The following Case Law Review by Fronefield Crawford was originally published in Environmental Currents, the newsletter of the Brandywine Conservancy's Municipal Assistance Program. Since 1967, the Brandywine Conservancy has conserved natural and cultural resources of the Brandywine River watershed and other selected areas with a primary emphasis on conservation of water quantity and quality. To date, the Conservancy's efforts have resulted in the permanent protection of more than 40,000 acres in southeastern Pennsylvania and northern Delaware. The Conservancy's professional planners and natural resource managers provide conservation solutions to landowners, farmers, and municipalities. For more information about the Conservancy's programs and services, visit www.brandywineconservancy.org or call 610-388-2700.

Case Law Review

This article highlights three land use cases of interest. The first is from the Pennsylvania Supreme Court, with the Opinion having been written by Justice Lamb just before his departure from the bench. The second is a thorough analysis of the types of issues that will not justify the denial of a subdivision or land development plan. The third is a classic example of what happens when municipal subdivision and land development requirements—here involving tree replacement—go beyond the bounds of reasonableness.

Appeal of Realen Valley Forge Greenes Associates from the Decision of the Zoning Hearing Board of Upper Merion Township, ___ A.2d ___, 2003 Pa. Lexis 2403 (December 18, 2003).

Facts

The Valley Forge Golf Club property in King of Prussia (Upper Merion Township), consisting of 135 acres, remains in the same "AG" agricultural zoning classification as did most of the King of Prussia area forty years ago. While King of Prussia has developed with intensive commercial, retail and office uses surrounding the Valley Forge Golf Club property, as a result of piece-meal rezonings granted by the Upper Merion Township Board of Supervisors (primarily in the 1970s and 1980s), the Golf Club property has remained developable only for single family residential uses as a result of its agricultural zoning classification.

The owners of the Golf Club property filed a challenge to the validity of the agricultural zoning of the tract, as a form of "spot zoning" (conceptually referred to as "reverse spot zoning" because the fact that it remains the only property zoned agricultural as a result not from the initial classification, but rather from being the only remaining agriculturally zoned property after all others originally so zoned were rezoned for commercial development).

Successive members of the township Board of Supervisors, throughout the 1980s and 1990s were determined to maintain the golf course property as a remnant of open space in the now

highly-developed King of Prussia area. The Zoning Hearing Board rejected Realen's spot zoning challenge, concluding:

> "The subject property is unique. The subject property has many distinguishing features that make it different from other surrounding properties. Such characteristics include its shape, road frontage, adjoining and existing uses as well as natural features, not to mention the sheer large size of the property. The strongest justification, in the Board's opinion, was the fact that it was surrounded on all sides by major arterial highways, and that such highways formed a rational basis to draw the zoning district boundaries between the AG district and the now-rezoned commercial classification of the surrounding properties."

Both the Montgomery County Court and the Commonwealth Court, on appeal, sustained the decision of the Zoning Hearing Board that the agricultural zoning classification did not constitute unlawful spot zoning or special legislation. The Pennsylvania Supreme Court thereafter accepted the Petition for Allowance of Appeal filed by Realen.

Decision

The Pennsylvania Supreme Court, again by Justice Lamb writing for the Court, reversed the courts below and concluded that the Valley Forge Golf Club property's classification in the township's agricultural zoning district constituted unlawful spot zoning.

The Court first discussed the concept of spot zoning, looking back to the initial decision by the Court in *Appeal of Mulac*, 418 Pa. 207, 210 A.2d 275 (Pa. 1965) and subsequent decisions:

> "Spot zoning challenges have at their conceptual core the principle that lawful zoning must be directed toward the community as a whole, concerned with the public interest generally, and justified by a balancing of community costs and benefits. These considerations have been summarized as requiring that zoning be in conformance with a comprehensive plan for the growth and development of the community. Spot zoning is the antithesis of lawful zoning in this sense. In spot zoning, the legislative focus narrows to a single property and the costs and benefits to be balanced are those of particular property owners. ...
>
> While the size of the zoned tract is a relevant factor in a spot zoning challenge, the most important factor in an analysis of a spot zoning question is whether the rezoned land is being treated unjustifiably different from similar surrounding land." (Slip Opinion, pp. 26, 27)

The Court next considered the issues found by the Zoning Hearing Board to be justification for the agricultural zoning classification of the Golf Club property, stating as follows:

> "The analysis of the tribunals below on this issue is seriously flawed. First, the large size of the tract is not determinative. ... The question is whether the lands at issue are a single, integrated unit and whether any difference in their zoning from

> that of adjoining properties can be justified with reference to the characteristics of the tract and its environs. ... There can be no question, as the zoning board found, that arterial roadways are, in many instances, an appropriate feature to be designated as the boundary between incompatible zoning districts. But the issue here is not whether any zoning district designation could be appropriately applied to the Golf Club's lands, but whether the AG district designation can be so justified. It turns reason and land planning precepts on their head to assert, as the zoning board's decision implies, that this tract's restricted, agricultural zoning is justified by its ready access to the region's primary arterial roads on every hand. Apart from a bare assertion that it is so, neither the Zoning Board nor the courts below have offered either reason or authority to support the proposition, essential to the propriety of the decision here reviewed, that the location of these highways makes agricultural zoning appropriate for this tract while the properties on the opposite side of the same roadways are appropriately zoned and developed for intense commercial use. ... No characteristic of the Golf Club's property justifies the degree of its developmental restriction by zoning as compared to the district designation and use of all of the surrounding lands both within the township and in the adjoining municipality. This is spot zoning." (Slip Opinion, pp. 27-30.)

The Court went on to note that there is no legal distinction between the more common form of spot zoning (where a tract is singled out for rezoning) and "reverse spot zoning" ("where an island develops as a result of a municipality's failure to rezone a portion of land to bring it into conformance with similar surrounding parcels that are indistinguishable"). (Slip Opinion at 31.)

Having so found the zoning classification of the golf club property to be unlawful spot zoning, the Pennsylvania Supreme Court remanded the case to the Court of Common Pleas of Montgomery County "for further proceedings consistent with this Opinion, our decision reported as *Casey v. Zoning Hearing Board of Warwick Township*, 459 Pa. 219, 328 A.2d 464, 469 (Pa. 1974) and MPC Section 1006-A(c) through (e), 53 P.S. Sections 1106-A(c) through (e), which require that Realen be afforded 'definitive relief' as the successful challenger of the township's zoning ordinance." (Slip Opinion at 34.)

Comment

Two members of the Supreme Court did not participate and one member (Justice Saylor) dissented. Thus, Justice Lamb's Opinion was written on behalf of a four-justice majority of the Court. Although dissenting, Justice Saylor acknowledged that "there are fairness elements involved that would suggest that the township should consider alternatives reflecting a degree of compromise, for example, along the lines of proposals from 1967 and 1981 [involving partial development of the tract and partial preservation of the green space] or acquisition of development rights from the landowner for compensation ..." (Slip Opinion, p. 57.) The majority had also acknowledged that "in reviewing an ordinance to determine its validity, courts must generally employ a 'substantive due process inquiry,' involving a balancing of landowners rights against the public interest sought to be protected by an exercise of the police power." (Slip Opinion, pp. 23, 24.)

So viewed, the issue of arbitrary spot zoning carries with it a tinge of the "takings" issue. Indeed, this is one of the important issues recognized in Justice Lamb's Opinion for the majority:

> "The drawing of the zoning boundary lines to create an 'island' of the golf club property does not, in and of itself, constitute the illegal spot zoning; rather, it is the extremely disparate treatment between a very low intensity development potential (single family dwellings) under the agricultural zoning for the Golf Club in contrast to the very high intensity commercial uses authorized under the adjacent zoning districts that creates the arbitrariness and illegality of the agricultural zoning classification."

It is respectfully submitted that the Court's decision was the proper one in the facts presented. While it is certainly true that preservation of green space in the face of development pressures is a valid public purpose, the due process clauses of the federal and Pennsylvania constitutions mandate that such public benefits not be derived solely from one or a few property owners. Had the golf course property been zoned to enable one or more higher intensity forms of development, which would have been perceived as more closely approximating the type of development authorized on the surrounding properties, the sting of the isolated zoning classification would have been ameliorated, if not removed. Indeed, even the township's own planning consultant found the agricultural zoning classification to be unrealistic in its *de facto* preclusion of reasonable development of the golf course property:

> "The bottom line is that this critical piece of remaining open space is in a concentrated area nearing if not surpassing urban intensities. ... The reality of the evolving urban character of the area must be dealt with thru [sic] a rational planning process. ... Indeed, we feel that urban-suburban office may be under-utilizing the site. ... It is in the public interest to optimize the intensity of the site, in principle trading quantity for quality. ... John Rahenkamp and Associates [the township's planning consultant] cannot excuse the township from responsibility for not moving forward on the critical planning to begin dealing with the realities of this intense core area." (Slip Opinion, pp. 15-16.)

CACO Three, Inc. v. Board of Supervisors of Huntingdon Township, 845 A.2nd 991 (Pa.Cmwlth. 2004).

Facts

CACO Three ("Applicant" or "CACO") submitted a preliminary land development plan for development of a 235 acre tract as a mobile home park for proposed 275 mobile home units. At the time of submission, Huntingdon Township did not have a zoning ordinance, but did have a Comprehensive Plan and a Subdivision and Land Development Ordinance ("SALDO"). After some plan revisions and extensions, CACO submitted a revised preliminary plan but, the following day (September 14, 2000), the Board of Supervisors rejected the revised preliminary

plan. The Board cited nine bases for rejecting the plan (to be discussed below), and issued a written decision supporting the plan rejection.

As is sometimes the case when preliminary plan rejections are litigated, the township enacted a zoning ordinance shortly after rejecting the preliminary plan, under which the subject property was zoned for agricultural conservation, which would prohibit mobile home park development.

The Board of Supervisors set forth the following reasons, based upon various requirements of the SALDO, for denial of the preliminary plan:

1. Inconsistency with the Comprehensive Plan - a section of SALDO required that "plans shall conform to the municipal comprehensive plan ... and be coordinated with existing land development ... so the entire area may be developed harmoniously." Under the Comprehensive Plan, the area in question was proposed for very low density of development.

2. Hazardous Conditions - a provision of SALDO provided that land subject to hazards of life, health or property may not be developed unless the hazards have been removed. A quarry was located partially on the subject property. CACO proposed to fence off the portions of the quarry which were located on its property, but was unable to obtain permission to fence the entire perimeter of the property, including areas that were occupied by adjacent properties.

3. Water and Sewer System Requirements - the township stated that the design details for both water supply and sewage (proposed to be connected to a public sewer system) were insufficiently detailed to meet the requirements of the ordinance.

4. Stormwater Management - similarly, the township stated that the Applicant had failed to submit sufficient design calculations to satisfy the requirements of SALDO with respect to stormwater management criteria.

5. Lack of Highway Occupancy Permits - the township stated that the failure to submit highway occupancy permits to PennDOT was not in compliance with a SALDO requirement that HOP numbers be indicated for each intersection with a state highway.

CACO appealed to the county court, which sustained the decision of the township. The Applicant then filed its subsequent appeal to Commonwealth Court.

Decision

Commonwealth Court reversed the denial of the preliminary plan, and remanded the case back to the township for preliminary plan approval. The Court stated that each of the stated reasons for denial of the preliminary plan was insufficient to justify the denial. A summary of the Court's reasoning, as to each of the items, is as follows:

1. The Court held that, unlike a specific and regulatory zoning ordinance, a comprehensive plan is, by its nature, an "abstract recommendation as to desirable approaches to land utilization and

development of the community." Thus, the Court concluded that "any inconsistency with the comprehensive plan, standing alone, cannot justify disapproving the land development plan." With regard to the "harmonious development" criterion, the Court also stated that "a preliminary plan cannot be rejected on the basis of amorphous criteria, such as non-compliance with the 'purpose' of the ordinance or inconsistency with the 'harmonious development'."

2. To require fencing of the quarry on land not owned by the developer would require an "off-site improvement." Section 503-A prohibits municipalities from imposing requirements for "the construction, dedication or payment of any off-site improvements ... except as may be specifically authorized under this Act." While this section of the MPC was designed to deal with off-site highway improvements, it is not specifically so limited, and thus applies to the quarry-fencing requirement here under consideration. The Court further noted that the safety hazard posed by the quarry was not a sufficient basis, in any event, to deny preliminary plan approval, because it constituted a "general, non-specific standard in SALDO."

3. Where water and sewer systems have to undergo detailed design prior to commencement of construction, the Court stated that at preliminary plan level "it is more reasonable and consistent with the mandate of §508(2) of the MPC to condition final approval of the development plan upon obtaining all required permits from the DEP." Further, the Applicant's engineering report demonstrated the feasibility of the sewer connection, so that rather than denying the preliminary plan on this basis, the township was required to make final design calculations and details a condition of preliminary approval. Similarly, the failure to provide detailed water system design should have been the basis for imposition of a condition of approval, rather than denial of the plan.

4. The defects in the stormwater management design and calculations were "minor technical defects that can be corrected by amending the plan," and consequently these defects do not justify outright disapproval of the preliminary plan.

5. Again, outright disapproval of a preliminary plan based upon lack of required highway occupancy permits is improper.

In addition to discussing each of these bases, Commonwealth Court set out the following guidelines to be followed in this type of circumstance:

> "The preliminary plan is essentially conditional in nature in that after its approval, the developer must still fulfill all the requirements to obtain final approval. ... Consequently, even where the preliminary plan fails to comply with the objective, substantive requirements, the governing may in its discretion either reject the plan outright or grant conditional approval. ... Further, the preliminary plan containing minor defects correctable by amendment must be approved subject to a condition that necessary corrections be made."

<u>Comment</u>

The township sought to elevate the comprehensive plan to a regulatory document, by making specific reference thereto in SALDO. While, as a general matter, it is legally sufficient for an ordinance to incorporate requirements of other documents by reference, the effort to incorporate the "requirements" of a municipal comprehensive plan is inherently flawed, not because of the fact that the comprehensive plan is a separate document, but rather because its very nature is general and non-specific.

The Court here applies a "real world" practical approach to dealing with the requirements that a municipality may legitimately impose at the preliminary plan stage. Thus, irrespective of what SALDO may require, an applicant for subdivision or land development approval cannot be required to produce outside permits and approvals—e.g., PennDOT Highway Occupancy Permits, DEP sewer planning approvals, NPDES Stormwater Discharge Permits, etc.—at the preliminary plan stage. Further, the message from Commonwealth Court is that the failure to produce detailed designs of all systems at the preliminary plan stage (again, such as stormwater management details and sanitary sewage system details) cannot be a proper basis to deny a preliminary plan approval, since these are "correctable" deficiencies:

> "Failure to include labels, notations and design calculations in the preliminary plan is not objective defects that will justify outright disapproval of the preliminary plan; rather, it is minor technical defects that can be corrected by amending the plan."

Trojnacki v. Solebury Township Board of Supervisors, 842 A.2d 503 (Pa.Cmwlth. 2004).

Facts

Mr. Trojnacki ("Applicant") filed an application to subdivide a seven-acre parcel into two lots, each in excess of three acres. One lot would contain the existing dwelling, and the other would be available for construction of a new home. Except where the existing improvements were located, however, the entire parcel was wooded. Solebury Township sought to impose the requirements of the "Solebury Township Tree Replacement Ordinance" ("STTRO"), a component part of the Subdivision and Land Development Ordinance. The STTRO specified that the loss of trees in conjunction with any subdivision or land development (irrespective of the number of trees which would remain after development) required a property owner to plant new trees on a sliding scale, with the number of new trees required to be planted being based upon the diameters of the trees to be felled as part of the development. At the top of the sliding scale was a replacement requirement for 10 new trees (each with a minimum 3" caliper) for each tree with a caliper of 24 inches or more which is removed.

Applying this formula to the Trojnacki two-lot subdivision, the tree removal necessary for construction of a new house on the extra lot would necessitate the planting of 336 replacement trees. Since the lot was already wooded, the only area in which replacement trees could be planted "on-lot" was in the stormwater management area, with a maximum of 25 trees to fit into that area. The landowner declined to plant trees off-site and, hence, the Solebury Township Board of Supervisors denied the final subdivision plan. The Applicant filed both an appeal to

Court and a mandamus action, alleging in the latter that his right to final approval was clear and unequivocal and, therefore, the proper subject of a mandamus action. The Bucks County Court dismissed the appeals, and the landowner took them on to Commonwealth Court.

Decision

The landowner challenged the validity "as applied to this application" of the STTRO, both on the ground that it was in contravention of the prohibition in Section 503-A of the MPC against requiring off-site improvements, and because it was unconstitutional.

After getting past the procedural issue raised by the township—that the Applicant had failed to properly request waivers of this requirement—Commonwealth Court concluded that the requirements of STTRO, that an applicant for subdivision approval plant trees off-site, was in contravention of the MPC. The Court did not, therefore, reach the constitutional issue.

> "The clear implication is that §503-A allows municipalities to condition subdivision on on-site improvements, or even fees in lieu thereof, but the statute disallows such practices with regard to off-site improvements."

The Court rejected the township's argument that Article V-A of the MPC precluded only off-site highway improvement requirements, and that the planting of trees in a public park (as here required) did not fall within the scope of a "public capital improvement."

The Court refused to grant the Applicant's request for mandamus relief, since it was unclear whether the planting of the 25 trees on-site was in itself an acceptable motive compliance with the on-site requirements of STTRO; hence, the Court remanded the case back for further review by the Board of Supervisors.

Comment

This case presents a classic example of taking "a good thing too far." The concept of tree replacement has been reasonably well received by most developers, so long as the additional cost of the tree replacement requirements is not unreasonable. But to require a landowner to plant 336 replacement trees because of the construction of one residence on one new lot, leaves one reaching for the appropriate adjective: "ludicrous" or "outlandish." Had the total tree replacement requirement been, say, 25 trees, in all likelihood the matter would never have been litigated. By such severe overreaching, the township's ordinance left the landowner with no choice but to litigate and foul the nest for the future of off-site tree replacement. (Many developers have voluntarily agreed, in my experience, to provide a reasonable amount of off-site tree replacement without arguing the point "on principle.") The case would be even more interesting had the Court been required to reach the constitutional issue.