

Development Workshop, Inc.
Room 5170
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1735 Market Street
Philadelphia, PA 19103-7599

May 28, 2009

By Hand Delivery

The Honorable Shelley R. Smith, City Solicitor
City of Philadelphia
1515 Arch Street, 17th Floor
Philadelphia, PA 19107

Re: Central Delaware Riverfront Overlay District, Bill No. 090170 (the "Bill")

Dear Shelley:

We write on behalf of the Development Workshop, Inc. with respect to the Bill. The Workshop is a non-profit organization, whose members are landowners and developers, including those who have been invested in the Central Delaware Riverfront for years; former Philadelphia planning directors and commerce directors; representatives of trade unions; engineering, architectural and other consultants; and members of law firms active in development.

We understand that the Bill is scheduled for a hearing before the Rules Committee on June 3, 2009. At the meeting of the Planning Commission on May 19, Deputy City Solicitor Henry Schwartz stated that the Law Department was going to review the Bill for legality and whether it would work a taking. We respectfully draw your attention to what we believe are fundamental legal defects.

I. The Planning Commission is not Authorized under the Philadelphia Home Rule Charter to Make Zoning Decisions.

Under the City Charter, the power to zone resides in City Council; administrative determinations in the Zoning Board of Adjustment; and permit issuance in the Department of Licenses & Inspections. The Planning Commission's role in the zoning context is to prepare zoning bills and advise City Council. Phila. Charter, §§ 2.2-307, 4.4-601 and 4.4-604. There is no basis under the Charter for a delegation to the Commission of the power to make case-by-case

decisions granting or denying zoning permits. Phila. Charter, § 1.1-102 (1) (providing that the power of the City may only be exercised as “designated and authorized in this chapter”). Under Pennsylvania law, municipal agencies may exercise only those powers authorized in the enabling legislation, here the Charter. See Eves v. Lower Gwynedd Twp. Zoning Bd. of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960).

II. Parcel-by-Parcel Zoning Decisions Are Not Lawful.

Even were the Planning Commission an authorized zoning agency under the City Charter, which it is not, the discretionary power to approve or deny a “plan of development” for a single property conditioned on a subjective determination whether the plan “provides for development appropriate in scale, density, character and use for the surrounding community, and is consistent with applicable plans” is contrary to comprehensive planning principles. To be lawful, zoning requires a comprehensive plan and uniform standards within districts. This is fundamental. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

III. The Bill would Impose an Unlawful Moratorium.

At the meeting of the Planning Commission on May 18, the Bill was presented as a “stop-gap.” Apparently, this characterization was thought to make some of the legal defects appear less relevant, but, on the contrary, the stop-gap itself makes the Bill defective. For the first six months, nothing may proceed within the land zoned commercial. Until the master plan is completed, likely a year and a half away, the Bill would have no lawful basis. There is, however, a 1982 Central Riverfront District Plan, which remains in effect and is the governing plan. The Bill violates the Plan. Claims that the Bill is merely a “placeholder” or “stop-gap,” moreover, cannot be taken seriously.

There is no support in Pennsylvania law for a placeholder zoning ordinance. Zoning moratoriums are not recognized as a valid exercise of the policy power in Pennsylvania. Naylor v. Hellam Twp., 565 Pa. 397, 773 A.2d 770 (2001). Nor may the power to suspend development temporarily be implied. Id. In Hellam, the Supreme Court struck down a temporary moratorium intended to stop development while the municipality revised its comprehensive plan. Id. The Court cited with approval the following language in Boron Oil Co. v. Kimple, 445 Pa. 327, 333, 284 A.2d 744, 747-748 (1971): “However much a rapidly expanding municipality may wish to declare ‘time out’ and stop all development, such effect, by whatever means achieved, would be constitutionally impermissible.” So much more so here, where the municipality is not rapidly expanding.

IV. The Bill Would Create an Unlawful "Floating" Zone in Violation of Comprehensive Planning Principles.

The scheme of conditioning zoning approval on the Commission's case-by-case, discretionary review of a plan of development violates comprehensive planning principles. Euclid, supra. Conditioning permits on the Commission's judgment whether a "development [is] appropriate in scale, density, character and use for the surrounding community" is clearly not acceptable zoning. The Bill would create a floating zone over all commercial properties, all properties east of Columbus Boulevard and all riverfront properties in the Overlay District. The law of the land would no longer be the underlying zoning district, but the specifics of a parcel-by-parcel plan of development to be approved or denied by the Commission in its discretion. This is not lawful zoning. Eves, supra. In Eves, the case-by-case analysis of individual applications and plans was to be performed by township supervisors for "suitability and compliance with the standards they themselves established in the ordinance." 401 Pa. at 219, 164 A.2d at 12. The facts in Eves are equally applicable here.

V. The Bill Would Effect Takings of Private Property Without Just Compensation.

The "setback" contemplated under the Bill -- presently undefined -- goes way beyond a normal setback for light and air, in scope and intent. The change from as-of-right zoning in commercial districts to a prohibition against any development whatsoever unless the landowner constructs a recreational trail is unlawful on its face and works an unconstitutional exaction. Moreover, the Commission would be empowered to use its unlawful, discretionary powers to grant or deny zoning to leverage the setback in order to expropriate private property for a public recreational trail. For example, Section 7 of the Bill provides as follows: "If the property owner does not dedicate the waterfront setback to the City or its agent, the property owner shall be responsible for maintaining the waterfront setback open to the public, constructing a recreational trail and maintaining the recreational trail."

Landowners affected by the proposed overlay made substantial investments in Philadelphia over the years based upon a reasonable expectation that zoning would be coherent and in accordance with the comprehensive plan. Many invested substantially in construction, engineering and design. Commonwealth Court has recently recognized the general principle that under circumstances not unlike those here "zoning changes acutely threaten one's property rights." Highway Materials, Inc. v. Whitmarsh Twp. Bd. of Supervisors, No. 1321 C.D. 2008, slip op. at 7 (Commw. Ct. May 21, 2009). A Riverwalk plan has been in place since 1982, largely on sidewalks and other public property, and is already partially developed. Why this is insufficient has never been explained. The exaction of an unmapped, undefined "recreational trail"-- as proposed in the Bill -- would sever development sites and interfere with reasonable investment-backed expectations. The Bill would in effect create a City street, without going through the statutory procedures for mapping and opening streets. Takings jurisprudence is complex and fact sensitive, to be sure, but the facts here are extreme and support a finding that the Bill is intended to appropriate private property without just compensation and therefore, the

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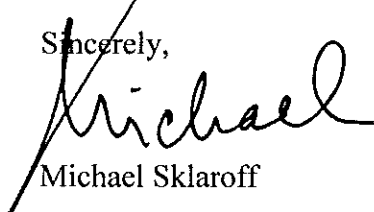
Bill, during its pendency, and when implemented, would work a regulatory taking. See, e.g., Dolan v. City of Tigard, 512 U.S. 374 (1994).

For the foregoing reasons, the Development Workshop recommended that no action be taken on the Bill until these issues were addressed as part of the comprehensive planning process the Planning Commission is about to undertake.

In any event, we ask that the Law Department consider this letter in its analysis.

Best regards.

Sincerely,



Michael Sklaroff

MS/djh
Enclosures

cc: The Honorable Anna C. Verna, Council President (via hand delivery)
The Honorable Frank DiCicco (via hand delivery)
The Honorable Members of the Rules Committee (via hand delivery)
Henry Schwartz, Deputy City Solicitor (via hand delivery)
Mr. Brian Abernathy (via hand delivery)
Development Workshop Members