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The Pennsylvania Supreme Court during the last few years has taken a more active role in reviewing land use cases. 2003 saw the Pennsylvania Supreme Court hand down several decisions, coinciding as well with Justice William Lamb's tenure on the Court. (Chester County's William Lamb was appointed to the High Court by Governor Rendell, with the understanding that he would not run for election during the 2003 electoral process. Thus Justice Lamb's tenure ended at the close of 2003.)

Three of the Supreme Court's important decisions were authored by Justice Lamb during the final months of his tenure and these three decisions will be the subject of this Article. It is fair to say that while Justice Lamb's tenure on the Court was brief, his insight into land use issues as reflected in these three cases is clear evidence that he well served the citizens of the Commonwealth of Pennsylvania during his term on the Court.

Kennedy v. Upper Milford Twp. Zoning Hearing Board, 8334 A.2d 1104 (Pa. 2003).

Facts.

The Upper Milford Township Zoning Hearing Board, at the close of its hearing on a controversial case involving a proposed cellular tower 200' in height, recessed the public meeting, went into executive session, discussed the issues among themselves, and returned to reopen the public meeting. The Chairman thereupon offered a "compromise motion" by which the Zoning Board would grant relief, up to a 180' high tower, rather than the 200 feet in height as requested by the applicant. In essence, the Chairman opined that the Applicant was entitled to the grant of a variance, but that the minimum necessary to afford relief would limit the antenna height to 180 feet. The motion was approved by the Zoning Hearing Board and the variance thus granted.

Neighboring property owners filed both an appeal from the Board's decision and a complaint in the Court of Common Pleas alleging that the action of the Zoning Hearing Board, in deliberating in private executive session, constituted a violation of the 1998 Sunshine Act. Although the trial court concluded that the Zoning Hearing Board's executive session was authorized under the Sunshine Act, Commonwealth Court on further appeal reversed and held the executive session not to have been authorized under the Sunshine Act. The Pennsylvania Supreme Court thereupon accepted the Petition for Allowance of Appeal in order to provide a definitive answer to the question whether zoning hearing boards, as "quasi-judicial" bodies, were entitled to engage in private executive sessions prior to rendering their decisions.[1]

Decision

The Supreme Court first noted the exact language of Section 708 of the Sunshine Act, 65 Pa.C.S. Section 708(a), as follows:

> "Section 708. Executive Session.
>
> a. Purpose - an agency may hold an executive session for one or more of the following reasons:
>
> . . .
>
> (5) to review and discuss agency business which, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law, including . . . quasi-judicial liberations.

The Court noted that, in fact, zoning hearing boards were clearly "quasi-judicial" bodies:

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[1]The Zoning Hearing Board acknowledged that it had conducted quasi- judicial deliberations during the executive session recess.

> "Neither can there be any serious doubt that zoning hearing boards . . . are quasi-judicial bodies which perform formal fact-finding and deliberative functions in a manner similar to that of a court." 834 A.2d at 1114.

While the Court could perhaps have stopped right there and concluded that the Zoning Hearing Board's deliberation in executive session was specifically authorized under the Sunshine Act, it went further into the policy reasons behind the authorization for zoning hearing board to, in effect, maintain the same level of privacy as is afforded to members of a reviewing court:

> "As an agency characterized predominately by judicial characteristics and functions, it is particularly appropriate for zoning boards to deliberate privately. The necessity of collegiality to group decision-making of the highest quality is well established as is the degree to which collegiality and public deliberations are incompatible. . . . frequently, zoning boards must choose between unpalatable alternatives. Under these circumstances, it is simply not possible for zoning board members frankly to exchange their views in a public forum. The deliberation of matters so charged with emotion and political signification must be cloaked with the protection of privacy if it is to assist the board in carrying out its weighty decisional responsibilities." 834 A.2d at 1115-1117.

The Court then returned to the task of construing the exact meaning of the section of the Sunshine Act as above quoted, focusing on the meaning of the word "including" as clear indication of the legislative intent to allow zoning hearing boards to engage in deliberations during executive sessions:

> "By use of "including", which means "to take in [or] contain within as a constituent, component or subordinate part of the larger whole," the Legislature telegraphed its intent that the introductory clause and the list are not independent criteria. Instead, the function of "including" in the provision is to denote that the categories of agency business listed at the end of the provision are intended to be a non-exclusive set of examples . . . ."

Thus, the Court reached its holding:

> "By force of the express terms of 65 Pa.C.S. Section 708(5), quasi-judicial deliberations conducted by a zoning hearing board in the matter of a contested application pending before the agency are a proper subject of an executive session from which the public can be lawfully excluded." 834 A2.d at 1119.

Comment

We respectfully suggest not only that the conclusion reached by the Court was the correct one as a matter of statutory interpretation, but that the extensive analysis of the quasi-judicial nature of zoning hearing board decisions which Justice Lamb provided in the opinion is dead right. Zoning hearing boards are "the court of first resort" in matters over which they have jurisdiction, many of which are controversial. Indeed, zoning hearing board members often have need to discuss legal issues not only among themselves, but with their solicitor prior to framing a motion for decision. The Court summed up the issue as follows:

> "It is, after all, no coincidence that this Court, just as each of the Commonwealth's appellate courts, considers its judicial deliberations to be the most confidential and private of all its activities. An atmosphere of complete confidentiality is seen to be essential to the candid and forthright exchange of views necessary to decision-making of the highest quality. The deliberations of quasi-judicial agencies are no less dependent on such an atmosphere of confidentiality." 834 A.2d at 1121.

The line between "deliberations" which are properly now the subject of private discussion during an executive session, and the actual "decision" must be kept in mind. Once the executive session has been completed, it is still incumbent upon the zoning board members to frame an appropriate motion to grant or deny relief (and, as

necessary, to impose conditions on the grant of relief). The final decision-making function must still be conducted in an open meeting.

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

Facts.

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

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

Successive members of the township Board of Supervisors, throughout the 1980s and 1990s were determined to maintain the golf course property as a remnant of open space in the now highly-developed King of Prussia area.

The Zoning Hearing Board rejected Realen's spot zoning challenge, concluding:

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

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

Decision.

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

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

> "Spot zoning challenges have at their conceptual core the principle that lawful zoning must be directed toward the community as a whole, concerned with the public interest generally, and justified by a balancing of community costs and benefits. These considerations have been summarized as requiring that zoning be in conformance with a comprehensive plan for the growth and development of the community. Spot zoning is the antithesis of lawful zoning in this sense. In spot zoning, the legislative focus narrows to a single property and the costs and benefits to be balanced are those of particular property owners. ...

> While the size of the zoned tract is a relevant factor in a spot zoning challenge, 'the most important factor in an analysis of a spot zoning question is whether the rezoned land is being treated unjustifiably different from similar surrounding land.' (Slip Opinion, pp. 26, 27)

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

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

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

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

Comment.

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

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

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

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

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

Appeal of Dolington Land Group and Toll Bros., Inc. from the Decision of the Zoning Hearing Board of Upper Makefield Township, ___ A.2d ___, (Pa. December 30, 2003).

Facts.

The owners of several contiguous tracts of land, aggregating approximately 311 acres, and calling themselves the "Dolington Land Group," filed a challenge to the validity of the zoning regulations applicable to their properties, located in Upper Makefield Township, Bucks County. The tracts were zoned primarily CM-Conservation Management (with a small portion of the tract being Village Residential). The applicable zoning, however, was not just the product of Upper Makefield Township, but rather part and parcel of a joint zoning ordinance ("JZO") enacted collectively by Newtown Township, Newtown Borough, Wrightstown Township, and Upper Makefield Township, pursuant to Article VIII-A of the MPC. The four municipalities had enacted a joint comprehensive plan in 1983, followed by a JZO the following year.[2]

None of the region's "primary growth area" was located within Upper Makefield Township, but rather a portion of the "secondary growth area" was within the township and the balance of Upper Makefield was reserved as a "conservation management area," characterized by severe environmental constraints and active farming on prime agricultural soils.

The Dolington Land Group's validity challenge contained two primary issues: 1)whether the JZO as a whole made inadequate provision for higher density multi-family housing; and 2) whether the CM-Conservation

[2]Thus, the joint zoning ordinance well predates the enactment by the state legislature in 2000 of Acts 67 and 68 (the "Growing Smarter" initiative), by which "multi-municipal" planning and implementation were authorized under new Article XI of the MPC. For purposes of this case, however, the issues presented with respect to the "joint zoning ordinance" would apply equally in the context of a "multi-municipal plan" implemented separately by the member municipalities under Article XI.

Management zoning district regulations unreasonably restricted the right of the property owners to develop their respective tracts of land.

With respect to the first or "fair share" component of the challenge, the challenging landowners asserted that, within the entire four-municipality jointure, only 3.58% of the "undeveloped land" was zoned to permit multi-family development.

Upper Makefield Township responded that, in fact, multi-family development was permitted within more than 400 acres, with the potential for multi-family housing to be developed at 3.9 units per acre--a total of approximately 1,600 multi-family dwelling units which the township argued was well in excess of the calculated and projected need for additional multi-family housing in the four-municipality region.

To buttress this argument, the township introduced the testimony of the jointure's planning consultant, who had engaged in periodic fair share analyses for the jointure several times between 1984 and the present, all of which confirmed that the four municipalities as a whole were, in fact, providing for a fair share of multi-family housing development with the acreage so zoned.

Upper Makefield also pointed to the fact that it was, along with Wrightstown Township, the "rural component" of the jointure and that Wrightstown Township had previously been determined not to be located within the path of growth and development and, therefore, not subject to the classic three-prong *Surrick* analysis.[3] Consequently, the township argued that the *Surrick* "fair share" analysis should not even be applied in this context. The challengers, however, argued to the contrary that, so long as the jointure (i.e., any one component of the four-municipality region) was in the path of growth, then the *Surrick* analysis must be applied.

With regard to the second or "unreasonable restriction" component of the validity challenge, the challengers argued that the CM district regulations precluded development of approximately 83% of the 292 acres of the subject properties zoned Conservation Management, leaving only 16% available for development activities. The challengers cited the Supreme Court's Decision in *C&M Developers, Inc. v. Bedminster Township ZHB*, 820 A.2d 143 (Pa. 2002) in support of its argument, that this level of restriction was unreasonable and, hence, unconstitutional.

The township's rejoinder was based upon the fact that the CM zoning was flexible enough to authorize a "performance subdivision" of 168 total lots on the 16% of the land areas which were developable. In fact, the CM district regulations recognized three different types of development--"conventional," "cluster" and "performance." For each type, the evidence indicated that there were a "full potential" number of lots (if the environmentally restricted lands were developable) and an "actual" number of lots, where the environmental constraints would be honored. For the conventional subdivision, there would be a potential of 88 lots, reduced to 30 lots because of the environmental constraints; for the cluster approach, the maximum potential of 138 lots was reduced to 69 because of the constraints; and for the performance subdivision, the theoretical maximum of 176 lots was reduced only marginally to 168 lots.

Decision.

The Supreme Court sustained the decision of the Zoning Hearing Board that the acreage within the jointure upon which multi-family development could occur--420 acres as found by the Zoning Hearing Board--was sufficient to meet the region's fair share obligation for multi-family development. In other words, the Court chose to apply the third prong of the *Surrick* analysis in rejecting the fair share component of the validity challenge.

The Court endorsed the "periodic analytic process" utilized by the jointure's planning consultant to review the fair share issue on a periodic basis:

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[3] In *Appeal of MA Kravitz Company, Inc.*, 460 A.2d 1075 (Pa. 1983), Wrightstown Township was so classified.

> "The periodic analytic process employed by the jointure's planning commission with the assistance and counsel of the county planning authorities and expert planners, is, in our view, an entirely appropriate method for a municipality or multi-municipal jointure to meet its obligation to provide for the proportion of the regional need for higher density, multi-family housing fairly ascribed to it. Implemented conscientiously and in good faith, this method will insure that land is available for development of an appropriate variety of housing types on a continuous basis." (Slip Opinion, p. 17.)

The Court also took note of the fact that during the intervening 25 years since the *Surrick* decision, "factors previously of little or no concern have assumed preeminence." Thus, the Court opened the door to consideration, as part of a *Surrick* analysis of "an increased awareness of the environmental sensitivity and public value of undisturbed wetlands, floodplains, slopes, and woodlands; the growing national and state-wide awareness of the true cost of sprawl and the need to implement contrary land use policies; and the growing recognition of the importance of agricultural lands and activities and of prime agricultural soils."

The Court concluded that "each of these factors acts to counterbalance to some extent the desire for intense development and each of these factors can properly serve in an appropriate municipal or multi-municipal context as a legitimate justification for the imposition of carefully tailored restrictions of the type, design, location and intensity of permitted development." (Slip Opinion, p. 18.)

Dealing next with the second or "unreasonably restrictive" component of the validity challenge, the Court compared the development potential of the subject properties under the CM-Conservation Management District regulations here applicable with the Bedminster Township Agricultural Zoning regulations, which were deemed to be unreasonably restrictive in the *C&M Developers* case in 2002. Here, a total of 168 lots could be developed on the 292 CM-zoned acres owned by the challengers, even though most of the land was environmentally restricted. Further, these 168 "performance subdivision" lots were only four short of the maximum theoretical of 172 performance lots which would have been developable on the subject property but for the environmentally sensitive portions of the tract.[4]

The Court discussed the need to balance preservation of environmentally sensitive lands and agricultural soils on the one hand with the right of property owners to have reasonable development rights on the other hand, stating as follows:

> "The Dolington Group presents no challenge to the joint zoning ordinance insofar as it restricts the development of floodplains, floodplain soils, wetlands, steep slopes and mature woodlands. Only the restriction of development on prime agricultural soils is the subject of particular objection together with the challenge to the aggregate effect of the regulations as a whole. We first reject the contention that prime agricultural soils are less deserving of zoning protection than are other sensitive environmental lands and resources. ... The recent expressions of a legislative and executive intent to preserve the Commonwealth farms and agricultural lands serve only to underscore the significance and propriety of the jointure's efforts in this regard.
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> Nevertheless, ... regulations designed and intended to preserve agricultural lands, while serving a laudable purpose, may too severely, or indiscriminately, restrict landowners rights, ... and, thereby, exceed the enacting municipalities' lawful powers." (Slip Opinion, pp. 22-23.)

Turning then to the comparison between the Bedminster Township regulations found to be unreasonable in the *C&M* case and the Conservation Management district regulations here at issue, the Court noted that the Bedminster restrictions on environmentally sensitive lands and agricultural soils served to reduce the development potential from 461 lots to 51 lots, whereas, as indicated above, the Conservation Management district regulations in Upper Makefield Township reduced the performance subdivision lot potential by only a very small percentage.

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[4]The Court noted that, under the *C&M Developers* decision, the municipality is not required to show "extraordinary justification" for large lot zoning.

Important to the Court in distinguishing this zoning from the Bedminster regulations was the fact that "the maximum number of permitted dwelling units [in Upper Makefield's Conservation Management district] is calculated with reference to the base site area; that is, the tract area before deducting any of the areas of natural constraint and before deducting the prime agricultural lands." Thus, these regulations served primarily to control where the development of the subject property could and could not occur, without unreasonably reducing the total number of lots which could be developed, thereby buttressing the Court's conclusion that these regulations were not unreasonably restrictive and were, to the contrary, a valid exercise of the municipal police power authority.

Comment.

The Court chose to deal with the multi-family exclusion or fair share issue under the third prong of the *Surrick* analysis. Thus, the Court chose not to rule upon the issue whether Upper Makefield Township, not being itself "within the path of urban and suburban growth" was nevertheless subject to the full *Surrick* analysis as a result of other municipalities within the jointure being within the path of growth.[5]

Nevertheless, this decision is an important endorsement by the Pennsylvania Supreme Court of the propriety of zoning which limits development of both environmentally sensitive land and prime agricultural soils. In the *C&M* decision, the Court had endorsed the Bedminster Township agricultural zoning provisions, requiring between 50% and 60% of prime agricultural soils to be set aside and remain in agricultural use, but the correlative restrictions on density were severe enough in the Court's view to invalidate the total impact as unreasonably restrictive. Here, the total impact of the Conservation Management zoning regulations was to allow the development of 168 performance zoning lots (i.e., tightly clustered lots), or a density of approximately .57 units per acre. Further, the focus of the joint zoning ordinance's regulations restricting development of environmentally sensitive land was not to facially reduce the development potential, but rather to guide the development to the 16% of the land area not encumbered by environmentally sensitive features.

We can summarize the lessons to be drawn from the Court's decision in *Dolington* as follows:

1. the fair share issue (whether applied in the context of multi-municipal zoning or to a single municipality's zoning ordinance) will not be evaluated in a vacuum, but rather will be judged in the context of the projected demand for multi-family development within the region and/or municipality;

2. it is unclear whether a municipality which, in itself, is not within the path of growth, will nevertheless be subject to a full *Surrick* analysis if it joins in a multi-municipal planning and zoning scheme, where a portion of the region is located within the path of growth;

3. a *Surrick* analysis will also be tempered by the "modern" zoning tools for avoiding sprawl, protecting agricultural soils and preserving environmentally sensitive land features; and

4. zoning to "net out" environmental features from the density calculation may or may not be valid, depending upon the severity of the impact of the density reduction; conversely, zoning to preserve environmentally sensitive land by only modestly reducing density, but rather clustering the development areas to those portions of the tract more suitable for development will pass constitutional muster.

Conclusion.

[5]In fact, the Court noted that there was insufficient evidence to even determine whether the jointure "considered in its parts or as a whole" was within the path of growth. Thus, the Court concluded that "we ... leave for another day the question of the proper application of *Surrick's* threshold inquiry to the zoning legislation of a multi-municipal jointure." (Slip Opinion, pp. 13.)

The three cases discussed above provide welcome and well-reasoned clarifications to the state of land use law in the Commonwealth of Pennsylvania. That all three decisions were authored by Chester County's Justice William Lamb has "done use proud."