

## **Chapter 2**

### **Land Use and Zoning**

#### **Introduction**

The object of this chapter is to provide some of the basics about zoning and hopefully dispel some of the myths.

Obtaining zoning is an integral part of the operation of a surface mine. Unfortunately, zoning is oftentimes a highly charged emotional issue, which, at times, resembles ritual warfare more than an orderly process to sort through competing land uses. Therefore, it is essential to understand zoning and how it affects the aggregate industry.

#### **Types of Zoning Authorities**

##### **1. County Rural Zoning**

ORC § 303.02 authorizes county commissioners to regulate the use of land for trade, industry, residence, recreation, and other uses in the unincorporated areas of the county. County rural zoning only governs land uses in those townships in the county that vote for zoning. ORC § 303.04 requires the establishment of a county zoning commission composed of five members appointed by the county commissioners. ORC § 303.14 sets forth the authority of a county Board of Zoning Appeals (“BZA”). The authority of the BZA includes the ability to:

- hear appeals of administrative decisions
- grant variances from the terms of the zoning resolution when the grantin of the variance will not be contrary to public interest, and when owing to special circumstances a literal interpretation of the zoning resolution will result in unnecessary hardship to the applicant.
- grant conditional use permits if the conditional use is provided for in zoning resolution.
- revoke a variance or conditional use permit for the extraction of minerals if any condition of the variance or conditional use permit is violated. This authority is unique to mineral extraction. No other use is subject to this provision. The statute provides for notice and the right to a hearing if a conditional use permit for mineral extraction is going to be revoked.

#### **Procedure for a zoning change under county rural zoning**

The county zoning commission (“CZC”) may initiate an application to amend the zoning resolution or a landowner or lessee may initiate an application to amend the resolution. Amendments are directed to the CZC, which forwards the application on to the regional planning commission for its review and recommendation. The regional planning commission recommends approval or denial. This recommendation is not binding.

After the CZC receives the planning commission recommendation, the CZC votes to either recommend or deny the application. This vote must be within 30 days of the hearing. The county commissioners then vote to approve or deny the recommendation of the CZC. If the county commissioners modify or overrule the CZC recommendation, it must be with a unanimous vote. The county commissioners have 20 days to issue their decision. If approved, the zoning change becomes effective 30 days after the decision of the commissioners.

## **2. Township Zoning**

ORC § 519.02 authorizes the township trustees to adopt zoning resolutions to regulate trade, industry, residence, recreation and other uses. Generally, township zoning is similar to countywide zoning, but there is much case law that has developed around township zoning pertaining to surface mining. Some of the law stemming from these township zoning cases is as follows:

From the outset it must be noted that a township or county may adopt a zoning resolution that prohibits surface mining in all or part of the territory. *Henn v. Universal Cement Company* (1957), 76 OL Abs 439.

The power of townships to enact zoning regulations to regulate surface mining was not pre-empted by ORC § 1514. *Set Products v. Bainbridge Township BZA* (1987), 31 Ohio St.3d 260.

Townships may enact zoning resolutions to regulate surface mining so long as its resolution does not come into direct conflict with ORC § 1514. OAG 81-065.

Zoning authority extends to regulating the removal and stripping of topsoil within the district or the entire territory. *Miesz v. Mayfield Heights* (1952), 92 O App 471.

Because surface mining is not an unlawful use, *per se*, the zoning resolution must bear some relation to the general welfare of the territory. *Henn v. Universal Cement Company, supra*.

Mineral extraction is not exempt from township zoning. *Kane v. Kreiter* (1963), 195 N.E.2d 829.

Townships may consider conservation of underground water resources when adopting zoning. *Ketchell v. Bainbridge Township* (1990), 52 Ohio St. 3d 239.

### **Procedure for township zoning change (“Amendment”)**

Amendments can be from either trustees or private landowners or lessees. Applications for zoning changes go to the township zoning commission (“TZC”). Mailed notice must be given to all property owners within the area to be rezoned, contiguous to that area, and directly across the street from the area to be rezoned. The TZC sends the application to the regional planning commission for recommendation. The TZC must consider the regional planning commission’s recommendation, but the TZC does not have to follow the recommendation. However, within 30 days of hearing the recommendation, the TZC must vote to recommend approval or denial of the

application. The TZC recommendation then goes to the trustees for a vote. The trustees must vote within 30 days of hearing the recommendation.

A unanimous vote is required if the vote results in a decision other than the one recommended by the TZC. Any zoning change must take effect 30 days after the vote. ORC § 519.13 creates a way to appeal the decision through the township board of zoning appeals. This board consists of five members appointed by the trustees. The board has the same authority as the county BZA and the same authority to revoke mineral extraction uses that are conditional.

### **3. Municipal Zoning**

The Ohio Constitution provides home rule for municipalities. Municipalities have all the powers of local self-government. Municipalities are empowered to adopt very comprehensive zoning ordinances, and they are not limited by specifically granted powers like counties and townships are. However, the municipalities are limited by the fact that local laws cannot be in conflict with the general laws of the state. An advanced discussion of municipal zoning is not necessary for this guide because municipal zoning is extremely complex, and few surface mines are located in cities.

#### **Conditional Uses**

Conditional uses are uses that are not explicitly permitted in the zoning code but are permitted if the use can meet certain safeguards if additional conditions are imposed. Conditional use permits differ from zoning amendments and variances.

Zoning amendments are legislatively granted changes in the uses permitted within a particular zoning district, and variances are administratively granted waivers of restrictions on uses or objective standards such as height, area, or setback limitations.

The conditional use permit process is not applicable unless the proposed conditional use is expressly authorized as a special or conditional use in the zoning code's relevant district section. As such, conditional use permits are administratively issued and legislatively authorized. BZAs typically issue conditional use permits.

#### **Typical General Standards for Conditional Use Permits**

If the proposed use is in fact a conditional use as established under the provisions of the zoning resolution the conditional use will need to be:

harmonious with and in accordance with the general objectives, or with any specific objectives, of the township's zoning resolution.

designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance with the existing and intended character of the general vicinity, and such use will not change the essential character of the same area.

non hazardous or disturbing to existing or reasonably anticipated future neighboring uses.

non detrimental to property in the immediate vicinity or to the community as a whole.

adequately served by essential public facilities and services such as highways, streets, police and fire protection, drainage structures, refuse disposal and schools, or known that persons or agencies responsible for the establishment of the proposed use shall be able to adequately provide such service.

one that does not create excessive additional requirements at public cost for public facilities and services and will not be detrimental to the economic welfare of the community.

one that will have structures, roads and utilities in compliance with the County Subdivision Regulations, the Board of Health standards and the County Building Code.

one that has vehicular approaches to the property, which shall be so designed as to not create an interference with traffic on surrounding public streets or roads.

one that will not involve uses, activities, processes, materials, equipment and conditions of operation that will be detrimental to any person, property, or the general welfare by reason of excessive production of traffic, noise, smoke, fumes, glare or odors.

one that will not result in the destruction, loss or damage of any natural, historic, scenic or environmentally sensitive area, feature or site.

### **Standard of Review by BZAs**

An administrative board defines and applies the standards of the zoning code when deciding to grant or deny a permit. An ordinance can establish the burden that the board has to meet to grant a conditional use permit. Typically, the zoning code provides for a preponderance of the evidence type of standard. However, the zoning code may provide for the criminal standard of beyond a reasonable doubt. *See, Blue Stone Sand & Gravel v. Mantua Township Zoning Board of Appeals* (1998), 127 Ohio App.3d 37, 711 N.E.2d 749.

“Beyond a reasonable doubt” means: “Not mere possible doubt, because every thing relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.” Ohio Jury Instructions— Criminal § 403.10

Blue Stone, sought a zoning certificate from Mantua Township to mine gravel and sand on Blue Zone’s tract of land, which was located in a residential zoning district. The BZA denied the conditional zoning permit. The Court of Common Pleas reversed the ruling because it applied a preponderance of the evidence instead of a reasonable doubt standard. The court of appeals held that R.C. Chapter 519 does not require a township to provide for conditional use permits; they are discretionary with the township. Therefore, the township is not required to grant the permits, so using the “beyond a reasonable doubt standard” does not violate due process rights.

### **Application Process for Conditional Use Permits**

The conditional use application typically calls for more detail than an application for a zoning amendment. The application forms are assigned by the administering agency, and the application is filed with the administrative agency that has the authority to issue such permits and is directed to the planning agency for its synopsis and critique if the planning agency did not issue the permit.

### **Issuance of the Conditional Use Permit**

The conditional use hearings are considered adjudicatory. They are open to the public, but they are not public hearings for the purpose of presenting “opinions.” Individuals that testify must do so under oath and are subject to cross-examination. Speculative testimony such as, “the establishment of a quarry will suck all neighboring houses into the pit” is not evidence that can be relied upon by the BZA if it denies a conditional use permit.

### **Specific Issues Imposed on Conditional Uses**

“[T]he authority of townships to zone is limited to the types of uses to which structures and land may be put. The police power granted to townships pursuant to R.C. 519.02 does not encompass the authority to limit the hours of operation of otherwise lawful commercial enterprises within their jurisdiction.” *Board of Township Trustees of Bainbridge Township v. Funtime, Inc.* (1990), 55 Ohio St.3d 106.

However, there is always the risk that if the applicant does not agree to some limitation on hours of operation, the BZA may deny the application, thus, forcing an appeal. The suggested approach is to discuss this issue with legal counsel for the BZA and have that person advise the BZA that hours of operation is not a permissible subject of the conditional use permit.

### **Environmental Issues**

The BZA may condition a permit upon the applicant obtaining all applicable environmental permits and requirements. *Families Against Reily/Morgan Sites v. Butler Cty BZA* (1989), 56 Ohio App.3d 90.

### **Does the Use Serve Community Need**

The need for a business is not the proper subject of zoning regulations. *Automotive Supermarkets, Inc. v. City of Willoughby* (1989), 27 Ohio App.3d 238.

### **Increase in Traffic**

While evidence at a hearing may show that there would be an increase in traffic as a result of the conditional use, there must also be a showing of the impact concerning the increase in traffic. Courts may look at other uses in the area that may have a greater impact on traffic such as gas stations, schools, etc. *Fallang v. Butler Cty. BZA* (1998), WL 42225.

## **Noise Issues**

In 1999, the Ohio legislature passed a bill that allows township trustees to pass regulations prohibiting noise in any area that was zoned that allows for residential use. The bill grandfathered existing industrial uses that generated noise and some expansion of the use. In addition, the bill exempts surface mining operations from township noise regulations. See, ORC § 505.172.

## **Prior Existing Nonconforming Uses**

An existing use in a zoning district, which later prohibits such, a use is referred to as a nonconforming use. This issue arises when there was no zoning at the time the operation started, or the zoning was changed after the operation began. This is a very complicated issue and the specific zoning code must be examined and should be discussed with applicable zoning authorities.

To qualify as a nonconforming use, two (2) requirements must be met: (1) the use must have been in existence prior to the enactment of the zoning regulation prohibiting the use; and (2) the use must have been lawful when commenced.

The above requirements recognize the constitutional right under the Fourteenth Amendment to continue a given use of real property if such use is already in existence when the zoning regulation restricting the use is enacted. To prohibit the use of a prior existing use would constitute the unlawful taking of property without the due process of law.

In *City of Akron v. Chapman*, the leading nonconforming use case in Ohio, the Ohio Supreme Court held unconstitutional an ordinance, which provided that existing undesirable uses could be terminated after a reasonable period of time as determined by the city council. The court held:

The right to continue to use one's property in a lawful business and in a manner which does not constitute a nuisance and which was lawful at the time such business was established is within the protection of Section 1, Article XIV. Amendments United States Constitution and Section 16, Article I of the Ohio Constitution, providing that no person shall be deprived of life, liberty or property without due process of law. *City of Akron v. Chapman* (1953), 160 Ohio St. 382.

ORC § 303.19 and ORC § 519.19 impose limitations on the authority of counties and townships respectively, to regulate the existing uses of land. Generally, the lawful use of any dwelling, building or structure and of any land or premises existing at the time of the enactment of a zoning resolution may be continued although it does not conform to the uses permitted in that district. Consequently, a board of county commissioners or a board of township trustees may not enact a zoning resolution that requires the immediate termination of a nonconforming use within the district. However, nonconforming uses are not vested with all the rights of a conforming use and thus, are subject to limitations regarding expansion and continuance of the use.

Absent reliance on a specific waiver granted by a BZA, there must be an actual use of the nonconforming property to establish a grandfathered use. However, grandfathering based on vested rights is a discussion outside the scope of this guide.

Generally, for a nonconforming use to remain lawful after the enactment of the zoning resolution, there must be an actual use of the property at the time of the enactment. It has been held that the mere intention or contemplation of use is insufficient to establish a nonconforming use. *Donham v. E.L.B., Inc.* (1983), 8 O Misc. 2d 31. A person must do more than purchase the property with a settled purpose to use it in a certain manner. *Windsor v. Lane Development Co.* (1958), 109 O App 131. It has also been held that mere preparation for a particular use does not constitute a nonconforming use. *Shew v. Dermer* (1963), 2 O Misc 65.

The Ohio Supreme Court set forth the common-law standard to determine if a nonconforming use existed prior to the adoption of a zoning resolution. In *Smith v. Juillerat*, the Lake Erie Coal & Supply Company was enjoined from strip mining coal from property it had leased. The mineral leases were entered into prior to the enactment of the township zoning resolution. The plaintiffs in the case owned residential property, which abutted or was adjacent to the land leased by the coal company. The company had obtained a license to strip mine and had drilled a test hole in preparation of strip mining but did not begin to extract minerals from the property at the time the zoning resolution was enacted. The court held that no nonconforming use prior to the adoption of the zoning resolution had been established, stating:

Where no substantial nonconforming use is made of property, even though such use is contemplated and money is expended in preliminary work to that end, a property owner acquires no vested right to such use and is deprived of none by the operation of a valid zoning ordinance denying the right to proceed with his intended use of the property. *Smith V. Juillerat* (1954), 161 Ohio St 424.

While the overwhelming weight of legal authority requires that the property be in actual use, there are some unusual circumstances where the courts have found a nonconforming use absent actual use. Thus, it is clear that in order to establish a prior existing nonconforming use, the property in question must have actually been put to that use prior to the enactment of the zoning resolution.

### **The Nonconforming Use must Be Legal.**

In order to establish a nonconforming use, Ohio law requires the nonconforming use to be lawful. In other words, the use of property must be lawful at the time the use was established in order to qualify as a nonconforming use. *Petti v. Richmond Heights* (1983), 5 Ohio St. 3d 129. The legality of the use depends on the use itself. For instance, if a permit is required and the permit is granted in violation of the applicable zoning ordinance, there can be no valid nonconforming use. However, the failure to obtain a required license may not necessarily render the use unlawful where the license is not a condition precedent to operating the use. In *Board of Trustees, Williamsburg Twp. v. Kriemer*, the court held that since one could be fined for not

obtaining a permit to operate a junkyard but such use could not be enjoined, it was not necessary to have the permit to establish the lawful operation. *Board of Trustees, Williamsburg Twp. v. Kriemer* (1991) 72 App. 3d 608. Likewise, in *12701 Shaker Blvd Co. v. City of Cleveland*, the court held that the failure to secure a permit for an otherwise lawful building would not create an impediment proscribing a nonconforming use. The court reasoned that by imposing penalties for the failure to obtain a permit for a building within legal standards, the legislature indicated that it did not intend to prohibit the use for lack of a valid permit. *12701 Shaker Blvd Co. v. City of Cleveland* (1972), 31 O. App.2d 199, 207.

ORC § 1514.02 states that “...no operator shall engage in surface mining or conduct a surface mining operation without a permit issued by the chief of the division of reclamation.” ORC § 1514.07 authorizes the chief of the division to issue orders directing the operator to cease violation if the chief finds that an operator has violated any requirement of Chapter 1514. Moreover, the chief has the authority to enforce Chapter 1514 through injunctive relief even though the acts to be enjoined are punishable as criminal acts under ORC § 1514.99. See, *Call v. G. M. Sader Excavating & Paving* (1980), 68 Ohio App. 2d 41.

Consequently, unlike *Board of Trustees, Williamsburg Twp. v. Kriemer* and *12701 Shaker Blvd Co. v. City of Cleveland*, *supra*, holds that a surface mining operation is required to obtain a surface mining permit from the State of Ohio prior to conducting a surface mining operation. If the surface mining operation does not obtain the requisite permit, it is subject to both criminal penalties and injunctive remedies. Moreover, the scope of the definition of surface mining appears broad enough to thwart the initiation of such activity related to surface mining without a permit. ORC § 1514.01(A) defines surface mining to include:

...all or any part of a process followed in the production of minerals from the earth or from the surface of the land by surface excavation methods, such as open pit mining, dredging, placering, or quarrying, and includes the removal of overburden, or quality of mineral deposits, and the incidental removal of coal\*\*\* but does not include: test or exploration boring; ... the extraction of minerals other than coal from borrow pits for highway construction purposes, provided that such extraction is performed under a bond, contract, and specifications that substantially provide for and require reclamation practices consistent with the requirements of this chapter; the removal of minerals incidental to construction work, provided that the owner or person having control of the land upon which the construction occurs, the contractor, or construction firm possesses a valid building

permit; nor the removal of minerals to a depth of not more than five feet, measured from the highest original surface elevation of the area to be

excavated, where not more than one acre of land is excavated during twelve successive calendar months.

### **What Constitutes Actual Use of the Property?**

While it is clear from the case law cited above that there must be an actual use of the property in order to establish a prior existing nonconforming use, the question remains as to the extent the facility needs to be in use to come within the protection of an existing nonconforming use. Case law indicates that it is not necessary for the use to be at its peak capacity in order to establish a nonconforming use. In *State ex rel Howland Twp Trustees v. Bailes*, the court held that where a property had two house trailers on it and electricity and water lines had been installed to support five trailers, but the owner had not yet installed all five, the property owner had acquired a valid nonconforming use for five trailers. *State ex rel Howland Twp Trustees v. Bailes*, (1961), 87 Abs 321.

Perhaps the most instructive case in Ohio is that of *Meuser v. Smith*. In *Meuser*, a substantial amount of work, including at least some actual construction for the specific purpose of the use, was done in good faith and pursuant to lawful permits issued by the appropriate public authority. This permit was never revoked before a change in zoning. The actual construction would have proceeded as of the effective date of the zoning, had such construction not been enjoined in a later action, which was determined to be without merit. Subsequent to the termination of the injunction, the defendants entered into other contracts and expended further sums of money with the view of completing construction. The court held that such work is sufficient to constitute a lawful nonconforming or existing use, since it is not necessary, under the circumstances, that the use exist in full measure prior to such zoning change. *Meuser v. Smith* (1955), 75 OLA 161.

Thus, if a surface mining operation obtained its surface mining permit and its environmental permits, constructed its scales, office, and plant and began to crush stone prior to the enactment of a zoning resolution, it would seem to satisfy the requirement that it was in operation prior to the enactment of the zoning change.

### **Limits That Can Be Put on the Operation of Nonconforming Uses**

Nonconforming uses may be subject to reasonable regulation by the county or the township. The issue of reasonableness arises when the owners of a nonconforming use wish to expand their business or structures, repair structures, add additional uses or change uses, or use additional parts of their property for the nonconforming use.

In *City of Columbus v. Union Cemetery Association*, the court held that where not using part of the land is important to the use, and then a court may well decide the land held vacant may also be nonconforming. *City of Columbus v. Union Cemetery Association* (1976), 45 Ohio St 2d 47. In *Union Cemetery*, the unused land was being held in inventory for future use as gravesites. The court found that the entire acreage owned by the cemetery to be a prior existing nonconforming use stating:

Cemeteries, because of the very nature of their function, must hold land in which no burials have been made. The fact that the unused portion of the lands of the Union Cemetery Association is not all contiguous, and not all purchased at the same time, does not make it any less in “use” as a cemetery so long as the land was being held for burying ground at the time the resolution was passed. *City of Columbus v. Union Cemetery Association* (1976), 45 Ohio St 2d 47.

In *State ex rel. Union Limestone, Inc. v. Bumgarner*, the court held that an entire 47 acre tract of land used for mining, quarrying and processing of limestone, and containing the usual structures incident to such operations, as well as storage piles of stone, constitutes a “lot” within the purview of the zoning resolution and, therefore, the entire 47 acres was held to be a nonconforming use. In that case the applicable resolution allowed for expansion of the nonconforming use on a “lot.” *State ex rel. Union Limestone, Inc. v. Bumgarner* (1959), 110 Ohio App. 173.

There is existing case law that holds that while a quarry operation was allowed to expand on the initial tract of land where the quarry commenced operation, it was not allowed to expand to a separate adjoining tract of land. In *Davis v. Miller*, a nonconforming quarry owned property on the east and west sides of Route 33 in Franklin County. The court held that where the property on the west side of the road was used for quarrying and the crushing of stone and that use predated the zoning ordinance, that use for the entire lot was a lawful nonconforming use. However, as to the lot on the east side of the road, the court held that because no use had been established and because the zoning ordinance recognized the continuation of the use on a “lot,” the property on the east side of the road was not a prior existing nonconforming use. *Davis v. Miller* 163 Ohio St. 91.

### **The “Borrow Pit” Ploy**

One method to attempt to circumvent the grandfathering issue may be to start a borrow pit and attempt to enlarge that use. The case of *Griffin V. Roberts* is instructive. In *Griffin*, the court held that the property owner had changed the use of the property from being primarily a “borrowing pit” to a place for conducting an excavation business, a garage for storage, repair and maintenance of heavy equipment. The appeals court found that the trial court considered all the various facts and circumstances in order to determine whether or not a change in use is, in fact, a continuation of the present nonconforming use or was an unlawful expansion of said nonconforming use, finding the expansion to be unlawful. *Griffin V. Roberts* 1983 WL 7346.

Based on the definition of a surface mining operation in ORC § 1514.01(A), it is likely that a court would conclude that since a borrow pit is excluded from the definition of surface mining because it is for one identifiable project rather than existing for an on-going operation, the surface mining operation would not be a lawful extension of the borrow pit. The court could

reason that when the identifiable project was completed, so too was the need for a nonconforming use.

### **Res Judicata**

The general rule is that once an application for a conditional use has been denied by the BZA, that decision, while subject to appeal, is final and the applicant will not be allowed to refile or reapply for another conditional use permit at a later time. *Set Products v. Bainbridge Township* (1987), 31 Ohio St.3d 260. In *Set Products*, the request for a variance to operate a sand and gravel surface mine was denied by the BZA. The second application was found to be too similar to the original application and was not considered by the BZA.

Application of the *res judicata* principle requires an identity of parties to both applications. *Res judicata* can be defeated by a showing of changed circumstances in the second application. Issues such as a change in the ingress and egress of the site, the size of the site, the extent of activity on the site, and new owners or operators may be sufficient changes to defeat the *res judicata* rule. Changing the application regarding blasting and fencing were found to be not substantial. *Set Products v. Bainbridge Township* (1987), 31 Ohio St.3d 260.

### **Limits on Governmental Power**

The Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment confine governmental activity. The various constitutional limitations include: A regulation must validate a public purpose such as promoting division of incompatible uses to avoid congestion, health and noise problems

The achievement of the purpose must be reasonably related to the means to achieve that purpose.

Taking of property should not be an effect of regulation. The central principle of the takings clause has been stated as:

[T]his court has generally “been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.” Rather, it has examined the “taking” question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action—that have particular significance. *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.* (1981), 452 U.S. 264, 295.

In *Agins v. City of Tiburon*, the United States Supreme Court found that the application of a zoning ordinance to a particular piece of property was a taking because the zoning ordinance did not substantially advance a legitimate state interest or because it denied the owner of the property the economic viable use of the property. *Agins v. City of Tiburon* (1980) 447 U.S. 255. In *Smith*

*v. Summit County*, the court held that the deprivation of a landowner's interest in the use of ground water under his land was not a taking under the Ohio Constitution. *Smith v. Summit County* (Summit App. 1998), 1998 Ohio App. Lexis 6438.

## **Surface Mining Issues**

### **Interplay Between Zoning and Land Planning and the Issuance of Surface Mining Permits**

In 1998, the Reclamation Commission held that the term "future intended use" as found in ORC § 1514.02(A)(9)(b) means post mining land use. The Reclamation Commission also held that the future intended use cannot conflict with a zoning plan or a comprehensive plan that governs land uses in the area to be reclaimed. The Reclamation Commission also ruled that if a conflict between the future intended use and local zoning or comprehensive land plan was asserted by a local official, then the Division of Mines and Reclamation is not authorized to issue a surface mining permit.

Currently, the Division requires that an applicant for a surface mining permit or an amendment to add additional reserves must contact local officials and obtain signatures that no such conflict exists. If a conflict is asserted, it is up to the applicant and the local officials to resolve the conflict. The future intended use may require different zoning than the zoning necessary for mineral extraction. As such, it is likely that when asked, local officials will note that the zoning for the future intended use, i.e., a lake with residential development, conflicts with the terms of the conditional use permit.

This issue should be covered in the zoning application and specifically note the intended future use. The object is to build an argument that no conflict exists.

## **Impact Fees**

Impact fees or "exactions" may be required by cities and counties of applicants for the defrayment of the cost of infrastructure. These impact fees grew out of requirements that subdivision developers dedicate space for parks and other public uses. Impact fees are offered "in lieu" of these dedications. There is no express statutory authorization for impact fees in Ohio, but Ohio has strong home rule language that may support such requirements. See, 1994 OAG No. 94-034, holding that a county planning commission may require developers to pay a fee in lieu of a dedication of a park.

## **Regulatory Takings**

## **General Constitutional Framework**

### **Procedural and Substantive Due Process**

The 14<sup>th</sup> Amendment to the United States Constitution states that no state “shall deprive any person of life, liberty, or property, without due process of law.” There are two types of due process: procedural and substantive. Procedural due process is the entitlement of a fair procedure regardless of the correctness of ultimate decision. The type of hearing afforded depends on the nature of the right affected, i.e., criminal trial versus a zoning variance hearing. Substantive due process goes to the fundamental fairness of the decision and may turn on what right is affected.

### **The Fifth Amendment’s “Takings” Clause**

The Fifth Amendment to the United States Constitution states that “property [shall not] be taken for a public use without just compensation.” This refers to the government’s eminent domain powers and applies to both a physical taking or occupation of property and the over-regulation of property by the government, also known as a “regulatory taking.”

The Fifth Amendment applies to the states by way of the Fourteenth Amendment. The Fourteenth Amendment also contains a Due Process Clause; however, unlike the Fifth Amendment’s requirement of just compensation, the Fourteenth Amendment’s Due Process Clause’s only remedy is to have the legislation set aside. The Fifth Amendment’s Takings Clause is “distinct” from substantive due process. In *Nollan v. California Coastal Commission* (1987), 483 U.S. 825 and *Dolan v. City of Tigard* (1994), 512 U.S. 374, the Supreme Court stated that the takings issue is distinct from substantive due process. Although discerning where the distinction lies may be more a theoretical discussion than it is a relevant one.

### **Basic Principles of Takings Jurisprudence**

#### **Historical Analysis**

Legislation that “goes too far” may constitute a taking. In *Pennsylvania Coal Co. v. Mahon* (1922), 260 U.S. 393, the Supreme Court’s “too far” test was first announced. The facts and outcome of *Pennsylvania Coal* are strikingly similar to a case later decided by the Ohio Supreme Court. In *Pennsylvania Coal*, the company retained the subsurface mineral rights after conveying the surface rights. The state then passed legislation prohibiting mining that would cause a subsidence. The Supreme Court held that there was a taking of subsurface rights even if the surface rights retained value.

In general, the determination of whether a land use regulation constitutes a compensable taking is an *ad hoc*, factual inquiry depending upon several factors. In *Penn Central Transportation Company v. City of New York* (1978), 438 U.S. 104, the Court set forth a number of complex factors for the court to consider when analyzing a takings issue, including the regulation’s economic effect on the landowner, the extent to which the legislation interferes with the distinct

investment backed expectations, and the character of the governmental action. The *Penn Central ad hoc* analysis is considered when some economic value is left in the property.

Two critical factors in any takings analysis are: (1) whether the legislation failed to substantially advance legitimate state interests; or (2) whether the legislation denies an owner the economically viable use of his property. *Keystone Bituminous Coal Association v. DeBenedictis* (1987), 480 U.S. 470. *See also, Agins v. City of Tiburon* (1980), 447 U.S. 255.

In *Nollan v. California Coastal Comm.* (1987), 483 U.S. 825, the property owner's zoning permit to rebuild his house was conditioned on the granting of an easement across his property to offset the perceived harm caused by preventing the public "psychologically from realizing that a stretch of coastline exists nearby..." In footnote 3, the Court created some confusion by requiring the government to support legislation against takings claims by showing a substantial public purpose rather than by requiring the party attacking the legislation to show that the public purpose is unreasonable under a traditional rational basis test.

A taking will have occurred when no economic value is left in the land after the legislation unless the limitation imposed is inherent in the title to the property itself as a result of background principles of state nuisance and property law. In *Lucas v. South Carolina Coastal Council* (1992), 506 U.S. 1003, the Court addressed the situation where all economic value of the property was taken. The "background principles" of state nuisance law must be genuine so that legislative bodies cannot simply declare that a particular use constitutes a nuisance in order to avoid paying just compensation. Unless all economic value is taken, the factors enumerated in *Penn Central* will provide the basis of the analysis.

A regulation that would otherwise be an unconstitutional taking absent compensation is not transformed into a background principle of the State's law, which cannot be challenged by those who acquire title after the enactment, by virtue of the passage of title. *Palazzolo v. Rhode Island* (2001), 533 U.S. 606. However, the right to improve property is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land use restrictions.

A complete deprivation of property interest occurs when a mining company's sole reason for purchasing the subject property was to mine it and the governmental action prohibits that use.

The Ohio Supreme Court, in *State ex rel. R.T.G., Inc. v. The State of Ohio* (2002), 98 Ohio St.3d 1, 780 N.E.2d 998, had before it a case involving the denial by the Ohio Department of Natural Resources of a coal mining permit. The Court defined the relevant parcel in the vertical context, and under Ohio law, the coal/mineral interest, to be a separate and severable interest.

## **Takings in the Form of Exactions**

In *Dolan v. City of Tigard*, (1994) 512 U.S. 374, a store owner was required to dedicate some of her property for a pedestrian/bike path in order to alleviate traffic congestion as well as for flood control. In *Dolan*, the Court set forth the test for determining whether a takings has occurred due to an exaction. Accordingly, a court is required to determine two issues: (1) Whether an essential nexus exist between the claimed state interest and the requirement imposed; and (2) Whether the degree of exaction bear a reasonable relation to the use or is it merely being used as an excuse by the government to obtain an improvement. The *Dolan* Court's use of the reasonable relationship was intended to invoke a higher standard than the "rational basis" test. To avoid this confusion, the Court adopted the "rough proportionality" test, which requires that the exaction be related in nature and scope to the impact.

## **Takings Due to Zoning**

The basis for zoning is well described in the landmark case upholding the constitutionality of zoning in *Village of Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365. In 1922, the Village of Euclid, Ohio enacted a zoning ordinance that divided the Village into six use districts and a number of classifications within each district. The term "Euclidian zoning" refers to the type of comprehensive zoning scheme adopted by the Village of Euclid, which, coincidentally was named after Euclid, the Greek mathematician. In that case, the Supreme Court held that governmental action should be set aside only if it is arbitrary, capricious, or unreasonable, bearing no substantial relationship to public health, safety, morals or the general welfare. It is important to remember that the burden of proof is on the person attacking the ordinance and that zoning is designed to correct evils, such as nuisance. It does not matter whether the evil materializes as long as the government believed or could have believed that it did or would.

In *Nectow v. City of Cambridge* (1928), 277 U.S. 183, the plaintiff owned a piece of property bounded by railroad tracks, a Ford Motor Company plant, and other factories. The government had zoned the property residential. The Court overturned the zoning classification because the zoning bore no substantial relationship to public health, safety, morals or general welfare. The landowner may be entitled to have the zoning ordinance overturned and may be entitled to compensation for the period of time that the land was unlawfully zoned. In *First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles* (1987), 482 U.S. 304, the Court provided guidance as to the remedy when a taking occurs due to zoning. Previously, the only remedy available for such a taking was the overturning of the legislation and allowing the local government a reasonable period of time to rewrite the zoning ordinance before the government could purchase the land thereby allowing the zoning ordinance to remain intact.

However, on remand, the appellate court held that there was no compensable regulatory taking, while observing that "[t]he complaint does not allege \*\*\* that it was unreasonable for the County to conclude [the] limitations would contribute substantially to public safety. See, *First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles* (1989), 210 Cal.App.3d 1353.

The Ohio Supreme Court held that compensation was due for a substantial period of the time that the property was unusable due to restrictive zoning. As the litigation lasted from 1995 to October 2002, plaintiff was entitled to compensation. *State ex rel. Shemo v. City of Mayfield Heights* (2002), 96 Ohio St.3d 379.

### **Takings Due to Moratoria on Development**

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002), 535 U.S. 302, the Court held that a moratorium on land development imposed during the process of devising a comprehensive land use plan does not constitute a *per se* taking of property requiring compensation under the Takings Clause. Rather, the question of whether the Takings Clause requires compensation when the government enacts a temporary regulation denying a property owner the use of his property is to be decided by applying the *Penn Central* factors and not by any categorical rule. *See also, Shemo, supra.*