
**An Ecological and Physical Investigation of Pittsburgh Hillside
LEGAL REPORT to the City of Pittsburgh Hillside Committee**

Land-Use Controls for Hillside Preservation in the City of Pittsburgh

Final Report
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**LAND-USE CONTROLS FOR HILLSIDE PRESERVATION
IN THE CITY OF PITTSBURGH**

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1. Introduction.

Although it is a Pennsylvania Home Rule Municipality, the City of Pittsburgh (the City) has no home rule power to engage in land-use regulation. The Home Rule Charter and Optional Plans Law specifically limits the power of home rule municipalities to engage in land-use regulation to those granted by the Municipality's Planning Code of 1968 or other enabling legislation.¹ Since the Municipalities Planning Code (MPC) specifically does not apply to cities of the second class² (Pittsburgh at the time of adoption of its home rule charter), Pennsylvania courts have recognized that the City's authority to engage in zoning and other land-use regulation must be found in its original enabling legislation and any subsequent statutes applying to second class cities in particular or to municipalities in general and not in the MPC.³

The City of Pittsburgh zoning enabling legislation is Act No. 69 of 1927, as amended.⁴ Subdivision control enabling legislation is found in sections 9 through 12 of another 1927 Act,⁵ authority for the adoption of an official map, in sections 5 through 8 and 14 through 20 to of that same Act.⁶ The adoption of any of these land-use controls is discretionary with the City.

Certain state statutes impose mandatory land-use regulation on all municipalities in Pennsylvania. These include the Flood Plain Management Act of 1978⁷ and the Storm Water Management Act of 1978.⁸

2. Pittsburgh's Zoning Authority in General.

The authority to adopt and revise zoning regulations is lodged in the City Council, with advisory or recommendatory authority in the City Planning Commission. Land use control ordinances are an exercise of the police power entrusted to the City under the enabling legislation and the City's Home Rule Charter. These ordinances are presumed valid and any challenger must carry a heavy burden to establish that they are not.⁹

Essentially, there are two bases on which one may challenge the validity of a police power regulation:

1. The regulation fails to respect the due process rights of property owners in that it is not substantially related to the protection of any legitimate public purpose or is arbitrary, capricious, or an abuse of the City's legislative authority;
2. The regulation constitutes a "regulatory taking" of the owner's property without compensating the owner for that "taking."

A. Legitimate Police Power Purposes.

A land use regulation is valid when it promotes legitimate police power purposes — protection of the public health, safety, morals, or general welfare. Its provisions must be substantially related to the purpose it seeks to serve. The Pennsylvania Supreme Court has explained the proper approach to reviewing a land use regulation as follows:

" . . . Pennsylvania courts use a substantive due process analysis which requires a reviewing court to balance the public interest served by the zoning ordinance against the confiscatory or exclusionary impact of regulation on individual rights. The party challenging the constitutionality of certain zoning provisions must establish that they are arbitrary, unreasonable and unrelated to the public health, safety, morals and general welfare. Where their validity is debatable, the legislature's judgment must control."¹⁰

The Pennsylvania courts have attempted to maintain a sensitive balance between the need of the public to adopt regulations for public benefit and the right of private property owners to make reasonable use of their property. The presumption in favor of the power to adopt particular regulations is not easily overcome. However, the municipality must act in a manner which does not sacrifice the constitutionally protected rights of its citizens:

"Property owners have a constitutionally protected right to enjoy their property. That right, however, may be reasonably limited by zoning ordinances that are enacted by municipalities pursuant to their police power, i.e., governmental action taken to protect or preserve the public health, safety, morality, and welfare. Where there is a particular public health, safety, morality, or welfare interest in a community, the municipality may utilize zoning measures that are substantially related to the protection and preservation of such an interest."¹¹

Whether a regulation serves a legitimate police power interest involves a balancing of the interest to be served and the rights of the landowner to make reasonable use of its property. "A

conclusion that an ordinance is valid necessitates a determination that the public purpose served [by the ordinance] adequately outweighs the landowner's right to do as he sees fit with his property, so as to satisfy the requirements of due process.”¹²

A regulation is arbitrary or capricious where it does not substantially advance a legitimate police power objective or treats similar landowners differently with no reasonable basis for that difference. An example of a regulation that is not substantially related to a legitimate police power objective is one whose purpose or result is to exclude lawful uses of land from the entire municipality.¹³

Therefore, zoning regulations must be designed to promote and protect the purposes of zoning as set forth in the City's enabling legislation. These are:

“Such regulations shall be made in accordance with a comprehensive plan, and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the topography and character of the district, with its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city.”¹⁴

These several purposes readily encompass regulations to protect and preserve hillsides or steeply sloped land within the City and hillsides views from locations within the City. For example, hillside regulations can “secure safety from fire, panic and other dangers.” Development on hillsides, especially steep slopes with unstable soils, can increase the danger of landslides. Unrestricted development is likely to increase the quantity of stormwater runoff from the developed site, threatening neighboring public and private properties by changing the natural slope of the land, removing existing vegetative cover, and adding impervious surfaces. Removing vegetative cover, particularly trees, can adversely affect air quality as trees serve as filters of fine particulates and reduce the amount of free carbon in the atmosphere.

By protecting those distinctive characteristics that define the Pittsburgh cityscape and city neighborhoods, hillside zoning regulations “promote health and the general welfare.” What evidence there is suggests strongly that property values are enhanced by the availability of public and private open spaces.¹⁵ One of the essential purposes of zoning from its earliest days has been the protection of private property values. These regulations can also serve to prevent or minimize erosion that often follows development on steeply sloped land and encourage soil stabilization. The Ecological Report on Pittsburgh's Hillsides developed by The STUDIO for Creative Inquiry has produced tools that permit identification of steeply sloped parcels with unstable soils and other physical conditions that argue for or against development of specific parcels based on the presence or absence of ecological hazards and other characteristics.¹⁶

Hillsides can be particularly appropriate places to “prevent the overcrowding of land” and “avoid undue concentration of population.” Increased density of development requires more intensive use of the land. As density increases, so do the public safety risks created by landslides on unstable soils, unconfined stormwater runoff, with concomitant downhill flooding, earth

movement, and erosion. Public health and safety concerns from increased development on steep slopes also include the ability to provide such public services as police, fire, and ambulance service, water and sewer service, snow removal on public streets and steps, street and utility maintenance, refuse collection, and public transportation. Providing adequate public services and infrastructure becomes more difficult as development density increases on steeper slopes. By limiting population on steeply sloped areas of the City to prevent overcrowding of the land, the City can reduce the public and private risks that attend development in those areas.

Existing vegetation, particularly trees, have been shown to contribute to improved air quality in a variety of ways.¹⁷ Regulations addressing the need to maintain or restore trees and other vegetative ground cover on steeply sloped lands will serve the enabling legislation's zoning purpose of "provid[ing] adequate light and air."

Limiting the density of development on steeply sloped areas aids "the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements" in a variety of ways. Some of these have already been described in this Report; others are described in the Farber Report and the Perkins Eastman Report.¹⁸ By limiting the removal of protective ground cover and the creation of impervious surfaces, requiring control of surface water runoff from new development, limiting the location of new streets and other public utilities, and similar requirements, the City's hillside zoning regulations directly address the enabling legislation's goal of "the adequate provision of transportation, water, sewerage, schools, parks and other public requirements." As mentioned, the cost of installing and maintaining public infrastructure – streets, water and sewer lines – on steeply sloped land is believed to be more expensive than similar infrastructure on flatter land, as is the provision of public services – police, fire, ambulance, snow removal, refuse collection, public transportation. These are among the "other public requirements" whose "adequate provision" are proper bases for zoning regulations.

The same section of the enabling legislation specifically requires that zoning regulations "be made with reasonable consideration, among other things, to the topography and character of the district, with its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city."¹⁹ The Perkins Eastman PHYSICAL REPORT demonstrates that there is a small number of development patterns or prototypes on steeply sloped land that describe the texture and character of Pittsburgh's hillsides. Along with its river (and the few remaining major stream) valleys, the hillsides themselves are the essential determinant of Pittsburgh's physical and social character. Pittsburgh's hills define many aspects of its essential spatial and cultural character. They serve as the edges or boundaries of neighborhoods and as defining visual elements from many vantage points within the City. Protection and maintenance of those elements furthers legitimate public interests explicitly recognized in the enabling legislation. In other words, "topography and character" of zoning districts in the City are inextricably linked together. The enabling legislation invites regulations that respect these distinct prototype characteristics and are designed to preserve them.

A regulation may be found to be arbitrary where it results in different treatment of similarly situated properties without providing a reasonable basis for that difference in treatment.²⁰ The very nature of a significant hillside slope suggests the reasons for treating the sloping land here differently from flat land. While it may be difficult to see a difference in the

carrying capacity of two neighboring parcels at the extreme edges of sloped and flat land, the City's determination of specific boundaries where made in good faith and not obviously discriminatory or otherwise unreasonable will be upheld.²¹ Our courts do not require mathematical precision in the location of zoning district boundaries; what is required is a reasonable, good faith effort to determine where one district should end and another begin.

B. Regulatory Takings.

Even where a zoning or other police power regulation satisfies the basic requirements of substantive due process (considerations of essential fairness), it may be held unenforceable as a "regulatory taking" in certain rare instances. Although developers and landowners often challenge regulations on their face as "regulatory takings," these facial challenges are almost always unsuccessful. They are unsuccessful because the facts before the court do not demonstrate the impact of the regulation on a specific parcel of land. Without this information, the presumption of validity that attaches to police power regulations swings the scales of judgment in favor of the government.

Successful "regulatory takings" challenges, relatively rare as they are, are those that demonstrate how the regulations, when applied to a specific parcel of land, are so restrictive as to leave the owner with no reasonable economic use of its land. Here the court is able to weigh the impact of the regulation on a specific parcel of land. Sometimes, this impact will be so severe as to overcome the presumption of validity and swing the balance in favor of the property owner.

The Pennsylvania "regulatory taking" analysis parallels that of the United States Supreme Court, so that the Pennsylvania and federal tests are essentially the same.²² The regulation is judged by standards of substantive due process or essential fairness. A regulation works a "taking" only if it does not bear a substantial relationship to the legitimate police power purposes or it deprives the property owner of all reasonable economic uses of its property. The regulation is presumed valid. The property owner bears the heavy burden of proving that it is not. As the Commonwealth Court has observed: "An ordinance which promotes the public health, safety, morals, or general welfare of the community and is substantially related to the purpose which it purports to serve substantially advances a legitimate state interest"²³

Even though the regulation meets the first prong of this test, it still may be a "taking" as applied to the owner's property if the owner is not left with some reasonable economic use of its property.

There can be several steps to a "regulatory takings" analysis in Pennsylvania, once the regulation has been found to bear a substantial relationship to a legitimate police power objective. First, the court must examine the regulation's effect on the value of the property as regulated. If that effect prevents the owner from making any economic use of the land, the regulation works a "taking" as a matter of law, provided the owner could have made the prohibited use of its property without the regulation. This type of challenge often is called a "*Lucas* challenge" after the United States Supreme Court decision in which it was applied.²⁴ Successful *Lucas* challenges are extremely rare, since most land use regulations limit what an owner may do with its property, but leave the owner with some available economic use. Where a hillside protection zone limits the density of development or the removal of vegetation in order

to protect against landslides or uncontrolled surface water runoff or to preserve the character of the hillside, a *Lucas* challenge should not pose a significant threat to the regulation as long as the owner is still able to make some use of the property.

At the extreme, even if the owner is left with no developmental use, the regulation may survive a *Lucas* challenge if the owner's development plans would have created a public nuisance, as by exacerbating the risk of landslides or uncontrolled surface water runoff damaging neighboring land or public facilities. The *Lucas* decision, itself, recognized that a landowner does not have a constitutional right to use its land in a way that creates a public nuisance.²⁵

Once it has been determined that the regulation does not deny the owner all economic use of its property, the court will look to see if the regulation unfairly deprives the owner of economic value by applying what the Pennsylvania courts term "traditional takings analysis."²⁶ Here, three factors, also often called the "*Penn Central* factors,"²⁷ are evaluated to determine whether the regulation amounts to a "regulatory taking."

First, the court examines the character of the regulation to determine if it is "invasive" or "regulatory" in nature. An "invasive" regulation is one that requires the owner to admit others to its land without that owner's voluntary consent. A property owner's right to exclude is one of the most fundamental rights of ownership. A regulation that prevents the owner from excluding others is unconstitutional as a matter of law.²⁸ The economic impact of this regulation on the owner is irrelevant, it is the denial of the right to exclude that works a taking.

If the regulation is not "invasive," the court next turns to the economic impact of the regulation on the owner's property rights. Most land use regulations affect the value of land and many reduce the value from what it might be without the regulation. This reduction in value, by itself, is not a "taking." A property owner is not entitled to make the highest and best use of its land; it is entitled to make an economically reasonable use of its land.²⁹ If the regulation does not allow the owner some reasonable economic use, measured by the owner's "reasonable investment backed expectations," it will be regarded as a "taking."

It is important to note that, where the regulation amounts to a "regulatory taking" of an owner's property in Pennsylvania, that owner is given a choice of remedies. The owner may seek compensation for the value of the property that has been "taken" under the Pennsylvania Eminent Domain Code. Alternatively, it may ask the court to hold that the regulation, as applied to the owner's property, is invalid. If the regulation is found to be invalid as applied, the owner may proceed to develop its property without regard to the restrictions of that regulation. A judicial determination that the regulation is invalid as applied to one owner's property is not conclusive of its validity as applied to another owner's property or other property of the same owner. Each decision must stand on its own unique facts.

C. Conclusions.

A zoning regulation that is intended to preserve the character of the City by protecting its steep hillsides from the dangers of over-development or to preserve the City's character should be found to serve a legitimate police power purpose, particularly when reference is had to the purposes of zoning as set forth in the City's enabling legislation. As long as the owner of the

zoned parcel is allowed some reasonable use of its property, the regulation should also satisfy the “regulatory takings” test.

3. Jurisprudence — The Courts and Hillside Protection.

A. In Pennsylvania.

Although the Pennsylvania courts have not been asked to review many zoning ordinances or other police power regulations intended to protect the integrity of hillsides or steep slopes, the Commonwealth Court has upheld two approaches to hillside protection, one in the form of a zoning ordinance and the other as a separate ordinance regulating the commercial removal of trees from steep hillsides. Both techniques survived “regulatory takings” challenges.

In *Jones v. Zoning Hearing Board of the Town of McCandless*,³⁰ the Town amended its zoning ordinance to create a new D-Development District that, among other things, established standards for the preservation of steep slopes, forests and woodlands, and streams in the District. Under the ordinance, increasingly smaller lot areas could be developed or stripped of vegetation as the lot’s slope increased from 12 to 15%, from 15 to 25%, and above 25%.³¹ The ordinance also limited the area of woodlands that could be cleared and developed, requiring the remaining area to be maintained as permanent open space. The required amount of open space varied depending on whether the lot contained “young woodlands,” “woodlands,” and “mature woodlands.”³²

Jones, a landowner in the D District, challenged the validity of the ordinance under the MPC. The trial court upheld the ordinance. On further appeal to the Commonwealth Court, Jones also challenged the ordinance as a “regulatory taking.”

Following the Pennsylvania analysis already described, the court first looked to see if the ordinance substantially advanced legitimate state interests or was unreasonable, arbitrary, or capricious. The landowner bore the burden of rebutting the presumption of constitutional validity that attaches to zoning ordinance. He asserted that the definitions and related restrictions governing steep slopes and woodlands were arbitrary and unreasonable because they lacked any scientific or engineering basis. The rezoning resulted from an architectural firm’s study of the area. The firm’s recommendations formed the basis of the new zoning district regulations. Although the court’s opinion does not indicate the scientific or engineering basis for the particular restrictions adopted, it concludes this part of its analysis by saying: “Upon review of the record and the regulations attacked, we conclude that the challenged portions of the Ordinance are not arbitrary or unreasonable, but rather substantially related to the purpose which they purport to serve.”³³

The court then proceeded to the second step of the “regulatory takings” analysis, the economic impact of the regulation on Jones’ land. Jones asserted that the ordinance worked a “taking” of his property because it did not permit him to build on 70% of his land. However, he conceded that he could still develop the remaining 30% for 89 residential units or 150,000 square feet of commercial space. The Town’s expert witness testified that even more intensive development for either of these uses was possible. Without further discussion, the court upheld the ordinance, saying only: “It is clear from the evidence presented that Landowner has not been

deprived of the viable use of his property.” Like so many unsuccessful “regulatory takings” challenges, Mr. Jones was unsuccessful because he could not show that the regulations at issue deprived him of the reasonable economic use of his land.

The second case, *Taylor v. Harmony Township Board of Commissioners*,³⁴ involved an ordinance (not a zoning ordinance) prohibiting timber harvesting “in areas determined by the [Township] Engineer, with reference to published or commonly accepted guidelines, to be landslide-prone or flood-prone.”³⁵ Taylor was refused a permit to log his land after the Township Engineer had determined that the area in question was “landslide-prone.” Taylor then requested a variance, as provided for in the ordinance, and was again denied, following a hearing before the Township Board of Commissioners. The Commissioners found, based on geologic reports and other evidence submitted at the hearing, that the area was prone to slide and that timber harvesting would increase the risk of landslides.

Taylor’s first challenged the power of the Township to regulate timbering, asserting (1) that the Township’s enabling legislation did not provide this power and (2) the MPC prohibited unreasonable restrictions on timber harvesting. The court found numerous provisions in the enabling legislation authorizing the adoption of ordinances to protect public safety and welfare. The court rejected this attack, explaining:

“Although police powers are not without limitation, Pennsylvania courts have recognized that municipalities have the power to enact legislation aimed at protecting the health, safety, and welfare of citizens under the general welfare clauses contained in municipal codes.”

“Turning now to [the ordinance], it is clear that the Township enacted that ordinance to prevent harm to the public welfare caused by landslides and stormwater runoff. Keeping in mind that [the ordinance] enjoys presumptive validity, and judging by the plain language and necessary effect of [the ordinance], [the ordinance] is a valid exercise of the Township's power because it seeks to minimize floods, landslides, and dangerous stormwater runoff; it seeks to prevent damage to roads, damage to drains, damage to public utilities, damage to watercourses, fire hazards, and reduction in property value; and it seeks to enhance the natural beauty and environment within the Harmony Township. All these aims fall squarely within the general police power provisions of the Code cited above.”³⁶

Because the ordinance lacked any of the “exclusive hallmarks of zoning,” it was not limited by the provisions of the MPC. “[W]e conclude that [the ordinance] is not a zoning ordinance, does not deal with subdivision of Taylor's land, and does not deal with residential development; instead, the scope of Ordinance 335 is to regulate logging and timber harvesting that may jeopardize the integrity of the land in flood-prone or landslide-prone areas.”

Finally, Taylor asserted that the ordinance was invalid as a “regulatory taking” because it denied him the economically viable use of his land. The court noted that it had already decided the first step of this challenge when it found the ordinance substantially advanced legitimate state interests. Since Taylor provided no evidence as to the economic impact of the ordinance on his land if timber harvesting is not allowed, there was insufficient evidence to overcome the presumption of validity.

A similar ordinance withstood validity or "regulatory takings" challenge in the Allegheny County Court of Common Pleas.³⁷ Like the Harmony Township ordinance, Shaler Township's Logging Ordinance prohibits logging on slopes of 25% or greater; it further regulates logging where permitted by requiring mulching and reforestation. The plaintiff charged that the ordinance was so unreasonable as applied to the land in question as to be invalid. The court, affirming the Zoning Hearing Board's denial of a variance, found that the plaintiff had not proven that the regulations rendered the land valueless. In other words, the plaintiff, like the *Jones* and *Harmony* plaintiffs, failed to meet the burden of proof necessary to establish a "regulatory taking."

In the *Jones* case, the Commonwealth Court demonstrated its unwillingness to engage in any lengthy review of the adequacy of scientific and engineering standards for steep slope and woodland preservation where the ordinance was based on studies and expert advice and the landowner did not demonstrate the unreasonableness of the regulations. It was sufficient that the municipality had carefully considered the regulations and the public purposes they served. In *Taylor*, the court recognized the validity of limiting timber harvesting, and presumably the removal of other vegetation that contributes to slope stabilization, where removal would increase public hazards. The existence of evidence of the hazardous nature of the specific land played a more important role in upholding the denial of the permit because the ordinance was designed to protect against a specific peril — landslides. It became important to know if the land in question was susceptible to that peril.

B. Elsewhere.

Hillside or slope protection zoning is a relatively new zoning objective. There is almost no significant discussion in the legal literature. Hillside protection zoning ordinances have generally been upheld in the relatively few jurisdictions where they have been challenged on substantive due process grounds. A California intermediate appellate court upheld a zoning provision prohibiting development on slopes greater than 20% and within 500 feet of a major ridge.³⁸ Colorado has upheld an ordinance limiting development on certain slope areas where there were significant erosion and drainage problems.³⁹ Idaho has approved the application of zoning code and building code requirements to development on slopes of 15%.⁴⁰ Ohio has upheld the application of Cincinnati's Environmental Quality-Hillside District overlay zoning technique against charges of vagueness and a challenge to the City's authority to adopt overlay zones.⁴¹ Finally, Oregon has upheld implementation of a hillside development zoning ordinance against facial, procedural, and vagueness challenges.⁴²

At least one hillside preservation zoning regulation has been invalidated as a "regulatory taking." In *Corrigan v. City of Scottsdale*,⁴³ the City attempted to protect hillside or mountain land by creating a Hillside District, consisting of two parts, the Conservation Area and the Development Area. No buildings, structures, or impermeable surfaces were permitted in the Conservation Area, but "density credits," or transferable development rights, were allocated to lands in that Area which could be transferred to permit development in Development Area. *Corrigan* brought a "regulatory takings" challenge to the ordinance as it applied to lands she owned in the Conservation Area. Each court that reviewed the ordinance found that it substantially advanced a legitimate police power interest in protecting open space and, to that

extent, was a valid regulation. The Arizona Supreme Court, however, also found that ordinance worked a “taking” of Corrigan’s land because it denied her any economic use of that land. The availability of the development credits did not constitute just compensation for that taking under the Arizona Constitution, which requires compensation be made by the payment of money. As a result, the landowner was entitled to monetary compensation for this “taking.”

One lesson of *Corrigan* is that the municipality must not get too greedy in its efforts to restrict private property for public benefit. The property owner must be left with some reasonable economic use of its land if the regulation is to survive a “regulatory takings” challenge.⁴⁴ The existence of administrative relief from the strictures of the regulation by way of a variance, as in the case of zoning ordinances, can greatly reduce the risk of a successful “regulatory takings” challenge. The agency empowered to grant the variance can conduct the intensely factual inquiry required in “regulatory takings” cases and tailor relief that both protects the essential objectives of the regulation and the landowner’s right to make reasonable use of its property.

4. Aesthetics and Zoning in Pennsylvania.

It is exceedingly tempting to bottom many hillside preservation measures solely on aesthetic values. Heavily forested hillsides do appeal to most observers. Courts in many jurisdictions regard aesthetic considerations alone as a legitimate basis for police power measures.⁴⁵ Even in those jurisdictions, of course, a restriction which totally destroys all value of land to secure an aesthetic benefit to the community will be invalid.

Pennsylvania planners and lawyers, however, must be more cautious. The Pennsylvania courts have not looked with favor on regulations designed primarily to serve aesthetic values. Police power regulations must be “reasonable.” What is “reasonable” requires some degree of non-subjective verification in Pennsylvania jurisprudence. Our courts tend to view purely aesthetic judgments as subjective, personal judgments of the decision-maker, judgments whose reasonableness can not be tested by objective standards. Although language in some earlier zoning cases may suggest that aesthetic values alone can support zoning regulations,⁴⁶ more recent cases strongly state otherwise. As the Commonwealth Court recently observed, “We have stated many times that a ‘municipality may include aesthetic factors in the exercise of its zoning powers, but aesthetics alone cannot justify zoning decisions.’”⁴⁷

This is not to say that aesthetic considerations may not play an important role in zoning and other land-use regulations. The Commonwealth Court has also stated: “Our cases also make clear that a municipality may include consideration of aesthetic factors in the exercise of its zoning powers. We note, however, that our Supreme Court has held that aesthetics alone cannot justify zoning decisions. Our decisional line, consequently, links aesthetic factors with considerations of property value.”⁴⁸ Pennsylvania courts do recognize that property values are affected by the aesthetic qualities of the neighborhood.⁴⁹ Regulations that link aesthetic values to private property value are sustainable.

Thus, where aesthetic considerations support other legitimate police power objectives — “provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements” — or show “reasonable consideration,

among other things, to the topography and character of the district, with its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city” — they should be upheld. These aesthetic requirements are now not simply subjective judgments of one person or a small group of people, they are an important part of preserving those aspects of the City’s character that its enabling legislation directs it to protect.

5. Intergovernmental Zoning Conflicts.

Pennsylvania's courts have long held that land-use activities by some other governmental agencies are subject to land-use control authority of a municipality, while others are not. Examples of the latter include direct activities of the federal government⁵⁰ and of the Commonwealth itself. Problems can arise, however, where agencies of the Commonwealth seek to use land within the City for purposes not permitted in the particular zoning district.

A closely divided Pennsylvania Supreme Court initially set forth a general test to be applied in resolving inter-governmental disputes of this nature.⁵¹ Where the dispute is between two agencies of the Commonwealth, e.g., the City and another government agency, the conflict is to be resolved by determining the legislature’s intent as to which agency should prevail. Generally, the City's land-use regulations control unless the General Assembly has exempted the other agency from local control by granting it the power of eminent domain in locating its facilities or by clear statutory language showing the legislative intent to exempt it.

Subsequently, the court modified this principal significantly.⁵² The grant of eminent domain to another agency is no longer evidence of a legislative intent to allow that other agency to acquire and develop land for its governmental purposes without regard to local land-use regulation. Traditional principles of statutory interpretation apply to determine the legislature’s intent where that intent is not expressed in either body’s governing statutes.⁵³ As a result, state and local agencies are subject to a municipality’s land-use controls unless (1) the legislature specifically provided otherwise or (2) subjecting the other agency to local control would frustrate the state’s mandate to that agency. In the court’s view, this two step examination permits two co-equal instrumentalities of the Commonwealth to fulfill their missions with the least disruption of legislative intent.

Where the legislature has expressly stated that a state agency is subject to local zoning control, that intent will be given effect. For example, the enabling legislation of the Housing Authority of the City of Pittsburgh specifically requires that projects developed by the Authority comply with local zoning and other land-use controls.⁵⁴

The City's zoning enabling act provides further evidence of legislative intent that the City’s requirements pre-empt the less restrictive provisions of conflicting state statutes. Where certain provisions of the City’s zoning regulations – yard requirements, building height, open space requirements, or “other higher standards than are required in any other statute” – conflict with other statutes, the stricter provision – of the zoning ordinance or the statute – will control.⁵⁵ Other principles of statutory interpretation that may apply include (1) more recent statutes control over earlier statutes and (2) more specific statutes control over more general statutes.

In a 1998 decision, the Commonwealth Court addressed the need of the Pennsylvania Turnpike Commission to obtain local zoning approval for the expansion of a rest area on the

main line of the Pennsylvania Turnpike.⁵⁶ The Township sought to enjoin the Commission from completing the expansion until it had complied with the Township's zoning regulations. The Commission argued that it was exempt from local land-use controls by virtue of that part of its enabling legislation which reads: "The exercise by the commission of the powers conferred by this act in the construction, operation and maintenance of the turnpikes and in effecting toll road conversions shall be deemed and held to be an essential governmental function of the Commonwealth."⁵⁷ To subject this "essential governmental function of the Commonwealth" to local regulation would frustrate the legislature's purpose in creating the Turnpike Commission.

The court rejected the Commission's argument, saying:

"In the present case the Commission's proceeding on the assumption, never tested in court, that it could ignore such local police power enactments has led to the frustration of the Township's zoning scheme and to injury sufficient to merit the imposition of a preliminary injunction. Questions of the precise scope and design and impact of the project, which could have been addressed in proceedings pursuant to the land-use ordinances, were not addressed. The Commission's enabling legislation does not expressly confer upon it the power to disregard local land-use regulation, regardless of the consequences, and the Court is convinced that the legislature did not intend for the Commission's authority to be pre-eminent over that of the Township here."⁵⁸

In a later decision in this case, the court entered partial summary judgment against the Turnpike Commission, holding that it was subject to the Township's local land-use controls even though the expansion project may have been motivated by health and safety concerns.⁵⁹

This case involved the expansion of an existing rest area along the Turnpike and not the location of the route of the Turnpike. While the logic of the case may suggest that local land-use regulations apply equally to the location of state highways and Turnpike Commission routes, it seems unlikely that our courts will allow local municipalities to frustrate state agencies' route choices all together. It is more likely that the Commission and PennDOT will be required to comply with local land-use regulations for facilities ancillary to the highway, and to highway design requirements imposed by local ordinances when the municipality imposes those same requirements on other road development decisions, including those made by the municipality.

This judicial reluctance to interfere with route selection is made an even more likely by the extensive process in which both the Turnpike Commission and PennDOT must follow in selecting highway routes where federal highway funding is involved. For example, PennDOT is required to conduct a public hearing on the acquisition of land for new or additional right-of-way that will be financed in any part by the federal Department of Transportation and to follow the hearing procedures of the Federal Government for federal-aid transportation programs.⁶⁰ The state statute sets forth 23 specific factors which the Department must consider before making a final determination as to the location of the highway. These factors include the effect of the location on "residential and neighborhood character and location;" "conservation including air, erosion, sedimentation, wildlife and general ecology of the area," "recreation and parks;" "aesthetics," "property values;" engineering, right-of-way and construction costs of the project and related facilities;" "maintenance and operating costs of the project and related facilities." Courts will be reluctant to overturn decisions made after good faith consideration of all of these factors.

6. Other Hillside Protection Mechanisms — Streets and the City’s Official Street Map.

The City of Pittsburgh’s land-use control enabling legislation makes reference to a “major street plans,” “official street map,” and “street plats.” The “major street plan” is an element of the City’s master plan. The “official street map” serves an additional function. The Planning Commission is required to maintain copies of all approved subdivision plans and each street plat made by it, as adopted or modified by Council, as well as a plat showing the location of all public streets accepted by Council. In addition, the Commission is to maintain a map or maps of all streets established by law or officially approved by the City. All of these plans and maps together constitute the “official street map” of the City.⁶¹

The City may not accept, open, improve, or use any street which either (1) does not otherwise have the legal status of a public street or (2) is not shown on the official master plan or on a street plat or the official map. No building may be erected on a lot unless “the street giving access to the [lot] ... shall have received the legal status of ... a public street ...” or is shown on the “official street map” or “or unless such tract, lot or parcel has been created or transferred in compliance with this act [subdivision regulations]”⁶² No cases were found to indicate whether the lot to be improved must, itself, front on a street, or whether the lot will qualify under this provision if it has legal access to a mapped street but no frontage on that street. It is likely that a court would conclude that the lot must have access to a public street, but need not front on that street. Under this view, a back lot that enjoys an access easement over an adjoining lot fronting on a public street would qualify as having the required “access” under this provision.

By statute, a municipality's power to accept an offer of dedication, in an approved subdivision plan or otherwise, expires 21 years after the offer was made.⁶³ The Pennsylvania Supreme Court has held that formal acceptance by ordinance or resolution is not sufficient to preserve the public's rights to use a dedicated street beyond this 21 year period.⁶⁴ The street must be “actually opened and used” as a public street within that time or the power of acceptance is lost. This interpretation requires the municipality to take some physical action indicating its intent to accept the offer of dedication within those 21 years. This may be by grading and paving the street; municipal maintaining the street, as by paving, cleaning, snow removal, or similar activities; or by installing or allowing the installation of utility lines within the right-of-way. Acts that amount “opening” or “using” part of a street (e.g., 2 of the 5 blocks in the original dedication) will not preserve the public character of the unused part (the other 3 blocks).⁶⁵ Once a street dedication has been actually accepted and opened, the roadway will not revert to the abutting owners merely because the street has not been used for 21 years; proper and formal vacation is required.⁶⁶

Because the enabling legislation prohibits the improvement of property which does not have access from a public street, The Planning Commission may want to review the “Official Street Map to determine if offers of dedication in sensitive hillside areas have expired and the paper street is no longer properly included on the Map. The vacation of existing paper streets in development sensitive areas that have been accepted would serve to reduce pressure for undesirable development. After vacation, new development would, most likely, be subject to subdivision controls that could assure adequate street access compatible with the nature of the area.

Expiration of the City's power to accept an offer of dedication is not a perfect remedy. Those property owners who purchased lots in the subdivision after the offer was made and their

successors have an implied private easement in these streets.⁶⁷ They may continue to use the easements without legal objection from their neighbors.

NOTES

¹ 53 P.S. § 2961(a)(10) (“(a) POWERS GRANTED BY STATUTE. – With respect to the following subjects, the home rule charter shall not give any power or authority to the municipality contrary to, or in limitation or enlargement of, powers granted by statutes which are applicable to a class or classes of municipalities: . . . (10) Municipal planning under the act of July 31, 1968 (P.L. 805, No. 247), known as the Pennsylvania Municipalities Planning Code.”).

² See, e.g., 53 P.S. §§10105 and 10107(5).

³ *Klein v. Council of Pittsburgh*, 643 A.2d 1107, 1109-110 (Pa. Cmwlth. Ct. 1994) (conditional use). See also *Vitti v. Zoning Board of Adjustment*, 710 A.2d 654, 657 n. 4 (Pa. Cmwlth. Ct. 1998) (variance criteria); *Pessolano v. Zoning Board of Adjustment*, 632 A.2d 1090, 1093 n. 3 (Pa. Cmwlth. 1993); *Nernberg v. City of Pittsburgh*, 620 A. 2d 692, 694 n.5 (Pa. Cmwlth. Ct. 1993) (standing to appeal grant of conditional use); *North Point Breeze Coalition v. City of Pittsburgh*, 60 Pa. Cmwlth. Ct. 298, 431 A.2d 398 (1981) (conditional use).

The Pennsylvania Supreme Court has occasionally evaluated zoning variances in Pittsburgh by MPC standards, but the result would not have changed had that court used the City’s zoning enabling act standards. See *Hertzberg v. Zoning Bd. of Adjustment*, 554 Pa. 249, 721 A.2d 43 (1998); *Allegheny West Civic Council v. Zoning Bd. of Adjustment*, 547 Pa. 163, 689 A.2d 225 (1997).

⁴ Act of March 31, 1927, as amended, 53 P.S. §§ 25501 to 25508.

⁵ Act of March 31, 1927, as amended, 53 P.S. §§ 22769 to 22773.

⁶ Act of May 13, 1927, as amended, 53 P.S. §§ 22769 to 22773 (Supp.).

⁷ 32 P.S. § 681 *et seq.*

⁸ 32 P.S. § 680.1 *et seq.*

⁹ See, e.g., *C&M Developers v. Bedminster Twp. Zoning Hearing Bd.*, 573 Pa. 2, 820 A.2d 143 (2001); *Jones v. Zoning Hearing Board of the Town of McCandless*, 134 Pa. Cmwlth. Ct. 435, 578 A.2d 1369 (1990) (upholding zoning ordinance provision preserving “sensitive natural resources such as woodlands, streams, and steep slopes” against regulatory takings challenge), citing *Boundary Drive Associates v. Shewsbury Twp. Board of Supervisors*, 507 Pa. 481, 491 A.2d 86 (1985) (upholding constitutional validity of agricultural preservation district as applied to owner’s property).

¹⁰ *Boundary Drive Associates v. Shewsbury Twp. Board of Supervisors*, 507 Pa. 481, 489, 491 A.2d 86, 90 (1985). See also *C&M Developers v. Bedminster Twp. Zoning Hearing Bd.*, 573 Pa. 2, 820 A.2d 143 (2001).

¹¹ *C&M Developers v. Bedminster Twp. Zoning Hearing Bd.*, 573 Pa. 2, 820 A.2d 143 (2001) (citations omitted).

¹² *Hopewell Twp. Bd. of Supervisors v. Golla*, 499 Pa. 246, 452 A.2d 1337 (Pa. 1982).

¹³ *National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1966).

¹⁴ 53 P.S. § 25053.

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- ¹⁵ See Stephen Farber, *Hillside Slopes and Valuation* (2004).
- ¹⁶ Timothy Collins, et al, *An Ecological and Physical Investigation of Pittsburgh Hillside* ECOLOGICAL REPORT to the Hillside Steering Committee (2004).
- ¹⁷ See Stephen Farber, *Hillside Slopes and Valuation* (2004).
- ¹⁸ Perkins Eastman, *An Ecological and Physical Investigation of Pittsburgh Hillside* PHYSICAL REPORT to the Hillside Steering Committee (2004).
- ¹⁹ 53 P.S. § 25053.
- ²⁰ See, e.g., *C&M Developers v. Bedminster Twp. Zoning Hearing Bd.*, 573 Pa. 2, 820 A.2d 143 (2001) *Hopewell Twp. Bd. of Supervisors v. Golla*, 499 Pa. 246, 452 A.2d 1337 (1982); *Surrick v. Zoning Hearing Bd. of Twp. of Upper Providence*, 476 Pa. 182, 382 A.2d 105 (1978).
- ²¹ See *DiSanto v. Lower Marion Twp.*, 410 PA. 331, 189 A.2d 135 (1963); *Best v. Zoning Bd. of Adj.*, 393 Pa. 106, 141 A.2d 606 (1958).
- ²² See, e.g., *Machipongo Land & Coal Co. v. Department of Env'tl Protection*, 569 Pa. 3, 799 A.2d 751 (2002); *United Artists' Theater Circuit v. City of Philadelphia*, 535 A.2d 370, 635 A.2d 612 (1993) ([T]his Court has continually turned to federal precedent for guidance in its 'takings' jurisprudence, and indeed has adopted the analysis used by the federal courts.)
- ²³ *Jones v. Zoning Hearing Board of the Town of McCandless*, 134 Pa. Cmwlth. Ct. 435, 578 A.2d 1369 (1990).
- ²⁴ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1001 (1992).
- ²⁵ *Lucas*, 505 U.S. at 1027-1029). For the comparable Pennsylvania constitutional view, see *Machipongo Land & Coal Co. v. DEP*, 569 Pa. 3, 34, 799 A.2d 751, 769 (2002) ("*Lucas* stands for the proposition that regulations that deprive an owner of 'all economically beneficial or productive use of land' are takings unless the use constitutes a public nuisance or are caused by the nature of the use and the owner could have expected that the government might prohibit it.>").
- ²⁶ See *Machipongo*, *supra*, n.18.
- ²⁷ This name comes from the case in which the factors were first enunciated, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).
- ²⁸ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 422, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982) (state statute granting cable company access to apartment building owner's land to install cable service without owner's consent held an unconstitutional "taking").
- ²⁹ *Miller & Sons Paving, Inc. v. Plumstead twp.*, 552 Pa. 652, 717 A.2d 483 (1998).
- ³⁰ 134 Pa. Cmwlth. Ct. 435, 578 A.2d 1369 (1990).
- ³¹ *Jones*, 134 Pa. Cmwlth. Ct. at 438 n.4, 578 A.2d at 1370 n.4.
- ³² *Jones*, 134 Pa. Cmwlth. Ct. at 438 n.5, 578 A.2d at 1370 n.5.
- ³³ *Jones*, 134 Pa. Cmwlth. Ct. at 440, 578 A.2d at 1371.
- ³⁴ 851 A.2d 1020 (Pa. Cmwlth. Ct. 2004).
- ³⁵ *Taylor*, 851 A.2d at 1020.

³⁶ *Taylor*, 851 A.2d at 1025.

³⁷ *Trumco, Inc. v. Zoning Hearing Board for Shaler Twp.*, 132 Pgh. Leg. J. 259 (All'y Co. 2004).

³⁸ *Northwood Homes, Inc. v. Town of Moraga*, 216 Cal. App. 3d 1197, 265 Cal. Rptr. 363 (Cal. Ct. of App. 1989).

³⁹ *Sellon v. Manitou Springs*, 745 P.2d 229 (Colo. 1987).

⁴⁰ *Ada County v. Fuhrman*, 91 P.3d 1134 (Id. 2004).

⁴¹ *Franchise Developers, Inc. v. Cincinnati*, 30 Ohio St. 3d 28, 505 N.E.2d 966 (Ohio 1987) (“Based on the foregoing analysis, we find that the overlay zoning scheme presented here constitutes a proper exercise of the city's zoning authority in its attempt to preserve and protect the character of certain neighborhoods that the city deems important, in order to promote the overall quality of life within the city's boundaries.”). *See also Approval of a Residence at 10 Guido St. v. Zoning Bd. of Appeals of Cincinnati*, 117 Ohio App. 3d 319, 690 N.E.2d 593 (Ohio Ct. App., 1996) (Issuance of zoning permit under Environmental Quality-Hillside District affirmed as development application met ordinance requirements; “The evidence showed that the building would be designed, colored and landscaped to blend in with the hillside and that it will actually help to support it. The proposed building would not detrimentally impair the public view or the majority of the private views.” 690 N.E.2d 596.)

⁴² *Rogue Valley Ass'n of Realtors v. City of Ashland*, 158 Ore. App. 1, 970 P.2d 685 (Or. Ct. App. 1999).

⁴³ 149 Ariz. 538, 720 P.2d 513 (1986).

⁴⁴ *See, e.g., Corrigan v. City of Scottsdale*, *supra*, n. 37 and accompanying text; *Burrows v. City of Keene*, 121 N.H. 590, 432 A.2d 15 (1981).

⁴⁵ *See* 2 Rathkopf's *The Law of Zoning and Planning* § 16:5 (2004 Electronic Edition; WestLaw).

⁴⁶ “If the legislature has the power to compel a property owner to submit to a forced sale for the purpose of creating an attractive community, it has the power to regulate his property for such objectives.

“Not only is the preservation of the attractive characteristics of a community a proper element of the general welfare, but also the preservation of property values is a legitimate consideration since ‘[Anything] that tends to destroy property values of the inhabitants of the ... [community] necessarily adversely affects the prosperity, and therefore the general welfare, of the entire ... [community].’ *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217, 222 (1955).

““We are satisfied that at long last conscientious municipal officials have been sufficiently empowered to adopt reasonable zoning measures designed towards preserving the wholesome and attractive characteristics of their communities and the values of taxpayers' properties.”

Best v. Zoning Board of Adj., 393 Pa. 106, 117, 141 A.2d 606, 612-13 (1958) (citations omitted).

⁴⁷ *Lombardozzi v. Millcreek Twp. Zoning Hearing Bd.*, 829 A.2d 779, 782 (Pa. Cmwlth. Ct., 2003) (citations omitted). *See also Norate Corporation, Inc. v. Zoning Board of Adjustment*, 417

Pa. 397, 207 A.2d 890 (1965); *Rogalski v. Upper Chichester Twp.*, 406 Pa. 550, 178 A.2d 712 (1962) (similar language).

⁴⁸ *White Advertising Metro, Inc. v. Zoning Hearing Board of Susquehanna Twp.*, 70 Pa. Cmwlth. Ct. 308, 320, 453 A.2d 29, 31 (1982).

⁴⁹ See *Berk v. Wilkinsburg Zoning Board*, 48 Pa. Cmwlth. Ct. 469, 410 A.2d 904 (1980) (landscaping requirements; “Aesthetics and property values are legitimate considerations in a township's exercise of its zoning power to promote the general welfare.”).

⁵⁰ E.g., *United States v. City of Chester*, 144 F.2d 415 (3d Cir. 1944).

⁵¹ *City of Pittsburgh v. Commonwealth*, 468 Pa. 174, 360 A.2d 607 (1976).

⁵² *Commonwealth v. Ogontz Area Neighbors Ass’n*, 505 Pa. 614, 483 A.2d 448 (1984); see also *Olon v. Commonwealth*, 534 Pa. 90, 626 A.2d 533 (1993) (legislative intent to pre-empt local zoning shown where legislature authorized acquisition of specific property for specific use that conflicted with existing zoning); *County of Venango v. Borough of Sugar Creek*, 534 Pa. 1, 626 A.2d 489 (1993) (county jail location subject to borough zoning ordinance); *Hazelton Area School Dist. v. Zoning Hearing Bd. of Hazle Twp.*, 566 Pa. 180, 778 A.2d 1205 (2001) (use of school baseball field by private business for summer baseball league unrelated to School District’s constitutional and statutory duties and subject to local zoning control); *Northampton Area Sch. Dist. v. E. Allen Twp. Bd. of Supervisors*, 824 A.2d 372 (Pa. Cmwlth. 2003) (school district subject to Twp. land use regulations).

⁵³ *Commonwealth v. Ogontz Area Neighbors Ass’n*, 505 Pa. 614, 633, 483 A.2d 448, 452 (1984). See also *Kee v. Pennsylvania Turnpike Commission*, 722 A.2d 1123, 1125-1126 (Pa. Cmwlth. Ct. 1998).

⁵⁴ 35 P.S. 1556.

⁵⁵ 53 P.S. § 25058.

⁵⁶ *Kee v. Pennsylvania Turnpike Commission*, 722 A.2d 1123 (Pa. Cmwlth. Ct. 1998).

⁵⁷ 36 P.S. § 651.6.

⁵⁸ *Kee*, 722 A.2d at 1127.

⁵⁹ *Kee v. Pennsylvania Turnpike Commission*, 743 A.2d 546 (Pa. Cmwlth. Ct. 1999). For another case in which the Pennsylvania Turnpike Commission applied for a variance from the Twp. zoning ordinance, see *Kennedy v. Upper Milford Zoning Hearing Bd.*, 779 A.2d 1257 (Pa. Cmwlth. Ct. 2001) (local zoning power not an issue).

⁶⁰ 71 P.S. § 512(b).

⁶¹ 53 P.S. § 22780.

⁶² 53 P.S. § 22775.

⁶³ 36 P.S. § 1961.

⁶⁴ *Appeal of Gaus*, 531 Pa. 133, 137, 611 A.2d 696, 698 (1992).

⁶⁵ *Appeal of Gaus*, 531 Pa. 133, 611 A.2d 696 (1992).

⁶⁶ See *Appeal of Gaus*, 572 A.2d 246 (Pa. Cmwlth. 1990)., *rev'd on other grounds*, 531 Pa. 133, 137, 611 A.2d 696, 698 (1992). As to vacation of streets, see 53 P.S. §§ 6501 to 6705.

⁶⁷ See e.g., *Estojak v. Mazsa*, 522 Pa. 353, 562 A.2d 271 (1989).