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STATE OF WASHINGTON  
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NO. 90780-3

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SUPREME COURT  
STATE OF WASHINGTON

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MMH, LLC AND GRAYBEARD HOLDINGS, LLC,  
Appellants,

and DOWNTOWN CANNABIS CO., LLC; MONKEY GRASS  
FARMS, LLC; AND JAR MGMT, LLC d/b/a RAINIER ON PINE,  
Intervenor-Appellants,

v.

CITY OF FIFE,  
Respondent,

and ROBERT W. FERGUSON, Attorney General of the State of  
Washington,  
Intervenor-Respondent.

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REPLY BRIEF OF APPELLANT

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 ORIGINAL

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4-14-15

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## I. INTRODUCTION

Municipalities possess constitutional authority to enact reasonable zoning ordinances as an exercise of their police power. However, a municipality may not enact a zoning ordinance that is in conflict with state law. The Respondents argue that because I-502 grants municipalities some amount of regulatory authority over marijuana businesses, a municipality's outright ban is therefore constitutional. This argument goes too far.

In passing Ordinance No. 1872, the City of Fife disregards the will of the voters and the intent of our Legislature. No opt out powers are expressly offered to local governments in I-502. The voters and Legislature expressly tasked the State with jurisdiction over the recreational marijuana trade. The general law is thorough and creates a pervasively regulated industry to which the Legislature did not leave room for localities to interfere.

On the authority set forth below, Plaintiff's MMH and Graybeard respectfully requests the court find Fife Ordinance No. 1872 conflicts unconstitutionally with I-502.

## II. ARGUMENT

Ordinance No. 1872 violates article XI, § 11 because the ordinance irreconcilably conflicts with I-502. In determining whether an ordinance is in 'conflict' with general laws the test is,

whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa. Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits.

*City of Bellingham v. Schampera*, 57 Wn.2d 106, 111, 356 P.2d 292, (1960)(internal citations omitted). In their respective responses, the City and attorney general argue that Fife Ordinance No. 1872 does not conflict because I-502 "contains no specific language creating a right that Fife's ordinance denies." (Attorney General br. at 22). However, the City and attorney general misstate the article XI, § 11 test, and ask the court to disregard a simple fact: that the ordinance forbids, what the general law expressly permits.

- A. The City and attorney general misstate the *Schampera* Test: irreconcilable conflict exists where an ordinance prohibits what state law permits and is not limited to circumstances where state law creates an entitlement.**

Respondents argue that irreconcilable conflict arises, "only where State law creates a right to engage in an activity in circumstances prohibited by a local ordinance." (Attorney General

br. at 10). Respondents however misstate the law. As explained by the Court in *City of Bellingham v. Schampera*, the ultimate question to be asked in the case of any local ordinance involving an exercise of police power is where the ordinance (a) permits or licenses that which a state law forbids, or (b) prohibits that which a state law permits. 57 Wn.2d 106, 111, 356 P.2d 292 (1960).<sup>1</sup> Washington case law does not require that a statutory “right” exist in order for the Court to find conflict.

The inquiry does not focus on a “right”, but must focus on whether the substantive conduct proscribed (or licensed) by the two laws are at odds. The analysis does not hinge on the existence of a statutory right. In *Schampera*, the appellant challenged Bellingham’s DUI ordinance arguing that conflicted with the State DUI statute because the ordinance imposed penalties in excess of those provided by statute. *Id.* at 108. The Court concluded that the ordinance did not conflict because both laws prohibited the same conduct.

The statute, as well as the ordinance, in the case at bar, is prohibitory, and the difference between them is only that the ordinance goes farther in its prohibition—*but not counter to the prohibition under the statute*. The city does not attempt to

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<sup>1</sup> While now arguing that this is a “shorthand version of the test that the Court has sometimes used,” the attorney general posited this formulation as proper on at least one occasions. See 14 Op. Att’y Gen. 4 (1982).

authorize by this ordinance what the Legislature has forbidden; not does it forbid what the Legislature has expressly licensed, authorized, or required.

*Id.* at 111(emphasis added). No conflict existed, because the Bellingham ordinance simply went farther in its prohibitions.

However, where an ordinance permits conduct that a statute prohibits, the ordinance is unconstitutional. In *Town of Republic v. Brown*, 97 Wn. 2d 915, 652 P.2d 955, 958 (1982), the Court found article XI, § 11 conflict under similar facts. Comparing the City of Republic's DUI ordinance with the State DUI statute, the Court determined that the ordinance provided for a presumption of being under the influence if a driver's blood alcohol level ("BAC") was found to be 0.10 percent or greater, while the statute set forth a per se violation of the statute at the same BAC. Additionally, the ordinance did not contain the mandatory sentence that was provided in the statute. *Id.* at 920. The Court held the Republic ordinance conflicted with the state statute by permitting conduct (driving with a BAC over .10 and a discretionary jail sentence) which was forbidden by statute. *Id.* The statute created no "right or entitlement" that was prohibited by the local ordinance. Nonetheless, conflict existed because the ordinance permitted that which a state law forbid.

The inquiry must remain focused on what is specifically permitted or prescribed by the statute. In *Ritchie v. Markley*, 23 Wn.App. 569, 597 P.2d 449 (1979) (overruled on other grounds), the court found a conflict between Clallam County's shoreline management act and the State Shoreline Management Act of 1971 because the county ordinance did not exempt agricultural activities from permit requirements. The court focused on the specific activities addressed by the competing laws,

As noted, SMA specifically allows irrigation projects and agricultural service roads to be built without a state permit in shoreline and wetland areas. The county shoreline ordinance, by contrast, allows no exemptions for agricultural activities. The two laws conflict because they reflect opposing policies.

*Id.* at 574. In that case, the ordinance allowed the county to prohibit precisely what the state statute allowed and was held unconstitutional.

The identical reasoning was applied in *City of Seattle v. Eze*, 111 Wn.2d 22, 33, 759 P.2d 366 (1988). There, the Court held that no conflict existed between a city ordinance and state statute where both prohibited the same conduct and the ordinance differed only "in terms of the scope of their prohibitions." See also *State v. Kirwin*, 165 Wn. 2d 818, 826-27, 203 P.3d 1044, 1048 (2009) (the

focus of the article XI, § 11 inquiry is on the conduct proscribed by the two laws (a question of substance), not their attendant punishments (a question of magnitude)). Again, the focus of the inquiry is the substantive nature of the competing laws. Here, the subject matter is identical, the licensing of marijuana businesses. However, Ordinance No. 1872 does not “simply go farther in its prohibitions”, the ordinance expressly prohibits that which is permitted by I-502. An irreconcilable conflict thus exists.

**a. *Weden* and *Lawson* must be distinguished when the analyzed under the proper constitutional standard.**

As argued *supra*, the appropriate constitutional inquiry does not focus on a “right”, but must focus on whether the substantive conduct proscribed (or licensed) by the two laws are at odds. Stated another way, if the areas of operation of the statute and ordinance are distinct there is no conflict. *Seattle Newspaper-Web Pressmen's Union Local No. 26 v. City of Seattle*, 24 Wn. App. 462, 469, 604 P.2d 170, 173 (1979). Under this analysis, the respondents’ reliance on *Weden* and *Lawson* is misplaced.

While the *Weden* court found no conflict between the San Juan County Ordinance and state law, the Court went to great

length to clarify that the ordinance and statute did not contemplate the same subject matter,

The Legislature did not enact chapter 88.02 RCW to grant PWC owners the right to operate their PWC anywhere in the state. The statute was enacted to raise tax revenues and to create a title system for boats. See RCW 88.02.120. RCW 88.02.020 provides, in pertinent part: "Except as provided in this chapter, no person may own or operate any vessel on the waters of this state unless the vessel has been registered and displays a registration number and a valid decal in accordance with this chapter...." On its face, the statute prohibits operation of an unregistered vessel. Nowhere in the language of the statute can it be suggested that the statute creates an unabridged right to operate PWC in all waters throughout the state.

*Weden v. San Juan Cnty.*, 135 Wn. 2d 678, 694-95, 958 P.2d 273, 281 (1998). Conflict did not exist because the statute prohibited the "operation of an unregistered vessel," while the County ordinance prohibited the "operation of personal water craft use on all marine waters and one lake in the San Juan County." The subject matter of the two laws was different.<sup>2</sup> Because the areas of operation of the statute and ordinance were distinct, irreconcilable conflict did not exist.

Similarly, in *Lawson v. City of Pasco* the Court's focus was the substantive content of the statute and challenged ordinance.

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<sup>2</sup> The Court also examined whether the ordinance conflicted with chapter 88.12 RCW, chapter 90.58 RCW, chapter 43.99 RCW, and the public trust doctrine with similar results. *Weden*, 135 Wn. 2d at 695.

168 Wn.2d 675, 230 P.3d 1038 (2010). There, the Petitioner challenged a local ordinance which prohibited recreational vehicle sites for occupancy purposes in any residential (RV) park. Lawson argued that the ordinance conflicted with the Washington State Mobile Home Leasing and Tenancy Act (“MHLTA”).

However, the Court examined the MHLTA and determined it was intended only to “regulate and determine legal rights, remedies, and obligations arising from any rental agreement between a landlord and a tenant regarding a mobile home lot . . .” *Id.* at 683. The Court concluded that the statute neither forbade recreational vehicles from being placed in the lots, nor did it require them. *Id.* Conflict did not exist because the statute regulated landlord-tenant relationships in mobile home parks whereas the ordinance outlawed certain vehicles from the parks. Again, the areas of operation of the statute and ordinance were distinct, thus irreconcilable conflict did not exist.

What these cases teach us is that our inquiry must focus on what specifically the Legislature authorized by statute and what the City seeks to prohibit in an ordinance. In *Weden*, San Juan County’s ordinance banned personal watercraft on certain waters, while the statute addressed a wholly different subject matter: the

registration of boats in Washington State. In *Lawson*, no conflict existed where the ordinance banned RV's and the statute regulated mobile home tenancies. In *Schampra, Kirwin, and Eze*, no conflict existed because, although the subject matter was the same between statute and ordinance, the ordinances' prohibitions were not *counter* to those of the statutes.

In this case, Fife Ordinance 1872 prohibits precisely what the Legislature has expressly authorized: the production and sale of recreational marijuana. Ordinance 1872 does not simply differ in the scope of its prohibition; the ordinance is an outright ban of a business activity that is granted by State law. In the words of *Schampera*, Ordinance No. 1872 is *counter to the prohibition* of the statute. The Ordinance is thus invalid

**b. The Respondents misstate *Rabon*: A local ordinance may require more than state law requires only where the laws are prohibitive and conflict with the general law does not result.**

Further, Respondents overstate the holding of *Rabon v. City of Seattle*, 135 Wn. 2d 278, 292, 957 P.2d 621, 627 (1998). The attorney general relies on *Rabon* for the proposition that, “[t]he fact that an activity may be licensed under state law does not lead to the conclusion that it must be permitted under local law.” (Attorney

General br. at 11). However, the attorney general citation omits a critical qualifier. The full citation follows,

The fact that an activity may be licensed under state law does not lead to the conclusion that it must be permitted under local law. *A local ordinance may require more than state law requires where the laws are prohibitive. Lenci v. City of Seattle*, 63 Wn.2d 664, 671, 388 P.2d 926 (1964).

*Rabon*, 135 Wn. 2d at 278 (emphasis added). As describe below, the attorney general's argument fails as applied to Ordinance No. 1872.

*Lenci v. City of Seattle* concerned an auto wrecker's challenge to a Seattle ordinance which required a fence taller than that required by the relevant statute. 63 Wn.2d 664, 388 P.2d 926 (1964). Of considerable import is the explanation given by the court in *Lenci* in holding the challenged ordinance did not conflict with state law,

It is well-settled that a city may enact local legislation upon subjects already covered by state legislation so long as its enactments do not conflict with the state legislation; and the fact that a city charter provision or ordinance enlarges upon the provisions of a statute, by requiring more than the statute requires, does not create a conflict unless the statute expressly limits the requirements.

*Id.* at 671 (internal quotations omitted). When taken in context, for the rule stated by the attorney general to apply, (1) the ordinance and statute must both be *prohibitive* in nature, and (2) where the

laws are both prohibitive, the ordinance can go farther in its prohibition.

Such an analysis does not apply to Fife's ordinance. First, I-502 is not *prohibitive*. Second, the ordinance does not go farther in its prohibition; it goes *counter* to what is licensed by I-502. *Rabon* does not save the city. Irreconcilable conflict exists.

**B. The authority to enact reasonable regulations does not equal the authority to exclude a lawful land use.**

The attorney general argues throughout that in seeking to invalidate Ordinance No.1872, MMH asks the court to “invent a distinction and hold that I-502 allows cities to adopt ‘reasonable regulations’ but not ban marijuana businesses.” (Attorney General br. at 24). The Court need not “invent” anything. The distinction between authority to regulate and authority to exclude has been repeatedly addressed by this Court.

Constitutionally, cities may enact reasonably regulate activities that are authorized by state law within their borders but, they may not prohibit same outright. In *Second Amendment Found. v. City of Renton*, 35 Wn.App. 583, 668 P.2d 596 (1983), the City of Renton prohibited by ordinance the possession of handguns in taverns and bars. A group of handgun owners

challenged the ordinance on the basis that it unconstitutionally conflicted with Chapter 9.41 RCW, the state law governing the licensing of concealed pistols. *Id.* at 585. Citing *Schampera*, the court found that because chapter 9.41 RCW did not license one to be in possession of a firearm at any time or place, the Renton ordinance did not contradict the statute. *Id.* at 588-89. Because the ordinance simply went farther in its prohibition of firearm possession, conflict did not exist.

The court defined the city's authority under these circumstances,

While an absolute and unqualified local prohibition against possession of a pistol by the holder of a state permit would conflict with state law, an ordinance which is a limited prohibition reasonably related to particular places and necessary to protect the public safety, health, morals and general welfare is not preempted by state statute.

*Id.* at 589. See also *Yarrow First Assocs. v. Town of Clyde Hill*, 66 Wn.2d 371, 376, 403 P.2d 49 (1965) ("the power to regulate streets is not the power to prohibit their use"). Thus, the authority to ban something permitted under state law does not constitutionally follow on the heels of a city's authority to regulate.

Indeed, Washington's attorney general acknowledged the same distinction. In an opinion addressing the constitutionality of

ordinances which ban firearms in bars, our attorney general recognized,

[the] distinction between the validity of (a) an absolute, unqualified, local prohibition against possession of a concealed handgun by the holder of a state concealed weapon permit-at any time or place-and (b) a limited prohibition related only to particular times and places. The former is invalid under state law but the latter is not.

14 Op. Att'y Gen. 8 (1982); See *Weden v. San Juan Cnty.*, 135 Wn. 2d 678, 721, 958 P.2d 273 n.7 (1998) (Saunders, J dissenting). The rule was also recognized in *State, Dep't of Ecology v. Wahkiakum Cnty.*, in addressing the reach of Wahkiakum county's authority to regulate biosolids,

Thus, the County may regulate biosolids if necessary to comply with other applicable laws. However, the County does not have the authority to completely ban the land application of all class B biosolids when that ban conflicts with state law.

184 Wn.App. 372, 385, 337 P.3d 364 (2014). The distinction between authority to regulate and authority to exclude is well settled. While a city's police power is expansive, it is not limitless. Ordinance No. 1872 over reaches and must be held unconstitutional.

**C. Exclusionary zoning is unconstitutional.**

The distinction between regulatory authority and authority to ban an activity is further clarified in the context of zoning regulation. The City and Attorney General's arguments rely heavily on the assertion that WAC 314-55-020 (11) expressly grants cities and counties the authority to exclude I-502 businesses from their jurisdictions. However, their reliance is misplaced. While WAC 314-55-020 (11) requires regulatory compliance from I-502 business owners, the regulation is not permission to municipalities to unlawfully or unconstitutionally exclude through zoning state permitted businesses.

Zoning ordinances will typically be found invalid and unreasonable where the zoning ordinance attempts to exclude or prohibit existing and established uses or businesses that are not nuisances. 8 McQuillin Mun. Corp. § 25:5 (3d ed.). Express delegations of power to prohibit an otherwise lawful use are rare, and usually are limited to specific uses which are regarded as singularly harmful. 1 Am. Law. Zoning § 9:16 (5th ed.). Exclusionary zoning ordinances are an unreasonable exercise of police power. See *Norco Const., Inc. v. King Cnty.*, 97 Wn. 2d 680, 685, 649 P.2d 103, 106 (1982). Common subjects of these

exclusionary ordinances are junkyards, dumps, outdoor movies, motels, and mobile home parks. Generally, municipal efforts to totally exclude these uses homes from a community have been found unconstitutional.

This Court dealt with this issue in the context of mobile homes in *Duckworth v. City of Bonney Lake*, 91 Wn. 2d 19, 586 P.2d 860 (1978). There, a family challenged the revocation of a permit to place a mobile home in a residential district. The relevant ordinance provided however that mobile homes may only be cited in a designated “duplex and trailer” district. *Id.* at 24. The Court found the city’s ordinance constitutional in reliance primarily on the notion that the ordinance provided an adequate area within the city for mobile homes.

In sum, it is generally recognized that where a municipality provides an adequate area for mobile home development, as was done in the instant case, mobile homes may be excluded from conventional residential districts. As we have said, a municipality may exclude them from conventional residential districts because as a nonconventional use they tend to lower, adversely affect, or at least stunt the growth potential of the surrounding land.

*Duckworth v. City of Bonney Lake*, 91 Wn. 2d 19, 31, 586 P.2d 860, 868 (1978). Conversely, were an ordinance completely excludes a use, it will generally be deemed unconstitutional.

While *Duckworth* did not expressly address complete exclusion of mobile homes, the issue has been addressed in other jurisdictions. The courts of most jurisdictions are not favorably disposed toward zoning regulations which exclude otherwise legal uses from all of the territory of a municipality. 3 Am. Law. Zoning § 20:4 (5th ed.). A zoning ordinance which totally excludes legitimate uses or fails to provide for such uses anywhere within the municipality should be regarded with particular circumspection and in fact must bear a more substantial relationship to the public health, safety, morals and general welfare of the community than an ordinance which merely confines that use to certain area in the municipality. *Hodge v. Zoning Hearing Bd. of West Bradford Tp.*, 11 Pa. Commw. 311, 312 A.2d 813 (1973). In evaluating the validity of exclusionary ordinances, the courts shift the burden of proof to the municipality to demonstrate that the ordinance promotes the public health, safety, and welfare. See *Appeal of Shore*, 524 Pa. 436, 573 A.2d 1011 (1990) (invalidating an ordinance which totally excluded mobile homes from a municipality, where there was no evidence to support justification of such exclusion). The same scrutiny would apply to exclusionary zoning of I-502 uses.

A similar analysis was applied by this Court in *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. Wenatchee*, 50 Wn.2d 378, 381, 312 P.2d 195 (1957). In determining that a zoning ordinance cannot wholly exclude churches from residential districts, the Court examined the case law from numerous jurisdictions and held,

Generally, zoning ordinances which wholly exclude churches in residential districts have been held to be unconstitutional. Apparently, such provisions have not survived court review for the generally-stated reason that an absolute prohibition bears no substantial relation to the public health, safety, morals, or general welfare of the community.

*Congregation of Jehovah's Witnesses*, 50 Wn. 2d at 381. Without doubt, the building at issue in *Congregation of Jehovah's Witnesses* was subject to Wenatchee's reasonable zoning and building safety requirements, as would any other business or home. However, as *Congregation* makes clear, a city's authority to enforce reasonable zoning ordinances does not equate to the power to exclude.

Cases dealing with the zoning of alcohol sales are helpful by analogy. In a minority of jurisdictions, state liquor laws are held to preempt local zoning laws that attempt to regulate the locations of places selling alcoholic beverages. 3 Am. Law. Zoning § 18:52 (5th

ed.). Other states permit local governments to zone with respect to alcohol sales, either expressly or through case law. *Id.*

An illustrative example is found in *Westlake v. Mascot Petroleum Co.*, 61 Ohio St. 3d 161, 164, 573 N.E.2d 1068, 1071 (1991) holding modified by *Ohioans for Fair Representation, Inc. v. Taft*, 1993-Ohio-218, 67 Ohio St. 3d 180, 616 N.E.2d 905. There, Ohio's Supreme Court addressed the respective authority of municipalities and the state to regulate liquor sales under Section 3, Article XVIII of the Ohio Constitution, a provision analogous to Washington's article XI, § 11.<sup>3</sup> Also, at issue in *Westlake*, was a provision of the Ohio liquor control regulation which acknowledged that applicants were required to meet local "building, safety, or health requirements" similar to WAC 355-15-020 (11). *Id.* at 166. On review of the legislative intent of the relevant statutes, the Court found the primary authority to regulate the sale of alcoholic beverages is delegated to the Department of Liquor Control, and that the legislative or executive authority of a political subdivision has only such rights or powers with regard to these sales as are expressly granted under the relevant liquor statutes. *Id.* at 167. The

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<sup>3</sup> Ohio Constitution Section 3, Article XVIII provides that the authority of municipalities is limited to local police, sanitary and similar regulations not in conflict with state law,

Court held a municipality is without authority to extinguish privileges arising under a valid Ohio Liquor Control permit through the enforcement of zoning regulations. Similarly, Fife's ordinance must fail.

**D. Ordinance No. 1872 thwarts the intent of the legislature and will of the people.**

The attorney general argues that Washington voters intended that local jurisdictions could ban I-502 business thus undermining the statewide distribution system. In support of their argument, the attorney general cites the marijuana reforms of Colorado, Alaska, and Oregon stating that in those instances, voters allowed local governments to ban marijuana business.

However, this assertion omits a key distinction: in each of the states cited by the attorney general, the voters' pamphlets expressly stated that local governments would be able to prohibit marijuana businesses. For example, Alaska's ballot language stated,

The bill would allow a local government to prohibit the operation of marijuana-related entities. A local government could do that by enacting an ordinance or through voter initiative. The ordinances could cover the time, place, manner, and registration of a marijuana entity's operations.<sup>4</sup>

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<sup>4</sup> State of Alaska Division of Elections, *Ballot Measures Appearing on the 2014 General Election Ballot*, last accessed April 12, 2015 available at <http://www.elections.alaska.gov/doc/bml/BM2-13PSUM-ballot-language.pdf>

In Colorado, the following language appeared,

Local governments may enact regulations concerning the time, place, manner, and number of marijuana establishments in their community. In addition, local governments may prohibit the operation of marijuana establishments through an ordinance or a referred ballot measure; citizens may pursue such a prohibition through an initiated ballot measure.<sup>5</sup>

While in Oregon, voters were advised,

A city or county may adopt reasonable time, place and manner regulations of the nuisance aspects of licensed retail activities. A city or county may opt out of having marijuana businesses only by petition signed by 10 percent of registered voters and approved by a majority of voters at a general election.<sup>6</sup>

The I-502 pamphlet contains no such language. CP 662-670. In 2012, Washington voters were advised that,

The state could deny, suspend, or cancel licenses. Local governments could submit objections for the state to consider in determining whether to grant or renew a license. The state could inspect the premises of any license holder. Prior criminal conduct could be considered for purposes of granting, renewing, denying, suspending or revoking a license. The state could not issue a license to anybody under age 21.

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<sup>5</sup> Colorado Secretary of State, *2012 State Ballot Information Booklet and Recommendations on Retention of Judges*, last accessed April 12, 2015 available at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application/pdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251822971738&ssbinary=true>

<sup>6</sup> Oregon Secretary of State, *2014 Voters' Pamphlet* last accessed April 12, 2015, <http://www.oregonvotes.gov/pages/history/archive/nov42014/guide/pdf/book13.pdf>

CP 663. Further,

The number of retail outlets, and thus retail licenses, is determined by LCB in consultation with the Office of Financial Management, taking into account population, security and safety issues, and discouraging purchases from illegal markets. The initiative also caps retail licenses by county. Given the initiative's similarities with previous state monopoly liquor laws, the number of retail outlets is estimated at 328 (the same number of state and contracted liquor stores that were in operation Dec. 31, 2011).

CP 665. The Court's purpose when determining the meaning of a statute enacted by the initiative process is to determine the intent of the voters who enacted the measure. *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wn. 2d 736, 746, 257 P.3d 586, 590 (2011). The only reasonable inference to be drawn here is that voters intended the ultimate authority over siting of retail marijuana outlets to be vested with the State and the LCB. It cannot be inferred from the voters' pamphlet that Washington voters intended that local city and county councils could render I-502 meaningless through local legislation.

In *Washington State Dept. of Revenue v. Hoppe*, the Court identified the official voters' pamphlet as a primary means of determining legislative intent when construing a law adopted by a vote of the people. 82 Wn.2d 549, 552, 512 P.2d 1094 (1973). The Court also identified several other fundamental principles of

interpretation, stating that the “spirit or intention of the law prevails over the letter thereof” and that the “collective intent of the people becomes the object of the court’s search for ‘legislative intent’ when construing a law adopted by a vote of the people.” *Id.* Here, it is plain that Washington voters intended that the LCB would decide where retail outlets would be located, not local governments.

*Hoppe* concerned when and how proposed property tax changes would take effect in King County. *Id.* On review of the challenged legislation Court stated,

A conscientious voter who read every word of the text of [the proposed legislation], the ballot title, the official explanation of the effect of the measure and the statement for the proposal would not find a whisper of suggestion that its impact would not be felt until 1974.

*Id.* at 555. Similarly, those who voted for I-502 would have not the slightest inclination that their local city council could gut the initiative. Allowing local governments such authority would “create in the legislature a veto power over every initiative.” *Id.* at 557. In rejecting King County’s arguments, the Court held, “[t]o so hold would turn the reserved initiative power of the people into a futile exercise.” *Id.* The same applies here. The will of the people should be honored.

Washington's 2012 voters' pamphlet takes special care to discuss how marijuana businesses would be restricted as to their locations, "[l]ocations could not be within 1,000 feet of any school, playground, recreation centers, child care center, park, transit center, library, or game arcade." The pamphlet details how many outlets would open, how the number of retail outlets would be determined, specifying that population, security and safety issues, and discouraging purchases from illegal markets must be taken into account. It cannot be argued that voters anticipated that whole counties, cities, and municipalities could simply ban marijuana uses. If it was will of the people that recreational marijuana should not exist in their city, they certainly would not have voted I-502 into law.

In stark contrast to the authority given to the State, the only mention of authority given to local governments is one sentence that provides that local governments could submit objections for the State to consider in determining whether to grant or renew a license. Nothing in the 2012 Voters Pamphlet demonstrates that an average voter would understand that cities could outlaw I-502 businesses. If proponents of I-502 wanted voters to approve language that would authorize local bans they should have clearly

explained to voters the consequences of the initiative. See *TeleTech Customer Care Mgmt. (Colorado)*, 171 Wn. 2d at 753. Washington voters intended that the LCB would decide where retail outlets would be located, not local governments.

### **III. CONCLUSION**

Ordinance No. 1872 conflicts with state law because it prohibits lawful marijuana business activity that is expressly permitted under state law. Accordingly, the Court should reverse the trial court's grant of summary judgment to the City, and remand the matter for further proceedings.

Submitted this 13<sup>th</sup> day of April, 2015

DAVIES PEARSON P.C.

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Hodge v. Zoning Hearing Bd. of West Bradford Tp., 11 Pa.Cmwth. 311 (1973)  
312 A.2d 813

11 Pa.Cmwth. 311  
Commonwealth Court of Pennsylvania.

Robert H. HODGE and Elizabeth W. Hodge, his  
wife, Appellants,

v.  
The ZONING HEARING BOARD OF WEST  
BRADFORD TOWNSHIP, Appellees.

Argued Oct. 3, 1973. | Decided Nov. 29, 1973.

Mobile home park owners sought to expand their park and were denied permission by the zoning board. The Court of Common Pleas, Chester County, D. T. Marrone, J., upheld the zoning board and mobile home park owners appealed. The Commonwealth Court, No. 235 C.D.1973, Blatt, J., held that challenge to the zoning ordinance on the basis of procedural irregularities in its adoption was not timely; that the mobile home park in existence did not constitute a nonconforming use such as would have given the owners a right to continue the natural expansion of the park; that it was not an abuse of discretion to limit mobile home parks to districts zoned commercially; that where there was one mobile home park in existence and other land zoned commercially, there was no exclusionary zoning from the fact that only 2 1/2 percent of the township was zoned commercially; and that the zoning ordinance was not an invalid special legislation aimed at halting the natural development of the existing mobile home park.

Affirmed.

Kramer, J., dissented and filed opinion.

West Headnotes (13)

<sup>111</sup> **Zoning and Planning**  
↔Enlargement or Extension of Use

Challenge to validity of zoning ordinance based on alleged procedural irregularities in its adoption, which had not been brought before the Court of Common Pleas within 30 days of its adoption, could not be raised before the zoning board on request for expansion of a nonconforming use. 53 P.S. §§ 10101 et seq.,

65741.

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1 Cases that cite this headnote

<sup>121</sup> **Zoning and Planning**  
↔Enlargement or Extension of Use

A nonconforming use includes the right of natural expansion so long as that expansion is reasonable and not detrimental to the welfare of the community.

1 Cases that cite this headnote

<sup>131</sup> **Zoning and Planning**  
↔Existence of use in general

Doctrine of nonconforming use does not insure one who engages in a permitted use in one zoning district the right to engage in the same use in an adjoining district where such use is prohibited.

Cases that cite this headnote

<sup>141</sup> **Zoning and Planning**  
↔Existence of use in general

Only physical evidence manifested in the most tangible and palpable form can bring about the application of nonconforming clauses in a zoning ordinance, and before a supposed nonconforming use may be protected, it must exist somewhere outside the property owner's mind.

1 Cases that cite this headnote

<sup>151</sup> **Zoning and Planning**

↔Existence of use in general  
**Zoning and Planning**  
↔Vested or property rights

Where money expended on facility for a nonconforming use was minimal and where much of the material purchased for the nonconforming use could also be applied to conforming uses, landowner had failed to establish the existence of a nonconforming use or a vested right to use the area for his intended purpose.

Cases that cite this headnote

<sup>161</sup> **Zoning and Planning**  
↔Enlargement or Extension of Use

Where mobile home park in existence at the time of adoption of a zoning ordinance conformed to that ordinance at the time of its adoption or shortly thereafter, landowner had not established a nonconforming use such as would allow him to expand the mobile home park into areas where it would be a nonconforming use.

Cases that cite this headnote

<sup>171</sup> **Zoning and Planning**  
↔Construction, Operation, and Effect

The nomenclature of the district to which a use is restricted is of no consequence where it clearly does not result in grouping such use with totally incompatible uses, thus rendering the districts concerned unusable for the purpose.

2 Cases that cite this headnote

<sup>181</sup> **Zoning and Planning**  
↔Mobile homes; trailer parks

It was not an abuse of discretion for township to

restrict mobile home parks to districts zoned commercial.

1 Cases that cite this headnote

<sup>191</sup> **Zoning and Planning**  
↔Public health, safety, morals, or general welfare

Zoning ordinance which totally excludes legitimate uses or fails to provide for such uses anywhere within the municipality should be regarded with particular circumspection and in fact must bear a more substantial relationship to the public health, safety, morals and general welfare of the community than an ordinance which merely confines that use to a certain area in the municipality.

1 Cases that cite this headnote

<sup>1101</sup> **Zoning and Planning**  
↔Validity of regulations in general  
**Zoning and Planning**  
↔Regulations in general

Presumption of the validity of a zoning ordinance can be overcome by establishing that such ordinance totally excludes a legitimate use from the community, and thereafter it is the responsibility of a municipality to establish the validity of a total ban, but where a challenger alleges that there is de facto exclusionary zoning, challenger carries the heavy burden of showing that the ordinance, as applied, effectively prohibits such use.

5 Cases that cite this headnote

<sup>1111</sup> **Zoning and Planning**  
↔Mobile homes; trailer parks

Where at least one mobile home permitted by zoning ordinance was already in existence, and

where there was other undeveloped land zoned for mobile home parks, fact that only 2½ percent of a township was zoned for mobile homes and that 1 percent to 1½ percent of that amount was already developed did not establish a de facto exclusionary zoning.

2 Cases that cite this headnote

<sup>112]</sup> **Zoning and Planning**  
← Mobile homes: trailer parks

Zoning ordinance is not exclusionary merely because the areas zoned for mobile home parks are small and already occupied by existing mobile home parks.

1 Cases that cite this headnote

<sup>113]</sup> **Zoning and Planning**  
← Mobile homes: trailer parks

Zoning ordinance which limited growth of one mobile home park but which also provided other land on which other mobile home parks could be developed did not constitute invalid special legislation aimed at halting the natural development of the existing mobile home park.

1 Cases that cite this headnote

**Attorneys and Law Firms**

\*313 \*\*815 William H. Mitman, West Chester, for appellants.

Agulnick & Talierco, Ronald M. Agulnick, West Chester, Glenvar E. Harman, Downingtown, for appellees.

Before BOWMAN, President Judge, and CRUMLISH, Jr., KRAMER, WILKINSON, MENCER and BLATT, JJ.

**OPINION**

BLATT, Judge.

Robert H. and Elizabeth W. Hodge are the owners of a large tract of land located in West Bradford Township (Township). The property is bisected by the Thorndale-Marshallton Road, with approximately 137 acres lying on the east side of the road and approximately 188 acres on the west side of the road. Since acquiring the land in 1957, the Hodges have used it primarily as a commercial orchard, but beginning in 1966, they also began installing mobile homes, eventually establishing a mobile home park known as 'Appleville', which included mobile homes located on both sides of the Thorndale-Marshallton Road.

\*314 When the Hodges first began placing mobile homes in Appleville, the Township had no zoning ordinance, but a comprehensive plan was adopted on August 12, 1969, and, on April 14, 1970, following public hearings, a zoning ordinance was also adopted (to be effective April 19, 1970). This ordinance permitted mobile home parks in commercial districts only, and then by special exception. The Hodges' land was zoned partially residential and partially commercial, with part of Appleville being within a residential district. On March 9, 1971, the Township's zoning map was amended so as to include all of Appleville in a commercial district, with the establishment of commercial districts of approximately 20 acres on each side of the road.

Subsequent to the enactment of the April 14, 1970 ordinance, the Hodges sought a special exception from the Zoning Hearing Board (Board) for Appleville. The Board granted an exception, finding that there were then five mobile homes on the west side of the road, all conforming with the ordinance, and fifty-four homes on the east side of the road, some conforming and some nonconforming. On appeal to the Court of Common Pleas of Chester County (No. 60, February Term, 1971), the Board's decision was affirmed, and no appeal was ever taken from that order.

On December 5, 1970, the Hodges filed an application with the Township Zoning Officer for permission to install 300 mobile homes on the west side of the Thorndale-Marshallton Road. The application was refused on the same day on the grounds that it did not conform to the zoning ordinance. The Hodges then appealed to the Board, numerous hearings were held between December 29, 1970 and August 19, 1971, and on October 2, 1971, and Board \*\*816 rejected the application, finding that the

proposed additional mobile homes would be placed largely in a residential district where mobile home parks were not permitted. It also found \*315 that, despite the Hodges' contentions to the contrary, this proposal did not constitute the expansion of a nonconforming use. The Board held that the park on the west side of the road, where the additional mobile homes were to be placed, was a conforming use, and that, since March 14, 1971, so was the entire park on the east side of the road. Additionally, the Board found that the Hodges had made no substantial outlay of funds on the proposed additional spaces prior to the effective date of the zoning ordinance. The Court of Common Pleas of Chester County, without taking any additional testimony, affirmed the Board's order.

Our scope of review where, as here, the court below took no additional evidence, is limited to a determination of whether or not the Board abused its discretion or committed on error of law. *Philadelphia v. Earl Scheib Realty Corp.*, 8 Pa.Cmwlth. 11, 301 A.2d 423 (1973). The Hodges have raised a number of questions concerning the action of the Board as well as the validity of the Township's zoning ordinance, and we will attempt to deal with each of these questions individually.

#### PROCEDURAL IRREGULARITIES

<sup>141</sup> The Hodges have challenged the validity of both the Township's comprehensive plan and its zoning ordinance because of alleged procedural irregularities in their adoption. We must note, however, that this challenge was raised before the Board rather than in an action brought before the Court of Common Pleas within 30 days of the adoption of the ordinance, and it was, therefore, not properly raised. *Gerstley v. Cheltenham Township Commissioners*, 7 Pa.Cmwlth. 409, 299 A.2d 657 (1973); *Linda Development Corp. v. Plymouth Township*, 3 Pa.Cmwlth. 334, 281 A.2d 784 (1971). Our Supreme Court has stated, in \*316 *Roeder v. Hatfield Borough Council*, 439 Pa. 241, 246, 266 A.2d 691, 694 (1970):

'As to testing defects in the process of enactment of an ordinance by a borough, the MPC, s 915,' states that these issues may be raised in a proceeding before the Board only within 30 days of the effective date of the ordinance. Even though the MPC thus creates a statute of limitations, it does not create a formal procedure by which such questions may be raised. As s 910 explicitly states that the Board has no power to pass on the validity of an ordinance and as such

questions will rarely involve issues within the special competence of the Board, issues concerning the process of enactment should be brought before the court of common pleas (formerly the Court of Quarter Sessions) within 30 days of the date of enactment pursuant to s 1010 of the Borough Code.'

The proper procedure here would have been for the Hodges to bring an action, pursuant to Section to 702 of The Second Class Township Code, Act of May, 1, 1933, P.L. 103, 53 P.S. s 65741, in the Court of Common Pleas within 30 days of the effective date of the ordinance. Since they did not do so this matter is not properly before us and it need not be considered.

#### EXPANSION OF A NONCONFORMING USE

<sup>121</sup> The Hodges contend that they have established a mobile home park as a nonconforming use on their property and are entitled to expand that use by adding 300 \*\*817 mobile homes, and it is generally true that a nonconforming use includes the right of natural expansion so long as that expansion is reasonable and not detrimental to the welfare of the community. \*317 *Township of Lower Yoder v. Lester J. Weinzierl*, 2 Pa.Cmwlth. 289, 276 A.2d 579 (1971). 'Structures may be erected on open land previously devoted to a nonconforming use, as of right. However, the erection of structures upon land not previously so used, may only be accomplished by way of variance, the requisites of which are hardship to the owner and absence of detriment to the public interest.' *Philadelphia v. Angelone*, 3 Pa.Cmwlth. 119, 128 280 A.2d 672, 677 (1971).

<sup>131</sup> <sup>141</sup> The question in this case, however, is whether or not a nonconforming use actually did exist, or if in fact the original construction in Appleville constituted a use compatible with the terms of the zoning ordinance. It would be specious to contend that the doctrine of nonconforming use ensures one who engages in a permitted use in one zoning district the right to engage in the same use in an adjoining district where such use is prohibited. *Colonial Park for Mobile Homes, Inc. v. Zoning Hearing Board*, 5 Pa.Cmwlth. 594, 290 A.2d 719 (1972). Moreover, in determining whether or not a nonconforming use existed, '(o)nly physical evidence manifested in the most tangible and palpable form can bring about the application of nonconforming clauses in a

zoning ordinance. Before a supposed nonconforming use may be protected, it must exist somewhere outside the property owner's mind.' *Cook v. Bensalem Township Zoning Board of Adjustment*, 413 Pa. 175, 179, 196 A.2d 327, 330 (1964).

<sup>151</sup> As found by the Board (and by the lower court in the unappealed decision at No. 60, February Term, 1971), and as supported by substantial evidence in the record, the Hodges' mobile home park on the west side of the road, where the planned expansion is to take place, was in conformance with the zoning ordinance as of the date of its enactment. On the east side of the road, where apparently no expansion is presently planned, part of the mobile home park was in conformance \*318 as of the date of enactment of the ordinance and the entire park was in conformance following the amendment of the ordinance on March 14, 1971. It is true that some physical activities were begun on the proposed 300 sites prior to the enactment of the zoning ordinance, but these were hardly sufficient to establish that the additional area concerned was now subject to a nonconforming use. And, although there was planning for the 300 proposed sites, the money expended on facilities was minimal. In fact, much of the material that was purchased could be applied to conforming uses or to the existing mobile home park. If anything, the monies so expended for such activities seem to have been spent in a 'race' to beat the effective date of the zoning ordinance, which is not a permissible action in establishing a nonconforming use. *Penn Township v. Fratto*, 430 Pa. 487, 244 A.2d 39 (1968); *Penn Township v. Yecko Bros.*, 420 Pa. 386, 217 A.2d 171 (1966). For similar reasons, there would be no basis for a finding that the Hodges had a vested right to use the area in question as a mobile home park. See *Clover Hill Farms, Inc. v. Lehigh Township*, 5 Pa.Cmwlth. 239, 289 A.2d 778 (1972); *Friendship Builders, Inc. v. West Brandywine Township Zoning Hearing Board*, 1 Pa.Cmwlth. 25, 271 A.2d 511 (1970).

<sup>161</sup> We must agree with the Board and the lower court, therefore, that the Hodges had not established a mobile home park as a nonconforming use, and that, because their mobile home park does in fact conform to the dictates of the zoning ordinance, there is no right of expansion available to them now.

Because of this holding, therefore, we need not decide their challenge to the validity of Section 1000(b) of the Township \*\*818 zoning ordinance, which limits the expansion of a nonconforming use to 50%.

### \*319 VALIDITY OF THE ZONING ORDINANCE

The Hodges have raised some challenges to the substantive validity of the zoning ordinance, at least as it applies to mobile home parks. It is clear that, in considering the validity of this ordinance, we must presume it to be valid and constitutional, the burden of proving otherwise being upon the Hodges. See *Schubach v. Silver*, 9 Pa.Cmwlth. 152, 305 A.2d 896 (1973).

<sup>171</sup> <sup>181</sup> They contend that it was improper to confine mobile home parks to commercial districts, and that such parks should be permitted in residential districts as well (individual mobile homes are permitted in residential districts). Such a restriction, however, has clearly been held to be valid<sup>2</sup> and we see no reason now to change that position. The nomenclature of the district to which a use is restricted is of no consequence where, as here, it clearly does not result in grouping such use with totally incompatible uses and thus rendering the districts concerned unusable for the proposed use. A mobile home park unlike individual mobile homes, is often a commercial as well as a residential development, and it requires specific regulations by the municipality. It is hardly improper or discriminatory to place reasonable restrictions on such a development, including placing it in other than purely residential districts. At any rate, this is a decision for the local legislative body to make and we cannot find that the Township here abused its discretion in so doing.

<sup>191</sup> <sup>101</sup> The Hodges also contend that this zoning ordinance constitutes a de facto exclusion of mobile home parks because only 2 1/2% Of the Township is zoned for \*320 commercial use and 1% To 1 1/2% Of this amount is already developed.<sup>3</sup> It is true that a zoning ordinance which totally excludes legitimate uses or fails to provide for such uses anywhere within the municipality should be regarded with particular circumspection and in fact must bear a more substantial relationship to the public health, safety, morals and general welfare of the community than an ordinance which merely confines that use to a certain area in the municipality. *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970); *Exton Quarries, Inc. v. Zoning Board of Adjustment*, 425 Pa. 43, 228 A.2d 169 (1967). It is also true that the presumption of the validity of a zoning ordinance can be overcome by establishing that such an ordinance does totally exclude a legitimate use from the community, and thereafter it is the responsibility of the municipality to establish the validity of the total ban. *Beaver Gasoline Company v. Osborne Borough*, 445 Pa. 571, 285 A.2d 501 (1971). When, however, a challenger alleges that there is de facto exclusionary zoning, he carries the heavy burden of showing that, even though on its face an ordinance permits a specific use, the ordinance

as applied effectively prohibits such use.

<sup>111</sup> <sup>112</sup> The facts in this case could in no way support such a finding. Not only does at least one mobile home park which is permitted by the ordinance (the Hodges') already exist, but there is still other undeveloped land in commercial (and industrial) districts in the Township which the Hodges have not established could not be used for mobile home parks. In fact, a zoning ordinance is not exclusionary merely because the areas zoned for mobile home parks are small and already \*321 occupied by existing mobile home parks. Groff Appeal, \*\*819 supra. 'The mere assertion that these areas are small hardly overcomes the presumption of constitutionality.' Honey Brook, supra, 430 Pa. at 621, 243 A.2d at 333.

<sup>113</sup> Lastly, the Hodges contend that the purpose of the Township's zoning ordinance was to halt the natural development of Appleville. Although there evidently was a certain amount of hostility to the Hodges' mobile home park in the Township, we cannot find that the ordinance here constituted invalid special legislation, as was the case in Limekiln Golf Course, Inc. v. Zoning Board of Adjustment of Horsham Township, 1 Pa.Cmwlth. 499, 275 A.2d 896 (1971).

For the above reasons, therefore, we must affirm the order of the lower court.

Footnotes

- <sup>1</sup> The provisions of the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, 53 P.S. s 10101 et seq., which are here applicable to not include those amendments added by the Act of June 1, 1972, P.L. --, No. 93.
- <sup>2</sup> Honey Brook Township v. Alenovitz, 430 Pa. 614, 243 A.2d 330 (1968); Appeal of Abraham P. Groff from the Decision of Warwick Township Board of Adjustment, 1 Pa.Cmwlth. 439, 274 A.2d 574 (1971).
- <sup>3</sup> It should be noted that mobile home parks are also permitted in industrial districts, because the zoning ordinances provide that all permissible uses in a commercial district are also permissible in industrial district.

KRAMER, Judge (dissenting).

I respectfully dissent for the same reasons I dissented in Township of Ohio v. Builders Enterprises, Inc., 2 Pa.Cmwlth. 39, 44, 276 A.2d 556, 559 (1971). My reading of the applicable law permits me to conclude that where the record supports the property owner's contention that his Entire property was patently intended to be used for the nonconforming use in Actual use that he should not be required to prove an extension to his nonconforming use but rather only to prove the intended use at the time the Zoning Ordinance or its amendment was passed. This does not mean that the property owner's unannounced intention, or what may have been in the mind of the property owner is controlling, but rather what should be controlling is what the record shows was his patent intention. My reading of the record in this case leads me to believe that this property owner adequately showed his intention to use the entire property for mobile home park purposes; therefore, I would reverse the court below and direct the issuance of a permit.

Parallel Citations

312 A.2d 813

61 Ohio St.3d 161  
Supreme Court of Ohio.

CITY OF WESTLAKE, Appellant,  
v.  
MASCOT PETROLEUM COMPANY, INC., d.b.a.  
Sunoco Sunmart, Appellee.

No. 90-1090. | Submitted April 16, 1991. | Decided  
July 24, 1991.

City brought action against service station owner to enjoin sale of alcoholic beverages at service station. Owner filed counterclaim for declaratory judgment that state law preempted ordinance against sale of alcoholic beverages at service stations. The Court of Common Pleas, Cuyahoga County, enjoined sale of beer and wine at service station. Owner appealed. The Court of Appeals reversed and remanded. Motion to certify record was allowed. The Supreme Court, Sweeney, J., held that: (1) service station owner's allegation that state statutes preempted ordinance did not challenge constitutionality of ordinance, and, thus, Attorney General did not need to be served with owner's counterclaim for declaratory judgment, and (2) owner's privileges under permit by Department of Liquor Control authorizing sale of beer and wine could not be divested by ordinance.

Affirmed.

West Headnotes (5)

<sup>111</sup> **Declaratory Judgment**  
☞Service on Attorney General

Where unconstitutionality of municipal ordinance is express basis for declaratory relief, service of copy of proceeding upon Attorney General is jurisdictional requirement. R.C. § 2721.12.

6 Cases that cite this headnote

<sup>121</sup> **Declaratory Judgment**

☞Service on Attorney General

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Service station owner's allegation that state statutes preempted municipal ordinance against sale of alcoholic beverages at service stations did not challenge constitutionality of ordinance, and, thus, Attorney General did not need to be served with owner's counterclaim for declaratory judgment; any constitutional issue would arise only after conflict was determined to exist and only where city sought to invoke home rule authority to defeat application of state law. R.C. §§ 2721.12, 4303.01 et seq.; Const. Art. 18, § 3.

16 Cases that cite this headnote

<sup>131</sup> **Declaratory Judgment**  
☞State or state officers

While statute which requires that Attorney General be made party to declaratory judgment action challenging constitutionality of municipal ordinance is applicable to proceedings initiated by way of counterclaim, it is not implicated where sole allegation is that ordinance is preempted by state law. R.C. § 2721.12.

2 Cases that cite this headnote

<sup>141</sup> **Intoxicating Liquors**  
☞Concurrent and conflicting regulations by state and municipality

Service station owner's privileges under permit for sale of beer and wine issued by Department of Liquor Control could not be divested by city ordinance against sale of alcoholic beverages at service stations. R.C. §§ 4301.01 et seq., 4303.26, 4303.292 (A)(2)(a).

12 Cases that cite this headnote



pleas court. The appellate court concluded that the trial court erred in granting the permanent injunction without a hearing, that W.C. Section 1216.03(d)(1) fn. (g) was preempted by state law, that the business operated by appellee was not encompassed within the definition of "automotive service station" contained in W.C. Sections 1216.03(e)(1) and 1203.05(f), and that the common pleas court did not possess jurisdiction to entertain that portion of the declaratory judgment action brought as a counterclaim by appellee which challenged the \*163 constitutionality of the ordinance because the Attorney General had not been served with the complaint as required by R.C. 2721.12.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

#### Attorneys and Law Firms

Patrick A. Gareau, Director of Law, and Robert C. McClelland, for appellant.

Calfee, Halter & Griswold, Wm. Tousley Smith and Ronald D. Holman II, Cleveland, for appellee.

Brian J. Melling, Bedford, and Clarence B. Rader III, urging reversal for amicus curiae, Ohio Mun. League.

SWEENEY, Justice.

#### I

The threshold issue submitted for our review concerns the procedural foundation necessary to maintain the present challenge to the Westlake municipal ordinance through the declaratory judgment mechanism. The instant action is governed by R.C. 2721.12, which provides:

"When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration. No declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, the municipal corporation shall be made a party and shall be heard, *and if any statute or the ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and shall be heard.*" (Emphasis added.)

**\*1071** <sup>111</sup> Where the unconstitutionality of a municipal ordinance is the expressed basis for declaratory relief, service of a copy of the proceeding upon the Attorney General is a jurisdictional requirement. Accordingly, the syllabus to *Malloy v. Westlake* (1977), 52 Ohio St.2d 103, 6 O.O.3d 329, 370 N.E.2d 457, provides as follows:

"Failure to serve the Attorney General under R.C. 2721.12 with a copy of the proceeding in a declaratory judgment action which challenges the constitutionality of an ordinance precludes a Court of Common Pleas from rendering declaratory relief in that action." See, also, *Sebastiani v. Youngstown* (1979), 60 Ohio St.2d 166, 14 O.O.3d 405, 398 N.E.2d 558.

Clearly, this result obtains regardless of whether the declaratory judgment action is initiated by complaint or responsive pleading.

**\*164** The crucial inquiry, therefore, concerns the basis upon which the Westlake municipal ordinance is sought to be invalidated. It is readily apparent that appellee's counterclaim for declaratory relief, predicated upon the terms of the ordinance and, specifically, its definition of "automotive service station," is not of constitutional dimensions. Consequently, this aspect of the declaratory judgment action is not foreclosed by the failure of appellee to serve a copy of the counterclaim upon the Attorney General.

<sup>121</sup> Appellant contends, however, that the preemption issue is constitutional in nature inasmuch as the conflict between the ordinance and state law necessarily involves an interpretation of the home rule authority of charter municipalities under Section 3, Article XVIII, Ohio Constitution. This argument is without merit. As an initial matter, the challenge initiated by appellee merely involves the contention that the ordinance in question is inconsistent with the regulatory framework established by R.C. Chapter 4303.

While the respective authority of municipalities and the state to legislate upon certain subjects involves a constitutional question, any conflict between state law and municipal ordinances is determined by reference to their operative provisions. Accordingly, while Section 3, Article XVIII provides that the authority of municipalities is limited to local police, sanitary and similar regulations not in conflict with state law, the specific provisions of the state legislation and the municipal ordinance govern whether a conflict exists. In determining whether a conflict does exist, a court refers to the language of the statute to determine whether the General Assembly intended to preempt local regulation on the subject.

Inasmuch as the issue of preemption involves an interpretation of the state statute, the constitutionality of the ordinance is not at issue and the Attorney General need not be served with the complaint in order for the common pleas court to retain jurisdiction over the claim. Any constitutional issue would arise only after a conflict is determined to exist and then only where *appellant* seeks to invoke its home rule authority to *defeat* the application of state law.

However, even if we were to entertain the proposition that the Attorney General must be served whenever a *defense* to a declaratory judgment action is predicated upon constitutional grounds, no such defense was asserted by appellant herein. Throughout the course of this action, appellant has contended that no conflict exists between the state law and the municipal ordinance. Appellant has not advanced the argument that a conflict exists and that, pursuant to Section 3, Article XVIII, the local ordinance must prevail. Accordingly, no constitutional issues have been presented for resolution either as a basis for invalidating the ordinance or as a justification for its legality.

<sup>[3]</sup> \*165 We therefore hold that, while R.C. 2721.12, which requires that the Attorney General be made a party to a declaratory judgment action challenging the constitutionality of a municipal ordinance, is applicable to proceedings initiated by way of counterclaim, it is not implicated where the sole allegation is that the ordinance is preempted by state law.

**\*\*1072 II**

<sup>[4]</sup> Appellant further contends that its municipal ordinance prohibiting the sale of beer and wine by automotive service stations is not preempted by R.C. Chapter 4303. In support of this contention, appellant relies upon the decision of this court in *Ridgley, Inc. v. Wadsworth Bd. of Zoning Appeals* (1986), 28 Ohio St.3d 357, 28 OBR 420, 503 N.E.2d 1036. *Ridgley* involved a municipal ordinance adopted by the city of Wadsworth which contained a zoning restriction similar to the one at issue in the case *sub judice*. The appellant in *Ridgley* argued that the Wadsworth zoning regulation conflicted with the state's regulation of liquor sales, and was therefore invalid. In analyzing the argument, the majority in *Ridgley* considered R.C. 4303.292(A)(2)(a), which provided:

"The department of liquor control may refuse to issue, transfer the ownership of, or renew, and shall refuse to transfer the location of any retail permit issued under this

chapter if it finds:

" \* \* \*

"(2) That the place for which the permit is sought:

"(a) Does not conform to the building, safety, or health requirements of the governing body of the county or municipality in which the place is located. *This section shall not be construed to include local zoning ordinances, nor shall the validity of local zoning regulations be affected by this section.*" (Emphasis added.) 137 Ohio Laws, Part I, 1870-1871.

In a four-to-three decision issued December 30, 1986, the majority in *Ridgley* held that R.C. 4303.292(A)(2)(a) barred the state from issuing a liquor permit to a business located in an area where the sale of alcohol is prohibited by a zoning ordinance. The syllabus in *Ridgley* provides:

"A municipality is not preempted by operation of state law from promulgating and enforcing zoning ordinances limiting the retail sale of alcoholic beverages within the municipal corporate boundaries."

In contrast, the dissenting justices in *Ridgley* argued that the state intended by its enactment of R.C. Title 43 to preempt local regulation of liquor sales, and that R.C. 4303.292(A)(2)(a) was never intended to allow municipalities to regulate such sales through zoning. Rather, the dissenting opinions expressed \*166 the view that local control of liquor sales was limited to the mechanisms specifically provided by R.C. Title 43. *E.g., id.* at 365, 28 OBR at 427, 503 N.E.2d at 1042 (Sweeney, J., dissenting).

Effective July 1, 1987, R.C. 4303.292 was amended by the legislature to provide as follows:

"(A) The department of liquor control may refuse to issue, transfer the ownership of, or renew, and shall refuse to transfer the location of any retail permit issued under this chapter if it finds:

" \* \* \*

"(2) That the place for which the permit is sought:

"(a) Does not conform to the building, safety, or health requirements of the governing body of the county or municipality in which the place is located. *As used in division (A)(2)(a) of this section, 'building, safety, or health requirements' does not include local zoning ordinances. The validity of local zoning regulations shall*

not be affected by this section.” (Emphasis added to indicate amended portion.) 142 Ohio Laws, Part II, 3618–3619.

Moreover, R.C. 4303.26 was amended on the same date to provide in relevant part:

“Applications for regular permits authorized by sections 4303.02 to 4303.23 of the Revised Code may be filed with the department of liquor control. No permit shall be issued by the department until fifteen days after the application for it is filed. When an application for a new class C or D permit is filed, when class C or D permits become available, when an application for transfer of ownership of a class C or D permit or transfer of a location of a class C or D permit is filed, or when an application for an F–2 permit is filed, no permit shall be issued, nor shall the location or the ownership of a permit be transferred, by the department until the department notifies \*\*1073 the legislative authority of the municipal corporation, if the business or event is or is to be located within the corporate limits of a municipal corporation, or the clerk of the board of county commissioners and township trustees in the county in which the business or event is or is to be conducted, if the business is or is to be located outside the corporate limits of a municipal corporation, and an opportunity is provided officials or employees of the municipal corporation or county and township, who shall be designated by the legislative authority of the municipal corporation or the board of county commissioners or township trustees, for a complete hearing upon the advisability of the issuance, transfer of ownership, or transfer of location of the permit. *In this hearing, no objection to the issuance, transfer of ownership, or transfer of location of the permit shall be based upon noncompliance of the proposed permit \*167 premises with local zoning regulations which prohibit the sale of beer or intoxicating liquor, in an area zoned for commercial or industrial uses, for a permit premises that would otherwise qualify for a proper permit issued by the department of liquor control.*” (Emphasis added to indicate language supplied by amendment.) 142 Ohio Laws, Part II, 3616–3617.

It is evident from the language of the amendments that the exclusive authority to regulate the sale and consumption of alcoholic beverages is vested in the Ohio Department of Liquor Control and the Ohio Liquor Control Commission.

Were not the clear language of R.C. 4303.26, as amended, sufficient to evidence this legislative intent, Section 3, Am.Sub.H.B. No. 419, the bill containing the amendments, provides as follows:

“The legislative intent of this act is to specify that only the residents of a community have the right to approve or disapprove the sale of alcoholic beverages through the statutory provisions authorizing a local option election, that if sales of such beverages are approved, the primary authority to regulate the sale of alcoholic beverages is delegated to the Department of Liquor Control, and that the legislative or executive authority of a political subdivision has only such rights or powers with regard to these sales as are expressly granted under Chapter 4303. of the Revised Code.” 142 Ohio Laws, Part II, 3675.

Thus, the language and intent of the amendments are wholly consistent with the view of the prior law expressed by the dissenting opinions in *Ridgley*. Assuming *arguendo* that any ambiguity remains, the rules of statutory construction contained in R.C. 1.49 remove all doubt. This section provides as follows:

“If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

“(A) The object sought to be attained;

“(B) The circumstances under which the statute was enacted;

“(C) The legislative history;

“(D) The common law or former statutory provisions, including laws upon the same or similar subjects;

“(E) The consequences of a particular construction;

“(F) The administrative construction of the statute.”

R.C. 4303.26 and 4303.292 could not be any less ambiguous. However, if such were the case, resort to R.C. 1.49 assists their proper construction in several ways. The object to be obtained by the amendments was clearly to \*168 supersede the decision in *Ridgley*. R.C. 1.49(A). To our knowledge, no other event occurred which would have provoked the legislative action. Likewise, the circumstances of the statutory enactment (occurring less than six months after the *Ridgley* decision) evidence the reason for legislative attention. R.C. 1.49(B). The legislative history is very explicit. R.C. 1.49(C). Section 3 of the amending bill sets forth the reasons why the General Assembly felt it necessary to amend the statute. Likewise, the knowledge possessed by the General Assembly of former statutory provisions as interpreted by this court not only may be presumed but may be

considered to have been the \*\*1074 motivating factor behind the amendments. R.C. 1.49(D).

<sup>151</sup> We therefore hold that where a business entity operating in a commercial or industrial district has been issued a valid permit for the sale of alcoholic beverages by the Ohio Department of Liquor Control, a municipality is without authority to extinguish privileges arising thereunder through the enforcement of zoning regulations.

Inasmuch as it is our conclusion that appellant could not, through its zoning powers, divest appellee of its permit privileges, it is unnecessary for us to determine whether the operation of appellee is encompassed within the definition of "automotive service station" contained in W.C. Section 1203.05(f).

The judgment of the court of appeals is therefore affirmed.

*Judgment affirmed.*

MOYER, C.J., and HOLMES, DOUGLAS, WRIGHT, HERBERT R. BROWN and RESNICK, JJ., concur.

**Parallel Citations**

573 N.E.2d 1068

Appeal of Shore, 524 Pa. 436 (1990)

573 A.2d 1011

524 Pa. 436  
Supreme Court of Pennsylvania.

In re Appeal of Arthur SHORE from the Decision  
of the Board of Supervisors of Solebury Township  
denying Request for Curative Amendment.  
Appeal of SOLEBURY TOWNSHIP.

Argued Oct. 27, 1988. | Decided April 26, 1990.

Township board of supervisors rejected landowner's constitutional attack on ordinance excluding mobile home parks. The Court of Common Pleas, Bucks County, Edward G. Biester, Jr., J., affirmed, and landowner appealed. The Commonwealth Court, 91 Pa.Cmwlth. 7, 496 A.2d 876, affirmed. Thereafter, the Supreme Court, 515 Pa. 306, 528 A.2d 576, vacated and remanded for reconsideration in light of Supreme Court judicial decision. On remand, the Commonwealth Court, 107 Pa.Cmwlth. 522, 528 A.2d 1045, No. 3 C.D. 1984, Craig, J., reversed Court of Common Pleas' order and remanded. Township petitioned for allowance of appeal. The Supreme Court, No. 17 E.D. Appeal Docket, 1988, Zappala, J., held that: (1) Common Pleas Court's finding that ordinance effectively prohibited mobile home parks was supported by the evidence, and (2) on remand, Court was not required to be guided by statute of municipalities planning code that had been repealed during pendency of appeal.

Affirmed in part, vacated and remanded in part.

Nix, C.J., filed a joining concurring opinion.

McDermott, J., filed a joining concurring opinion in which Papadakos, J., joined.

Larsen, J., filed a dissenting opinion.

West Headnotes (2)

<sup>111</sup> **Zoning and Planning**  
↔ Weight and Sufficiency of Evidence in  
General

Trial court's finding that township zoning ordinance effectively prohibited mobile home parks was supported by the evidence, in

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landowner's action attacking constitutionality of ordinance, where the ordinance recognized mobile home parks by including a definition of them, but did not list mobile home parks in any of the residential zones, and the enumerated uses and no others were permitted.

7 Cases that cite this headnote

<sup>121</sup> **Zoning and Planning**  
↔ Remand and further proceedings below

Court of common pleas was not required, on remand, in case challenging a township's zoning ordinance for failing to provide for mobile home parks, to be guided by a statute under municipalities planning code dealing with appeals of land use decisions that had been repealed during time in which appeal was pending. 53 P.S. § 11011(2); § 11006-A (Repealed).

7 Cases that cite this headnote

#### Attorneys and Law Firms

**\*\*1011 \*437** Stephen B. Harris, Warrington, for appellant.

Edward F. Murphy, Caroline F. Achey, Richard P. McBride, Newtown, for appellee.

**\*\*1012** Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, ZAPPALA, PAPADAKOS and STOUT, JJ.

#### Opinion

ZAPPALA, Justice.

We review an order of Commonwealth Court remanding this case to the Court of Common Pleas of Bucks County based on a finding that Solebury Township's zoning ordinance unlawfully prohibited the development of mobile home parks. 107 Pa.Cmwlth. 522, 528 A.2d 1045.

The question is whether this ordinance, which provides for a variety of housing types and population densities, is nevertheless exclusionary with regard to its treatment of mobile home parks.

In this protracted litigation, the Township first held that its ordinance did not prohibit mobile home parks, and denied \*438 the developer's proposed curative amendment. On appeal, the court of common pleas found that the ordinance did prohibit mobile home parks, rejecting the Township's contrary finding for lack of substantial evidence. Nevertheless, the court affirmed the denial of the curative amendment based on its reading of our decision in *In Re: M.A. Kravitz Co., Inc.*, 501 Pa. 200, 460 A.2d 1075 (1983). Commonwealth Court also affirmed, based on the interpretation it had given *Kravitz* in *Fernley v. Board of Supervisors of Schuylkill Township*, 76 Pa.Comm.w. 409, 464 A.2d 587 (1983). While the developer's petition for allowance of appeal was pending, we reversed the Commonwealth Court's decision in *Fernley* at 509 Pa. 413, 502 A.2d 585 (1985). Accordingly, we granted the petition and remanded for reconsideration in light of our decision in *Fernley*. Commonwealth Court then determined that the ordinance improperly excluded mobile home parks, and remanded to the common pleas court for consideration in accordance with 53 P.S. § 11011(2). We granted the Township's petition for allowance of appeal and now affirm.

The Township's primary argument is that this case falls within the rationale of *Kravitz*. There, a plurality of this Court sustained an ordinance that failed to provide for townhouses although provision was made for residential uses other than single family detached dwellings. It did not approve a rule whereby an ordinance prohibiting a given residential use could nevertheless be sustained under the "fair share" analysis of *Surrick*. See 501 Pa. at 210-211, 460 A.2d at 1081. As was later made clear in *Fernley*, an ordinance that prohibits a particular use is not tested by the "fair share" analysis.

An important element of the plurality opinion in *Kravitz*, seemingly ignored in later cases looking to it for guidance, was the distinction between an ordinance prohibiting particular uses and an ordinance failing to provide for particular uses. A zoning ordinance, like all legislative enactments, is presumed to be valid and constitutional; one challenging it bears a heavy burden of proof. Demonstrating that an \*439 ordinance expressly excludes a particular use is perhaps the most clear-cut means of meeting that burden, for "the constitutionality of total prohibitions ... cannot be premised on the fundamental reasonableness of allocating to each type of activity a particular location in the community." *Exton*

*Quarries Inc. v. Zoning Bd. of Adjustment*, 425 Pa. 43, 59, 228 A.2d 169, 179 (1967). Though the proof is more difficult, it is also possible to show that a use is effectively prohibited throughout the municipality although it is apparently permitted. *Benham v. Middletown Township*, 22 Pa.Comm.w. 245, 349 A.2d 484 (1975).

In *Kravitz*, it was noted that the township had, on review, determined that townhouse development would be permitted in one of the residential districts, not by variance or special exception but as a permitted use. This determination, supported by substantial evidence in the record and affirmed by the court of common pleas, gave indication that the zoning power was not being used unreasonably. In other words, the challenger had not met its burden of proving that the ordinance effectively prohibited the proposed use.

**\*\*1013** <sup>11</sup> Although the Township here claims that its ordinance merely fails to provide for mobile home parks, we are satisfied that the common pleas court did not err in characterizing the ordinance as effectively prohibiting mobile home parks. We note particularly that the ordinance recognized mobile home parks by including a definition of them, but did not list them in any of the residential zones, where the enumerated uses *and no others* were permitted. The Board's original rationale, that mobile home parks would be permitted, essentially as subdivisions made available for rent, in either the Residential Development District or the Village Residential District is untenable. Although each individual unit in a mobile home park might qualify as a single family dwelling, the large minimum lot size for each dwelling (20,000 square feet) in those districts would make development of a mobile home park economically unfeasible, allowing at most only 2.1 units per acre *before* accounting \*440 for road right of way requirements. (By way of comparison, the developer proposed minimum lot sizes of 4300 square feet, at a density of 5.3 units per acre *after* allowing for road right of way and open space, a density described as lower than average for mobile home parks.)

We are aware that some early Commonwealth Court cases affirmed rulings where mobile home parks would have been required to meet minimum lot sizes of 20,000 square feet per dwelling unit. Cf. *Delaware County Investment Corporation v. Zoning Hearing Board of Township of Middletown*, 22 Pa.Comm.w. 12, 347 A.2d 513 (1975); *Colonial Park for Mobile Homes, Inc. v. Zoning Hearing Board*, 5 Pa.Comm.w. 594, 290 A.2d 719 (1972). In *Delaware County Investment*, however, the landowner had sought a *variance* from the township's minimum lot

size regulation and the court found no abuse of discretion in the finding that the landowner had not shown the unique hardship necessary to the grant of a variance. In *Colonial Park*, the court, while acknowledging that such evidence might exist, found no evidence in the record before it from which it could conclude that the burden of demonstrating the unconstitutionality of the ordinance had been met. Here, as stated, the court of common pleas ruled otherwise on the record before it, Commonwealth Court affirmed, and we find no error.

[2] Commonwealth Court remanded this case to the court of common pleas for entry of an order consistent with Section 1011(2) of the Municipalities Planning Code, 53 P.S. § 11011(2). While this appeal was pending, however, the General Assembly repealed Article X of the Code, dealing with appeals of land use decisions, and replaced it with Article X-A. Act 1988-170. Unlike Section 1011(2), new Section 1006-A, 53 P.S. § 11006-A, does not enumerate specific factors that a court must consider in granting relief. Rather, as it did in 1972, the Code now grants courts broad discretion to approve the proposed use "as to all elements," or to approve it "as to some elements, refer [ring] other elements to the [appropriate authority] for \*441 further proceedings, including adoption of alternative restrictions, in accordance with the court's opinion and order." Although Act 1988-170 contained no indication as to whether the legislature intended it to be applicable to cases pending when it became effective, it would be inappropriate to require the court, on remand, to be guided by a statute that has been repealed.

The appellee argues that the proper relief in this case is entry of judgment ordering approval of the development *as filed*. This Court, however, is not in a position to determine the extent to which the proposal ought to be approved. The court of common pleas is best situated to judge whether the development should be approved as filed or whether the Board, under the supervision of the court, may require adherence to certain reasonable regulations.

Insofar as it reverses the August 7, 1985 order of the Court of Common Pleas of Bucks County, the order of the Commonwealth Court is affirmed. Insofar as it remands for entry of a supplemental order consistent with Section 1011(2) of the Municipalities \*\*1014 Planning Code, 53 P.S. § 11011(2), the order of the Commonwealth Court is vacated. The case is remanded to the Court of Common Pleas of Bucks County for entry of an order and proceedings consistent with Section 1006-A of the Municipalities Planning Code, 53 P.S. § 11006-A. The court of common pleas shall retain jurisdiction during the

pendency of this matter.

Jurisdiction relinquished.

STOUT, J., did not participate in the decision of this case.

NIX, C.J., files a joining concurring Opinion.

McDERMOTT, J., files a joining concurring Opinion in which PAPADAKOS, J., joins.

LARSEN, J., files a dissenting Opinion.

NIX, Chief Justice, concurring.

I join the opinion of Mr. Justice Zappala and write separately to emphasize the obligation of the lower court, in its \*442 supervisory capacity over the Board, to apply only *reasonable* restrictions, if any, upon the development or use as filed. It is true the pertinent language of the Pennsylvania Municipalities Planning Code, 53 P.S. § 10101, et seq., ("the Code"), gives broad discretion to the courts to "order the described development or use approved as to all elements or ... order it approved as to some elements and refer other elements to the governing body agency or officer having jurisdiction thereof for further proceedings, including the adoption of alternative restrictions, in accordance with the court's opinion and order." 53 P.S. § 11006-A(c). However that discretion must be exercised within a frame of reference allowing the proposed development or use of the successful challenger, in this case Arthur Shore, as impacted by those purposes enumerated in Section 10105 of the Code.<sup>1</sup> Restrictions posing insuperable difficulties or economic impracticability shall not and will not be countenanced irrespective of any rationale advanced therefor.

McDERMOTT, Justice, concurring.

The retributory concepts underlying *Fernley*,<sup>1</sup> that communities should be somehow punished because, unlike enterprising developers, they did not foresee all the commercial and residential possibilities in their community and therefore lost their opportunity for rational development is here ended. The anomaly that owners of land could have \*443 more than reason would allow, because they caught the municipality sleeping, is an invidious and destructive concept for any rational planning for the health and welfare of the community involved.

The legislature<sup>2</sup> has wisely given broad authority to courts

to give no more than the circumstances require and the community can stand. I trust the court below will fully understand, in exercising that discretion, that the "Fernley ticket" to any special advantage has been cancelled.

I join the majority.

PAPADAKOS, J., joins this concurring opinion.

\*\*1015 LARSEN, Justice, dissenting.

I vigorously dissent.

The Commonwealth Court was correct in holding that Solebury Township's zoning ordinance unconstitutionally excludes the development of mobile home parks. The majority is incorrect in framing this issue as a matter of factual dispute.<sup>1</sup> Ordinances rise and fall on their face. A use is either included or it is excluded *as a matter of law*, and this matter is quite simply determined by reading the ordinance. A party to an exclusionary zoning dispute cannot by evidence show that apples are oranges or that two plus two equals five. Trial courts need not pore over the records in these cases to find evidence of inclusion or exclusion. Rather, they must examine the plain meaning of \*444 the ordinances themselves, using the statutory rules of construction to interpret the words of the ordinances. To allow the meanings of the ordinances to depend upon what zoning boards wish them to mean is to throw the law into chaos, and will encourage these governing bodies to continue engaging in practices that exclude persons of moderate and limited income from residing in their communities.

#### Footnotes

<sup>1</sup> § 10105. Purpose of Act

It is the intent, purpose and scope of this act to protect and promote safety, health and morals; to accomplish coordinated development; to provide for the general welfare by guiding and protecting amenity, convenience, future governmental, economic, practical, and social and cultural facilities, development and growth, as well as the improvement of governmental processes and functions; to guide uses of land and structures, type and location of streets, public grounds and other facilities; to promote the conservation of energy through the use of planning practices and to promote the effective utilization of renewable energy sources; and to permit municipalities to minimize such problems as may presently exist or which may be foreseen.

<sup>1</sup> *Fernley v. Board of Supervisors of Schuylkill Township*, 509 Pa. 413, 502 A.2d 585 (1985).

<sup>2</sup> Pa. Municipal Planning Code, 53 P.S. § 10101, *et seq.*

<sup>1</sup> The majority states that "the court of common pleas found that the ordinance did prohibit mobile home parks, rejecting the Township's contrary finding *for lack of substantial evidence.*" Maj. op. at 1 (emphasis added). In discussing *In Re*:

In addition, the majority commits grievous error in remanding the case for entry of an order and proceedings consistent with a section of the Municipalities Planning Code which came into effect *after* the case was argued to this Court.<sup>3</sup> A majority of this Court previously considered the 1978 amendment that was made to *this* section of the Code, and determined that a retroactive application of the amendment to a case which challenged a zoning ordinance before the amendment went into effect constituted a violation of due process. *Fernley v. Board of Supervisors of Schuylkill Township*, 509 Pa. 413, 502 A.2d 585 (1985), *reargument denied*.

It is manifestly unjust to change the "rules of the game" while a case wends its cumbersome way through our appellate system. We are always striving to achieve predictability in the law, so that citizens can be able to continually keep their affairs and behavior in order. The majority today, by giving retroactive effect to section 1006-A of the Code, 53 P.S. 11006-A, seriously undermines this goal.

Accordingly, I would affirm the order entered by the Commonwealth Court wherein it remanded the case to the Court of Common Pleas of Bucks County for the entry of an order consistent with the provisions of section 1011(2) of the Code, 53 P.S. § 11011(2), with the common pleas court retaining jurisdiction for the purposes of ensuring that development is not prevented or unduly burdened for reasons of retribution.

#### Parallel Citations

573 A.2d 1011

*Co., Inc.*, 501 Pa. 200, 460 A.2d 1075 (1983), the majority states that the township's determination that townhouse development was a permitted use was "supported by *substantial evidence* in the record and affirmed by the court of common pleas." Maj. op. at 3 (emphasis added). And in discussing *Colonial Park for Mobile Homes, Inc. v. Zoning Hearing Board*, 5 Pa. Commw. 594, 290 A.2d 719 (1972), the majority states that "the court, while acknowledging that such evidence might exist, *found no evidence in the record* before it from which it could conclude that the burden of demonstrating the unconstitutionality of the ordinance had been met." Maj. op. at 4-5 (emphasis added).

- <sup>2</sup> Section 1011(2), 53 P.S. § 11011(2), was repealed and section 1006-A, 53 P.S. § 11006-A, was enacted on December 21, 1988, to become effective in 60 days, or approximately four months after the case was argued.

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Please find reply brief of Appellants and exhibits.

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**Subject:** RE: Downtown Cannabis Co et al v City of Fife and AG's Office Supreme Court Cause No. 90780-3

I do apologize, here is the actual brief

Greetings, attached for filing with the Supreme Court is the Intervenor-Appellants Reply Brief. It is being filed by Salvador A. Mungia, WSBA No. 14807 of Gordon Thomas Honeywell on behalf of all Intervenor-Appellants. Pursuant to agreement among the parties, the brief is also being served via this email. Please let me know if there is anything further you require. Thank you.

**Gina Mitchell** Assistant to  
Salvador Mungia, John Guadnola  
and Stephanie Bloomfield

  
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