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October 27, 2017

VIA E-MAIL AND U.S. MAIL

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Re: West Pennsboro Township-Smith/Butler Appeal

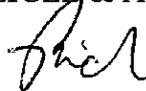
Dear Nate, Hubert, Kate and Steve:

I have enclosed the Decision entered by the West Pennsboro Township Zoning Hearing Board.

Thanks for your attention to this matter.

Sincerely,

WEIGLE & ASSOCIATES, P.C.



Richard L. Webber, Jr., Esquire

RW:rrw

Enclosure

Cc Evelyn Swartz, Secretary for

West Pennsboro Township Board of Supervisors (via e-mail)

IN RE: APPLICATION OF : **BEFORE THE ZONING HEARING**
 : **BOARD OF WEST PENNSBORO**
 : **TOWNSHIP CUMBERLAND COUNTY,**
KARL SMITH, : **PENNSYLVANIA**
BETTY BUTLER AND MARK BUTLER, : **SUBSTANTIVE VALIDITY CHALLENGE**
 : **DATE FILED: February 16, 2017**
Appellants

DECISION

I. BACKGROUND PROCEDURAL HISTORY

On February 16, 2017, Appellants filed an Application for Substantive Challenge to the Validity of Ordinance Nos. 2016-02 and 2016-04. Those Ordinances were adopted by the West Pennsboro Township Board of Supervisors. The Ordinances rezoned 2 tracts of real estate from High Density Residential (R-2) to Industrial (I). The rezoned tracts are known as 1617 Newville Road (Bock tract) and 1525 Newville Road (Shover tract).

Six hearing sessions were held by this West Pennsboro Township Hearing Zoning Hearing Board between March 29, 2017 and August 23, 2017.

Parties participating in the hearing sessions include Appellants, represented by Nathan C. Wolf, Esquire, of Wolf & Wolf, as well as Allen Distribution, represented by Hubert X. Gilroy, Esquire and Kate W. Millikan, Esquire, both of Martson Law Offices.

On October 19, 2017, this Board conducted a special meeting in which it rendered a unanimous verbal decision to grant the request made by Appellants to invalidate the Ordinances.

II. FINDINGS OF FACT

THE BOARD HEREBY FINDS THE FOLLOWING FACTS:

1. Appellants are Karl Smith, of 1554 Newville Road, Carlisle, PA 17015 and Betty Butler and Mark Butler, of 1701 Newville Road, Carlisle, PA 17015.
2. On March 21, 2016, Allen Distribution filed an application with the Board of Supervisors seeking to have two tracts of real estate rezoned from High Density Residential (R-2) to Industrial (I).
3. In addition, Allen Distribution simultaneously filed a Site Concept Plan showing two industrial buildings referred to as cross dock facilities.

4. The two tracts at issue were and are as follows:
 - A. Tract owned by William P. and Valerie A. Bock known as 1617 Newville Road, Carlisle, PA 17015, containing 70.475 acres, further identified as tax parcel number 46-07-0473-017.
 - B. Tract owned by Allen D. Shover containing 62.72 acres, known as 1525 Newville Road, Carlisle, PA 17015, further identified as tax parcel number 46-07-0473-018.
5. The Bock tract is located to the west of the Shover tract.
6. A total of 125 acres of the combined Bock and Shover property is situate in West Pennsboro Township, with the remaining 8 acres located to the east in North Middleton Township.
7. Allen Distribution entered into a contract with Bocks and Shover to purchase both tracts.
8. Appellant Karl Smith owns and resides at 1554 Newville Road, Carlisle, PA 17015 (West Pennsboro Township).
9. Mr. Smith's property fronts on Pennsylvania Route 641 to the south.
10. The Butlers own and reside at 1701 Newville Road, Carlisle, PA 17015 (West Pennsboro Township).
11. Butler's property is located to the west of the Bock/Shover tract.
12. On March 28, 2016, the Township Board of Supervisors ("Supervisors"), during their regular meeting, accepted the rezoning Application as filed by Allen Distribution, scheduled a public hearing, and referred the Application to the Cumberland County Planning Commission, the West Pennsboro Township Planning Commission and the Western Cumberland County Council of Governments (WCCOG) for consideration.
13. In 2007, the West Pennsboro Township Board of Supervisors adopted the *Western Cumberland County Joint Comprehensive Plan* as the official Comprehensive Plan for West Pennsboro Township (the WCCOG Plan).
14. On April 21, 2016, the Cumberland County Planning Commission reviewed the rezoning Application and issued a written report.

15. The written report of the Cumberland County Planning Commission indicated that the project was “consistent with Municipal Comprehensive Plan” (the WCCOG Plan) and “inconsistent with the County Comprehensive Plan”.
16. In spite of the inconsistency with the County Comprehensive Plan, the Cumberland County Planning Commission voted, 4-2, to recommend approval of the proposed rezoning.
17. On April 28, 2016, the West Pennsboro Township Planning Commission reviewed the rezoning Application and voted to remain neutral.
18. On May 9, 2016, a Steering Committee of the Western Cumberland Council of Governments reviewed the rezoning request and concluded that the rezoning was consistent with the WCCOG Plan and voted unanimously to approve the change.
19. The Supervisors conducted public hearings on Allen’s Application to rezone on May 25, 2016 and June 27, 2016.
20. On July 25, 2016 the West Pennsboro Township Supervisors adopted Ordinance 2016-02.
21. Ordinance 2016-02 changed the zoning classification of the Bock and Shover tracts of real estate (the rezoned property) from High Density Residential (R-2) to Industrial (I).
22. On August 24, 2016, Appellant Karl Smith filed an appeal in the Cumberland County Court of Common Pleas alleging procedural errors regarding the adoption of Ordinance 2016-02.
23. In order to address issues raised in Mr. Smith’s appeal, the Supervisors held a third public hearing on October 24, 2016.
24. The Supervisors were presented with significant amount of testimony and information regarding environmental issues during the course of its 3 public hearings, and particularly during its June 27, 2016 hearing, including testimony from expert witnesses.
25. On November 21, 2016, the West Pennsboro Township Board of Supervisors adopted Ordinance 2016-04, which again rezoned the Bock/Shover properties from High Density Residential (R-2) to Industrial (I).

26. On January 3, 2017, the Township issued a Preliminary Opinion to Allen indicating that the proposed warehouse use complied with the Zoning Ordinance and Zoning Map, subject other applicable land use approvals.
27. On or about February 16, 2017, Smith and the Butlers filed their *Application for Substantive Challenge to the Validity of Ordinance Nos. 2016-02 and 2016-04*.
28. Hearing sessions were held by this West Pennsboro Township Hearing Zoning Hearing Board on March 29, April 19, May 24, June 21, July 26, and August 23, 2017, all beginning at 6:00 p.m. and the majority of which lasted for three hours.
29. Zoning Hearing Board members Toby Fauver, David Hockenberry II, and Grant A. Marshall attended all six hearing sessions, as well as the Solicitor for the Board, Richard L. Webber, Jr., Esquire.
30. The following witnesses presented testimony on behalf of the Appellants:
 - A. April Showers, AICP, an expert in municipal planning and drafting of comprehensive planning documents and zoning ordinances;
 - B. Don Paul Shearer, Real Estate Appraiser/Advisor, an expert general real estate consultant, appraiser, and broker;
 - C. George Pomeroy, Ph.D., AICP, an expert in theories and application of land planning principles;
 - D. Rebecca Bascom, M.D., MPH, an expert in internal medicine, respiration medicine, critical care medicine, preventative medicine, occupational medicine, and the impacts of air pollution on human health;
 - E. David Smith; and
 - F. Bill Everett.
31. The following witnesses presented testimony on behalf of Allen Distribution:
 - A. James S. Snyder, P.E., an expert civil engineer in land use development;
 - B. Daniel Holland, Senior Consultant, an expert on air quality;
 - C. Gregory E. Creasy, P.E., an expert in infrastructure and traffic engineering;

D. Michelle A. Brummer, AICP, an expert community land use planner; and

E. Timothy C. Cormany, AICP, an expert in land use and municipal planning.

32. All three Appellants presented testimony.

33. No testimony was presented by any representative of Allen Distribution aside from its expert witnesses.

34. The West Pennsboro Township Board of Supervisors did not participate in any of the six hearing sessions.

35. The Southern boundary of the rezoned property, from its southeast corner, follows Pennsylvania Route 641 in a westerly direction, then proceeds along residential property classified as R-2 in a northerly direction along said property, then in a westerly direction to the rear of that and other residential properties zoned as R-2, then in a southerly direction back to Pennsylvania Route 641, then in a westerly direction.

36. The properties that front on Pennsylvania Route 641 to the south are residential properties zoned as R-2.

37. Properties located immediately behind the properties that front on the south side of Pennsylvania Route 641 are also zoned R-2.

38. The properties adjacent to the western boundary of the rezoned tract, as well as a narrow portion of property adjacent to the northwest boundary of the rezoned property, are zoned R-2.

39. The R-2 zone continues to the west of R-2 zoned properties that border the western side of the rezoned tract.

40. The Pennsylvania Turnpike borders the majority of the northern boundary of the rezoned property, except in its northwest corner as stated in 38 above.

41. The properties located to the north of the Pennsylvania Turnpike are zoned Agricultural (A).

42. The Agricultural zone continues on the north side of the Pennsylvania Turnpike to the border of Lower Frankford Township.
43. The properties located to the east of the rezoned tract are located in North Middleton Township and are zoned "Neighborhood Commercial" as per the North Middletown Township Zoning Ordinance.
44. Said properties adjacent to the east of the rezoned tract located in North Middleton Township are residential in nature, and are bordered to the east by Meadowbrook Road.
45. Property zoned Industrial by North Middleton Township lies east of Meadowbrook Road.
46. Neither the rezoned property nor any of the surrounding properties have access to the Pennsylvania Turnpike, as there is no interchange there.
47. The rezoned property is similar in nature to the adjoining properties.
48. The rezoned property is not surrounded by land located in West Pennsboro Township that is zoned less restrictively than the R-2 zone.
49. There are no unique physical characteristics on the rezoned property that would prevent it from being used for something for which it is zoned (R-2).
50. The rezoned property is suitable for agricultural and residential uses.
51. There are approximately 50 single family homes that are adjacent to the rezoned property.
52. The rezoning will result in an adverse effect on adjacent and nearby residential properties.
53. Industrial uses are inconsistent with and incompatible with adjoining and surrounding residential uses.

III. DISCUSSION

A. GENERAL ZONING LAW

Appeals from preliminary opinions of the Zoning Officer are within the jurisdiction of the Zoning Hearing Board under the Township Zoning Ordinance and the Pennsylvania Municipalities Planning Code (MPC). 53 Pa. Stat. Ann. 10916.2.

This Zoning Hearing Board has jurisdiction under the MPC to hear challenges filed by persons aggrieved by the use or development on land of another by an ordinance or a map who challenge its validity on substantive grounds. 53 Pa. Stat. Ann. 10916.1(b).

Smith and Butler are “aggrieved persons” as defined by the MPC.

Allen Distribution, by virtue of its status as a purchaser under a contract, is a “landowner” as defined by the MPC. 53 Pa. Stat. Ann. 10107. Allen Distribution, therefore, has legal standing to apply for rezoning and to be a party in this case.

Neither party has contested the legal standing of the other party.

“Zoning classifications are largely within the sound discretion and judgement of the pertinent legislative or zoning body.” Cleaver v. Bd. of Adjustment of Tredyffrin Twp., 200 A.2d 408, 413-415 (Pa. 1964).

“All zoning ordinances.....are presumed constitutional and valid. The burden thus falls on the challenger to prove otherwise.” Dimattio v. Millcreek Twp. Zoning Hearing Bd., 147 A.3d 969, 974 (Pa. Commw. 2016).

“The challenging party must clearly establish the provisions are arbitrary and unreasonable and have no relation to the public health, safety, morals, and general welfare and if that validity is debatable the legislative judgement is allowed to control.” Schubach v. Silver, 336 A.2d 328, 335 (Pa. 1975).

B. ENVIRONMENTAL RIGHTS ANALYSIS

Appellants contend that the Board of Supervisors were obligated to investigate environmental impacts prior to adopting Ordinances 2016-02 and 2016-04. Appellants further argue that the Supervisors acted without first having sufficient information with which to understand or consider the impacts to the environment prior to rezoning the property. Appellants further contend that the Supervisors failed to even ask for any information relating to environmental impact from Allen Distribution. Appellants therefore argue that the Ordinances should therefore be ruled as invalid for those reasons.

Appellants cite Article I, Section 27 of the Pennsylvania Constitution, which states:

“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including

generations yet to come. As trustee of the resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”

In addition, Appellants cite two cases: Robinson Township v. Commonwealth of Pennsylvania, 83 A.3d 901 (Pa. 2013), and Pennsylvania Environmental Defense Fund Foundation v. Commonwealth, 161 A.3d 911 (Pa. 2017).

Appellants argue in their post-hearing memorandum that, prior to adopting Ordinances 2016-02 and 2016-04, the Supervisors failed to exercise their duties regarding environmental issues that are now “clearly defined” by Robinson and Pa.Envtl. We disagree.

In Robinson, the Pennsylvania Supreme Court held that state legislation that effectively suspended the ability of local government to regulate the placement of oil and gas industry facilities was unconstitutional.

In Pa. Envtl., the Pennsylvania Supreme Court held that sections 1602-E and 1603-E of the Pennsylvania Fiscal Code relating to royalties were unconstitutional because the Commonwealth plainly ignored the Commonwealth’s constitutionally imposed fiduciary duty to manage the environmental public trust for the benefit of the people and public natural resources.

Both cases involved statutes enacted by the Pennsylvania legislature. Neither involved the constitutionality of municipal legislation or zoning.

Appellants cite no other cases in support of its contention regarding environmental rights. Appellants are therefore requesting that this Zoning Hearing Board create new law, without citing adequate authority to indicate that this Board has the power to do so.

A summary of the testimony at the hearing sessions of this Board is as follows. At the public hearings held by the Supervisors, significant evidence and information was presented by both proponents and opponents of the rezoning proposal, including environmental issues. The testimony included expert witnesses for both parties.

In addition, environmental impacts and issues would be further addressed in the land development and, if applicable, the conditional use process.

Appellants have not clearly established that this Zoning Hearing Board has the legal authority to overturn Ordinances that change zoning classifications based on the law raised by them cited above. Nor is this Board aware of any such authority.

B. SPOT ZONING ANALYSIS

1. General

The Pennsylvania Supreme Court has defined spot zoning as “a singling out of one lot or a small area for different treatment from that accorded to similar surrounding land indistinguishable from it in character, for the economic benefit or detriment of the owner of that lot.” Mulac Appeal, 210 A.2d 275, 276 (Pa. 1965).

The Pennsylvania Supreme Court expanded this definition by stating:

“It is well-settled that an ordinance cannot create an ‘island’ or more or less restricted use within a district zoned for a different use or uses, where there are no differentiating relevant factors between the ‘island’ and the district...Thus, singling out of one lot or a small area for different treatment from that accorded to similar surrounding land indistinguishable from it in character, for the economic benefit of the owner of that lot or to his economic detriment, is invalid ‘spot’ zoning.” Schubach at 336.

The Court in Mulac added: “What is most determinative is whether the parcel in question is being singled out for treatment unjustifiably differing from that of similar surrounding land, thereby creating an ‘island’ having no relevant differences from its neighbors.” Mulac at 277.

“Spot zoning is unconstitutional and invalid.” Dimattio at 974.

There is no precise formula to determine spot zoning. Whether a classification constitutes spot zoning is determined by facts guided by case law. Sharp v. Zoning Hearing Bd., 628 A.2d 1223, 1228 (Pa. Commw. 1993).

A spot zoning analysis applies to an amendment that rezones a property that is configured as a peninsula. Knight v. Lynn Township Zoning Hearing Board, 568 A.2d 1372, 1375 (Pa. Commw. 1990).

Spot zoning occurs when a property has been arbitrarily zoned differently from the surrounding property. Atherton Development Company v. Township of Ferguson, 29 A.3d 1197, 1204 (Pa. Commw. 2011). Reverse spot zoning, by contrast, occurs when a property arbitrarily remains static while the zoning designation of the surrounding properties changes. Id. In both cases, a zoning island forms whereby a single property is unjustifiably treated differently from the

surrounding properties by either the action or inaction of a municipality's zoning board. *Id.* at 1204-1205. There are numerous cases addressing the issue of "reverse spot zoning" as well as those regarding "spot zoning" in general (the latter type being applicable in the case at hand).

We must therefore analyze this rezoning in conjunction with the definition of spot zoning cited above, the related explanations, the case law, noted above, and the hearing testimony. Clearly, a comparison of the rezoned property with surrounding land is required. As cited below, there are a number of factors associated with the land that have been considered by Courts. Several additional issues are included within the definition of spot zoning. The phrase "singling out of one lot or a small area" must be considered.

Also, a finding of spot zoning must include a determination that the rezoning is for the economic benefit of the owner of that lot.

"In the event the initial review suggests discrimination, then further analysis is likely to center on the following factors:

- a. Does the size and shape of the zone that is being attacked make sense?
- b. How great is any inconsistency between the zoning applicable to the tract involved and that applicable to surrounding areas?
- c. What is the history of the zoning in the area?

Additional relevant factors to be considered are:

- a. The physical aspect and character of the land;
- b. How the rezoning affects the public health, safety, morals and general welfare of the community; and
- c. How the rezoning relates to the applicable comprehensive plan."

Robert S. Ryan & John E. Ryan, *Pennsylvania Zoning Law and Practice* §3.4.9 (Volume 1, G.T. Bisel Company, 2017).

2. Singling out of one lot or area

Although record title to the rezoned properties remains in Bock and Shover, the request for rezoning was made by Allen Distribution. The Supervisors clearly singled out Allen for the rezoning.

Allen's Site Concept Plan shows that both properties are included in the proposed use. There is no indication that the parcels will remain separate. "The question is whether the lands at

issue are a single, integrated unit...” In re: Realan Valley Forge Greenes Associates, 838 A.2d 718 (Pa. 2003). See also Baker v. Chartiers, 651 A.2d 542 (Pa. 1994), where the Commonwealth Court noted that the rezoning was “one integrated unit, the former Shaw farm, owned by one interest, Martin.” Baker at 1277. We find that the rezoned tract is one integrated unit.

3. Economic benefit

Clearly, the rezoning is for the economic benefit of Allen, as well as Bock and Shover. There was no testimony as to the direct benefit to be gained by any other party. As stated above, the Supervisors did not participate in any of the hearing sessions conducted by this Board. We therefore do not know what specific benefits were sought by the Supervisors for the benefit of the Township residents.

4. Size

As stated above, the rezoned property consists of a total of 133 acres, of which 125 is located in West Pennsboro Township. The Court in Mulac stated, “Clearly, the size of the property is only one of the determining factors.” Mulac at 276. In Dimattio, the Court noted that courts typically find spot zoning with respect to small parcels. Dimattio at 971. On the other hand, the Pennsylvania Supreme Court in Realen stated that the large size of the tract in that case (135 acres) was not determinative. Realen at 730. The Court in Realen found reverse spot zoning. We agree that there are cases where spot zoning was found where the rezoned tract was much smaller. For instance, the rezoned property in Mulac consisted of 1.04 acres (an entire city block). In Cavanaugh v. Fayette Co. Zoning Hearing Board, 700 A.2d 1353 (Pa. Commw. 1997), cited by Appellants, a 12 acre tract was rezoned. In re Appeal from Fayette County Ord. No. 83-2, 509 A.2d 1342 (Pa. Commw. 1986), (also cited by Appellants), addressed the rezoning of a 6 acre tract.

There have been, however, in addition to Realen, determinations of spot zoning involving larger tracts. In Appeal of Benech, 28 Pa. Commw. 415, 368 A2d. 828 (Pa. Commw. 1977), the Commonwealth Court found that spot zoning occurred where an 80 acre tract was rezoned.

In Baker v. Chartiers, 163 Pa. Commw. 574, 641 A2d. 688 (1994), the Pennsylvania Commonwealth Court found spot zoning where a 220 acre tract was rezoned from Agricultural to Industrial.

Obviously, industrial uses and warehouses will require much more acreage than property needed for single family residences.

5. Zoning Ordinance

The West Pennsboro Township Zoning Ordinance and the related map designate the following zones:

- a. (A) Agricultural
- b. (R) Rural Residential
- c. (R-1) Low Density Residential
- d. (R-2) High Density Residential
- e. (MHP) Manufactured Housing Park
- f. (MU) Mixed Use
- g. (C) Commercial
- h. (I) Industrial
- i. (Q) Quarry

West Pennsboro Township Zoning Ordinance 2008-01, as amended by Zoning Ordinance Amendment 2011-04 and 2016-03 § 109.

These designations are set forth above in order from the least intensive to the most intensive form of land use. There are three zoning classifications between R-2 and I.

The Zoning Ordinance states that the purpose of the R-2 zone is to accommodate the higher density housing needs of the Township. It further indicates that these zones are located around existing multi-family developments and major transportation routes. West Pennsboro Township Zoning Ordinance § 203.

Regarding the Industrial zone, the Ordinance states that the purpose of that zone is to provide for a wide range of industrial activities. In addition, it states that this zone provides for light industrial uses as permitted by right, but requires conditional use approval for heavier and more objectionable types of industrial uses. West Pennsboro Township Zoning Ordinance § 220.

There are 23 permitted uses in Section 220.2 for the Industrial (I) zone including certain types of manufacturing and processing. There are 16 conditional uses listed in § 220.3, including heavy industrial uses, warehousing, heavy equipment sales, service and repair, truck or motor freight terminals, truck stops, recycling facilities, principal waste handling facilities, junkyards and airports.

6. Comparison of zoning classifications

Appellants' expert witnesses addressed the differences in zoning classifications in comparing the rezoned tracts with adjoining and nearby real estate.

As indicated above, a "spot zoning" involves "differing treatment" of the rezoned land from that accorded similar surrounding land. As stated in Ryan's analysis above, the extent of inconsistency is a factor. In virtually all spot zoning cases, including those cited by each party, the Court has addressed this issue by comparing the applicable zoning classifications.

In the case at hand, properties zoned R-2 border the rezoned tract to the south, west and a portion of the northern boundary of the northwest corner of the rezoned property. Land zoned Agriculture is located north of the Pennsylvania Turnpike. The entire eastern boundary of the rezoned property borders North Middleton Township.

Importantly, the same holds true for the properties located in West Pennsboro Township that surround those properties that adjoin the rezoned tract.

Appellants cite a number of cases where the Court found spot zoning. First, they cite In re Appeal from Fayette County Ordinance No. 83-2, 509 A.2d 1342 (Pa. Commw 1986). The facts are similar to the case at hand. In Fayette Co., the County Commissioners rezoned a property from R-2 to Heavy Industrial. Interestingly, the rezoned property did border on Industrial. The Commonwealth Court analyzed the description of each classification in the zoning ordinance and concluded that it could be inferred from the Ordinance that residential uses were incompatible. The Court further noted that the rezoned property was surrounded by residential uses. The Court further stated that "simply because a piece of property borders property zoned industrial does not mean it automatically is zoned industrial". The Commonwealth Court therefore held that the Ordinance in question constituted spot zoning and was therefore invalid. In doing so, it reversed the Order of the Trial Court.

Appellants cite Cavanaugh v. Fayette County Zoning Hearing Board, 700 A.2d 1353 (Pa. Commw. 1997) as well. In Cavanaugh, a property was rezoned from A-1 to Business-1. The rezoned property was surrounded by A-1 and R-2. The Commonwealth Court found spot zoning.

In Baker, the tract was rezoned from Agricultural to Industrial. The tract bordered Industrial on one side, but Agricultural on the other three sides. The Pennsylvania Commonwealth Court affirmed the decision of the trial court which found spot zoning.

In Mulac, the Pennsylvania Supreme Court held that spot zoning occurred where an entire city block that was rezoned from E-Res. to Gen. Bus. Streets surrounded all sides of the rezoned tract. All land on the other sides of those streets was zoned E-Res.

In Appeal of Benech, the 80 acre tract was rezoned from Rural Residential (R-2) to Neighborhood and Highway Commercial (C-2) to allow for a racetrack. Interestingly, the rezoning created a doughnut-shaped commercial zone in an isolated rural area. The Zoning Hearing Board upheld the Ordinance. The trial court reversed the Zoning Hearing Board and invalidated the Ordinance. The Commonwealth Court affirmed the trial court's decision by finding that the rezoning constituted discriminatory spot zoning.

Allen cites three cases in support of its contention that Ordinance Nos. 2016-02 and 2016-04 do not constitute spot zoning. First, it cites DiMattio. Although the Commonwealth Court in DiMattio held that the rezoning did not constitute spot zoning, it did note that the "differentiation in zoning classification between the original R-1 zoning district and the change to R-2 was not so significant as to exceed the Supervisors' power to enact a zoning change". Id. at 972.

Allen also cites Lyons v. Zoning Hearing Board of Sewickley, 2015 Pa. Commw. Unpub. LEXIS 74 (Pa. Commw. 2015). In Lyons, a tract that had a history of being zoned differently from other borough properties was rezoned from R-2 (residential) to OMU (mixed use). The Court found that there was substantial evidence to support the Zoning Hearing Board's conclusion that the rezoning "was justified by the road frontage and the mix of surrounding uses and that the rezoning was consistent with surrounding mixed residential and commercial uses." Lyons at 22. The facts in the case at hand differ from those in Lyons.

Next, Allen cites Schubach II. In Schubach II, the Pennsylvania Supreme Court held that a change in zoning from R-4 to C-2 did not constitute spot zoning. The rezoning had been requested in order to permit the construction of a nursing facility. The Court noted that the rezoned tract bordered on industrial, residential, a medical center, and commercial. The Court stated: "Grouping together the fact that this land fronts on a commercial use, and is ill-suited, both economically and location-wise, for detached dwelling residential use, it is only realistic to say that this piece of land, by its very location, is useable only as a "natural extension of the already existing commercial use." Schubach II at 337. The Court further noted that the representative of the Planning Commission described the rezoned property as a transition zone between two areas of

different land use and that it represented the best buffer. Clearly, the facts in Schubach II differ from the case at hand.

Schubach II was decided approximately 5 years after Schubach I. Schubach v. Zoning Board of Adjustment, 270 A.2d 397 (Pa. 1970). In Schubach I, the Pennsylvania Supreme Court addressed a portion of the same tract that was rezoned in Schubach II. In Schubach I, the property in question was rezoned from R-4 to C-2 (the same as in Schubach II). All contiguous land remained R-4, and land across the street was zoned R-3. The Court stated that the rezoning was a “classic instance of spot zoning” and that “in the absence of relevant differentiation between the island and the land immediately adjacent thereto, the rezoning was illegal.” Schubach I at 399. The Supreme Court held that the Court below committed an error of law in failing to overturn the Ordinance as illegal spot zoning.

Interestingly, the Court in Schubach I was not persuaded by the argument that the rezoning represented an extension of a large commercially zoned area that was located a few hundred feet to the north of the rezoned property. The Court stated:

“We are not persuaded by such an argument since it would mean that every borderline area in the city could be subjected to such down zoning. The extension of this reasoning could lead to one tract after another falling into the C-2 classification; since A is C-2, then B should be C-2; since B is C-2, then C should be C-2; since C, then D; and so on, ad infinitum.”

Schubach I at 400.

We believe that the Pennsylvania Supreme Court’s analysis in Schubach I and Schubach II is very informative. In addition, the facts in the case at hand are more analogous to Schubach I.

In short, the case law does not support Allen’s contention that proximity to infrastructure, development and the Allen Road corridor, justify the rezoning.

7. Comparison of land characteristics

Two of Appellants expert witnesses, April Showers and George Pomeroy, testified that the rezoned property is similar in character to the properties that surround it. Allen’s expert witness Michelle Brummer admitted to the similarity as well.

8. Comprehensive Plan

Allen argues that the rezoning is consistent with the WCCOG Comprehensive Plan. Although the *map* of that Plan does indicate that the rezoned tract is within a zone designated as Industrial, there are other adjoining properties that were also zoned as Industrial. In addition, some adjoining properties which are zoned R-2 are designated as Commercial in the Plan.

The WCCOG Plan does contain the following text:

In order to avoid the associated headaches brought by sudden large scale development and its proximity to other zoning districts, care must be taken to avoid negative impacts to the surrounding and prosperous residential, agricultural and conservation communities. As a separation of the business districts from the residential and rural districts is of significant concern, these non-residential zones would ideally be limited to strictly nonresidential development and include allowances for other non-business uses like schools, hospitals, government facilities, and churches. Serious consideration must also be given to the need for proper transition between uses as conflicts may arise in some circumstances between neighboring properties.

WCCOG Plan, p. 119.

In other words, the WCCOG map is not the entire plan. In addition, the map and the text do not support the rezoning of an industrial island surrounded by residential properties.

In Schubach II, the Pennsylvania Supreme Court addressed the applicable comprehensive plan. The Court stated that the chancellor correctly found that the rezoning was in accord with the Plan. The Court noted, however, that a representative of the City Planning Commission testified that the rezoned area was a trouble spot because commercial and industrial uses were located across the street, and the rezoned property bordered residential. He further testified that the rezoned property was a “transition zone”, and that the rezoning represented the “best buffer”. The Court further stated:

“Instantly we merely recognized that to promote the orderly development of a community the zoning authorities must be allowed to put a piece of property to the use which is most beneficial to the comprehensive plan, **i.e.. establish a land use which best blends in with surrounding difference uses.**”

Schubach II at 338.

In the case at hand, reliance on the map found in the WCCOG plan does not establish a land use which best blends in with surrounding difference uses. In addition, there is significant difference in the zoning classification between the rezoned property (industrial) versus the adjoining properties to the south and west (R-2), and the north (A).

Smith and Butler point out that the WCCOG Plan was adopted nearly 10 years ago and should therefore be reviewed. The Municipalities Planning Code does require a review of the Comprehensive Plan every 10 years. 53 Pa. Con. St. 10301(c). We agree that the WCCOG Plan should have been reviewed in conjunction with the rezoning application, although it was not legally required.

Allen introduced the written report from the Cumberland County Planning Commission indicating that the proposed rezoning was consistent with the WCCOG plan. Smith and Butler note, and the written report from Cumberland County Planning Commission has established, that the rezoning was inconsistent with the Cumberland County Comprehensive Plan. The County Plan was adopted in 2011.

The MPC does provide that each shall give the other consideration.

In short, the classification of the rezoned property to industrial is consistent with the classification shown *for that* property on the WCCOG map. Nevertheless, the factors noted above, as well as the Schubach II analysis, mitigate the significance of that designation.

Finally, the fact that the various bodies have voted to recommend the rezoning, in conjunction with their review of the Comprehensive Plan(s), is not determinative as to whether the rezoning constitutes spot zoning.

9. Health, Safety, Welfare and Morals

Given all of the above, it is clear that this is a case of spot zoning. Also, the rezoning does not promote health, safety, welfare and morals of the West Pennsboro Township residents.

In the Fayette County case cited by Appellants, the Court stated that the rezoning was not enacted to enhance the public's health, safety, morals and general welfare, but rather was enacted to accommodate the plans of one landowner. Id. at 1346.

Don Paul Shearer, an expert regarding real estate, testified on behalf of Appellants that the rezoned industrial tract would have an adverse effect on the neighboring residential properties.

Finally, there was testimony regarding noise, light, and glare associated with industrial use.

IV. CONCLUSION

Regarding the Appellants' environmental rights argument, we find that there is no basis for overturning Ordinances 2016-02 and 2016-04.

We do conclude that Ordinances 2016-02 and 2016-04 constitute spot zoning. The Appellants have clearly established that the Ordinances unjustifiably, arbitrarily, and unreasonably single out land for different treatment than from that accorded to similar surrounding land of the same character for the economic benefit of Allen Distribution.

V. DECISION

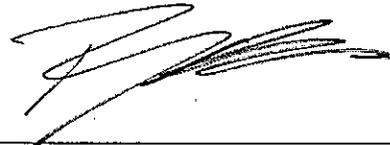
For reasons stated above, the Application of Karl Smith and Betty and Mark Butler is GRANTED, and Ordinances 2016-02 and 2016-04 are hereby deemed invalid.

**WEST PENNSBORO TOWNSHIP
ZONING HEARING BOARD**

Dated: _____

10/27/17

By: _____



Toby Fauver, Chairman

By: _____



David R. Hockenberry II, Vice Chairman

**ANY PERSON AGGRIEVED BY THIS DECISION OF THE WEST PENNSBORO
TOWNSHIP ZONING HEARING BOARD MAY APPEAL TO THE COURT OF
COMMON PLEAS OF CUMBERLAND COUNTY. THE APPEAL MUST BE FILED
WITHIN THIRTY (30) DAYS FROM THE DATE OF THIS DECISION.**