



8-1-2017

Zone Defense: How Zoning Laws Won in Tri-County Landfill, Inc. v. Commonwealth

Christyan A. Telech

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/elj>



Part of the [Environmental Law Commons](#)

Recommended Citation

Christyan A. Telech, *Zone Defense: How Zoning Laws Won in Tri-County Landfill, Inc. v. Commonwealth*, 28 Vill. Envtl. L.J. 305 (2017).

Available at: <https://digitalcommons.law.villanova.edu/elj/vol28/iss2/6>

This Casenote is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Environmental Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

2017]

ZONE DEFENSE: HOW ZONING LAWS WON IN
TRI-COUNTY LANDFILL, INC. V. COMMONWEALTH

I. INTRODUCTION

In *Tri-County Landfill, Inc. v. Commonwealth*,¹ the Pennsylvania Environmental Hearing Board (the Board) faced a motion for summary judgment, but much more was at stake.² The case posed the question of whether local zoning ordinances fell within the protections that the Pennsylvania Constitution afforded.³ Based on the outcome of that issue, the Board then had to determine what obligations its decision triggered.⁴

In its decision to deny the motion for summary judgment, the Board established that local zoning ordinances were within the protections established under Section 27 of the Pennsylvania Constitution (Section 27).⁵ The significance of this decision, however, is not limited to solidifying constitutional protection for zoning ordinances.⁶ The Board held that zoning violations contained within an application for a permit to operate a waste facility do not compel an automatic denial of applications filed with the Pennsylvania Department of Environmental Protection (DEP).⁷ In addition, the Board's decision created a new obligation for individuals or entities that desire to apply for certain permits within the Commonwealth of Pennsylvania (Commonwealth).⁸ Moreover, the Board has yet to

1. *Tri-Cty. Landfill, Inc. v. Commonwealth of Pennsylvania, Dep't of Env'tl. Prot. and Pine Twp. and Grove City Factory Shops LP, Intervenors*, No. 2013-185-L, 2015 WL 3486003 (Pa. Env'tl. Hearing Bd. May 22, 2016).

2. *See id.* at *1 (noting procedural posture of case).

3. For a further discussion of the environmental protections offered under the Pennsylvania Constitution, see *infra* note 25 and accompanying text.

4. For a further discussion of the Board's determination of obligations arising under its decision, see *infra* note 112 and accompanying text.

5. *See Tri-Cty. Landfill, Inc.*, 2015 WL 3486003, at *2-4 (holding zoning laws within ambit of Section 27 and outlining logic used to reach conclusion).

6. For a further discussion of the impact on permit applicants, see *infra* note 172 and accompanying text.

7. For a further discussion of the decision not to compel automatic denial of a permit application that includes a zoning violation, see *infra* note 115 and accompanying text.

8. For a further discussion of the new requirement placed on permit applicants, see *infra* note 172 and accompanying text.

306 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 305

analyze the question of how the DEP would be alerted to any zoning violations within an applicant's proposed plan.⁹

This Casenote begins with a discussion of the facts relevant to the Board's decision in Tri-County Landfill, Inc. as well as an overview of the dispute between the parties involved in the case.¹⁰ Then, this Note provides insight into the *Payne* test, which the Board relied heavily on when making its decision.¹¹ Following that discussion, this Note details the Board's decision regarding what obligations arose as a result of its holding.¹²

Subsequent to that analysis, this Note provides a critical perspective on what appears to be a decision that does not overstep any boundaries.¹³ Consequently, this Note details the Board's reliance on the plain language of statutes in its decision, which lends itself to a view that the decision did not impermissibly cross any lines.¹⁴ The analysis also highlights the Board's reservations regarding the imposition of a new obligation on the DEP.¹⁵ Subsequently, this Note also highlights the Board's failure to discuss an already-existing obligation imposed on permit applicants.¹⁶

Finally, this Note concludes with an overview of potential impacts of the Board's decision;¹⁷ one such impact includes the ramifications on citizens' rights to bring a claim under Section 27.¹⁸ This Note also discusses the open question of who bears the responsibility of bringing zoning violations within permit applications to

9. For a further discussion of the questions regarding the responsibility to report zoning violations to the DEP, see *infra* note 173 and accompanying text.

10. For a further discussion of the parties' arguments related to zoning and Section 27, see *infra* notes 90-92 and accompanying text.

11. For a further discussion of the *Payne* analysis, see *infra* note 58 and accompanying text.

12. For a further discussion of the Board's holding on obligations that arise under its holding, see *infra* note 113 and accompanying text.

13. For a further discussion of the limited scope of the Board's decision, see *infra* note 129 and accompanying text.

14. For a further discussion of the Board's reliance on the plain language of the statutes, see *infra* note 160 and accompanying text.

15. For a further discussion of the Board's hesitance to impose an obligation on the DEP to seek out zoning violations, see *infra* note 115 and accompanying text.

16. For a further discussion of the Board's choice not to discuss the requirement of an affirmative demonstration of compliance, see *infra* note 147 and accompanying text.

17. For a further discussion of the Board's holding, see *infra* notes 109, 113, 115 and accompanying text.

18. For a further discussion of the impact of the Board's decision on citizens' standing under Section 27, see *infra* note 168 and accompanying text.

the attention of the DEP.¹⁹ Consequently, it also highlights the creation of a new obligation in the permit approval process.²⁰ This Note then illustrates potential opportunities for unethical behavior on the part of zoning boards.²¹ In concluding with its discussion of the potential impact on community development on XYZ, this Note also considers prospective positive results from the decision.²²

II. FACTS

In *Tri-County Landfill, Inc. v. Commonwealth of Pa.*, the Board ruled on Pine Township, Grove City Factory Shops LP and several citizens' (Intervenors) motion for summary judgment, which the DEP later joined.²³ The motion focused on Tri-County Landfill, Inc.'s (Tri-County) application to operate a landfill, which the DEP previously denied.²⁴ A primary issue in this case was whether Section 27 of the Pennsylvania Constitution compelled the DEP to automatically deny Tri-County's permit.²⁵

In 2004, Tri-County applied for "a permit to reopen and expand its landfill."²⁶ The landfill, which originally opened in the 1970s, managed and expanded operations for numerous years without permission from the Pine Township Zoning Board.²⁷ When the landfill reopened, the larger design encompassed approximately ninety-nine acres, which constituted half of which was in Pine Township.²⁸ Tri-County's application required description of the landfill it wished to operate and an expected height of 140 feet.²⁹

19. For a further discussion of who bears the responsibility of reporting zoning violations to the DEP, see *infra* note 165 and accompanying text.

20. For a further discussion of the new obligation arising in the permit application process, see *infra* note 172 and accompanying text.

21. For a further discussion of the potential for unethical behavior by zoning boards, see *infra* note 175 and accompanying text.

22. For a further discussion of potential positive outcomes following the Board's decision, see *infra* note 179 and accompanying text.

23. See *Tri-Cty. Landfill, Inc.*, 2015 WL 3486003, at *1 (summarizing parties' arguments on summary judgment issue).

24. See *id.* (summarizing procedural posture of case).

25. See PA. CONST. art. I, § 27 (establishing Commonwealth's constitutional obligation to act as trustee of natural and environmental resources for citizens).

26. *Tri-Cty. Landfill Inc.*, 2015 WL 3486003, at *1 (outlining timeline of events leading to permit and subsequent denial).

27. *Tri-Cty. Landfill, Inc. v. Pine Twp. Zoning Hearing Bd.*, 83 A.3d 488, 495 (Pa. Commw. Ct. 2014) (highlighting lack of zoning approvals for earlier expansions), *appeal denied*, 627 Pa. 776, 101 A.3d 788 (Pa. Commw. Ct. 2014).

28. *Id.* at 493 (noting size and geographical location of landfill and planned expansion).

29. *Tri-Cty. Landfill Inc.*, 2015 WL 3486003, at *1 (highlighting desired height of landfill).

308 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 305

The height, however, directly violated Pine Township's local zoning ordinance and limited the maximum height for structures within the municipality to forty feet.³⁰

In an effort to gain approval for the plan, Tri-County made numerous cases to the Pine Township zoning board to no avail.³¹ Eventually, Tri-County brought an action in the Union County Court of Common Pleas challenging the zoning board's denials.³² Tri-County requested relief, including overturning the zoning board's denial of assorted variances, nonconforming use permits, and equitable variances.³³ The trial court, however, largely upheld the Pine Township Zoning Board's decisions.³⁴

Upon the trial court's decision, Tri-County appealed its case before the Commonwealth Court of Pennsylvania.³⁵ The Commonwealth Court of Pennsylvania affirmed the trial court's decision and denied Tri-County's appeals.³⁶ Aside from overcoming zoning issues, Tri-County also needed to obtain a permit from the DEP to operate the facility.³⁷ Tri-County applied for the permit, which included a proposed landfill height of 140 feet.³⁸ The DEP denied the permit request; the factors compelling denial included the vio-

30. *Id.* (defining ordinance's municipal limit on height of structures).

31. *Pine Twp. Zoning Hearing Bd.*, 83 A.3d at 493 (noting Tri-County made many attempts using various legal theories to gain zoning approval). Tri-County made a number of arguments, including the definition of "structures" within the zoning ordinance does not include landfills; that Tri-County never abandoned its nonconforming use from its earlier operation of the landfill; that Pine Township's zoning, as codified, creates a ban on landfills within the municipality; and various equitable theories. *Id.* at 500-04.

32. *Id.* at 503 (stating legal action Tri-County took after Zoning Hearing Board denied appeal).

33. *Id.* (listing holdings of trial court that Tri-County challenged in Pennsylvania Commonwealth Court).

34. *See id.* (noting affirmation of zoning board decision by trial court, despite disagreement over aspect of zoning board's ruling). The trial court disagreed with the zoning board's determination that Tri-County abandoned its non-conforming use by closing the landfill. *Id.*

35. *See id.* at 493 (outlining procedural posture and issues presented to court).

36. *See Pine Twp. Zoning Hearing Bd.*, 83 A.3d at 495 (establishing holding of court). Tri-County appealed the decision and was denied. *See Tri-Cty. Landfill, Inc. v. Pine Twp. Zoning Hearing Bd.*, 101 A.3d 788 (Pa. Commw. Ct. 2014) (denying appeal).

37. For a discussion of the requirement stipulating that entities operating a landfill need a permit see *infra* note 45 and accompanying text.

38. *See Tri-Cty. Landfill, Inc. v. Pa., Dep't of Env'tl. Prot. and Pine Twp. & Grove City Factory Shops LP, Intervenors*, No. 2013-185-L, 2015 WL 3486003, at *1 (Pa. Env'tl. Hearing Bd. May 22, 2016) (noting Tri-County included proposed height in application for DEP permit).

lation of local zoning laws and a history of entities associated with Tri-County that continually engaged in noncompliance.³⁹

Tri-County appealed the decision and brought the case before the Board.⁴⁰ On appeal, several citizens, Pine Township, and Grove City Factory Shops LP intervened and moved for summary judgment; they argued that Section 27 compelled an automatic denial since Tri-County's plan violated local zoning ordinances.⁴¹ The DEP later joined in the motion for summary judgment and agreed with the Intervenor that not issuing the permit was the correct decision; the parties, however, disagreed as to whether a denial was constitutionally mandated.⁴² Tri-County agreed with the DEP in arguing that no such obligation existed.⁴³ After considering the merits of both arguments, the Board dismissed the motion, holding that the decision to deny the permit hinged on the discretion of the DEP and analysis of such discretion was inappropriate for summary judgment.⁴⁴

III. BACKGROUND

In the Commonwealth, an entity that desires to operate a municipal waste facility or landfill must obtain a permit through the DEP.⁴⁵ The application for a permit must contain a wide array of information, including members and associates of the entity applying for the permit, as well as those parties' previous violations of law.⁴⁶ The issuance or denial of a permit depends on the applicant "affirmatively demonstrating" compliance with both statutory law and the Pennsylvania Constitution.⁴⁷

39. *See id.* (outlining DEP's rationale for denying permit application).

40. *Id.* (stating procedural posture of case before Board).

41. *Tri-County Landfill Inc.*, 2015 WL 3486003, at *1 (identifying intervening parties and outlining basic crux of legal argument); *see generally ULI Development Case Studies*, URBAN LAND INSTITUTE, available at <http://casestudies.uli.org/wp-content/uploads/sites/98/2015/12/C028013.pdf> (last visited Sept. 16, 2016) (providing background information on Grove City Factory Shops, including location in relation to Pine Township).

42. *Tri-County Landfill Inc.*, 2015 WL 3486003, at *2 (noting parties' differing views on what obligations arise under Pennsylvania Constitution).

43. *Id.* (detailing parties' opposing arguments).

44. *Id.* at *6-7 (denying request for summary judgment because, as matter of law, denying permit without opportunity to modify was not abuse of discretion).

45. *See* 25 PA. CODE § 271.101 (2016) (stating requirement for permit to operate facility).

46. *See id.* § 271.124-25 (mandating all parties associated with entity applying for application must state identities along with violations of law).

47. *Id.* at § 271.201 (listing requirements for permit approval). For a further discussion of Article I, Section 27 of the Pennsylvania Constitution, *see supra* note 25 and the accompanying text.

310 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 305

More specifically, the Pennsylvania Constitution places a duty on the state to act as a trustee of public resources and to preserve them for citizens of the Commonwealth.⁴⁸ As noted in the Commonwealth Court of Pennsylvania's holding in *White v. Twp. of Upper St. Clair*,⁴⁹ citizens have standing to bring a claim under Section 27 if they have "substantial, direct, and immediate" interest in the matter within the ambit of the section.⁵⁰ In *White*, township residents brought a claim challenging the validity of local government actions relating to deed enforcement on a property on which a communications tower was constructed.⁵¹ The court held that the residents, as taxpayers and part of the public, had standing and their interests were squarely within the scope of Section 27.⁵²

After establishing standing, a claimant must show that a governmental action violated one of the rules of the test established in *Payne v. Kassab*.⁵³ In *Payne*, a group of citizens brought a class action suit opposing the Pennsylvania Department of Transportation's approval of a street-widening project.⁵⁴ The citizens contended that Section 27 should be read strictly and bring maximum protection to natural resources.⁵⁵ Citing concerns with the applicability of this interpretation, the court declined to apply it.⁵⁶ In doing so, the court established a three-part test to determine the lawfulness of an action under Section 27.⁵⁷ The test asks:

(1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Common-

48. PA. CONST. art I, § 27 (establishing environmental protections).

49. 799 A.2d 188, 197 (Pa. Commw. Ct. 2002) (citing *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 286 (Pa. 1975)) (noting test for standing).

50. *Id.* (outlining requirements for standing under section).

51. *Id.* at 192 (listing issues to be decided by court, including whether residents have standing).

52. *See id.* at 197 (noting resident's concerns of conservation, recreation, and historical purpose are protected by Pennsylvania Constitution).

53. 312 A.2d 86 (Pa. Commw. 1973), *aff'd*, 323 A.2d 407 (Pa. Commw. 1974), *aff'd*, 361 A.2d 263 (Pa. 1976) (establishing test for validity of board action within Commonwealth).

54. *Id.* at 92 (noting city council's recommendation for plan and Department of Transportation's subsequent approval of modification included in revised plan).

55. *See id.* at 94 (stating constitutional obligation and citizens' desired interpretation).

56. *See id.* (interpreting Section 27 to allow for normal development of land within Commonwealth). The court also explained that Section 27 creates a "public trust concept," through which the government manages resources within the Commonwealth, balancing development and citizen concerns with how the land will be utilized in proposed plans. *Id.*

57. *Id.* (identifying test used to determine validity of action).

wealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?⁵⁸

After reviewing the arguments made under those parameters, the court found that the Department of Transportation complied with the requirements and dismissed the case.⁵⁹

Municipalities are also instrumental in the preservation of environmental resources within the Commonwealth through the enactment of zoning laws.⁶⁰ The establishment of zoning laws is among the many purposes listed for Pennsylvania Municipal Planning Code (MPC).⁶¹ Communities enact land use and zoning ordinances to assure that land usage is consistent with citizens' values and needs.⁶² Moreover, local government's power to enact zoning receives consideration when the DEP reviews an application to operate a facility, such as a landfill, thanks to two statutory provisions, commonly referred to as Acts 67 and 68.⁶³

That notion received formal recognition from the courts in *Hoffman Min. Co. v. Zoning Hearing Bd. of Adams Twp., Cambria Cty.*,⁶⁴ in which the Supreme Court of Pennsylvania held that municipalities possessed the authority to "enact, amend, and repeal zoning ordinances to implement comprehensive plans and to ac-

58. *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. 1973) (listing three steps used to determine validity of action taken by DEP or other agency).

59. *See id.* at 94-96 (detailing Department of Transportation's compliance with each step of test).

60. *See* 53 PA. STAT. AND CONS. STAT. ANN. § 10105 (West 2016) (listing zoning as purpose of Municipal Planning Code).

61. *Id.* (highlighting purposes of Municipal Planning Code, including establishing zoning to further community objectives).

62. *See id.* § 10603(a) (noting factors that should be considered when drafting zoning ordinances).

63. *See id.* § 10619.2(a) (declaring that Commonwealth agencies, such as DEP, "shall consider and may rely [upon] . . . zoning ordinances" during permit review process). *Id.* § 11105 (establishing legal effect of municipalities adopting comprehensive plan, including zoning ordinances and laws). These statutory provisions, commonly referred to as Acts 67 and 68, respectively, outline the legal ramifications of municipal planning and its interplay with the DEP permit process. *See Tri-Cty. Landfill Inc.*, 2015 WL 3486003, at *3 (noting that statutes are often called Acts 67 and 68).

64. 32 A.3d 587 (Pa. 2011).

312 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 305

comply with any of the purposes of the MPC.”⁶⁵ One of the issues in *Hoffman* stemmed from a mining company seeking either a variance permit or the nullification of a zoning ordinance that prohibited mining within one thousand feet of structures.⁶⁶ The court, citing both the language and purposes of the MPC, upheld the action and recognized the notion of local land use ordinances working in tandem with state laws.⁶⁷

Courts also recognized the unique scope of zoning laws, as compared to the scope of typical state statutes.⁶⁸ Notably, in *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont (Huntley & Huntley, Inc.)*,⁶⁹ the Supreme Court of Pennsylvania noted that zoning laws are both “broader and narrower in scope” than state statutes.⁷⁰ The court reasoned that the narrowness stems from the limited scope of zoning laws, given that zoning laws govern only the particular municipality where enacted, whereas state statutes govern the whole Commonwealth.⁷¹ The broad aspect of zoning laws expresses itself in the wide range of subject matter that zoning and land use ordinances can encompass.⁷² When closely analyzing the MPC, it is clear that one of the specific purposes of zoning is the preservation of “the natural, scenic[,] and historic values in the environment.”⁷³ Despite that statutory purpose, in *Blue Mountain Preservation Association v. City of Eldred (Blue Mountain)*,⁷⁴ the Commonwealth Court of Pennsylvania declined to interpret Section 27 as imposing an affirmative obligation on zoning boards to enact policies that protect environmental resources.⁷⁵

65. *Hoffman Min. Co. v. Zoning Hearing Bd. of Adams Twp., Cambria Cty.*, 32 A.3d 587, 603 (Pa. 2011) (outlining authority of zoning boards to carry out various actions related to zoning ordinances).

66. *See id.* at 590–91 (outlining coal company’s petitions and relief sought).

67. *See id.* at 603–04 (supporting decision by noting purposes of MPC and language within Surface Mining Act that augments land use planning ordinances).

68. For a further discussion of the scope of zoning laws, see *infra* notes 70 and 71 and accompanying text.

69. 964 A.2d 855 (Pa. 2009).

70. *See id.* at 865 (contrasting reach of local ordinances and state laws).

71. *Id.* (illustrating differences in scope of local zoning laws and state laws).

72. *See id.* (explaining that zoning laws embody “overall statement of community development objectives”).

73. 53 PA. STAT. AND CONS. STAT. ANN. § 10604 (West 2016) (discussing purposes of zoning). This section lists the established purposes of zoning; among them is the preservation of natural and environmental resources. *Id.*

74. 867 A.2d 692 (Pa. Commw. Ct. 2005).

75. *Blue Mountain Pres. Ass’n v. City of Eldred*, 867 A.2d 692, 703 (Pa. Commw. Ct. 2005) (declaring that zoning boards have no obligation to enact protective ordinances).

In *Blue Mountain*, a citizens group brought a civil action against the city's zoning board after the board approved plans for a high performance car facility on land near the Appalachian Trail.⁷⁶ The citizens argued that the board had a duty under Section 27 to enact zoning policies to protect the environment of the trail and surrounding area.⁷⁷ The Commonwealth Court of Pennsylvania, however, found that Section 27 imposed no such duty on local municipalities and zoning boards.⁷⁸ Although it held that no affirmative obligation existed under Section 27 to enact zoning or land use ordinances, the court found that the board must review law applicable to the specific plan at hand.⁷⁹ After finding that the board appropriately considered the applicable law, the court noted that the board's approval complied with the *Payne* analysis and that the board enacted a number of measures designed to mitigate the noise produced by the facility.⁸⁰

Despite the lack of a constitutional obligation under Section 27 to enact land use ordinances or zoning laws, commenters urged local government bodies to take action when their municipalities faced high risks created by inconsistent land usage.⁸¹ For example, a chemical facility explosion in West, Texas could have been extremely deadly if a nearby school was in session.⁸² Commenters urged zoning boards to enact measures that prevent schools from being built in close proximity to chemical facilities that could be hazardous to both human and environmental health in the event of an emergency.⁸³

76. *See id.* at 695 (detailing specific plans for development and citizen groups' concerns).

77. *See id.* at 701 (outlining citizens' argument that board violated Pennsylvania Constitution by not enacting land use regulations to mitigate sounds from planned facility).

78. *See id.* at 702 (determining that court would not create obligation).

79. *See Blue Mountain Pres. Ass'n*, 867 A.2d at 703–04 (holding no affirmative obligation to enact land use legislation existed and board needed to consider Natural Trail Act).

80. *See id.* at 704 (detailing and listing restrictions board imposed to reduce noise output of facility).

81. *See* "West Explosion Shows Need for State, Local Zoning: Study," Chem. Reg. Rep. (BNA) 40 CRR 915 (Issue No. 32, 08/08/16) (urging action by zoning boards to mitigate risk of schools facing potential for disasters due to close proximity to chemical facilities).

82. *See id.* (referencing study predicting that, if explosion occurred during daytime, ten to forty percent of people in two closest schools would have died).

83. *See id.* (noting high number of schools within one-half of mile of type of facility in which West explosion occurred).

314 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 305

Once a municipality establishes a zoning ordinance, the ordinance can allow for conditional uses within zones.⁸⁴ Conditional permits grant “a zoning change which is subject to specific conditions either bilaterally or unilaterally agreed upon by the zoning authorities and applicant [after negotiations between the parties] which limit otherwise permitted uses in the zone district.”⁸⁵ Some jurisdictions do not allow conditional permits due to concerns regarding impropriety by zoning boards; conditional use permits, however, are valid in Pennsylvania.⁸⁶ As demonstrated in *Clinton County Solid Waste Authority v. Wayne Township (Clinton County)*,⁸⁷ municipalities in Pennsylvania can issue conditional use permits which allow for land usage that would otherwise be noncompliant with zoning ordinances in exchange for compliance with various conditions imposed by the zoning board.⁸⁸ In *Clinton County*, the court affirmed the authority of the zoning board to enact conditions on a landfill as long as the conditions did not fall within the governance of applicable laws.⁸⁹

IV. NARRATIVE ANALYSIS

The Board faced a decision that turned on two key questions: 1) whether zoning laws were within the ambit of Section 27; and 2) if so, whether a violation of municipal zoning laws compels a mandatory denial of a permit to operate a landfill within the municipality.⁹⁰ The Intervenor argued that both of those questions should be answered in the affirmative.⁹¹ Tri-County conceded that the plan outlined in its application required revisions to comply with local zoning ordinances, but maintained that the DEP should

84. See 53 PA. STAT. AND CONS. STAT. ANN. § 10603 (West 2016) (providing that zoning ordinance can allow conditional uses within zoning scheme).

85. JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 16:13 (updated Oct. 2016) (describing what conditional permits entail).

86. See *id.* (noting general concerns regarding propriety of zoning boards due to extrinsic forces).

87. 643 A.2d 1162 (Pa. Commw. 1994).

88. *Clinton Cty. Solid Waste Authority v. Wayne Twp.*, 643 A.2d 1162, 1168 (Pa. Commw. 1994) (establishing that town, residual to its police power under MPC, can issue conditional use permits provided for in zoning ordinance as long as applicable laws are observed).

89. See *id.* at 1169 (listing conditions imposed on landfill).

90. See *Tri-Cty. Landfill Inc. v. Pa. Dept. of Env'tl. Prot.*, 2015 WL 3486003, at *2, *5 (stating two main issues confronting Board). Between these two issues, the Board also established the obligations of the DEP when a violation of local zoning is brought to its attention. *Id.* at *4.

91. See *id.* at *1 (summarizing position upon which Intervenor based motion for summary judgment).

have nonetheless issued a conditional permit.⁹² The DEP and Intervenor agreed that not issuing the permit was the correct decision; the parties, however, disagreed as to whether a denial was constitutionally mandated.⁹³

The primary point of contention between the DEP and Intervenor hinges on the role of local zoning ordinances in the permit review process.⁹⁴ The parties specifically disagreed over whether zoning is considered within the scope of the *Payne* test.⁹⁵ Courts utilize the test to determine the validity of DEP action under Section 27.⁹⁶ The DEP, along with Tri-County, argued that local zoning ordinances need to be considered in the review process, but a plan that violates a local zoning ordinance does not require an automatic permit denial.⁹⁷ In contrast, the Intervenor posited that, if the DEP approved a plan that it knew violated local zoning laws, then the DEP would breach its duty under Section 27.⁹⁸

The Board began its process of answering that question with an analysis of the *Payne* test.⁹⁹ The Board placed emphasis on the first prong of the test, noting that both Tri-County's and the DEP's argument interpreted the test in a limited manner.¹⁰⁰ Rather than a restrictive interpretation, the Board pointed out that case law indicated that the *Payne* test includes "all applicable statutes and regulations," not just federal and state laws.¹⁰¹ With that in mind, the

92. *See id.* (detailing Tri-County's assertion that permit would need substantial modifications but did not require automatic denial).

93. *See id.* at *2 (noting parties' differing views on what obligations arise under Pennsylvania Constitution).

94. *See id.* (summarizing parties' arguments on impact of zoning violations on permit application process).

95. *See Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. 1973) (stating standard that is applied in assessing Department action under Article I, Section 27 of Pennsylvania Constitution), *aff'd*, 323 A.2d 407 (Pa. Commw. 1974), *aff'd*, 361 A.2d 263 (Pa. Commw. 1976). In the case at hand, only the first prong of the test is at issue. *Id.* The first prong of the test asks: "Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?" *Id.*

96. *See Tri-Cty. Landfill Inc.*, 2015 WL 3486003, at *2 (noting that Environmental Hearing Board recently affirmed use of test in prior case).

97. *Id.* (outlining argument proffered by DEP and Tri-County pertaining to impact of zoning violations within plan).

98. *Id.* (noting Intervenor's contrasting regarding effect of zoning violation in permit review process).

99. *See id.* (commencing analysis of DEP's action relating to permit approval).

100. *See id.* (explaining scope of test as defined by courts in contrast with scope argued by Tri-County and DEP).

101. *Tri-Cty. Landfill Inc.*, 2015 WL 3486003, at *2 (establishing what regulations courts have defined test to encompass).

316 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 305

Board then looked to whether local zoning laws maintained relevance to the protection of natural resources.¹⁰²

In determining whether local zoning ordinances served to protect the environment, the Board began its analysis by reviewing the purposes of the MPC.¹⁰³ The Board noted that the MPC listed environmental preservation as one of its purposes and related that to the holding of *Huntley & Huntley, Inc.*, which held that state regulations do not preempt local regulations.¹⁰⁴ Keeping that connection in mind, the Board found that local zoning regulations satisfied the requirements for consideration under the *Payne* analysis.¹⁰⁵

Tri-County and the DEP attempted to neutralize that finding with an argument focused on Acts 67 and 68.¹⁰⁶ The parties posited that, despite a statutory provision suggesting that the DEP may consider local decisions, the DEP retained a liberty to disregard them if it so desired.¹⁰⁷ The Board, however, found that argument untenable in light of the designed purpose of Acts 67 and 68.¹⁰⁸

On those grounds, the Board held that local zoning requirements were within the protections offered by Section 27 and, therefore, merited consideration in the *Payne* test.¹⁰⁹ The Board considered the purposes of municipal zoning ordinances as stated in statutes, as well as case law explaining those provisions.¹¹⁰ In

102. *Id.* (posing question of whether zoning laws fall into appropriate category for consideration in constitutionality of actions).

103. *See id.* (beginning judicial analysis with review of purposes of statute).

104. *See id.* at *3 (detailing purpose of statute and relationship between local ordinances and state statutes and regulations). For a further discussion of *Huntley & Huntley, Inc.*, see *supra* note 70 and accompanying text.

105. *Tri-Cty. Landfill Inc.*, 2015 WL 3486003, at *3 (declaring that local zoning ordinances serve to protect environment).

106. *See id.* (urging Board to adopt suggested interpretation which would limit obligation).

107. *Id.* (suggesting that DEP has option of disregarding local decisions in permit review process).

108. *See id.* at *4 (finding restrictive application of Acts 67 and 68 illogical based on purpose of Acts). For a further discussion of Acts 67 and 68, see *supra* note 63 and accompanying text. The Board did not explicitly answer the DEP and Tri-County's assertions regarding Acts 67 and 68; rather, it declared that "the Department clearly had the authority and indeed the obligation to honor zoning requirements under Article I, Section 27." *Id.*

109. *See id.* (explaining that local ordinances, in addition to state statutes, fall within scope of test).

110. *See Tri-Cty. Landfill Inc.*, 2015 WL 3486003, at *2, *4 (noting illogical nature of arguments posed by Tri-County and DEP, and characterizing need to look at local ordinances as "obligation" of DEP). The Board found it notable that Tri-County and the DEP posed an argument that would result in allowing the DEP to issue a permit in the face of an overt local zoning requirement violation. *Id.* The Board found it especially unpersuasive in light of the pertinent law, which indicated a desire to emphasize the autonomy of local zoning regulations. *Id.*

short, the Board found the argument incompatible with the stated purposes of municipal zoning regulations.¹¹¹

Next, the Board shifted its focus toward determining what obligations the DEP has when a zoning violation is brought to the Department's attention during the permit review process.¹¹² In answering that inquiry, the Board held that the DEP must consider a zoning violation when making its final decision if the violation is brought to the DEP's attention during the permit review process.¹¹³ After considering the violation, the Department will issue an appropriate decision in light of the circumstances.¹¹⁴

The Board further held that even when a permit application contains local zoning violations, the appropriate decision is not always to deny the permit.¹¹⁵ The Board declared that rather than denying a permit application that violates zoning regulations, the DEP could either suspend the permit review process or issue a conditional permit.¹¹⁶ Thus, the Board did not agree that the violation of zoning requirements compelled an automatic denial of Tri-County's permit, despite finding that zoning fell within the parameters of the *Payne* test.¹¹⁷ The Board agreed with the DEP's decision to not issue a permit in this particular case.¹¹⁸ Tri-County, however,

111. *See id.* at *2 (highlighting purposes of local zoning and land use ordinances as defined in Municipal Planning Code).

112. *See id.* at *4 (proceeding with analysis by seeking to determine what obligations arise when zoning violation is brought to attention of Board during permit review process).

113. *Id.* at *4 (describing resulting impact of Board's holding on DEP's permit consideration process). The Board noted that the DEP has no enforcement or investigative duties when zoning issues are brought to its attention during permit review process. *Id.*

114. *See id.* at *5 (explaining that, based on circumstances, Board can decide whether it is appropriate to grant permit outright, grant conditional permit, or suspend review process).

115. *Tri-City Landfill Inc.*, 2015 WL 3486003, at *5 (holding that, despite parties' argument that violation of local zoning compels automatic denial, viable alternatives to denial exist and can be employed).

116. *See id.* (noting that decision between alternatives involves consideration of various factors, including degree of conflict between plan and local ordinances).

117. *See id.* at *6 (remaining mindful of Tri-County's proposed alternative of granting conditional permit).

118. *See id.* at *5 (holding that not issuing permit was correct decision). The Board noted that Tri-County's plan plainly violated local zoning ordinances to such an extent that issuing a conditional permit would make little sense because the original plan would require alterations to an extent that it would not be a modification of the original plan; rather, it would amount to an entirely new plan. *Id.* Accordingly, no zoning question or issue remained open for debate or left unanswered. *Id.*

318 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 305

maintained that the DEP abused its discretion by not issuing some variety of permit.¹¹⁹

The Board concluded that reviewing the discretion of the DEP was not an appropriate area for summary judgment.¹²⁰ Tri-County's and the DEP's last argument maintained that the zoning issues should be assessed separately from the history of compliance issues of entities associated with Tri-County and jointly requested a bifurcation of the issues.¹²¹ The Board, however, denied the parties' request for bifurcation as to the zoning issue because the Board felt that the zoning issue and the compliance issues needed to be assessed in tandem to give the DEP and Board the most comprehensive set of facts upon which to make a determination.¹²² On those grounds, the Board denied the motion for summary judgment.¹²³

V. CRITICAL ANALYSIS

In *Tri-County Landfill Inc.*, the Board reached a sensible decision based on previous case law the plain language of applicable statutes.¹²⁴ The Intervenors, as citizens possessing standing under the holding in *White*, advocated for a strong decision that would effectively terminate any permit application that violated local zoning.¹²⁵ The Board began its analysis by determining that zoning regulations fell within the scope of environmental protections offered in Section 27 of the Pennsylvania Constitution and the *Payne* test based on the language of applicable statutes.¹²⁶ The Board clearly established that a purpose of land use planning statutes is

119. *Id.* at *6 (highlighting Tri-County's argument that DEP has issued conditional permits frequently, and doing so would be appropriate in present case). The parties also argued over whether the Board abused its discretion by not issuing the permit without Tri-County a chance to modify it. *Id.* The Board went on to note that encouraging Tri-County to modify its permit might be an abuse of discretion if it knew that it would deny the request based on compliance history. *Id.*

120. *Tri-Cty. Landfill Inc.*, 2015 WL 3486003, at *6-7 (establishing that reviews of DEP discretion not appropriate subject matter for summary judgment).

121. *Id.* (illustrating parties' desire to bifurcate proceedings to focus on zoning issues). All parties requested that the zoning issue and compliance issue be bifurcated, and that the Board focus on the zoning issue. *Id.* at *1.

122. *Id.* (finding that history of compliance issues with Tri-County's associates and zoning issue cannot be bifurcated).

123. *Id.* (denying motion for summary judgment).

124. *See id.* at *3 (citing to plain language of statute).

125. For a further discussion of standing under Section 27, see *supra* note 50 and accompanying text.

126. *Tri-Cty. Landfill Inc.*, 2015 WL 3486003, at *2 (starting analysis with review purposes of land use and zoning ordinances).

safeguarding natural resources.¹²⁷ The Board further noted that zoning, a closely related field also within the ambit of the MPC, served a similar purpose.¹²⁸ By clearly emphasizing the statutory language, the Board established a posture that it was relying on settled principals rather than overreaching its discretion.¹²⁹

The Board then applied *Huntley & Huntley, Inc.* to remove any ambiguity as to the roles of state laws and local ordinances in relation to safeguarding environmental assets and natural resources.¹³⁰ Comparing and contrasting state and local regulations allowed the Board to clearly demonstrate that it did not seek to disturb the reach of either area.¹³¹ This restrained approach enabled the Board to address the parties' arguments under Acts 67 and 68.¹³² Having outlined the purposes of zoning, the Board then issued a clear statement of the authority that the Acts granted.¹³³ Establishing this analysis provided strong grounds upon which to reject the DEP's and Tri-County's argument for restrictive application of Acts 67 and 68.¹³⁴ On those grounds, the Board found that zoning laws were unequivocally within the scope of Section 27, and that decision served as the foundation for the subsequent analysis.¹³⁵ By reaching that conclusion, the Board did not extend the scope of Section 27; rather, it properly clarified that local zoning regulations fell within its ambit.¹³⁶

Having determined that Section 27 contemplated zoning, the Board next resolved what DEP obligations arose under Section 27.¹³⁷ Primarily relying on its past decisions, the Board did not cre-

127. *Id.* at *1 (stating purpose of land use regulations). For a further discussion of the MPC and planning, see *supra* note 62 and accompanying text.

128. *Id.* (explaining zoning has purpose similar to that of land use planning).

129. See *id.* at *2 (citing to statutory language).

130. *Id.* at *3 (discussing "complimentary" role of state and local laws). For a further discussion of *Huntley & Huntley, Inc.*, see *supra* note 70 and accompanying text.

131. See *Tri-Cty. Landfill Inc.*, 2015 WL 3486003, at *3 (using illustration involving landfill to distinguish two types of law).

132. See *id.* (using emphasis to establish statutory purpose drafted by legislature).

133. For a further discussion of Acts 67 and 68, see *supra* note 63 and accompanying text.

134. See *Tri-Cty. Landfill Inc.*, 2015 WL 3486003, at *3 (rejecting restrictive interpretation after reviewing purposes defined within statute).

135. *Id.* at *4 (declaring parties' disagreements over scope of Acts 67 and 68 nonessential because acts clearly establish DEP's "obligation to honor zoning requirements").

136. See *id.* at *2, *4 (holding that statutory language indicated that all regulations were to be considered and DEP had obligation to consider them).

137. *Id.* at *4 (stating need to determine DEP obligation under Section 27).

320 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 305

ate an obligation for the DEP to independently seek out any zoning issues.¹³⁸ The Board's refusal to create a new affirmative obligation was seemingly consistent with the holding of the court in *Blue Mountain*.¹³⁹ Although *Blue Mountain* spoke to obligations of zoning boards and not the DEP, the reviewing bodies exhibited similar thinking in their hesitancy to impose newfound duties related to zoning on other entities.¹⁴⁰ This ruling further maintained one of *Hoffman's* key tenets: namely, deference to local government in establishing and enforcing zoning.¹⁴¹ The Board did not explicitly mention any purposes that the municipality sought to further with the established height requirement.¹⁴² It implicitly acknowledged those purposes later, however, when noting that Tri-County's plan clearly violated them.¹⁴³ By only requiring that the DEP consider, but not decide violations of zoning ordinances, the Board allowed local zoning bodies to retain autonomy in governing by reporting violations to the DEP during the permit review process.¹⁴⁴

The Board then addressed the issue of whether a violation of Section 27 should compel an automatic permit denial, or if the DEP could issue an alternative disposition.¹⁴⁵ One such alternative is the issuance of conditional permits, which *Clinton County* declared zoning boards had the authority to issue within zoning schemes.¹⁴⁶ The Board made an omission in its discussion of conditional permits, however, as it failed to consider the requirement of demonstrating affirmative compliance with Section 27 of the Pennsylvania Constitution, which includes zoning.¹⁴⁷ Before making its

138. See *id.* (utilizing precedent to establish DEP's role in zoning).

139. For a further discussion of *Blue Mountain*, see *supra* note 79 and accompanying text.

140. See *Blue Mountain Pres. Ass'n v. Twp. of Eldred*, 867 A.2d 692, 703 (Pa. Commw. Ct. 2005) (holding no affirmative obligation exists).

141. See *Hoffman Mining Co. v. Zoning Hearing Bd. of Adams Twp., Cambria Cty.*, 32 A.3d 587, 603 (Pa. 2011) (establishing that municipalities have authority to enact zoning to carry out purposes of MPC).

142. See *Tri-Cty. Landfill Inc.*, 2015 WL 3486003, at *1 (highlighting height requirement at issue).

143. See *id.* at *5 (noting plan's clear noncompliance).

144. See *id.* (detailing obligation that arises when zoning issue is brought to attention of DEP).

145. See *id.* (listing examples of alternatives to denial, including suspending review which had previously been done in case). For a further discussion of conditional permits, see *supra* note 84 and accompanying text.

146. See *Clinton Cty. Solid Waste Auth. v. Wayne Twp.*, 643 A.2d 1162, 1168 (Pa. Commw. 1994) (holding that municipalities have authority to issue conditional permits). For a further discussion of *Clinton County*, see *supra* note 88 and accompanying text.

147. For a further discussion of the need to affirmatively demonstrate compliance with laws and regulations, see *supra* note 47 and accompanying text.

decision on the matter, the Board listed facts that it found conducive to a decision to deny the permit.¹⁴⁸ The Board appeared to encourage the DEP to consider issuing a conditional permit, as evidenced by entertaining Tri-County's suggestion that the Department could have issued such a permit before the instant appeal.¹⁴⁹ Despite considering Tri-County's proposition, the Board found that it was inappropriate given that its plan violated zoning "beyond dispute."¹⁵⁰ By pointing out the circumstances that made denial appropriate in this case, but stopping short of determining that an obligation to deny exists every time zoning laws are violated within the realm of Section 27 of the Pennsylvania Constitution, the Board did not overreach its discretion in its decision.¹⁵¹

The Board then pivoted that discussion toward the subject of summary judgment.¹⁵² Retaining focus on the availability of alternatives to dissolution, the Board framed the discussion in a way that emphasized the difficulty of knowing DEP's focus in its decision-making.¹⁵³ The Board interwove that theme into its brief discussion of the request for bifurcation.¹⁵⁴ Tri-County's plea that the Board bifurcate the process seemingly asked the court to allow the DEP to ignore an aspect of its review process.¹⁵⁵ The Board's lack of receptiveness appeared to indicate its thoughts on the role of compliance history as an integral part of the process.¹⁵⁶ The emphasis on the consideration of a multitude of facts, and de facto encouragement of it by way of denying the request to bifurcate, displayed the Board's desire for the DEP to carry out its review process

148. See *Tri-Cty. Landfill Inc.*, 2015 WL 3486003, at *5 (detailing facts that appear indicative of obligation to deny permit, including failure to pass appropriate test).

149. See *id.* at *6 (considering Tri-County's suggestion of suspension of review process which had been done in past).

150. *Id.* at *5 (explaining unique aspects of case). In particular, considering substantial alterations needed for Tri-County's plan to comply with zoning, issuing "conditional permit, quite simply, would make no sense." *Id.*

151. See *id.* (noting unusual circumstances of case that made denial appropriate choice).

152. See *id.* at *6 (noting analysis of obligations to decision regarding summary judgment).

153. See *Tri-Cty. Landfill Inc.*, 2015 WL 3486003 at *6 (speculating about number of factors that triggered denial).

154. See *id.* at *6 (noting that Board and DEP should consider all factors when deciding which resolution is most appropriate).

155. For a further discussion of the requirement of inclusion of compliance history of associated entities, see *supra* note 46 and accompanying text.

156. See *Tri-Cty. Landfill Inc.*, 2015 WL 3486003, at *7 n.8 (alluding to Board's belief that compliance issues may demand denial).

322 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 305

and to make an informed decision and achieve a desirable result.¹⁵⁷ That outcome demonstrated deference to the established permit process and further displayed the lack of overreaching in its holding.¹⁵⁸

In its decision, the Board did not need to extend a previous holding to make zoning fit into the scheme of Section 27.¹⁵⁹ By using the plain language of the statute, the Board relied on a common sense interpretation to reach its conclusion.¹⁶⁰ In doing so, the Board respected the latitude of municipal zoning authorities to make and enact laws to protect natural resources and the environment, as their decision afforded those regulations the appropriate protection under Section 27.¹⁶¹ This action reflected the Board's proper reliance on the distinction between state laws and zoning regulations established in *Huntley & Huntley, Inc.*¹⁶²

VI. IMPACT

By declaring that zoning ordinances fall within the ambit of Section 27 of the Pennsylvania Constitution, the Board made a relatively broad holding that will impact permit applications within the Commonwealth.¹⁶³ In affording zoning laws consideration under Section 27 of the Pennsylvania Constitution, the Board strengthened the established purposes of zoning by giving it clear protection under the Pennsylvania Constitution.¹⁶⁴ The Board, however, left unanswered the question of who had the responsibility to bring to the DEP's attention the conflicts between zoning and a proposed plan in a permit application.¹⁶⁵ It appears, based on this decision, that different statutory provisions grant both municipal officials

157. See *id.* at *8 (emphasizing numerous facts that could impact DEP decision). The Board noted that issues regarding zoning violations and compliance history are both necessary to make an appropriate decision. *Id.*

158. For an overview of the requirements needed for permit approval, see *supra* note 47 and accompanying text.

159. For a further discussion of the purpose of Section 27, see *supra* note 25 and accompanying text.

160. See *Tri-City Landfill Inc.*, 2015 WL 3486003, at *2-3 (citing plain language of statute to establish decision).

161. For a further discussion of Section 27 protections, see *supra* note 25 and accompanying text.

162. For a further discussion of comparison between local zoning and state laws, see *supra* note 72 and accompanying text.

163. For a further discussion of the constitutional protection in Pennsylvania, see *supra* note 48 and accompanying text.

164. For a further discussion of an environmental purpose of zoning, see *supra* note 73 and accompanying text.

165. For a further discussion of zoning issues in a DEP permit approval process, see *supra* note 113 and accompanying text.

and citizens opportunities to alert the DEP of a zoning issue within a permit application.¹⁶⁶

The Board also preserved an avenue for citizens to pursue action under Section 27.¹⁶⁷ As long as citizens can establish that they possess the requisite interests related to zoning, they have a potential recourse in the event that the DEP remains unaware of a zoning issue.¹⁶⁸ It remains to be seen whether the decision will result in increased litigation on these grounds; it should be noted, however, that citizens are cognizant of the impact of zoning on various dimensions of community development.¹⁶⁹

Furthermore, the Board's decision creates a new obligation for permit applicants under one of the Pennsylvania statutes that details application contents.¹⁷⁰ The statute requires that the applicant affirmatively demonstrate compliance with Section 27 of the Pennsylvania Constitution.¹⁷¹ By determining that zoning falls within the ambit of Section 27 of the Pennsylvania Constitution, the Board created an obligation for applicants to affirmatively demonstrate compliance with zoning regulations.¹⁷² Because the Board declined to impose an obligation on the DEP to seek out zoning issues, it appears that the Board intended to leave that obligation with the zoning board and concerned citizens.¹⁷³ The required meeting among the applicant, zoning board, and DEP may be an appropriate time for the Board to raise issues that an applicant may try to conceal within an application.¹⁷⁴

166. See 25 PA. CODE § 271.141 (2016) (describing notice requirements when permit application is submitted to DEP); see also 25 PA. CODE § 271.202 (noting that municipal officials, including zoning officials, and DEP personnel are required to meet and discuss plan).

167. For a further discussion of standing under Section 27, see *supra* note 50 and accompanying text.

168. For a further discussion of the requirements necessary for citizens to have standing for a Section 27 claim, see *supra* note 50 and accompanying text.

169. See generally Kenneth A. Stahl, *Neighborhood Empowerment and the Future of the City*, 161 U. PA. L. REV. 939, 940 (2013) (describing citizens' conflicting desires for zoning).

170. For a further discussion of compliance requirements within an application, see *supra* note 47 and accompanying text.

171. For a further discussion of the need to affirmatively demonstrate compliance with the Pennsylvania Constitution, see *supra* note 47 and accompanying text.

172. For a further discussion of the need to affirmatively demonstrate compliance with the Pennsylvania Constitution and the Board's failure to consider this requirement, see *supra* notes 47 and 147 and accompanying text.

173. For a further discussion of the decision to decline to impose an obligation on the DEP to investigate for potential zoning violations, see *supra* notes 112-114 and accompanying text.

174. For a further discussion of the mandate for a meeting between the DEP and the local zoning board, see *supra* note 166 and accompanying text.

324 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 305

The Board's decision also potentially creates an opportunity for zoning boards to enforce a zoning violation in order to compel a DEP decision that slows down a development process.¹⁷⁵ Following this decision, zoning boards remain free of liability, even if the zoning decision is made in bad faith.¹⁷⁶ Moreover, even if zoning boards move along with the process and issue a conditional permit, concerns exist regarding the propriety of zoning boards issuing that type of permit.¹⁷⁷ Despite the necessary uses of certain types of permits, zoning boards retain latitude in their decision making process to craft outcomes that can achieve covert objectives.¹⁷⁸

Despite the opportunities for zoning boards to act unsavorily, the Board's decision could also facilitate necessary development.¹⁷⁹ After the DEP is alerted to a zoning violation contained in a plan, the ability to suspend review, rather than being required to deny a noncompliant plan, may lead to positive results.¹⁸⁰ Instead of forcing the abandonment of a potentially positive project due to a permit application denial, the DEP can issue a conditional permit or suspend the review process.¹⁸¹

Allowing a review process to be suspended, rather than denying a permit and forcing the process to end, will likely save time and resources of the DEP because it eliminates the potential for denied application to resurface in the form of a new application with revisions that demonstrate compliance.¹⁸² During the suspension, both the applicant and zoning board would be able to evaluate the merit and substance of their positions and potentially work out a compromise, such as a conditional permit with conditions

175. For a further discussion of potential outcomes when a zoning violation is brought to the attention of the DEP, see *supra* note 114 and accompanying text.

176. See R.P. Davis, Annotation, *Liability of municipality in damages for its refusal to grant permit, license, or franchise*, 37 A.L.R.2d 694 (1954) (establishing that zoning boards cannot be liable in damages for bad faith permit denial).

177. For a further discussion of concerns related to conditional permits, see *supra* note 86 and accompanying text.

178. See 3 JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 16:12 (updated Oct. 2016) (noting that special or conditional permits often facilitate development of projects that are undesirable).

179. See *id.* (highlighting flexibility that different permit types provide in community development).

180. For a further discussion of the Board's decision not to mandate automatic denial for noncompliant plans, see *supra* notes 115-119 and accompanying text.

181. For a further discussion of conditional permits, see *supra* note 85 and accompanying text.

182. For a further discussion of the permit requirements necessary to ensure compliance with the DEP, see *supra* notes 45-47 and accompanying text.

that mitigate community concerns.¹⁸³ These productive exchanges and solutions could work to further the established purposes of zoning, including balancing beneficial, but noncompliant plans, and community wishes.¹⁸⁴ This decision strengthens the role of local zoning ordinances within the realm of environmental protection and the protection offered under Section 27 of the Pennsylvania Constitution without forcing new obligations on the DEP and minimally increasing requirements for applicants within the Commonwealth.¹⁸⁵

*Christyan A. Telech**

183. For a further discussion of the nature of conditions attached to conditional permits, see *supra* note 85 and accompanying text.

184. For a further discussion of the purposes of zoning, see *supra* note 73 and accompanying text.

185. For a further discussion of the new obligation on permit applicants, see *supra* note 172 and accompanying text.

* J.D. Candidate, 2018, Villanova University Charles Widger School of Law, B.S., 2015, The Pennsylvania State University.