

**TOWNSHIP OF DERRY
BOARD OF SUPERVISORS
PUBLIC HEARING (PART 2 OF 2)
Tuesday, November 26, 2019, 5:30 PM**

CALL TO ORDER

Part 2 of the Tuesday, November 26, 2019 Derry Township Board of Supervisors public hearing was called to order at 5:49 p.m. by Chairwoman Susan Cort in the meeting room of the Administration Building in the Derry Township Municipal Complex, 600 Clearwater Road, Hershey, PA.

ROLL CALL

Supervisors Present:

Susan M. Cort, Chairwoman
Justin C. Engle, Vice Chairman
Richard D. Zmuda, Secretary
Marc A. Moyer
Matthew A. Weir

Supervisors Absent:

None

Also Present:

Charles Emerick, Director of Community Development
Christopher Christman, Township Manager
Jon A. Yost, Township Solicitor
Lauren Zumbrun, Economic Development Manager
Jenelle Stumpf, Planning/Zoning Coordinator

Public Registering Attendance: Jonathan M. Crist, 226 West Chocolate Ave., Hershey; Robert Naeye, *The Sun*; Linda Eyer, 2321 Raleigh Rd.; Marty Stabley, 241 Hilltop Rd., Hummelstown; John Foley, 238 Mine Rd.; Steve Smith, 1473 Spring Hill Dr.; Linette Quinn, PA State Police; Joanne Reed, PA State Police; Chris Trogner, Troegs Brewery; Patrick Beaver, PA State Police; Dennis Trout; Steve Seidl, 450 West Granada Ave., Hershey

NEW BUSINESS

A. Public hearing regarding proposed new Zoning Ordinance

Chuck Emerick, Director of Community Development, stated that on May 14, 2019, the Board of Supervisors authorized the start of the process to have Urban Design Associates (UDA) evaluate the Township's Zoning Ordinance and Architectural Guidelines, which led to both the revised Comprehensive Plan and the proposed new Zoning Ordinance. The new Zoning Ordinance was posted on the Township's website on October 11, 2019.

Mr. Emerick reviewed the changes to the Zoning Ordinance as follows:

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- There are a few changes that are consistent throughout the document:
 - Removal of previous amendments.
 - All Section references were changed from ‘Section’ to ‘§’.
 - Miscellaneous spelling corrections were made.
 - The Overlay number was added when Overlays are referenced.
 - Page numbers have been revised.
 - Minor word corrections have been made.
 - The new permitted use items were carried to the zoning district dashboard updates.
 - References to ‘Specific Criteria’ were added for permitted uses on the dashboards.
 - The zoning district and Overlay modifications were carried to the dashboards.
 - References to the Township’s new Street Tree Ordinance were added.
- No changes were made to Article I (Authority and Purpose).
- In Article II (Form and Function):
 - The descriptions of Permitted, Conditional Use, and Special Exception uses were revised to match the Definitions section of the Zoning Ordinance.
 - The Land Use Table has been revised:
 - Commercial Parking Lot or Structure is limited to O9.1
 - Financial Institutions are limited to O9.1 and O9.2
 - Food Services Without Drive-Through are limited to O9.1 and O9.2
 - Hotels and Motels are permitted in O9.1 as Conditional Uses
 - Laundromats and Micro-distilleries/Breweries are permitted in O9.1 and O9.2
 - Mixed Use Buildings, Pet Grooming Facilities, Photocopy Service, Private Parking Lot or Structure, and Exercise and Fitness Centers are permitted in all O9 subdistricts
 - The Country Club is permitted in O9.3 because it already exists where it crosses Mansion Road
 - Residence Hotels and Motels are permitted by Conditional Use in O9.1
 - Small-Scale Retail; Studios/Gallery for Teaching, Dancing, Art, Music or Similar Cultural Pursuits; Veterinary Office; and Visitor Center are permitted in all O9 subdistricts
 - Short-Term Rentals are permitted by right in O9.1 and O9.2 and by Special Exception in O9.3
 - Theater and Auditorium is permitted in O9.1 and O9.2
 - Life Care Facilities are permitted in O9.1 by right and O9.2 by Condition Use
 - Museums have been limited to Overlay O6 and O8 in the Palmdale Mixed Use district and to O8, O9.1, O9.2, O10, and O13 in the Hershey Mixed use district
- An exception to front yard setback requirements has been made to allow the Township to require that buildings retain the street front character of other building in the same vicinity to avoid substantial character changes.

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- Permitted encroachments into the front yard have been added for:
 - “Parking lots” (in addition to spaces) in the rear yard area of the Hershey Mixed Use and Palmdale Mixed Use have been added for clarity.
 - Parking spaces and lots are permitted in the side yard area of the O9 and O10 Overlays to allow parking lots to span multiple properties.
 - All stormwater facilities are permitted in the yard areas of properties.
 - Underground utility lines and vaults have been added (moved from another section of the Ordinance).
- In Article III (Zoning Districts and Overlays):
 - On Map 1, the Planned Campus North zoning district was enlarged due to the PA State Police Academy expansion planning and the General Commercial district was extended to encompass the Bluegreen Vacations and Troegs properties.
 - On Map 2, the O8 Compact Development Overlay was expanded to the east and the south; the size of the O9 Downtown Core Overlay was reduced and subdistricts O9.1, O9.2, and O9.3 were added; a 0.17-acre property was added to the O10 East Chocolate Avenue Overlay.
 - On Map 4, the North Master Plan Approval Area was extended.
 - Regarding the zoning district dashboards, Table 21 added Medical Center “affiliates” to minimum yard exceptions and Table 29 added requirements for the O9.1, O9.2, and O9.3 subdistricts and setback requirements to promote tree lawns.
- In Article IV (Performance Standards and Supplementary Regulations):
 - A modification has been made regarding access management on Middletown Road. Where a property cannot be accessed by the proper offsets or alignment, it is limited to a right-in, right-out driveway.
 - In the Downtown Core Overlay:
 - The entire district is clearly identified as a Traditional Neighborhood Development.
 - Parking requirements have been appropriately adjusted for good planning in a “downtown” setting.
 - Perimeter landscaping within 10 feet of a parking area can be used to meet the required landscaping.
 - Use and restrictions for parking lifts, automated parking facilities, and tandem parking have been added to the regulations.
 - Under parking requirements:
 - When determining parking calculations, fractions are always rounded up to the next whole number.
 - Parking for Short-Term Rentals is made to be one parking space per bedroom.
 - Parking factors for display areas are better described.

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- Parking factors for special parking spaces (like employee of the month) have been removed.
- Bicycle parking standards now reference a new Appendix G, which is a reference manual from the Association of Pedestrian and Bicycle Professionals publication to clearly address types and location of facilities.
- Perimeter parking lot landscaping can be included when within 30 feet of a street or alley.
- The 10-foot minimum setback for 6-foot high frontage fences has been limited to the address side of a property.
- The No-Impact Home Business description has been adjusted to exactly match the MPC.
- The Outdoor Lighting section has been modified to include signs in objects to be illuminated with a narrow beam of light; to allow lights that imitate candles or gas lamps; and to exclude café lights from lighting requirements.
- Performance standards have been added for Short-Term Rentals that are permitted by right.
- The Downtown Core Design Standards (formerly Chapter 89) have been highly illustrated, slightly reworked, and incorporated back into the Zoning Ordinance.
- In Article V (Conditional Uses and Special Exceptions):
 - The number of paper copies required for submission of Conditional Use and Special Exception applications has been reduced.
 - Townhouse are only permitted in the O9.1 and O9.2 subdistricts of the Downtown Core, and their driveways may not access Chocolate Avenue.
 - Parking for a Bed and Breakfast Home must access an alley when available. This same requirement has been added to Bed and Breakfast Homes under Section 502.1 (Special Exceptions).
 - Short-Term Rentals (formerly Specialty Homes) now include what have become standard conditions through the hearings.
 - Funeral homes are only permitted in the O8 and O13 Overlays of the Hershey Mixed Use zoning district.
 - Hotels in the Downtown Core O9.1 Overlay were added to the Conditional Uses.
 - Family Child Care Homes and Accessory Dwelling Units are limited to properties where single-family dwellings exist or are permitted.
 - Guest Lodging, Dining and Conference Facilities permitted in the O8 Compact Development Overlay are to serve only THEIR guests.
- In Article VI (Nonconformity Regulations), Section 225-607 has been added to note that expansions of use variances will require action by the Zoning Hearing Board.
- In Article VIII (Rezoning):

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- Section 225-802 notes that permits are required for permanent communication towers and not for temporary communication towers, and that permits are not required for “same for same” replacements of minor accessory structures.
- Section 225-802.4 notes that permits will not be accepted when known zoning violations exist on a property.
- Section 225-802.11 has been modified to allow an applicant to extend a permit to avoid denial.
- Section 225-805 regarding certificates of use and occupancy has been modified for clarity and also combined with the content from Section 225-802.E.
- In Article X (Administration and Enforcement), the requirements regarding the conduct of Zoning Hearing Board hearings was modified for clarity.
- In Article XI (Definitions), many definitions were modified and added (some due to inclusion of the Design Standards).

BOARD OF SUPERVISORS’ COMMENTS

Chairwoman Cort asked Mr. Emerick to put into perspective how the Zoning Ordinance and even the Comprehensive Plan can and should change over time, and that these proposed amendments are part of the ongoing process. Mr. Emerick said that the documents should absolutely be amended over time. Even the 2017 Zoning Ordinance has been amended three times since its adoption. The reason why we are discussing the Comprehensive Plan is because we feel there has been enough of a change in the Zoning Ordinance by adding the subdistricts to the O9 Overlay, and with trying to ensure that we are in the right place with the Design Standards, that we felt it necessitated an amendment to the Comprehensive Plan in order to make the modifications to the Zoning Ordinance.

Vice Chairman Engle thinks it is intended that these are living documents and they can be amended, but what is being proposed now is not a normal change. This amendment involved hiring a world-class planner and it comes only two years after the adoption of the 2017 Zoning Ordinance, so it is not something that will be done every two or three years. This is being proposed in recognition of getting a lot of things done in the 2017 Zoning Ordinance across the Township but maybe using too broad of a brush across the downtown. The comment was made that this amendment is in reaction to one hotel, but that is really not the case. The hotel helped to shine a light on some problems that we had in the 2017 Zoning Ordinance, but we have effectively made some material changes to the way the zoning is handled in downtown, breaking one zone into three, and being really intentional about what we want to see in the decades to come. This change is pretty monumental.

Supervisor Moyer asked what improvements, if any, have been made to increase the size of Notice signs that zoning issues are going to be heard and making the language in those Notice

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signs more conducive to ordinary people understanding what is actually being proposed, as opposed to simply identifying a piece of property by nomenclature and plot x, y, and z. Mr. Emerick confirmed with Supervisor Moyer that he is talking about zoning hearings and stated that nothing has been legislated in the proposed Zoning Ordinance to be different. The Municipalities Planning Code does not have very specific standards, but staff is currently exceeding those standards for Zoning Hearing Board Notices. Supervisor Moyer noted that there have been concerns in the past that when housing developments and significant projects were being proposed, the only sign being displayed publicly was a little placard with language that was very difficult for the average person to understand. We should give consideration to increasing the clarity and visibility of those types of Notices.

Vice Chairman Engle asked where it is prescribed that notice has to be given. Mr. Emerick responded that per the Municipalities Planning Code for Zoning Hearing Board hearings, staff conspicuously posts the subject property and provides written notice to property owners 200 feet up and down the street and within a 100-foot radius of the subject property. Notice of the hearing is also published two times in *The Sun*. There is no posting requirement for housing developments that are regulated by the Subdivision and Land Development Ordinance. For Conditional Uses, the subject property is posted and abutting property owners receive written notice, as prescribed by the Zoning Ordinance. Supervisor Moyer thinks the Township can do a better job. Vice Chairman Engle agreed and stated that it makes sense to also notify property owners across the alley for Conditional Uses, in addition to abutting property owners.

Chairwoman Court asked if changes were made to the proposed Zoning Ordinance to address the concerns of Supervisor Moyer and Vice Chairman Engle regarding Notice signs, would they be considered substantive changes? Mr. Emerick responded that the size of the posting is not presently legislated, but it could become a staff policy. That would be a substantive change to the proposed Zoning Ordinance. He added that he has a few items that he can bring into future amendments, and the concerns regarding Notice signs could be included with those amendments. Mr. Emerick stated that he has decided it is best to adopt the proposed Zoning Ordinance as written and advertised, and then amend it later for these additional changes.

In response to a question from Solicitor Jon Yost, Mr. Emerick stated the Notice of the Board of Supervisors' intent to consider and adopt that was advertised presented this as the adoption of a new Zoning Ordinance, not as changes that have been made to the existing Zoning Ordinance.

PUBLIC COMMENTS

Jonathan Crist, 226 West Chocolate Avenue, stated that he is an attorney with 40 years of zoning and real estate experience. He requested that his written testimony be incorporated into the record for this hearing (*see attached*). Mr. Crist's building was built in 1930, and he purchased the property on December 1, 1992, before there was any Downtown Core attempt at zoning. He takes issue with the Township trying to tell him what he can do with his property by

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way of the Design Standards being incorporated back into the Zoning Ordinance. The Design Standards never should have been in the Zoning Ordinance in the first place. Zoning does not have anything to do with aesthetic issues. Section 225-429 of the Zoning Ordinance claims it has the ability to do this because of Article VII-A of the PA Municipalities Planning Code (MPC), which is entitled 'Traditional Neighborhood Development' (TND). Mr. Crist commented it is obvious that someone does not know what TND entails. TND was intended for a developer to elect to submit a TND plan, which is a retro type of layout for more density, but it was always intended to cover new construction. TND has nothing to do with existing buildings. The Township does not have the right to use TND as a basis to regulate the aesthetics of existing buildings. Regulation of aesthetics has never been permitted under the MPC. Mr. Crist noted that Mr. Emerick has said the Township has been doing that since 1993, with over 400 submissions to the Design Board since. Mr. Crist acknowledged that many of the cases involved signage, and the Township can regulate the aesthetics of signs. However, the Township has gotten away with the regulation of property aesthetics for 26 years and was never challenged. It is not the function of government to tell a property owner what color they can paint the shutters on their building or which light fixture they can use. Mr. Crist believes proposed Section 225-429.G.1 [*Downtown Core Overlay Design Standards, Demolition of Existing Buildings*] of the Zoning Ordinance improperly attempts to prohibit demolition of existing buildings on Chocolate Avenue. Zoning can control demolition in terms of health, safety, and welfare, but cannot determine if a building can or should be demolished. That is a property owner's choice. What the Township is trying to do is control Chocolate Avenue through the Design Standards, but what they should have done years ago was create a historic preservation district instead. If a building is registered as a historic building, the Township could prohibit demolition and control the aesthetics.

Mr. Emerick said that Mr. Crist is well aware of the fact that the Township is currently defending the requirements of the Downtown Core Design Standards (Chapter 89) and the fact that the Township can do what is being proposed in the new Zoning Ordinance.

Vice Chairman Engle commented that one of the biggest disadvantages of creating a historic preservation district is being subject to the state's requirements, which are very applicable to a downtown such as Lancaster or Downingtown, but they do not really fit Hershey. Mr. Emerick added that in a true historic district, there is a full regiment of design characteristics that must be followed. The way the Township is trying to legislate that same feel is through a much more flexible method.

John Foley, Mine Road, Hershey, stated that the concepts that were shared at the first community meeting at the Hershey Story were filtered through the "world-class" consultant so that they could provide a vision for what this new zoning would look like in the downtown. The results were presented at the second community meeting and there was very little time for public comment. This has become more of a rush instead of a thoughtful and methodical process. The subdistricts that have been created are more like Monopoly, as in "I'd like to see this here and that there." We talk as if the Zoning Ordinance is a living, breathing document and it is

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modifiable, but yet we characterize the proposed Zoning Ordinance as a monumental change. Mr. Foley agrees with Mr. Crist that the proposed Zoning Ordinance is overreaching. Chapter 89 is in litigation, so why the rush? If it is being litigated, why not wait until we hear from the judge? Are the Design Standards really in compliance with the MPC? The Township can do better than this.

Steve Seidl, 450 West Granada Avenue, thinks a lot of good things have been addressed in the proposed Zoning Ordinance, notwithstanding some of the items that have been challenged, and this document begins to address some of what went wrong in 2017. Previously we were at 60% maximum impervious coverage in most of the downtown area and that went to 85% for much of the downtown in 2017, as well as expanding the extent of the Downtown Core Overlay. The same was true for the maximum height of buildings (from 40 feet to 60 feet) and minimum setbacks (from much bigger numbers to very small numbers). One of the positives in what is proposed now is having at least some transition from the commercial areas to the existing residential areas. Mr. Seidl thinks the O9.1, O9.2, and O9.3 subdistricts that UDA proposed in their recommendation are a good thing, but he is not sure if the lines designating the subdistricts are exactly right and there is enough of a transition between commercial and residential. It is not perfect, but what is proposed is more balanced than what we had in 2017. Mr. Seidl encouraged the Board to move the proposed Zoning Ordinance forward and deal with modifications later as amendments. He thinks the Board needs to keep their eye on the reduced parking regulations. Conceptually it might make sense for some of the very small uses in the downtown; however, it might need to be tweaked in the future as to whether it is a good thing or if it creates parking problems. One thing that is still missing is what triggers the requirement for a traffic study. Traffic is still out of control and it is getting worse. Part of the problem is development and part of the problem is infrastructure. Mr. Seidl thinks that should be considered for a future amendment.

Vice Chairman Engle thanked Mr. Seidl for his constructive contributions and involvement throughout this process.

Ken Gall, Hershey Trust Company, complimented the staff and the Board of Supervisors on the proposed Zoning Ordinance and for bringing in a consultant for the revisions. Regarding the specific changes that involve the Trust Company property, Mr. Gall stated that the State Police have a historic presence in Hershey. He had the opportunity to tour their facilities a few months ago, and they drastically need a new building. He appreciates the Township for recognizing that the State Police have been in Hershey since they started an academy and for allowing them to not have to look outside of the Township for a new location, which is what they would have been forced to do. Regarding the Troeg's site on East Hersheypark Drive, the proposed rezoning takes it from a nonconforming use to a conforming use. Regarding the downtown and the TND concept, Mr. Gall does not know how to achieve a TND setting without allowing some adapt reuse. He thinks that enacting a historic district would really take things the other way, and it is creative how the Township is dealing with it. He also thinks what is proposed in the new Zoning

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Ordinance will be a positive change and will enhance what the Township is trying to accomplish in the downtown, which is blending residential and commercial.

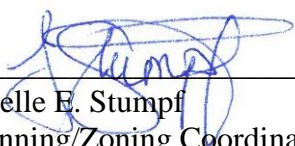
Dennis Trout, 2010 Locust Lane, commented that traffic on Middletown Road is a very important issue. During Mr. Trout's family's 65 years in Derry Township, different Boards have proposed a bypass to Middletown Road. Given the additional traffic that would be imposed on Middletown Road from Amazon and its development, Mr. Trout recommends that first priority in a future Comprehensive Plan should be given to a bypass before any further connections of any significance from Bullfrog Valley Road to Middletown Road at Gramercy Place, per what is proposed on the Township's Official Map. There currently is limited potential east of Middletown Road between Waltonville Road and Middletown Road, with a connection down to Route 283. There is another potential west of Middletown Road up to and including Fiddlers Elbow Road. A third option would be west of Derry Township, with connection to Union Street in the vicinity of the sewage treatment plant west of Swatara Creek. There are several significant distribution centers along Route 283 and it is only going to get worse. Strategic planning highly recommends that a bypass be provided before any further comprehensive planning is proposed. Mr. Trout stated that someone made a comment that the connection at Gramercy Place will reduce traffic on Middletown Road. As a retired professional engineer, Mr. Trout would like to see the study that such an additional intersection would reduce the traffic on Middletown Road.

ADJOURNMENT

On a motion by Chairwoman Cort, seconded by Vice Chairman Engle, and a unanimous vote, the hearing adjourned at 6:58 p.m.

SUBMITTED BY:

Richard D. Zmuda
Township Secretary



Jenelle E. Stumpf
Planning/Zoning Coordinator
(acting as stenographer)

**OBJECTIONS TO PROPOSED AMENDMENTS
TO THE DERRY TOWNSHIP ZONING ORDINANCE
RE: §225-429 DOWNTOWN CORE DESIGN STANDARDS
AND §225-315 SIDE AND REAR YARD SETBACKS**

The purpose of these objections is to bring to this Board's attention those portions of the proposed amendments to the Derry Township Zoning Ordinance which are unenforceable and/or constitutionally prohibited.

I.) PROPOSED §225-429 DOWNTOWN CORE DESIGN STANDARDS UNDER ARTICLE VII-A OF THE MPC "TRADITIONAL NEIGHBORHOOD DEVELOPMENT" HAS NO APPLICATION TO EXISTING BUILDINGS OR STRUCTURES NOR ARE THOSE STANDARDS MANDATORY FOR NEW CONSTRUCTION

Proposed Derry Township zoning addition §225-429 Downtown Core Design Standards cites as authority for its enactment Article VII-A of the Pennsylvania Municipalities Planning Code ("MPC") entitled Traditional Neighborhood Development ("TND").

Section 107 (a) of the Municipalities Planning Code defines a TND:

"Traditional neighborhood development," an area of land typically developed for a compatible mixture of residential units for various income levels and nonresidential commercial and workplace uses, including some structures that provide for a mix of uses within the same building. Residences, shops, offices, workplaces, public buildings and parks are interwoven within the neighborhood so that all are within relatively close proximity to each other. Traditional neighborhood development is relatively compact and oriented toward pedestrian activity. It has an identifiable center and a discernible edge. The center of the neighborhood is in the form of a public park, commons, plaza, square or prominent intersection of two or more major streets. Generally, there is a hierarchy of streets laid out with an interconnected network of streets and blocks that provides multiple routes from origins to destinations and are appropriately designed to serve the needs of pedestrians and vehicles equally.

Revised §225-401.1.I.2 declares all of the Downtown Core (09) Overlay to be a TND. However Traditional Neighborhood Development (Emphasis Supplied) is just that – an **optional framework** for the creation of new development – usually a large vacant parcel - by a developer who wishes to undertake a retro/historic layout or plan. **A TND has no application to existing buildings or structures. A TND may not be used to provide either architectural or aesthetic control of existing buildings or structures.**

Section 705-A of the MPC entitled “Forms of Traditional Neighborhood Development” confirms the requirement that there must be new construction as part of the development for TND provisions to apply:

Section 705-A. Forms of Traditional Neighborhood Development.--A traditional neighborhood development may be developed and applied in any of the following forms.

- (1) As a new development.*
- (2) As an outgrowth or extension of existing development.*
- (3) As a form of urban infill where existing uses and structures may be incorporated into the development.*
- (4) In any combination or variation of the above.*

Section 702-A(2) requires a municipality to set forth procedures for preliminary and final approval of traditional neighborhood development plans – just as it does for standard development plans.

Even where a community has identified a TND area under its ordinance, TND is merely an **option** to be exercised at the discretion of the developer. A TND is never mandatory and cannot be used to control non TND development projects. Even where a developer has elected TND it cannot be used to control the development’s aesthetic components.

II.) REGULATION OF AESTHETICS IS NOT PERMITTED UNDER THE MPC

Article I Section 1 of the Pennsylvania Constitution protects the citizen's right to the enjoyment of private property, and governmental interference with this right is circumscribed by the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution. 255 U.S. Const. amends. V, XIV; Pa. Const. art. 1, § 1; Girsh Appeal, 437 Pa. 237, 241 n. 3, 263 A.2d 395, 397 n. 3 (1970). In reviewing zoning ordinances, this Court has stated that an ordinance must bear a substantial relationship to the health, safety, morals, or general welfare of the community. National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 522, 215 A.2d 597, 607 (1965), citing, inter alia, Glorioso Appeal, 413 Pa. 194, 196 A.2d 668 (1964).

Surrick vs Zoning Hearing Board of Upper Providence Township, 476 Pa. 182, 188, 382. A.2d 105, 107-108 (1977)

Section 603(b) of the MPC specifies what zoning ordinances in

Pennsylvania may “permit, prohibit, regulate, restrict, and determine”:

- (1) Uses of land, watercourses and other bodies of water.*
- (2) Size, height, bulk, location, erection, construction, repair, maintenance, alteration, razing, removal and use of structures.*
- (3) Areas and dimensions of land and bodies of water to be occupied by uses and structures, as well as areas, courts, yards, and other open spaces and distances to be left unoccupied by uses and structures.*
- (4) Density of population and intensity of use.*

Zoning derives its authority from a municipality’s police power, meaning the provisions thereof must bear a rational relation to the protection of health, safety, morals and/or general welfare. Simply put: purely aesthetic issues (e.g. exterior colors, building façade materials, types of roof shingles, etc.) do not involve health, safety or welfare and have absolutely no place in a zoning ordinance.

New §225-1009 creates a Downtown Core Board (“Core Board”) under the alleged authority of Articles VI and VII-A of the MPC. The Core Board’s is charged with administering the §225-429 Downtown Core Design Standards and other requirements and regulations of the Downtown (09) Core.

§225-429 Downtown Core Design Standards are primarily concerned with aesthetic issues. The enumerated sub-sections with §225-429 include: (i) Building Typologies; (ii) Building Elements (*e.g.* Awnings, Bay Windows, Roofs, Terraces, Porches and the like); (iii) Materials and Applications (*e.g.* Exterior building paint colors, types of exterior surfaces, types of shingles, wood trim materials etc.). Most of the standards in §225-429 read like a overwrought Homeowners Association covenants declaration - with the Downtown Core Board substituting for the HOA’s Architectural Control Committee.

The only constitutionally allowable standards under proposed §225-429 is Signage. Everything else standards wise in proposed §225-429 is aesthetics and
must be STRICKEN!

III.) PROPOSED §225-429G.1 IMPROPERLY ATTEMPTS TO PROHIBIT DEMOLITION IN THE CHOCOLATE AVENUE CORE

In the interest of safety, a zoning ordinance may regulate procedures as to **HOW** a building or structure is to be demolished, **BUT** it is not the function of zoning to determine **IF** a building or structure can or should be demolished. Perhaps the owner no longer wishes to maintain a structure on the property but

wishes to 'warehouse the ground'. If a property owner wishes to demolish a structure on his property that is his choice. Derry Township does not have authority under the guise of zoning to override the owner's wishes.

Proposed §225-429G.1 states:

1. *Demolition of Existing Buildings. Adaptive reuse of existing buildings shall be utilized to the greatest extent possible. In the event that demolition of an existing building is proposed, the applicant shall submit the following information related to the structure in order to demonstrate the infeasibility of adaptive reuse:*
 - a. *That the structural integrity of the building is beyond repair or reuse and as a result the demolition of the existing building is in the best interest of public safety and welfare. The applicant shall provide a structural engineer's report to demonstrate structural disrepair.*
 - b. *That the desired general aesthetics and compatibility of design with surrounding uses will be more achievable with demolition of the existing structure and construction of a new building.*
 - c. *That the safety of vehicular and/or pedestrian access to the building will be more achievable with construction of a new building.*

[NOTE: It is unclear whether the ordinance is requiring the conditions §225-429G.1 a, b and c above to be satisfied cumulatively together or whether §225-429G.1 a, b and c are conjunctive and an owner must only meet one of them.]

Proposed §225-429G.1 improperly attempts to prohibit property owners from demolishing structures which already exist in the Chocolate Avenue Core district by injecting the concept of adaptive reuse. This is accomplished in two ways: (i) requiring a structural engineer's report to establish that the building is beyond

repair or reuse and (ii) requiring that there must be a new building constructed in its place.

Since there are no definable standards in proposed §225-429G.1, it is unclear just how anyone even determines what the “*general aesthetics*” and “*compatibility of design with surrounding uses*” are. Just whose aesthetic views control?

Aesthetics are subjective; “Beauty is in the eye of the beholder.” That is one of the main reasons the courts have refused to allow aesthetic controls through zoning.

What Derry Township is attempting to do under §225-429G.1 is to use zoning in place of the proper legislative procedures established with regard to demolition of properties in historic areas. The Pennsylvania Historic District Act of 1961, 53 P.S. §8001 *et. seq.* allows a municipality (in conjunction with and through the Pennsylvania Historical and Museum Commission) to create a designated Historic Overlay District under their zoning ordinance¹. Once the Historic District is defined, properties within said Historic District which are of unique historical value and worth preserving are identified. Once a property within the Historic District becomes historically certified, its demolition may be restricted and the aesthetics involved with its rehabilitation may be defined and dictated. As a carrot/reward for preserving a historic property in a historic district and undertaking historic rehabilitation, the property owner becomes eligible for Federal and Pennsylvania Income Tax credits for amounts spent on qualified historic rehabilitation.

¹ The Borough of Lititz has adopted a Historic Overlay District as § 214 of its Zoning Ordinance.

However Derry Township has never bothered to pursue Historic District certification – most likely because it has already allowed a majority of its historic buildings within its downtown area to be demolished. Many of the existing properties along Chocolate Avenue are not historic. So what Derry Township is trying to do is control what Chocolate Avenue looks like through back doors - first via Chapter 89 of its ordinances (which initially created the Downtown Core Design Standards and the Downtown Core Board) and now through proposed §225-429 of its zoning ordinance.

The reason that §225-429 is now being proposed is that Chapter 89 of the Derry Township Code of Ordinances (which was also entitled Downtown Core Design Standards and which was passed as a standalone ordinance) was challenged by hotel developer Bears Creek II which wished to demolish properties on West Chocolate Avenue to construct a hotel. Existing Chapter 89 of Derry Township's ordinances will most certainly be declared invalid and struck down by Dauphin County Judge John McNally in an opinion soon to be issued in the case of Bears Creek II, LLC vs. Board of Supervisors of Derry Township, Dauphin County PA at No 2019-CV-1345. Much of Chapter 89 has been imported into proposed §225-429 of the zoning ordinance.

IV.) THE APPEAL/REVIEW PROCEDURES OF §225-429C.3e and §225-429D1 and §225-429E4 ARE VIOLATIVE OF DUE PROCESS

Under proposed §225-429C1 the Downtown Core Board is composed of seven members - two of which are the Derry Township Supervisors on the Downtown Hershey Association and the other five members are the result of nominations from the Downtown Hershey Association who are then appointed by the Supervisors.

All appeals/reviews from the Downtown Core Board under either §225-429C.3e and §225-429D1 and §225-429E4 are to the full five member Derry Township Board of Supervisors of which two of the five who serve on the Downtown Core Board have already ruled on the application. The only time any applicant is going to take an appeal is when their application has been denied or substantially modified. Upon review, those same two supervisors who have already voted on the application are tasked with reviewing their own previous decision.

To assure due process in the form of an independent review of the Core Board's recommendations no Derry Township supervisors should sit on the Downtown Core Board.

V. PROPOSED DOWNTOWN CORE OVERLAY SECTION 09.2 OF §225-315 (HERSHEY MIXED USE) SIDE YARD AND REAR YARD SETBACKS DO NOT PROTECT ADJOINING AND NEIGHBORING PROPERTY OWNERS

Under the proposed amendments to its zoning ordinance Derry Township proposes to split current Overlay 09 into three sections: (i) Section 09.1 being the old industrial buildings to the rear of the North Side of West Chocolate Avenue; (ii) Section 09.2 being the Chocolate Avenue corridor proper; and (iii) 09.3 being the mostly residential properties on Caracas Avenue (to the South of Chocolate Avenue). For unknown reasons Caracas Avenue had been re-zoned commercial in 2017 and these amendments now propose to put Caracas back to residential status where it really belongs.

The proposed Overlay 09.2 amendments propose a 5" side yard setback and a 5" rear yard setback. Both of these setbacks are incompatible with the mix of neighboring and adjoining properties. Both a 15' side yard setback and a 15" rear yard setback are the minimums necessary to protect adjoining and rear property owners.

Commercial buildings up to 45 feet high are proposed in Overlay 09.2. But how can you build a commercial 45 high structure yet allow it to be placed only 5 foot from the adjoining property line - especially as most of the properties along the Chocolate Avenue corridor are small residential houses or commercial properties converted from former residences.

Since 09.3 is rezoning Caracas Avenue (to the South of Chocolate Avenue) back to residential, this means you have the potential of 45 high building in Section 09.2 butting up in the rear against residential properties separated only by a 15 foot alley. A 5" rear setback does not provide adequate protection to the residential properties in the rear. In addition to the 15" rear yard setback, to protect the residences on Caracas Avenue, the rear screening requirements of §225.403.1 (where commercial uses abuts a residential use) should be raised from §225.403.1A6 being a Class 6 (a 5" rear setback and 3 foot walls) to §225.403.1A3 being a Class 3 (a 15" rear setback and with a landscape buffer).

VI. A TRAFFIC STUDY NEEDS TO BE MANDATORY FOR ALL PROJECTS ON CHOCOLATE AVENUE AND THE CENTRAL HERSHEY AREA UNLESS THE TOWNSHIP SPECIFICALLY WAIVES THIS REQUIREMENT IN WRITING

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Historic Preservation Guidelines

For the Preservation, Promotion and Regulation
of Historic Resources

Lancaster County, Pennsylvania

May 2009

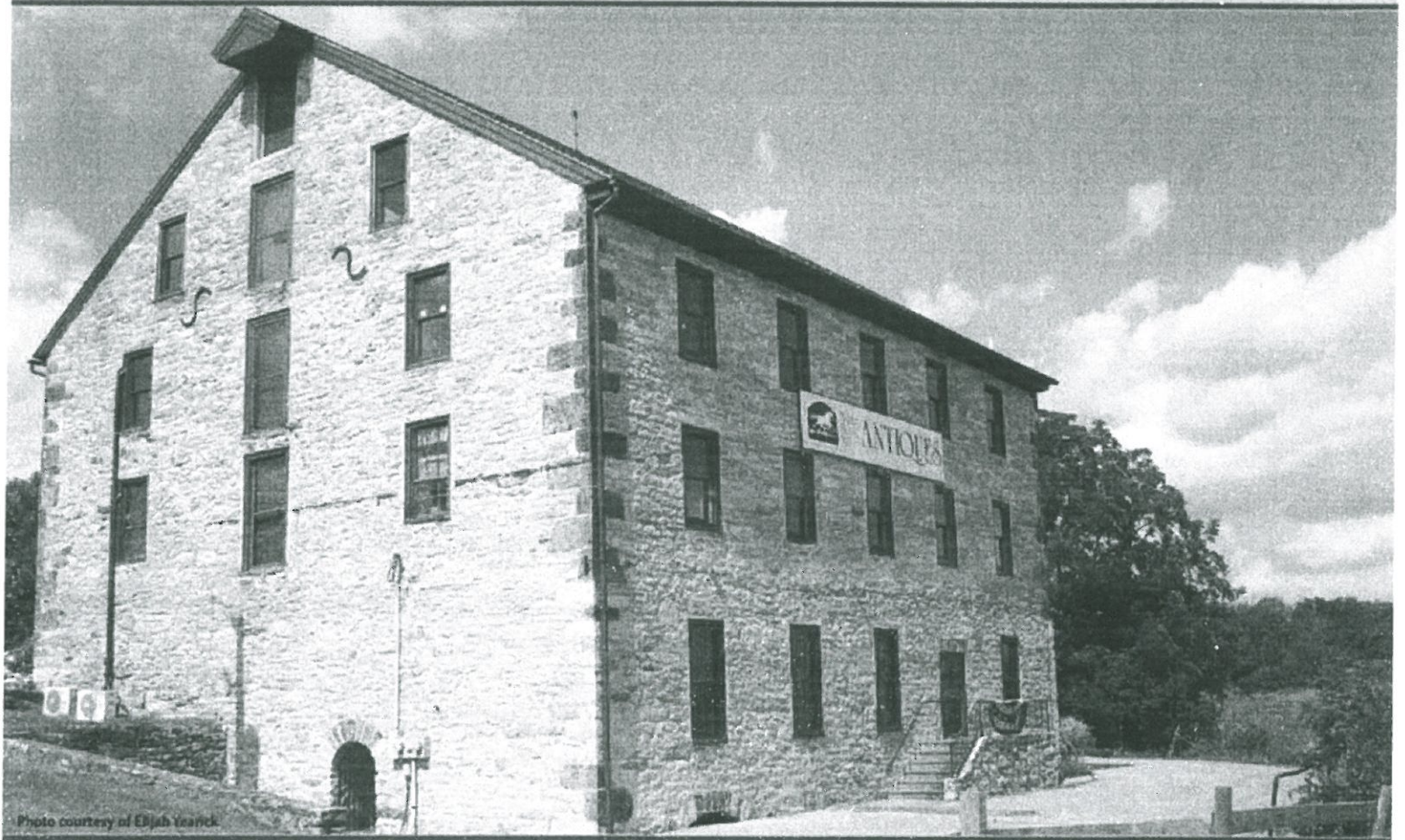


Photo courtesy of Elijah Yearick

*Lancastercountyplanning.org/
DocumentCenter/view/108*



Lancaster County Planning Commission



as an economic development tool for downtown commercial districts trying to revitalize their business districts. The majority of buildings in these areas are historic buildings. This program can provide funds for facade rehabilitation. The Elm Street Program provides funds to rehabilitate neighborhoods surrounding a downtown area. Identification and recognition of historic resources can also be a marketing tool for a community trying to attract visitors, business, or industry.

An inventory also allows owners of individual buildings to apply for listing on the National Register of Historic Places, a program with no regulations that bestows a distinctive status upon the building. Groups of buildings can also apply for listing on the Register as a district. Recognition, whether through the National Register or through a local recognition program promotes community pride and awareness of the heritage of the community.

Finally, an inventory can serve as a basis for regulations intended to retain community character. Regulations can be as stringent or as lenient as desired by the municipality; regulations can be tailored to meet the goals of a particular municipality. Regulations are the tools used to "slow down change" and to "keep things the way they are," which is what many people say they want.

Of course, the inventory must be kept up to date by the municipality if it is to continue to be useful.

Types of Regulations

There are two basic types of preservation regulations in Pennsylvania.

One type is enabled by the Pennsylvania Historic District of 1961, Act 167, as amended. This type of district can work well where resources are densely concentrated, such as a city, borough, or neighborhood. This Act requires that the district be on the National Register or certified as historic by PHMC. It also requires the establishment of a Historical Architectural Review Board (HARB) and regulations may include aesthetics as well as structural changes. Everything inside the district boundaries must abide by the regulations. In Lancaster County only Lancaster City, Strasburg and Columbia Boroughs use this type of preservation regulations and, of those, only one is very stringent - and that was a local decision.

The other type of regulations is enabled by the Pennsylvania Municipalities Planning Code (MPC), the legislation that allows municipalities to plan and zoning. Section 603.(g)(2) states: "zoning ordinances shall provide for protection of natural and historic features and resources. This is accomplished by using the tools in Section 603(b)2, "Zoning ordinances . . . may permit, prohibit, regulate, restrict and determine: size, height, bulk, location, erection, construction, repair, maintenance, alteration, razing, removal and use of structures." **Regulation of aesthetics is not permitted under the MPC.** The MPC works well in communities where resources are dispersed and in areas where resources are densely concentrated. Under the MPC, Section 605, an overlay district is created in which all historic resources are identified and any regulations adopted by the municipality apply only to the historic resources. This is the tool most recommended by LCPC.

If a municipality desires to develop historic preservation regulations the Lancaster County Planning Commission is available to work with the municipality to develop regulations appropriate for their goals. There is no one-size-fits all; however there are basic components from which municipalities may choose (this is true for Act 167

