



O'Donnell, Weiss & Mattei, P.C.

Do I Need a Municipal/Land Use Attorney?

Municipal Regulation

In 1789, Benjamin Franklin famously wrote that “in the world nothing can be said to be certain except death and taxes.” Now, more than 200 years later, Franklin’s list of worldly certainties may be expanded to include the regulation of a person’s activities by the municipality in which the person owns or uses land.

As indicated below, there are various types of municipalities in Pennsylvania. Each municipality, either by desire of its governing body or by state or federal mandate, promulgates its own regulations governing a variety of activities and the property within its borders. Among the primary subjects of municipal regulation are the development, use and occupancy of land within the municipality.

As municipal regulation becomes more pervasive and complex, the need to consult with and engage a municipal/land use attorney increases. A municipal/land use attorney may be consulted to assist a person in reviewing municipal regulations and dealing with the municipality, and may be engaged to represent the person at meetings with or hearings before agencies of the municipality, such as the governing body, planning commission and zoning hearing board. Especially regarding land, which frequently constitutes a large, if not the largest, asset of a person, a municipal/land use attorney may be consulted to advise of rights and obligations under existing or proposed municipal land use regulations, which affect, or may affect, the value of the person’s land and its present and future use, occupancy and development. In the case of a proposed use or development of neighboring land, which a person may find objectionable, a municipal/land use attorney may be consulted as to the rights a person may have to oppose the proposed use or development. A municipal/land use attorney will also represent a person in court actions concerning the enforcement of alleged ordinance violations as well as appeals and other proceedings involving decisions of municipal agencies.

Types of Municipalities

In Pennsylvania there are various types of municipalities. Among those are first class cities (Philadelphia), second class cities (Pittsburgh), second class A cities (Scranton), third class cities (e.g., Pottsville), boroughs (e.g., Pottstown, Phoenixville, Colledgeville, West Chester), first class townships (e.g., Upper Pottsgrove Township, Lower Pottsgrove Township, and West Pottsgrove Township), second class townships (e.g., East Coventry Township, North Coventry Township, South Coventry Township, and East Vincent Township), and incorporated towns (Bloomsburg). A second class township is the most common form of municipal government in Pennsylvania.

The governing body for each type of municipal government differs. In cities, boroughs and incorporated towns, the governing body is usually the council, while, in first class and second class townships, the governing body is usually the board of commissioners and board of supervisors, respectively.

Authority and General Regulations

Each municipality type derives its authority and power from statutes enacted by the Pennsylvania General Assembly. The statutes may be specific to each type of municipality or may apply generally to all or several of the types.

Pursuant to its applicable statutory authority, a municipality regulates a myriad of activities of persons living or working within its borders. Examples of such regulated activities include: the keeping of dogs and other pet animals; the numbering, construction and occupancy of buildings; the maintenance of real property; curfew of minor children; disorderly conduct; false alarms for crime, fire, or other emergency; tenancy reports for rented property; licenses and permits for the conduct of business; the operation and parking of motor vehicles on public streets; the storage of abandoned or junked motor vehicles; the use of public parks and recreation areas; and the use and operation of public and private water and sanitary sewer facilities.

The regulations of a municipality are generally established by an ordinance enacted by its governing body that will specify the regulations to be complied with and the penalties for noncompliance. Failure to comply with the regulations may subject the offending person to civil, and possible criminal, enforcement proceedings and fines. Although not in all cases, enforcement proceedings may be preceded by a prior written notice from the municipality to the offending person advising of the noncompliance, and directing compliance by a certain time before enforcement proceedings will be commenced.

Land Use Regulations

“A man’s home is his castle.” This familiar expression is reflected in some of the basic concepts of American law. In one sense, it refers to the right of privacy of an individual while in his home. In another, broader, sense, it refers to the right of a person to do with his land or other property as he pleases. However, the right of privacy in one’s home, or the right to use one’s land or other property, is not absolute. It is subject to reasonable governmental regulation.

One of the most common forms of governmental regulations applying to the use of land or property are land use regulations enacted by a municipality. These regulations may not only regulate the use of a person’s “castle,” but may also prohibit the construction of the “castle” in the first instance or limit its size and location.

Land use regulations of municipality are generally set forth in a zoning ordinance and a subdivision and land development ordinance enacted by the governing body of the municipality. The statutory authority for the enactment of such ordinances by all municipalities, except cities of the first and second class (i.e., Philadelphia and Pittsburgh), is the Pennsylvania Municipalities Planning Code, which was first enacted by General Assembly in 1968 and has been in effect, with various amendments, since January 1, 1969. The Pennsylvania Municipalities Planning Code is frequently referred to as the “MPC.”

Zoning

In general, a zoning ordinance divides the geographic area of a municipality into zones, known as zoning districts, and provides for only certain permitted uses of land in each district so that development of the municipality occurs in an orderly manner in accordance with a comprehensive plan. Residential, commercial and industrial districts are among the more usual districts established in a zoning ordinance, with agricultural zoning districts also appearing among the districts typically established in a rural municipality.

The usual zoning ordinance consists to two principal parts, a zoning map and text. The zoning map indicates the boundaries of the various zoning districts. The text contains regulations and standards for, among other things, (i) the use of land, buildings and other structures, (ii) lot area, (iii) building height, setback, and density, (iv) signs, and (iv) vehicular parking. Certain of such regulations and standards will be specific to each zoning district, while others may apply generally to all zoning districts.

Prior to enacting a zoning ordinance, or an amendment thereto, the governing body will hold at least one public hearing upon the ordinance or amendment. Notice of the public hearing will be advertised at least two times in a newspaper of general circulation in the municipality. Copies of the proposed ordinance or amendment will also be available for public inspection. Persons, whose properties are affected by the proposed ordinance or amendment, may appear at the hearing to express any concerns or objections for consideration by the governing body.

The zoning ordinance is administered in by an appointed municipal official known as the “zoning officer.” Such officer is required to administer the zoning ordinance in accordance with its literal terms. The officer does not have the power to permit any construction or any use or change of use that does not conform to the zoning ordinance.

In addition to the zoning officer, a municipality enacting a zoning ordinance must also create a zoning hearing board consisting of three or five residents of the municipality appointed by the governing body. The purpose of the zoning hearing board is to hear and render final adjudications in various matters, including (i) substantive and procedural challenges to a land use ordinance, (ii) appeals from determinations of the zoning officer, (iii) applications for variances from the terms of the zoning ordinance, and (iv) applications for special exceptions under the zoning ordinance.

A use in a particular zoning district may be allowed by the zoning ordinance in one of three ways: (i) by right; (ii) by special exception upon application to the zoning hearing board, or (iii) by conditional use upon application to the governing body. The zoning ordinance will set forth the specific standards and criteria, which must be met, for the grant of the special exception or conditional use.

A use, which is not allowed by the zoning ordinance in one of the foregoing three ways, may still be allowed by a variance granted upon application to the zoning hearing board. However, the legal standards for the grant of a variance are generally difficult to meet, including a showing by the applicant that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant. Such unnecessary hardship must not have been created by the applicant and must be due to unique physical circumstances or conditions of the property, which make it difficult, if not impossible, to reasonably use the property in strict compliance with the provisions of the zoning ordinance.

Special exceptions, conditional uses and variances may also apply to non-use provisions of the zoning ordinance.

A special exception, conditional use and variance, as well as an appeal from a determination of the zoning officer, will involve one or more public hearings before the zoning hearing board or governing body. At the hearing, the applicant must appear and present testimony and other evidence in support of the application. Also, persons affected by the application or appeal, such as neighboring property owners, may appear at the hearing and present testimony and other evidence supporting or opposing the application or appeal. In the case of hearings before the zoning hearing board, the municipality, by its governing body, may also appear in support of or in opposition to the application or appeal. There is no requirement that applicants or protestants be represented by legal counsel at the hearing. However, the more complex the application or appeal, the greater the need to engage a land use attorney so that the

application or appeal is properly presented or contested as the case may be in accordance with applicable requirements and standards.

Various time periods apply to matters heard by the zoning hearing as well as to conditional use applications heard by the governing body. For example, a property owner, who wishes to appeal a determination of the zoning officer to the zoning hearing board, will have 30 days after notice of the determination is issued to file the appeal. Failure to file the appeal within such time may result in the board dismissing the appeal solely as untimely without any consideration of the merits of the appeal.

Additionally, the zoning hearing board, and the governing body upon a conditional use application, will have 60 days from filing of an appeal or application to hold the first hearing upon the appeal or application, and 45 days after the last hearing to render a written decision upon the application or appeal. If the first hearing is not commenced or the written decision not rendered within such time periods, the MPC provides that a decision shall be deemed to have been rendered in favor of the applicant, unless the applicant has agreed to an extension of time.

If the applicant or a protestant is dissatisfied by the written decision rendered by the zoning hearing board, or by the governing body on a conditional use application, the applicant or protestant may appeal the decision to the court of common pleas of the county in which the subject land is located. The appeal must be filed within 30 days after entry of the written decision by the zoning hearing board or governing body. The decision of the court of common pleas in the appeal may then be subject to further appeal to the appellate courts. In appeals to the court of common pleas and beyond, individual applicants or protestants are not required to be represented by legal counsel. However, in view of the detailed standards, requirements and procedures that apply to zoning appeals to court, a person is well advised to consult with a land use attorney in determining whether to file or otherwise participate in such appeal.

A person violating, or permitting the violation of, a zoning ordinance, may be subject to various legal action, including a civil enforcement proceeding before a district justice instituted by the municipality which could result in a judgment against the offending person of up to \$500.00 per day together with court costs and reasonable attorney fees incurred by the municipality. The enforcement proceeding will not be commenced until the person is first given a written enforcement notice to correct the violation and fails, within the times set forth in the notice, either to correct the violation or to appeal the notice to the zoning hearing board. It is important to note that such notice must not be ignored because the failure to timely correct the violation or appeal to the zoning hearing, as set forth in the notice, will constitute a conclusive determination of a zoning ordinance violation. As a result, in any subsequent civil enforcement proceeding before the district justice, the only matter to be determined will be the amount of the judgment to be rendered against the offending person.

Subdivision and Land Development

A subdivision and land use ordinance, sometimes referred to as the “SALDO,” regulates “subdivisions” and “land developments.”

As defined in the MPC, a “subdivision” generally concerns the division or redivision of a lot, tract or parcel of ground into two or more lots, tracts or parcels, including changes in lot lines. A lease of a portion of a lot, tract or parcel constitutes a subdivision.

As also defined in the MPC, a “land development” generally concerns the improvement of one lot or two or more contiguous lots, tracts or parcels of land for any purpose including a group of two or more residential or nonresidential buildings, a single nonresidential building. A “land development” also concerns the division or allocation of land or space between two or more existing or prospective occupants by means or for purpose of streets, common areas, building groups or other features. Unless excluded by

the SALDO, a “land development” may include the conversion of a single-family dwelling into multiple dwelling units, as well as the addition of an accessory building to an existing principal dwelling.

Unlike a zoning ordinance, a SALDO does not establish the uses allowed in a municipality or regulate the location or density of uses. Rather, a SALDO generally regulates and provides standards for the layout and arrangement of lots in, as well as for the design and installation of public and private physical improvements to serve a proposed subdivision or land development. Examples of such improvements are streets, sidewalks, curbs, gutters, street lights, fire hydrants, shade trees, water mains, sanitary sewers, storm sewers, storm water detention or retention basins and other drainage facilities, recreational facilities, open space improvements, and buffer and screen plantings. The SALDO may also provide standards and specifications for the public dedication of streets and other improvements, as well as for the deposit of financial security to guarantee the completion of improvements.

The SALDO will require that no subdivision or land development may be effected until plans for a proposed subdivision or land development are granted final approval by the governing body of the municipality. Although not common, the SALDO may also provide that, in lieu of the governing body, approval of the plans may be granted by the planning commission of the municipality. The planning commission is created by the governing body. It consists of three to nine residents of the municipality appointed by the governing body and has various powers and duties, including giving advice and providing recommendations to the governing body on various land use matters, including whether to approve or disapprove a subdivision or land development plan.

The SALDO will contain detailed provisions for the submittal and processing of subdivision and land development plans, including the contents of the plans and the charging of application and review fees. Plans will include preliminary and final plans and possibly sketch plans. Although sketch plans are usually informal and optional, a SALDO may provide for sketch plans as formal required submissions. Under the MPC, a formal required plan must be prepared by certain professionals licensed by the Commonwealth of Pennsylvania, including registered professional engineers, registered professional land surveyors, and registered landscape architects.

In most cases, where a formal sketch plan is not required, the approval of a subdivision or land development plan will involve a two-step process. The first step will involve the submission and approval of a preliminary plan. The second step will concern the submission and approval of a final plan based upon the prior-approved preliminary plan. If a formal sketch plan is required, the process will then involve three steps, the first step being the submission and approval of the formal sketch plan and the second and third steps being the submission and approval of the preliminary and final plans respectively.

Under procedures commonly found in a SALDO, a subdivision or land development plan submitted for approval under each step of the process will first undergo detailed review by the planning commission of the municipality. The plan may also be referred, for review and comment, to the planning commission of the county in which the municipality is located, the municipality’s engineer, and possibly other professional consultants engaged by the municipality, such as a professional land use planner. The primary purpose of such reviews is to determine whether the plan complies with applicable provisions of the SALDO as well as those of the zoning ordinance and other governing ordinance. Upon conclusion of its review, including consideration of any review comments of the county planning commission and the municipality’s engineer and other consultants, the planning commission of the municipality will make a recommendation to the governing body to approve the plan, with or without conditions, or to disapprove the plan. In cases where compliance with certain SALDO provisions will impose undue hardship or are not reasonable because of peculiar conditions of the land, the planning commission may also recommend modifications to the provisions as part of its recommendation to approve a plan. The governing body will then render its decision on the plan. In so doing, the governing body will consider the recommendations

of the planning commission; however, the recommendations are advisory only and not binding on the governing body.

The decision of the governing body, or planning commission in lieu thereof, upon a subdivision or land development plan must be in writing. Generally, the decision must also be rendered not later than 90 days following the date of the first regular meeting of the governing body or planning commission, at which the plan is first reviewed, and must be communicated to the applicant not later than 15 days following the decision either personally or by mail. If the application is not approved in terms as filed, the decision must specify the defects found in the application, describe the requirements not met, and cite to the provisions of the SALDO as well as provisions of the zoning ordinance or other applicable law relied upon. Failure of the governing body, or planning commission in lieu thereof, to render or communicate the decision to the applicant within such time and manner will result in the plan being deemed approved in terms as presented unless the applicant has agreed to an extension of time or change in the manner of communication.

Once a subdivision or land development applicant has received final plan approval, the applicant, generally within 90 days of approval, must record the plan in the office of the recorder of deeds of the county in which the municipality is located. Additionally in general, when a final plan has been approved, no subsequent change or amendment to the SALDO, zoning ordinance or other governing ordinance may be applied to adversely affect the right of the applicant to commence and complete any aspect of the approved development in accordance with the terms of the approval within a period of five years from date of the preceding preliminary plan approval.

Similar to a zoning decision by a zoning hearing board or governing body, a decision of a governing body approving or disapproving a subdivision or land development plan is appealable to the court of common pleas of the county in which the municipality is located. A decision disapproving the plan, or approving the plan subject to conditions unacceptable to the applicant, may be appealed by the applicant. A decision approving, either without conditions or with conditions acceptable to the applicant, may be appealed by a third person, such as a neighboring property owner, who may be adversely affected by the decision. Like an appeal from a zoning decision, the appeal from a subdivision or land development decision must be filed by within 30 days after entry of the written decision by the governing body, and the decision of the court of common pleas in the appeal may then be subject to further appeal to the appellate courts. As with a court appeal of a zoning decision, a person is well advised to consult with a land use attorney in determining whether to file or otherwise participate in an appeal from a subdivision or land development decision.

Also similar to a person violating, or permitting the violation of, a zoning ordinance, a person violating a SALDO may be subject to various legal action, including a civil enforcement proceeding commenced by the municipality before a district justice in which the person may be required to pay a judgment of up to \$500.00 per day together with court costs and reasonable attorney fees incurred by the municipality. However, unlike an enforcement proceeding for a zoning violation, the enforcement proceeding for a SALDO violation need not be preceded by a written enforcement notice to correct the violation.

***Call today and talk to one of our land use attorneys
(610) 323-2800***