

TO: Professor Kushner

FROM: Nathaniel Gale

DATE: 15 October 2009

RE: Legal Environment of Planning Final

After careful review of the facts concerning Baxter Nature's ("Nature") complaint against Willy Maikett ("Maikett") and the Town of Westmoreland's ("Town") subsequent decision, I have summarized a number of legal matters at issue, as well as predicted the result of potential litigation between the three parties above. Please note, however, that a number of issues can only be weakly applied to the facts, namely the takings doctrine, and will not carry weight in the courtroom. Nevertheless, Maikett has many arguments strongly supported by case law.

To begin, Maikett will likely argue that Town is in violation of the substantial evidence doctrine, a reference to the need for relevant evidence that a "reasonable mind would accept as adequate to support a conclusion." *Pittsburgh Cellular Telephone Co. v. Board of Supervisors of Marshall Township*. The Town would argue that relevant evidence exists with the testimony of Nature, on which they base their denial. However, two experts' testimonies were heard at the permit hearing, both of whom argued facts that directly contradicted Nature's statements. While Nature does offer photos as facts, many of his reasons for denying the project are based on conjecture, superficial concerns, and thus lack hard evidence. He generically states that apartment complexes have more crime than single-family neighborhoods without applying it to the matter at hand. As seen in *Sunderland Family Treatment Services v. City of Pasco*, findings cannot rest on "unsubstantiated fears."

Additionally, *Sunderland* understands that while "opposition of the community may be

given substantial weight, it cannot alone justify a local land use decision.” This is further supported by *Ross v. City of Yorba Linda* when the city tried to argue that neighborhood opposition to construction is a “rational basis” to forbid any such action. The court determined that “[if] public opinion by itself could justify the denial of constitutional rights, then those rights would be meaningless.“

Support for Maikett’s argument can also be found in the doctrine of *Burrell v. Lake County Plan Commission*. The Burrells, a party seeking to develop, attempted to dispute the accuracy of the affidavit of an engineer who was used as an expert witness. The court defined its role as determining whether the engineer’s evidence “*taken as a whole*” provides a reasonable basis for the Commission’s rejection of the plan. It was determined that the Commission had a “reasonable evidentiary basis” on which to align its decision with that of an expert witness. While the Town will assert that Nature’s suppositions provided such a basis, as these arguments are what led to Town’s eventual decision, the courts will find that the expert opinions and testimonies offered by traffic engineer Carmen Ghia and real estate appraiser Anna Ceptic will take precedent over Nature’s suppositions.

Maikett might also try to bring up the issue of discrimination in the denial of his development permit, specifically the issue of the Equal Protection Clause (“EPC”) present in the fourteenth amendment. The case of *Washington v. Davis* held that actions cannot be deemed unconstitutional based on disproportionate outcomes. While they understand such impacts are relevant, any such outcome cannot be the sole proof of a violation of the EPC. Instead, discriminatory intent or purpose is required.

Citing Nature’s testimony as proof, Maikett will contend that the city based its denial of his permit on the unsubstantiated adverse effects espoused by Nature. However, Nature’s

testimony did not invoke race, class, gender, or any other discrimination category. Whether or not the results of such of the Town's decision will lead to any disproportionate impacts on the area, discriminatory purposes were not the motivating factor. *Village of Arlington Heights v. Metropolitan Housing Development Corp* upheld the ruling of two lower courts by showing that the respondents ultimately failed to carry their burden of proving that Arlington Heights acted in an invidious manner. The same result will befall Maikett, as there is nothing in the record supporting unfair intent.

Another major issue is that of due process within the general zoning doctrine. As originally defined by *Village of Euclid v. Ambler Realty*, exercising police power by excluding various types of buildings must be rationally related to the health, safety, and welfare of the community. Thus, the overall constitutionality of Town's decision to deny Maikett a permit is put into question.

Town will claim that its decision was constitutional, based on the testimony and presentation of facts by Nature. Maikett will cite the expert opinions as directly conflicting with Town's denial, and directly conflicting with the health, safety, and welfare of the community. According to Ceptic, the proposed property may actually increase the neighboring property values. These discussions inevitably lead back to the issue of substantial evidence. As mentioned previously, the courts will find that Town's decision was lacking substantial evidence *and* it was a violation of the due process clause.

While the use being requested by Maikett is not a use of right, it is allowed by the zoning ordinance through a special exception flexibility device. A governing case in this matter is *Uintah Mountain RTC, L.L.C. v. Duchesne County*, in which the court overturns Duchesne County's decision to deny a special exception on the basis that the County's decision was

“arbitrary and capricious.” Overruling the County’s claim that the Uintah RTC “would not be a compatible use” in the neighborhood, the court cited evidence that the County granted a similar special exception to a separate RTC with the exact same zoning classifications.

Maikett will invoke the *Uintah* doctrine by looking to the north of his planned site, where the land is zoned a mixture of R-1 and R-2. One of Nature’s main complaints, adopted by the Town in its permit rejection, is that allowing an apartment complex in the R-1 zone is not compatible with the existing neighborhood structures. Furthermore, the apartment building would “impede normal and orderly development of the area.” Yet *Uintah* set the precedent of overturning “arbitrary and capricious” ruling when the zoning ordinance has allowed similar development in a nearby location under the same jurisdiction. The Town’s decision will be overturned.

Should Maikett choose to, he could attempt to argue the Takings Clause of the Fifth Amendment of the United States Constitution. He has a case with the lack of “rough proportionality” between the Town’s provisions and the planned development. This doctrine was defined by the Supreme Court in *Dolan v. City of Tigard*, in which they explain that any municipal requirements must be roughly proportional to the proposed development.

Maikett’s strongest complaint is against Town’s fifth provision for granting the special exception, which requires “adequate utilities...and other necessary facilities” to be installed to minimize congestion. He attempted to meet these standards, further substantiated by Ghia’s testimony, and yet the city still stated that the project would “create a vehicular and pedestrian safety problem.” However, such events will be hard to specifically quantify under the *Dolan* doctrine, and the court will not have a substantial reason to rule that the events violate the “rough proportionality” test.

Further discussion might be made with respect to the takings ruling in *Penn Central Transportation Co. v. New York City*. In this case, the Supreme Court established the need for balancing various elements of the effect and intent of any particular regulation. If Maikett attempts to argue that the denial of his permit constitutes a taking and violates the precedent set in *Penn Central*, the Town has significant reasoning for its decision. They have not diminished the value of his particular site, they have simply barred Maikett from a particular type of development. Also, Maikett's development is not a use of right in the specific zone, and the Town's ruling reconfirms the general plan's zoning ordinance. For these reasons, Town has significant case law to back up its decision under the takings clause, and Maikett is unlikely to cite such arguments in the court proceedings.

Overall, courts will eventually rule that Maikett will be able to follow through with his development. While Nature certainly had the residential standing to bring his case to the Town, the decision to deny the permit was based on unfounded policy and judicial precedent. The Town acted unconstitutionally, and the courts will find as such.