[J-24-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN RE: APPEAL OF REALEN VALLEY FORGE GREENES ASSOCIATES FROM THE DECISION OF THE ZONING HEARING BOARD OF UPPER MERION TOWNSHIP DATED AUGUST 13, 1999	:	No. 186 MAP 2002
v.	:	Appeal from the Order of the Commonwealth Court entered on 6/4/02 at No. 2782 CD 2000 affirming the Order of Montgomery County CCP, Civil Division, entered 12-01-2000 at No. 99-16287.
APPEAL OF: REALEN VALLEY FORGE GREENES ASSOCIATES	:	
		ARGUED: April 7, 2003

DISSENTING OPINION

MR. JUSTICE SAYLOR **Decided: December 18, 2003**

I am in accord with the Commonwealth Court's application of the legal principles governing constitutional validity challenges in the zoning arena, which are to be implemented with essential deference to legislative policy judgments arising out of the political process. See In re Appeal of Realon Valley Forge Greenes Assoc., 799 A.2d 938, 942 (Pa. Cmwlth. 2002). Additionally, I agree with that court's application of the relevant standard of appellate review, which is also deferential in terms of the judgment of the fact-finding tribunal. See id. Thus, I would affirm the Commonwealth Court's order based on the analysis that it has supplied, with the following supplementation, in light of the majority's contrary approach in the present appeal.

As a threshold matter, although the majority characterizes its analysis as substantial evidence review, I disagree that this is, in fact, the manner of review that it applies. Indeed, to assess whether or not the Zoning Hearing Board's factual findings

(which are favorable to the Township) are grounded in substantial evidence, it is, by the nature of the exercise, essential for the Township's evidence be considered. It is telling, in this regard, that each and every citation offered by the majority is to that portion of the record comprising Appellant's, and not the Township's, presentation.

The majority's approach to the Zoning Hearing Board's findings and the Township's evidence is apparent from the outset of its opinion, where it announces its holding that the zoning ordinance at issue was "designed to prevent development of the subject property and to 'freeze' its substantially undeveloped state for over four decades in order to serve the public interest as 'green space[.]'" Majority Opinion, slip op. at 1. This directly contravenes the Zoning Hearing Board's finding, supported by a multitude of factual findings closely grounded by way of citations to the hearing record, that through implementation of its governing zoning ordinance, the Township designed to allow, and has allowed, for multiple, economically viable, lower-density uses, as of right, as conditional uses, and by special exception. See Application of Realen Valley Forge Greene Assoc., Nos. 58-00-04312-00-4, 58-00-17494-007, slip op., at 9, FOF ¶59 (ZHB Upper Merion Aug. 13, 1999) (citing N.T., at 1141-1144); see also id. at 34 ("the intent of the AG zoning classification of the subject property is to encourage uses of lower density and intensity, particularly with regard to traffic, than would be permitted in less restrictive zoning classifications"). Such uses include development of single family detached dwellings, FOF ¶69-72 (citing N.T., at 682, Ex. T-12);[1] utilization as a hospital,

[1] In indicating (again, contrary to the findings of the Board) that single family residential development is not a feasible use for the property, the majority again relies on the evidence most favorable to Appellant, see Majority Opinion, slip op. at 19-20 (citing testimony from Appellant's expert witness), and omits the evidence favorable to the Township. See, e.g., N.T., at 682 (testimony of John E. Rahenkamp) ("It's obviously not an ideal site for large lot single-family homes. Could it be used for that, yes. But its not an ideal use." (emphasis added)). The Commonwealth Court's approach, on the other (continued...)

convalescent home or personal care facility, id. at 11, FOF ¶73-75 (citing N.T., at 783, 785-86, 1098-1109), educational, religious, and/or philanthropic use, id., FOF ¶76 (citing N.T., at 782), laboratory and research use, id., FOF ¶78-79 (citing N.T., at 789); single family cluster development and personal care facilities, id., FOF ¶80 (citing N.T., at 685, 801); an assisted living facility, id., FOF ¶81-82 (citing N.T., at 783, 1111), and combination uses, id. at 11-12, FOF ¶¶83-84, in addition to the present, economically viable use as a golf course. id. at 10 ¶¶64-67.[2]

Indeed, the majority's portrayal of a "holding zone," drawn from Appellant's evidence, was also squarely refuted by one of the Township's land planning experts, John E. Rahenkamp, who testified:

> I don't believe that the fact that it hasn't been developed can be characterized as a holding zone. There were uses possible. There are many applications that came forward. The fact that they weren't successful, unfortunately, I don't know which side bears the obligation or the responsibility, but the transactions failed to go forward. That's not to say the application, the developer or landowner didn't have opportunities to bring forward a case to the boards. So I don't see that as characterizing a holding zone at all, but in fact a place in which a great deal of activity has happened

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(...continued)
hand, took into account both lines of evidence and properly determined that their reconciliation rested squarely within the ambit of the fact-finder. See Realen, 799 A.2d at 942-43.

[2] Again citing only Appellant's evidence, the majority also goes to some lengths to demonstrate that Township officials had and/or have a strong preference that the Property remain in its present, largely open state, including by way of reference to the comprehensive plan and various efforts undertaken, over the years, in furtherance of the open-space objective. However, the substantial evidence discussed above, accepted by the Zoning Hearing Board, also supports its inference that, regardless of the personal preferences of Township officials, there was an appreciation among the members of the governing body who enacted the controlling zoning ordinance that it would be unduly restrictive to limit the Property to its existing, albeit desirable, use.

> and there is yet to be a match between the landowner's needs and desires and the ability of the town to accommodate it in some fair and reasonable way.

N.T. at 871.

Similarly, in reaching its critical conclusion that the zoning ordinance represents an impermissible instance of spot zoning, the majority both overlooks substantial evidence offered by the Township and, for reasons that it does not reveal, affords little or no weight to the circumstances that it acknowledges do militate in the Township's favor. Principally, while correctly recognizing that the most important factor in the analysis is whether the governing body has treated the property differentially for reasons that are not justifiable, see Majority Opinion, slip op. at 15 (citing Schubach v. Silver, 461 Pa. 366, 382, 336 A.2d 328, 336 (1975)), the majority nevertheless fails to confront the Zoning Hearing Board's explicit factual findings related to uniqueness, see Realen, slip op., at 6 FOF ¶35, 7-8 FOF ¶40-46, 9 FOF ¶54-61,[3] and the associated substantial, supporting evidence.

In this regard, first off, the majority apparently attaches no import to the fact that the property was developed in the 1920s, and presently is maintained, as a golf course. Such factor, however, was explicitly relied upon by the Zoning Hearing Board as a distinguishing feature, see Realen, slip op. at 24, which reliance was supported by the testimony of two expert land planners. See, e.g., N.T., at 762 (testimony of John E. Rahenkamp) ("The surrounding sites are relatively smaller, are differently configured, don't have a golf course sitting in the middle of them. They are obviously zoned

[3] It has also been said that, for a validity challenge based on spot zoning to have merit, the inconsistencies between zoning classifications must be so great as to indicate on its face an absence of planning, or the presence of special treatment. See Cleaver v. Board of Adjustment of Tredyffrin Twp., 414 Pa. 367, 200 A.2d 408 (1964). Notably, here, however, Appellant concedes the facial validity of the AG zoning. See Brief for Appellant, at 23.

differently and should be."); N.T., at 1141 (testimony of E. Van Reiker) (emphasizing the uniqueness of the Property in terms of its existing development and use). Indeed, the conversion of the Property into a golf course entailed extensive regrading and landscaping, see, e.g., N.T., at 295-96, 694-95, 802, which, because of the use to which the landowner of his own accord put it, the Township out of necessity was required to plan around.[4]

The majority also discounts the Property's 135-acre size as a substantial factor in the equation, despite the clear indication in the cases that size should be considered a factor, albeit not necessarily a controlling one, see generally ROBERT S. RYAN, PENNSYLVANIA ZONING LAW AND PRACTICE §3.4.9 (2003) ("Generally speaking, the zoning of larger tracts of land is not subject to a charge of discrimination[;] . . . [w]here a large area is devoted to a given zoning classification, the risks of special treatment, or an absence of planning, are greately reduced, or eliminated."), as well as clear record evidence. See, e.g., N.T., at 763 (testimony of John E. Rahencamp) (observing that the size of the tract "certainly makes it unique in the context of Upper Merion Township"); N.T., at 1141 (testimony of E. Van Reiker) ("Size of site is very critical in my view relative to looking at the side in a discrete or separate purpose. The larger the property becomes, the more, in my view, in my opinion, it stands alone in terms of critical analysis for land use.").

The majority also affords little weight to the circumstances that the Property is surrounded by roadways, which are commonly used as boundary designations for

[4] While the majority makes much of the fact that some rezoning of small tracts of AG lands occurred after the landowner requested rezoning for the golf course, it is significant, in my view, that the great majority of the rezoning occurred during the 1955 to 1960 time period, see N.T., at 382, 458, at least seven years prior to the landowner's first such request.

zoning districts, as a reasonable justification for the zoning classification, in contravention of the testimony of Appellant's own expert land planner:

> Q. Would you agree with me that in creating zoning districts, it is frequently common to use roads that separate one property from another as differences in zoning districts?
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> A. Roads are often used to separate different districts, yes.

N.T., at 243; accord N.T., at 1142 (testimony of E. Van Reiker) (explaining that roads are principal tool used by land planners).[5]

Further findings and evidence concerning uniqueness touch on the unusual terrain, see, e.g., N.T., at 694-95, 802 (testimony of John E. Rahenkamp) ("Internal to the site as well, there is almost sixty foot of grade across the site. It is a fairly significant

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[5] Relatedly, the majority places undue emphasis, in contravention of the judgment of the fact-finder, on the proximity of commercial uses to the Property. In this regard, Appellant's land planning expert also testified:

> Q. [I]n general, zoning is a concept that permits different types of uses on different parcels of ground within the municipality?
>
> A. Yes.
>
> Q. Some may be commercial, some may be industrial, some may be residential, some may be open space, but you get a whole variety of possible uses?
>
> A. Yes.
>
> Q. And obviously, some of these uses will be adjacent and right next to each other; correct?
>
> A. Yes.

N.T., 452-53.

roll. It is significant in terms of the visual quality around the whole area, not only internally but externally as well."); environmental considerations related to the Property, see N.T., at 726-33, 767, 832; the Property's ameliorative effect in terms of traffic and noise, see N.T. at 694-95; the visual significance of the property, particularly in light of its proximity to the Valley Forge National Park, see id.; N.T., at 721-22, 740, 749-50; and the consistent zoning of the property since 1953. Again, Mr. Rahenkamp's testimony perhaps most succinctly encapsulates the record evidence of uniqueness as it relates to the justification for the Property's differential classification:

> A. This site is unique compared to the sites surrounding it.
>
> Q. In what way is it unique, Mr. Rahenkamp?
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> A. It has significant elevation changes. It has significant vegetation. It happens to have an existing golf course in place on it. At least the sites on North Gulph Road on the upper side staddling essentially between the turnpike on the one side and North Gulph are relatively small. This is a large site. It's on one hundred and thirty-five acres in a township that has been characterized as an edge city, almost an urban place. One hundred thirty-five acres of vacant land is significant. This is not a small, incidental piece of ground and it's certainly not comparable at least in the size of the context to anything surrounding it.
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> * * *
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> Q. Is the AG zoning an appropriate zoning designation for this tract in your opinion?
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> A. It's obviously not the most refined zoning ordinance that ever was for this parcel of ground. On the other hand, because of its unique character, special exceptions, conditional uses are appropriate because you need to evaluate essentially how to place finesse on a piece of ground. It has a golf course on it. It has got some existing characteristics which are critical. And most particularly in terms of traffic, it has some very sensitive issues. It's very nearly to the point of overload.

* * *

> The existing AG zoning with the special exceptions and conditional uses is appropriate for this site. I have said several times it could be refined but it is certainly more appropriate than would be conventional office zone or a conventional residential zone or any of the conventional by-right zones which wouldn't reckon with the uniqueness of this site.

N.T., at 761-62.[6]

This testimony segues into the Zoning Hearing Board's findings concerning the public interests supporting low-density uses for such a property based on record evidence include prevention of overcrowding of land and congestion in travel and transportation, particularly given the location of the Property proximate to and abutting already overtaxed highways. See id. at 12, FOF ¶¶88, 90-91. In this regard, the Zoning Hearing Board found that conceptual plans for higher-density, commercial use such as those advanced by Appellant would have a severe, negative impact on the roadways surrounding the Property. See id. at 13, FOF ¶96 (citing N.T., at 1049-57, 1063). Notably, the prevailing traffic conditions on such roadways were described by transportation engineers as poor, see N.T., at 1223 (analogizing the conditions of

[6] Particularly in view of the obvious sensitivity of this property, at least on the face of this record, Appellant's development plans in relation to the Property were not only inappropriate, but were inflammatory. In this regard, there was unrebutted evidence to the effect that such plans reflected no correlation to any kind of an analysis of the site in terms of building placement and preservation of natural features, see N.T., at 706, 722, 726, 728; no evaluation of reasonable density, see N.T., at 322, 324; and no concern for environmental factors. See N.T., at 733. Indeed, Appellant presented no rebuttal of the assertion by the Township's expert that the plans effectively represented an evisceration of the site. See N.T., at 733; accord id. at 876 ("if the developer is willing and able to abuse the land that extraordinarily, I would certainly question whether or not that application ought to go forward.").

various roadways surrounding the property to an overflowing bathtub), 1239, and by residents as far worse. See, e.g., N.T., at 60-61 (reflecting a resident's perception that traffic and noise in the area is "horrendous"). Additionally, as the Zoning Hearing Board noted, there was no direct evidence that the various permutations of land development authorized by the applicable zoning ordinance had been or would be disapproved by the municipality -- neither Appellant nor the legal owner had submitted conceptual plan layouts for permitted uses, considered design layouts under the applicable criteria, or presented evidence that development of the Property within the constraints of the AG zoning district was economically impossible or unfeasible. See id. at 14, FOF ¶¶105-06 (citing N.T., at 313, 322).[7] The evidence that was credited by the Zoning Hearing Board as fact-finder merely demonstrates that the non-conforming commercial uses proposed by Appellant would be more lucrative, which, although certainly relevant, is an insufficient basis in and of itself to support invalidation of a legislative policy decision. See Kimberton Green, Inc. v. Borough of Phoenixville, 43 Pa. Cmwlth. 244, 247, 402 A.2d 284, 286 (1979); accord National Land and Investment Co. v. Easttown Twp., 419 Pa. 504, 524-25, 215 A.2d 597, 608 (1965); Montgomery Crossing Assoc. v. Township of Lower Gwynedd, 758 A.2d 285, 290-91 (Pa. Cmwlth. 2000). See generally 101A C.J.S. ZONING & LAND PLANNING §47 (2003) ("A zoning ordinance is not invalid because it does not permit, or prevents, the highest or best use of the property, or a use which is the most profitable for the owner, since a property owner is not entitled to have his property zoned for its most profitable use.").

[7] While the majority references the inability on the part of the landowner to gain developmental approval, each of the proposals made to the Township entailed efforts to obtain rezoning, not plans for lower-density development consistent with the existing zoning.

The majority's analysis, entailing the substitution of its findings for those of the fact-finder, has the effect of displacing the difficult, but I believe necessary, task of weighing public and private interests necessary under the Due Process Clause, which, despite the United States Supreme Court's approach,[8] remains this Court's preferred method of assessing validity challenges in the land use arena. See C&M Developers, 573 Pa. at ___, 820 A.2d at 151. In performing the necessary judicial balancing, it is important to maintain the perspective that land use regulation is a traditional, legislative tool implemented in furtherance of broader public concerns -- compliance with non-arbitrary regulation is generally an accepted incident to land ownership and investment. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027, 112 S. Ct. 2886, 2899 (1992) ("It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers."); Mark W. Cordes, Property Rights and

[8] The United States Supreme Court generally considers validity challenges under the Fifth Amendment's Takings Clause. Notably, it has rarely deemed general low-density-use zoning restrictions, and even open-lands designations, to be takings. See, e.g. Agins v. City of Tiburon, 447 U.S. 255, 261-62, 100 S. Ct. 2138, 2142 (1980) (rejecting a facial Takings Clause challenge to a zoning ordinance establishing, inter alia, an "open space zone," concluding that controlling urbanization and preserving open space advance legitimate state goals), overruled on other grounds First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 107 S. Ct. 2378 (1987). Indeed, it is also noteworthy that the takings test applied by the United States Supreme Court, in material respects, resembles this Court's substantive due process inquiry applicable here. Compare Agins, 447 U.S. at 260, 100 S. Ct. at 2141 (requiring, inter alia, an assessment of the weight of public interests in takings jurisprudence), with C&M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd., 573 Pa. 2, ___, 820 A.2d 143, 151 (2002) (describing the balancing of public and private interests under the doctrine of substantive due process). See generally Kenneth Salzberg, "Takings" as Due Process, or Due Process as "Takings"?, 36 VAL. U. L. REV. 413, 429-33 (2002) (commenting on the present overlap between federal takings and substantive due process jurisprudence).

Land Use Controls: Balancing Private and Public Interest, 19 N. ILL. U. L. REV. 629, 652 (1999) (noting that "any reasonable expectations in the land must take into account the possibility of regulation"). See generally Frank I. Michelman, A Skeptical View of "Property Rights" Legislation, 6 FORDHAM ENVTL. L. J. 409, 415 (1995) ("The American way, as the Court describes it, is to treat the bulk of events as belonging to the normal give-and-take of a progressive and democratic society; it is to treat regulation as an ordinary part of background risk and opportunity, against which we all take our chances in our roles as investors in property.").[9]

It is also worth reflecting on the character of judicial review on consideration of a challenge to the validity of a legislative enactment pursuant to substantive due process precepts -- notably, the application of the doctrine has been extensively and critically examined, particularly in the arena of economic regulation, over the years that have passed since Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539 (1905). See, e.g., David A. Strauss, Why Was Lochner Wrong?, 70 U. CHI. L. REV. 373, (2003) (discussing Lochner-era substantive due process and its aftermath and concluding that "judicial review requires courts to recognize the complexity of the issues they confront and to develop doctrines that, while vindicating constitutional rights, also accommodate values that are in tension with those rights").[10] Presently, the opinions of judges and

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[9] But cf. Lucas, 505 U.S. at 1034, 112 S. Ct. at 2903 (Kennedy, J., concurring) (conceding that an inherent circularity results where a property "owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority" because then "property tends to become what courts say it is"); Richard A. Epstein, Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations, 45 STAN. L. REV. 1369, 1385-86 (1993) (criticizing the use of existing regulations as a basis for discounting property rights based upon a theory of landowners' reasonable expectations of future regulations).

[10] While the majority does not expressly ground its analysis specifically in substantive due process, it acknowledges the interrelationship between the various theories for (continued...)

commentators are many and varied concerning the appropriate role of substantive due process in economic (including land use) regulation, ranging from its discrediting as a legitimate constitutional doctrine, see, e.g., Robert Ashbrook, Comment, Land Development, The Graham Doctrine, and the Extinction of Economic Substantive Due Process, 150 U. PA. L. REV. 1255, 1285-1295 (2002), to its full restoration in repair of other constitutional doctrines that are argued to be stretched to their limits on account of a void opened by the presently disfavored status of substantive due process. See, e.g., Salzberg, "Takings" as Due Process, 36 VAL. U. L. REV. at 429-34, 442. A common thread throughout the cases and the literature, nevertheless, seems to be that if courts are to maintain legitimacy in the application of substantive due process in considering government regulation, they must begin with a healthy respect for legislative, social policy judgments. See generally Peter J. Rubin, Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights, 103 COLUM. L. REV. 833, 839 (2003) ("[T]he risks inherent in the use of any open-ended constitutional provision to invalidate the actions of the political branches, certainly counsel caution in employing substantive due process.").

Here, there should be no question that strong public interests are involved, in light of the governing body's concern with overcrowding of land and congestion of transportation arteries, credited by the fact-finder. See generally C&M, 573 Pa. at ___, 820 A.2d at 155 (explaining that municipalities may utilize zoning ordinances to

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attacking the validity of an ordinance, see Majority Opinion, slip op. at 12, and does cross-reference substantive due process principles, see id. at 13-14. See generally EDWARD H. ZIEGLER, JR., ARDEN H. RATHKOPF, AND DAREN A RATHKOPF, 3 RATHKOPF'S THE LAW OF ZONING AND PLANNING §41.3 (4th ed. 2003) (recognizing the grounding of claims of spot zoning, inter alia, in substantive due process principles).

regulate, inter alia, density of population and intensity of use and to protect and preserve resources (citing 53 P.S. §10603(b)). See generally 101A C.J.S. ZONING & LAND PLANNING §46 (2003) ("The control and regulation of density, as related to population or use of land, are proper considerations or factors in zoning, and zoning regulations which have their justification in the prevention of overcrowding of land and the avoidance of undue concentration of population bear a substantial relation to the public health, safety, morals, or general welfare, and are valid.").[11] The public interest in lower-density use and open space has obviously increased over time, as land development has flourished. See generally Cordes, Property Rights and Land Use Controls, 19 N. ILL. U. L. REV. at 643-45 (noting that public limits on property use necessarily correspond to changing social values and conditions). It should also be observed that the public interest in low-density use for the Property plainly increased during the substantial time period during which the landowner voluntarily operated it as a commercial golf course; the landowner's choice in this regard obviously impacted on the Township's growth planning, particularly as it is clear from the record that Upper

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[11] The United States Supreme Court has explained:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Berman v. Parker, 348 U.S. 26, 33, 75 S. Ct. 98, 102-03 (1954) (citation omitted); see also 1 RATHKOPF'S THE LAW OF ZONING AND PLANNING §6.40 ("Open-space zoning, which limits the extent or density of development to preserve the visual character of an area or to implement growth management goals, is likely to be held a 'general welfare' type of restriction, which is designed to secure a widespread benefit.").

Merion experienced tremendous pressure in this regard over the years. See id. at 653-54 (noting that unfairness concerns attendant to land regulation are tempered where the landowner is on notice that the property has attributes which would implicate potential regulation).

I do not discount the landowner's interests in the equation, which are amply developed by the majority.[12] Indeed, there are fairness elements involved that would suggest that the Township should consider alternatives reflecting a degree of compromise, for example, along the lines of the proposals from 1967 and 1981, or acquisition of development rights from the landowner for compensation, to the extent legally permitted. See generally id. at 650-51 (discussing purchase of development rights and transferable development rights programs). Nevertheless, in view of the public interests involved, as a matter of constitutional, substantive due process, I simply do not believe that Appellant has demonstrated the kind of arbitrary or unbalanced action on the part of the governing body such as would implicate judicial redress in the form of site specific relief predicated on the plans presented by Appellant in these proceedings.

[12] Certainly, the majority raises valid fairness concerns in the Township's treatment of the Property, most notably, in the rejection of the 1967 and 1981 proposals for commercial enhancements to the golf course. See Majority Opinion, slip op. at 8, 26. I do not believe, however, that an appellate court has the ability to glean from such occurrences, particularly at the degree of abstraction in detail reflected in the majority opinion, unfairness as a matter of law on the order of manifestly arbitrary conduct, in derogation of the contrary judgment of the fact-finder. Cf. N.T., at 575 (testimony of John E. Rahenkamp) ("I don't know the reason it didn't go forward, whether it was . . . the Acorn side, or whether it was the township side."); N.T., at 468-70 (discussing the reasons for the denial of the landowner's 1967 request for rezoning). Furthermore, such plans are not presently offered before the Court as alternatives justifying a claim of as-applied invalidity.

As such, on this record, and in view of the supported findings of the Zoning Hearing Board, it is my considered view that deference is due here to the political branch. Accordingly, I respectfully dissent.