section 507.1 to the MPC, which would mirror the language contained in Section 603.1 of the MPC, in requiring ambiguous provisions of SALDOs to be interpreted in favor of the landowner.

Finally, the Bill would amend Section 508(4)(vi) of the MPC by removing the language that requires multi-phase residential developments to have at least twenty-five percent of the number of dwelling units in each phase, except for the last phase.