2019 Environmental Law Forum
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2018-2019 Land Use/Zoning Law Update

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HOW ZONING AND LAND USE ISSUES CAN FRUSTRATE, AND EVEN CANCEL, YOUR PROJECT

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PREEMPTION (OR WHY A DEP PERMIT IS ALMOST NEVER ENOUGH)

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Hoffman Mining Co. v. ZHB, 32 A.3d 587 (Pa.)

- *"There are three generally recognized types of preemption:*
  - *(1) express or explicit preemption, where the statute includes a preemption clause, the language of which specifically bars local authorities from acting on a particular subject matter;*
  - *(2) conflict preemption, where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute; and*
  - *(3) field preemption, where analysis of the entire statute reveals the General Assembly's implicit intent to occupy the field completely and to permit no local enactments.*
- *Both field and conflict preemption require an analysis of whether preemption is implied in or implicit from the text of the whole statute, which may or may not include an express preemption clause."*

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Huntley v. Borough Council, 964 A.2d 855 (Pa. 2009)

- Huntley and Huntley held a state permit under the Pennsylvania Oil & Gas Act to conduct drilling.
- Oakmont Borough had zoned the land where Huntley wanted to drill for residential use only.
- Huntley argued that the Pa. Oil and Gas Act preempted local zoning ordinances ("where" oil and gas are to be explored).
- The Commonwealth Court agreed, stating that the Oil and Gas Act preempted any zoning ordinance concerning any feature addressed by that Act.

Huntley v. Borough Council, 964 A.2d 855 (Pa. 2009)

- "Except with respect to ordinances adopted pursuant to the . . . Municipalities Planning Code, and . . . the Flood Plain Management Act, all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are hereby superseded. *No ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which impose conditions, requirements or limitations on the* ***same features*** *of oil and gas well operations regulated by this act or that accomplish the* ***same purposes*** *as set forth in this act.* The Commonwealth, by this enactment, hereby preempts *and supersedes* the regulation of oil and gas wells as herein defined."
- 58 P.S. §601.602 (emphasis added) (italicized sentence added by 1992 amendment).

Huntley v. Borough Council, 964 A.2d 855 (Pa. 2009)

- The Pennsylvania Supreme Court disagreed, finding that the Oil and Gas Act's preempted local regulation in the same way as the SWMA.
- The Court found that, while the Oil and Gas Act preempted municipalities from regulating "oil and gas well operations," "it does not automatically follow that the placement of a natural gas well at a certain location is a feature of its operation."
- "Where" oil and gas operations occurred was still controlled by local zoning ordinances.

Range Resources- Appalachia, LLC v. Salem Twp. 964 A.2d 869 (Pa. 2009)

- Companion case to Huntley.
- Salem Twp. enacted a mini Oil and Gas Act applicable only in Salem Township.
  - Required a township permit for all drilling-related activities.
  - Allowed township to declare drilling a public nuisance and revoke or suspend a permit.
  - Enacted regulations related to the plugging of wells, casing requirements and protection of water supplies.
- The Pennsylvania Supreme Court found that this local provision- "how" oil and gas were extracted- was preempted by the Oil and Gas Act.
  - This "how" vs. "where" distinction was previously addressed in the solid waste management context. *See Plymouth Twp. v. Montgomery*, 531 A.2d 49 (Pa. Commw. Ct. 1987).

TAKEAWAY:
WHILE THE STATE CAN REGULATE USES, MUNICIPALITIES STILL GENERALLY CONTROL WHERE USES CAN OCCUR!

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BASIC LAND USE CONCEPTS THAT PLAY A ROLE BEFORE THE ZONING BOARD OR MUNICIPAL GOVERNING BODY

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CONDITIONAL USES

*"Where the governing body, in the zoning ordinances, has stated **conditional uses** to be granted or denied by the governing body **pursuant to express standards and criteria**, the governing body shall hold hearings on and decide requests for such conditional uses in accordance with such standards and criteria*." Municipalities Planning Code 913.1 (emphasis added).

Gorsline v. Bd. of Sup'rs of Fairfield Twp., 123 A.3d 1142 (Commw. Ct. 2015)

- Developer wished to place a natural gas pad and well in the Township's Residential Agricultural (RA) District.
- None of the Township's districts provided for natural gas extraction, and developer applied for a conditional use under the zoning ordinance's general savings clause, which authorizes the Board of Supervisors to grant a conditional use where a proposed use is not specifically authorized anywhere in the Township.
- The ZHB and the Commonwealth Court both determined that a natural gas well was "consistent with permitted uses in the district" in that natural gas wells are consistent with gas utility structures, which were permitted uses in the district.

SPECIAL EXCEPTION

"*Where the governing body, in the zoning ordinance, has stated* ***special exceptions*** *to be granted or denied by the board* ***pursuant to express standards and criteria****, the board shall hear and decide requests for such special exceptions in accordance with such standards and criteria."* Municipalities Planning Code 912.1 (emphasis added).

Allegheny Towers v. City of Scranton, 2017 WL 83608 (Pa. Commw. Ct. Jan. 10, 2017)

- The Commonwealth Court reversed the denial of a special exception for a commercial communications tower.
- In its written findings of fact and conclusions of law, the zoning hearing board denied the exception because the applicant had failed to demonstrate that the construction would not have detrimental effects to the health, safety and welfare.
- The Commonwealth Court reversed. It held that, under the standards for a special exception, once the applicant has demonstrated that it meets all of the requirements for a special exception, it is the burden of objectors to demonstrate detrimental effects.

EDF Renewable Energy v. Foster Twp. ZHB, 2016 WL 6873015

- The Commonwealth Court affirmed the denial of a special exception for the construction of wind turbines.
- Developer submitted site plans that did not conform to the spatial requirements listed in the zoning ordinance: instead of submitting a 1 inch: 50 feet map, the submitted map had a ratio of 1 inch: 1.4 miles. Similarly, the map did not include the actual number of wind turbines proposed for each of the three districts, the proposed locations of the turbines, or their proposed sizes and height.
- The Commonwealth Court held that it was proper for the zoning board to reject an application on these deficiencies alone.

VARIANCES

*"The board shall hear requests for **variances** where it is alleged that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant."* Municipalities Planning Code 910.2 (emphasis added).

PPM Atlantic Renewable v. Fayette County Zoning Hearing, 93 A.3d 536

- The Commonwealth Court affirmed a decision of the zoning hearing board denying certain dimensional variances for windmills.
- The Zoning Hearing Board held that applicant did not meet the requirements for a dimensional variance, as there were genuine concerns about ice being flung from windmill blades.
- The Court of Common Pleas reversed with regards to the eight windmills, holding that because the eight windmills were all placed within the exterior boundaries of the land comprising and participating in the wind farm, there was no concern because all relevant landowners had assumed the risk.
- ***Parties, the Commonwealth Court held, cannot merely waive zoning requirements on their neighbor's (or their own) land.***

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NONCONFORMING USE

*"**Nonconforming use** [means] a use, whether of land or 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."* Municipalities Planning Code 107 (emphasis added).

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Itama Development Assoc. v. ZHB Rostraver Twp., 132 A.3d 1040 (Pa. Commw. Ct. 2016)

- A school district owned a legally nonconforming depot area where it would refuel and perform needed maintenance on school buses.
- Township and neighbors argued that the nonconforming use had been abandoned during the end of the school district's ownership of the property, and further that the continuous operations constituted a new and more intensive use
- The Commonwealth Court rejected both of those arguments, holding that the evidence of record clearly indicated no abandonment of the nonconforming use, and that the continuous operation was not sufficiently different from the school district's use as to qualify as an impermissible expansion of a nonconforming use.

EXCLUSIONARY ZONING

"*The constitutionality of* ***zoning ordinances which totally prohibit legitimate businesses*** *such as quarrying from an entire community should be regarded with particular circumspection; for unlike the constitutionality of most restrictions on property rights imposed by other ordinances, the constitutionality of total prohibitions of legitimate businesses cannot be premised on the fundamental reasonableness of allocating to each type of activity a particular location in the community."* Exton Quarries, Inc. v. Zoning Bd. of Adj. of West Whiteland Twp., 228 A.2d 169,179 (Pa. 1967) (emphasis added).

Pennsylvania Gen. Energy Co., LLC v. Grant Twp., 139 F. Supp. 3d 706 (W. D. Pa. 2015)

- A township passed a community bill of rights which purported to
  - 1) ban all depositing of oil and gas extraction waste in the township;
  - 2) nullify state or federal enactments to the contrary of section (1);
  - 3) create a new cause of action for enforcing the community bill of rights, which granted attorneys fees and costs to township residents; and
  - 4) determined that corporations had no legal rights within the Township.
- The District Court found that because the township prohibited deposition of oil and gas extraction waste anywhere in the township, it was *de jure* exclusionary, in violation of Pennsylvania law absent demonstration by the Township that the exclusionary regulation bears a substantial relationship to the public health, safety, morality, or welfare.

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2018-2019 CASE UPDATE

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ENVIRONMENTAL RIGHTS AMENDMENT AND PREEMPTION CASES

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"The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

Pennsylvania Constitution, art I, sec. 27

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Pennsylvania Environmental Defense Foundation v. Commonwealth, 161 A.3d 911 (Pa. 2017)

- In this non-zoning case, the Pennsylvania Supreme Court overturned the long-standing test enunciated in *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973) and held that Pennsylvania's Environmental Rights Amendment ("ERA") itself establishes a self-executing public trust responsibility superior to Pennsylvania statutory provisions.
- Under *Payne v. Kassab*, Pennsylvania courts examined ERA claims on the basis of whether or not the state actor complied with applicable statutory provisions. In *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013) called that into question, but did not overturn *Payne v. Kassab.*
- For a time after *Robinson Twp.*, the Commonwealth Court continued to apply the *Payne v. Kassab* test that required an ERA challenge to demonstrate a statutory violation. In this matter, the Pennsylvania Supreme Court overturned that decision, holding that the ERA itself establishes a self-executing public trust responsibility that can override Pennsylvania statutory requirements.

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Frederick v. Allegheny Twp. ZHB, 196 A.3d 677 (Commw. Ct. 2018)

- The Commonwealth Court affirmed the Court of Common Pleas and Township Zoning Board in denying a challenge to a zoning ordinance providing oil and gas development by right in all zoning districts.
- Commonwealth Court rejected the idea that the ERA required zoning restrictions on oil and gas development
  - Focus in *Robinson Twp.* cases was local expertise in developing zoning ordinances and the state's impermissible determination that oil and gas development belonged in all zoning districts; nothing precluded, the Court held, those local bodies from themselves determining that oil and gas extraction was appropriate for all districts.
- Court similarly rejected MPC and spot zoning arguments against permitting oil and gas exploration in all zoning districts.

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The Delaware Riverkeeper Network v. Sunoco Pipeline, L.P., 179 A.3d 670 (Commw. Ct. 2018)

- The Commonwealth Court affirmed a decision of the Court of Common Pleas dismissing an injunctive relief action that would have required pipeline construction to comply with local zoning districts.
- The Commonwealth Court determined that pipeline construction constitutes public utility action, and as a result the Public Utilities Commission ("PUC") had exclusive jurisdiction over pipeline construction, preempting local control.
- The Commonwealth Court noted that the PA Supreme Court has consistently upheld preemption in the public utility context, otherwise public utility network construction would be frustrated.
  - Court notes that preemption statutes for public utilities predated ERA by decades, without any indication that the amendment intended to affect that right.

Nutrient Management Act Preemption Provision 3 Pa. C.S. § 519

- **(a) General.--**This chapter and its provisions are of Statewide concern and occupy the whole field of regulation regarding nutrient management and odor management, to the exclusion of all local regulations.
- **(b) Nutrient management.--**No ordinance or regulation of any political subdivision or home rule municipality may prohibit or in any way regulate practices related to the storage, handling or land application of animal manure or nutrients or to the construction, location or operation of facilities used for storage of animal manure or nutrients or practices otherwise regulated by this chapter if the municipal ordinance or regulation is in conflict with this chapter and the regulations or guidelines promulgated under it.
- **(c) Odor management.--**No ordinance or regulation of a political subdivision or home rule municipality may regulate the management of odors generated from animal housing or manure management facilities regulated by this chapter if the municipal ordinance or regulation is in conflict with this chapter and the regulations or guidelines promulgated under it.
- **(d) Stricter requirements.--**Nothing in this chapter shall prevent a political subdivision or home rule municipality from adopting and enforcing ordinances or regulations which are consistent with and no more stringent than the requirements of this chapter and the regulations or guidelines promulgated under this chapter. No penalty shall be assessed under any such local ordinance or regulation under this subsection for any violation for which a penalty has been assessed under this chapter

Berner v. Montour Twp. ZHB, 176 A.3d 1058 (Commw. Ct. 2018)

- The Commonwealth Court reversed a decision of the zoning hearing board granting approval of a swine nursery and held that the Nutrient Management Act did not preempt local zoning ordinances of certain farms.
- The Commonwealth Court agreed that the Nutrient Management Act did preempt the local zoning ordinances of farms, provided they were of a certain size and type.
- In the instant application, the Commonwealth Court determined that the specific preemption language in the Nutrient Management Act did not apply to swine nurseries as small as the one proposed; accordingly, local zoning regulations still applied.

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LAND DEVELOPMENT CASES
AND PROCEDURAL ISSUES

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Appeal of Azoulay, 194 A.3d 241 (Commw. Ct. 2018)

- The Commonwealth Court held that failure to timely appeal each decision of a lower body can result in waiver of one or more issues.
- City Zoning Administrator approved a subdivision of one lot in a watershed overlay district, and then separate zoning permits for each of the two lots.
- Objector only filed appeal of the zoning permit for the first lot.
- The Commonwealth Court held that Objector's failure to appeal the second zoning permit resulted in waiver of any issues related to that permit.

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Lake MacLeod Homeowner's Assoc. v. Pine Twp., 2018 WL 1247587 (Commw. Ct. 2018)

- The Commonwealth Court held that a municipality cannot waive requirements of the SALDO without meeting certain requirements.
- Developer sought and received waivers related to:
  - A zoning ordinance requirement forbidding construction on slopes in excess of 40%; and
  - Certain private street requirements in the SALDO
- Township granted those waivers but did not include specific references as to why the waivers were necessary to prevent undue hardship.
- The Commonwealth Court held that, failing to specifically explain need for waivers rendered such waivers improper.

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Cogan House Twp. v. Lenhart, 197 A.3d 1264 (Commw. Ct. 2018)

- The Commonwealth Court reversed a decision of the Court of Common Pleas related to a violations of the Stormwater Management Act.
- Developer upgraded an old post-road running through Landowners' property without certain approvals.
- Landowners brought an action for violation of the Act.
- Court of Common Pleas determined that because the road had the same area footprint before and after the work, no violation occurred.
- The Commonwealth Court reversed, noting that because the upgrades (here, go from gravel to stone milling) could affect the movement of stormwater, compliance with the Act was necessary.

Sugar Grove Twp. v. Byler, 191 A.3d 84 (Commw. Ct. 2018)

- The Commonwealth Court reversed a Court of Common Pleas decision in a code enforcement situation.
- Township cited landowner for various code violations related to the presence of privies (outhouses) and other sewage facilities.
- Township rejected contentions that Landowners' adherence to Old Order Amish principles could affect code enforcement.
- The Commonwealth Court reversed on the specific ground that the free exercise analysis was conclusory and lacked sufficient analysis; vacating the decision for further consideration.

Kalmeyer v. Penn Hills, 197 A.3d 1275 (Commw. Ct. 2018)

- The Commonwealth Court vacated a decision of the Court of Common Pleas related to lack of jurisdiction.
- In 1994, Landowner and Municipality settled a dispute (filed in 1988) related to sewage fees and entered into a settlement agreement, but did not incorporate that agreement into a consent decree or other court order. The court then administratively closed the matter.
- In 2012, Landowner filed a petition, under the old dispute number, seeking to enforce the terms of the settlement agreement.
- The Commonwealth Court determined that the court lacked jurisdiction: unless a settlement agreement is incorporated into a consent decree or other court order, a court has no jurisdiction to review a petition to enforce a settlement in a discontinued matter.
- Party would have to file a new matter for breach of settlement agreement.

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Giuliani v. Springfield Twp., 726 Fed. Appx. 118 (3d Cir. 2018)

- The U.S. Court of Appeals for the Third Circuit affirmed the dismissal of a 1983 complaint related to code-enforcement actions by a township.
- Landowner filed a civil rights action alleging a decades-long vendetta of code-enforcement against his family's five-acre industrial property.
  - Landowner noted that a Township supervisor, prior to election, had been a tenant on the property with whom Landowner had a contentious relationship.
- The Third Circuit affirmed the dismissal of the matter. It noted that federal courts are not to become "super zoning tribunals." It further noted that Landowner had failed to appeal many of the decisions when he had a right to do so, and had failed to allege systemic bias in the Pennsylvania judicial system.

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SPECIFIC ZONING MATTERS

Markwest Liberty v. Cecil Twp. ZHB, 184 A.3d 1048 (Commw. Ct. 2018)

- The Commonwealth Court partially affirmed the Court of Common Pleas related to a special exception approval with certain conditions.
- Applicant appealed the approval of its natural gas compressor station where the approval required that Applicant meet certain additional standards not found in the zoning code.
  - In a prior portion of the application proceedings, Applicant was willing to meet these conditions. However, after a successful previous appeal to the Commonwealth Court, applicant was no longer willing to accept all of the conditions.
- The Commonwealth Court agreed with Applicant. It held that, for a conditional to be a reasonable addition to special exception approval, it must relate to a standard in the ordinance and be supported by evidence.
- Further the Commonwealth Court rejected the notion that previous agreeability to a condition, alone, could support the imposition of a condition.

Monroe Land Investments v. ZBA, 182 A.3d 1 (Commw. Ct. 2018)

- The Commonwealth Court affirmed the Court of Common Pleas in reversing the denial of a special exception for a coffee shop.
- Applicant proposed to build a take-out coffee shop and sought a special exception to do so.
- Objectors presented lay testimony related to traffic concerns and teenage loitering associated with coffee shops.
- The Commonwealth Court held that lay testimony regarding generalized traffic concerns cannot rebut an application that meets all of the requirements for a special exception.

Fowler v. City of Bethlehem ZHB, 187 A.3d 287 (Commw. Ct. 2018)

- The Commonwealth Court reversed a decision of the Court of Common Pleas affirming a zoning decision granting a use variance.
- Applicant owned a large, amalgamated, historic lot in a residential district that included nonconforming retail space and a conforming single-family residence.
- Applicant sought to redevelop the single-family residence into retail space, and argued that the historic, nonconforming and mixed-use status of the property provided requisite hardship. At the same time, Applicant admitted that it could redevelop the site in conformity with the code.
- Commonwealth Court held that Applicant failed to raise the requisite hardship, particularly where Applicant admitted it could be redeveloped in conformity with code.
- Commonwealth Court further rejected the idea that historic nature of buildings could justify variance.

Liberties Loft LLC v. ZBA, 182 A.3d 513 (Pa. Commw. Ct. 2018)

- The Commonwealth Court affirmed a decision of the Court of Common Pleas granting a use variance.
- Applicant sought a use variance to construct multi-family housing in an Industrial-Commercial Zoning District.
- To show hardship, Applicant presented testimony of real estate expert who testified that due to changing neighborhood circumstances and the nature of the building, the property was worthless as an Industrial or Commercial site.
- The Commonwealth Court held that a zoning board can rely on testimony it finds credible and accordingly, the zoning board could rely on such testimony in granting a use variance.

Gorsline v. Bd. of Suprs., 186 A.3d 375 (Pa. 2018)

- The Pennsylvania Supreme Court reversed the Commonwealth Court in affirming the zoning board's approval of a hydraulic fracturing well.
- Applicant argued that, pursuant to a zoning ordinance's savings clause, a well could be approved in a residential agricultural district as substantially similar to a "public service facility."
- The Commonwealth Court approved of this reasoning, citing its earlier decision in *Markwest Liberty v. Cecil Twp.* 102 A.3d 549 (Pa. Commw. Ct. 2014) where a natural gas compressor station was held to be substantially similar to an "essential service."
- The Pennsylvania Supreme Court reversed, but did not overrule *Markwest Liberty*. Instead, it parsed the language of the zoning ordinance and determined that a well, as opposed to a compressor station, did not constitute a substantially similar use *in that zoning ordinance.*

The Airbnb Cases

- In *Shvek v. ZHB of Stroud Twp.*, 154 A.3d 408 (Pa. Commw. Ct. 2017) and *Slice of Life, LLC v. Hamilton Twp. ZHB*, 164 A.3d 633 (Pa. Commw. Ct. 2017) Commonwealth Court held that the following local zoning ordinance language permitted short-term (Airbnb) rentals were permitted as of right in residential districts:
  - "a detached building designed for *or* occupied exclusively by one family, except for a mobile home." (emphasis supplied on disjunctive or)
- The Court parsed the language of the specific, local ordinance.

The Airbnb Cases (continued)

- In *Kinter v. ZHB of Smithfield Twp.*, 2019 WL 178486 (Pa. Commw. Ct. 2019), the Commonwealth Court determined that the following language did ***not*** permit short-term rentals as of right:
  - "As many as six (6) persons living together as a single, permanent and stable nonprofit housekeeping unit, using all rooms in the dwelling and housekeeping facilities in common and having such meals as they may eat at home generally prepared and eaten together with the sharing of food, rent, utilities or other household expenses."
- Local ordinance language matters!