Case Law Review

The focus of this edition of Case Law Review is the recent Pennsylvania Supreme Court decision in *C&M Developers, Inc. v. Bedminster Township ZHB*, a decision which has proven to be difficult to fully comprehend or predict how it will be applied in future cases. In addition, this edition includes a review of the first appellate court decision dealing with the new "forestry" provisions in Article VI of the Municipalities Planning Code (MPC), requiring all municipalities to allow timber harvesting as a use by right.

C&M Developers, Inc. v. Bedminster Township ZHB, A.2d, 2002 PA. Lexis 2294, (Pa. 2002)

Facts

Bedminster Township, located in the still predominantly rural northern Bucks County area, adopted in 1996 amendments to its Zoning Ordinance, establishing an "Agricultural Preservation" (AP) District, covering approximately 90% of the Township. Development within an AP District was limited under the zoning amendment essentially as follows:

First, between 50% and 60% of the productive agricultural soils area of a given tract must be preserved as privately owned farmland, to continue to be held in private ownership, rather than set aside as common open space lands. Secondly, the remainder of the tract may be developed with lots having a minimum area of one acre, but also requiring, in calculating density, the "net out" of certain environmentally sensitive areas—floodplains and wetlands—before subdividing off the one-acre lots. Also, within each one-acre lot, a 10,000 square foot "building envelope" free of environmentally constrained lands must be provided.

C&M Developers had purchased substantial acreage within what became the AP District of Bedminster Township prior to the enactment of the ordinance amendments. C&M filed a validity challenge to the ordinance amendments based primarily on the allegation that these ordinance provisions, taken as a whole, were unreasonably restrictive, limiting development of AP zoned land to approximately one unit per every three gross acres of land.

The Zoning Hearing Board (ZHB) rejected the validity challenge. The ZHB found that Bedminster Township was the situs of a viable agricultural industry and that, therefore, the Township had a legitimate interest in preserving its productive agricultural lands. The ZHB also concluded that the regulations were a reasonable means of accomplishing the Township's interest in preserving agricultural lands. The ZHB's decision was sustained by both the Bucks County Court of Common Pleas and the Commonwealth Court. Thereafter, the Pennsylvania Supreme Court accepted C&M's Petition for Allocatur and heard the case.

Decision

The Pennsylvania Supreme Court reversed the decision of the ZHB, as sustained by both the Bucks County Court and Commonwealth Court.

Initially, the Pennsylvania Supreme Court analyzed the "rule" initially promulgated by the Pennsylvania Supreme Court's plurality decision in *Concord Township Appeal, 268 A.2d 765 (Pa. 1970)* that where a zoning ordinance required lots of two acres or more in size, the burden shifted to the municipality to provide extraordinary justification for such a large lot size requirement. The court noted that the rule would not be here applicable, as it had been applied in *Concord* only to lot size, not to density, rejecting C&M's argument that the rule should here be applied even though the minimum lot area requirement was one acre, where the overall density permitted in the Zoning Ordinance was one dwelling per three acres.

Secondly, the court rejected the concept of a "*per se*" shift of the burden of proof:

> "While we agree with the sentiments expressed in the lead opinion in *Concord Township Appeal* that minimum lot sizes of two acres or more can be both unreasonable and exclusionary, we cannot conclude that any improper purpose served by such restrictions cannot be addressed and remedied under the traditional standard of review [with the burden of proof of unconstitutionality remaining on the challenging landowner]."

Having so concluded, however, the Supreme Court went on to hold that "the lower courts erred in finding that the restrictions in the Ordinance were reasonable and substantially related to the Township's general welfare interest in preserving its agricultural land." The Court's reasoning was as follows:

First, the Court followed its previous decisions (e.g., *Boundary Drive Associates v. Shrewsbury Township, 491 A.2d 86 (Pa. 1985))* that preservation of agricultural lands and activities is a valid and reasonable zoning purpose, justifying "agricultural zoning:"

> "The ZHB properly determined that the Township may enact, pursuant to its police power, zoning regulations to preserve its agricultural lands and activities."

Next, however, the Court determined that the AP zoning regulations when "looked at as a whole...unreasonably infringe upon a landowner's constitutionally protected right to freely use and enjoy his property. While the Township undoubtedly has an interest in preserving its agricultural lands, that interest does not completely outweigh a landowner's right to use his property as he sees fit."

Getting more specific, the Court sustained the validity of the mandatory set aside of between 50% and 60% of a tract area containing productive agricultural soils: "When viewed alone, the ordinance's set-aside restrictions also appear to reasonably balance the Township's interest in preserving its agricultural lands and activities with a landowner's interest in using his property as he desires..." In so holding, the Court also noted that the Bedminster Township AP zoning was not as strict in its limitation of development as the previously reviewed agricultural zoning adopted by several municipalities in Lancaster and York Counties (where the agricultural land must be maintained with the exception of one building lot per every 25 or 50 acres). The Court also rejected C&M's assertion that the agricultural set aside provisions of the AP regulations

were an attempt to preserve a "bucolic character" rather than an agricultural industry.

Having thus given its imprimatur on the agricultural set-aside provisions of the AP zoning regulations, the Court concluded that the "reasonable balance" was tipped too far against the landowner's rights by the addition of the provisions requiring the net-out of environmentally sensitive areas of land in calculating permitted density of one-acre lots:

> "We find that these [environmentally sensitive net-out] restrictions, when required in addition to the [agricultural lands] set-aside restrictions, not only unduly limit a landowner's ability to sell, subdivide or develop that portion of his tract left over to him, but also do not have a substantial relationship to the Township's interest in preserving its agricultural lands and activities or any other general welfare interest of the Township." (emphasis added)

The Court thereupon went on to criticize the Township for adopting the one-acre minimum lot area requirement, in the context of these net-out requirements, whereas, in other parts of the Township (i.e., the R-3 District), homes could be constructed on a lot with a minimum area of 8,000 square feet. The Court concluded that there was insufficient basis in the record to justify one-acre lots under these conditions, since the primary basis, as articulated by Township representatives during the hearings, was to forestall the development of large houses on small lots. Thus, the Court concluded that the one-acre minimum lot area requirement, under these circumstances, "ascribes an exclusionary purpose in the Township's enactment of that requirement."

The Court summed up its view of the matter as follows:

> "While we acknowledge that the Township has a legitimate interest in preserving its agricultural lands, we find that by requiring landowners of tracts greater than 10 acres to set aside between 50% and 60% of the agriculturally productive land on their tracts, the Township reasonably meets that interest. By also limiting a landowner to developing homes on 1 acre minimum lots on the buildable site area, however, the Township is no longer attempting to preserve agriculture, but rather is improperly attempting to exclude people from the area and in doing so is unreasonably restricting the property rights of the landowner. Thus, as the Ordinance minimum lot size requirement is an unreasonable restriction on the landowner's right to use his property and not substantially related to the Township's interest in preserving its agricultural lands, we find that the ZHB abused its discretion in sustaining the amended Zoning Ordinance as constitutionally valid."

Comment

This is a tough one. There are so many elements both in the Zoning Ordinance provisions (agricultural zoning, environmentally sensitive area set-asides, minimum lot size requirements, minimum building area requirements), and in the Court's analysis (agricultural zoning, minimum lot size analysis, reasonableness, exclusionary purposes, and density elements) that the best way

to approach the future impact of this decision is to sort out what appear to be certainties in the Court's analysis versus the uncertainties therein.

First, it is clear that the Pennsylvania Supreme Court has preserved the principle of law that agricultural zoning is a valid exercise of the police power, serving a legitimate health, safety and welfare (i.e., police power) purpose. Indeed, the mechanism utilized by Bedminster Township—a set-aside of between 50% and 60% of the agriculturally productive land within a tract for continued agricultural use—was legitimate and in fact less extreme in its impacts on private property rights than the more traditional agricultural zoning ordinances adopted in Lancaster and York Counties.

Secondly, the concept of shifting the burden to the municipality to justify large lot zoning—a concept that has been consistently implemented by the Commonwealth Court for over 30 years—is no longer the law of Pennsylvania. The "traditional test," where the burden demonstrating unconstitutionality of a particular ordinance provision remains on the challenging landowner, will now be applied under all circumstances, even where a minimum lot area requirement well exceeds the two- or three-acre standard initially invalidated in the *Concord Appeal*.

Thirdly, the Court's holding presents a further certainty that there are circumstances (here being one) where one-acre minimum lot size requirements will be considered unconstitutional, as evidencing an exclusionary purpose and, thus, being an unreasonable restriction on private property rights.

Here ends, however, our view of certainty. The Court's ultimate holding—invalidating the one-acre minimum lot size requirement—is a mixture of exclusionary zoning, unreasonable restriction, lot size and density. The mixture of all four elements into one holding leaves us uncertain as to how this precedent will be applied under a myriad of varying circumstances in the future.

<u>Lot Size or Density?</u>

The Court's invocation of exclusionary zoning principles, without at all attempting a "*Surrick*" analysis of the impact of the AP zoning, seems to be based upon the low density—one unit per three acres—ultimately permitted under the AP regulations. And yet the Court never specifically states that this is a density issue, rather than a lot size issue, and to the contrary focuses its analysis on the unreasonableness of a one-acre minimum lot area requirement under the circumstances presented. Suppose, for example, the Ordinance had allowed half-acre lots, but required such additional set-asides that the overall density would remain at one house per three acres? The logic of the Court's analysis would indicate that the result would have been the same, so that we view the case more in terms of density than in terms of lot size requirements. The problem with this approach, however, is the fact that the overall density challenged by C&M was essentially (i) equal to the net density restrictions sustained by Commonwealth Court in *Reimer v. Upper Mount Bethel Township, 615 A.2d 938 (Pa.Cmwlth. 1992)*, and way higher than the agricultural zoning densities affirmed by the Supreme Court in *Boundary Drive Associates v.*

Shrewsbury Township, 491 A.2d 86 (1985) and by the Commonwealth Court in *Codorus Township v. Rodgers, 492 A.2d 73 (1985).*

Environmentally Sensitive Net-Outs

The Court's Opinion states that, when the further net-outs for floodplain and wetland areas were superimposed on the agricultural productive lands set aside, the "balance" between reasonable regulation to serve the public interest and private property rights was tipped too far. This would seem to place the environmentally sensitive net-out provisions of the AP regulations as the culprits in the Court's ultimate finding of unreasonableness. And yet, once the Court so stated, it seems to have abandoned the focus on these elements of the AP zoning regulations and focus far more squarely on the one-acre minimum lot area requirement. Were the environmentally sensitive area net-outs really the culprit? The Court chose not to cite any of the previous cases (most particularly *Reimer, supra.* and *Jones v. McCandless Township ZHB, 578 A.2d 1369 (Pa.Cmwlth. 1990)*, where the Commonwealth Court had affirmed the validity of zoning regulations netting out all or a portion of environmentally sensitive land areas for purposes of density calculation and/or lot size.

One-Acre Minimum Lot Size

The Court's discussion of the one-acre minimum lot area requirement in the context of the Township's allowing substantially smaller lots—8,000 square feet—in the R-3 Zoning District creates a new problem of analysis. It is almost always true that minimum lot area requirements for single family homes will not be uniform throughout a Township. Indeed, this is the heart of zoning regulations—that minimum lot area requirements will vary among the various residential zoning districts of a municipality; and yet here, Bedminster Township was seemingly "hoist on its own petard" in allowing very small lots in the R-3 District in comparison with the one-acre lots required in the AP District. It is almost always true, as the Supreme Court noted in this case, that there is not a "hard" public health and safety basis for minimum lot area requirements, i.e., where does public health and safety stop and "neighborhood tone" begin? The Court's decision does not answer the question, but rather only raises the issue.

Conclusion

Perhaps the best approach to analyzing the C&M decision is to limit the analysis to the presence of all three factors which weighed upon the Court's decision, and not to try to isolate any one of the three components—agricultural set-aside, environmentally sensitive area set-aside, and one-acre minimum lot sizes. So viewed, a municipality would still be able to invoke two out of the three components in any given zoning scheme. So viewed, the Bedminster AP zoning would have survived if the agricultural set-aside provisions had been married only to the one-acre minimum lot area requirements. Similarly, the environmentally sensitive net out requirements would have survived scrutiny when coupled with the one-acre minimum lot area requirement, had the agricultural set aside provisions not also been present. Lastly, both of the two set-aside factors probably would have survived scrutiny had the minimum lot area requirement been substantially reduced, and the permitted density thus increased.

Chrin Brothers, Inc v. Williams Township ZHB, 2002 W.L. 31971277 No. 854 C.D. 2003 (Pa. Cmwlth. 2003)

Facts

The landowner, Chrin Brothers, Inc., sought to "clear cut" the trees on five separate properties which it owned in Williams Township, Northampton County, aggregating a total of close to 100 acres. The owner filed applications for zoning permits, and the zoning officer denied the requested permits in light of provisions in the Township Zoning Ordinance regulating forestry activities with which the zoning officer determined clear cutting operation would not comply.

In essence, the zoning ordinance regulated commercial forestry activities by (i) requiring a forestry management plan consistent with the timber harvesting guidelines of the Pennsylvania Forestry Association, (ii) prohibiting clear-cutting (except on tracts of less than two acres), (iii) requiring that at least 30% of the forest cover (canopy) be kept intact, with the residual trees being well distributed and of higher value species, (iv) requiring the submission of an erosion and sedimentation control plan, (v) prohibiting clear-cutting on slopes greater than 25% or within a 100-year floodway, and (iv) requiring re-forestation of areas so timbered.

The landowner challenged portions of the ordinance requirements, particularly those which limited clear-cutting on sloped or floodway areas, and those which required the maintenance of 30% of the forest cover (thus prohibiting clear-cutting).

The Zoning Hearing Board then heard the proverbial "battle of the experts" with respect to the validity of these provisions of the zoning ordinance. The Township's experts testified that the provisions at issue had a substantial relation to protection of public health, safety and welfare, primarily in their design to prevent accelerated soil erosion which occurs when clear-cutting of trees takes place. According to the testimony, it is not just the exposed condition of the soil after clear-cutting which accelerates erosion, but also the loss of the tree canopy's interception of rainfall during storm conditions that results in the accelerated erosion after clear-cutting:

> "[The canopy] helps absorb some of the water with the initial rainfall. And it acts as a shield basically protecting the soils from the initial impact that is part of the erosion process."

During the pendency of the validity challenge, the Township also modified the forestry regulations, primarily by prohibiting clear-cutting on slopes in excess of 15%, rather than 25%.

In the alternative, the landowner requested the grant of a validity variance from these requirements of the forestry regulations, on the basis that strict adherence thereto would be confiscatory of the economic value of the property.

Decision

The Zoning Hearing Board, citing the Township's expert as being more credible, concluded that the challenged restrictions on commercial forestry were not unreasonably restrictive of forestry

activities and, therefore, valid. The ZHB also denied the requested validity variance, concluding that reasonable use of the property can be made in compliance with the restrictions on clear-cutting. On appeal to the Northampton County Court, the decision of the Zoning Hearing Board was affirmed. The landowner then appealed to Commonwealth Court.

The first issue dealt with on appeal was whether the restrictions at issue were in contravention of Section 603(f) of the MPC, which requires that timber harvesting be a permitted use by right in all zoning districts in every municipality, and further states that zoning ordinances may not unreasonably restrict forestry activities. Commonwealth Court concluded that the restrictions did not contravene this provision of the MPC:

> "It is evident that Section 603(f) merely codifies many years of case law setting forth the general principle that zoning ordinances may not unreasonably restrict the manner in which a landowner chooses to use his land."

Consequently, the statutory test under Section 603(f) as to reasonableness coincides with the constitutional test historically applied by the courts to determine whether a particular ordinance provision has the requisite substantial relationship to protection of public health, safety and welfare.

Commonwealth Court concluded that these restrictions were not unreasonable, and did have the requisite substantial relationship to protection of public health, safety and welfare. In so holding, the Court relied substantially on its prior decision in *Jones v. Town of McCandless ZHB, 578 A.2d 1369 (Pa. Cmwlth. 1990)*. In that case, the McCandless zoning ordinance had been challenged in its provisions protecting environmentally sensitive areas from disturbance and development.

The Court then addressed the Zoning Board's denial of the requested validity variance, again affirming the Board's denial.

<u>Comment</u>

This is the first appellate decision dealing with the "forestry" provisions which were added to the MPC a few years ago. While forestry is mandated as a use by right in all zoning districts, the *Chrin Brothers* decision leaves the door open for substantial regulations of those permitted forestry activities. The Commonwealth Court reaffirmed the validity of regulations designed to protect environmentally sensitive topography. Indeed, the prohibition against clear-cutting on steeply sloped areas (even categorizing 15% to 25% slopes as within the steep slope category) was within the authorization of Section 604(2)(ii) of the MPC, which authorizes additional restrictions along or near "places of relatively steep slope or grade, or other areas of hazardous geological or topographic features."

Whether a more severe restriction on clear-cutting (e.g., requiring a 50% retention of existing canopy) would still be considered reasonable will be decided on a case-by-case basis. For now, it is clear that municipalities can (i) prohibit clear-cutting on steep slope areas and floodway areas,

and (ii) limit clear-cutting, so that a substantial forest canopy will remain after the logging activities.