Zoning Anomalies

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ABSTRACT

Since its enactment in 1968, the Pennsylvania Municipalities Planning Code has provided the legislative foundation for zoning and subdivision/land development ordinances in the 2,500+ municipalities within the Commonwealth. Local governments enact zoning ordinances, zoning maps, and subdivision/land development ordinances. Land use and municipal law practitioners must navigate through this complex regulatory landscape.

In doing so, practitioners encounter gaps and conflicts in substantive and procedural aspects of land use applications. This article identifies a number of zoning anomalies created by everyday encounters in both zoning and subdivision/land development matters. These include the interplay of the MPC with the Sunshine Act and such issues as the role of the public, notice requirements, what constitutes a land use decision, and more.

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I. INTRODUCTION

In 1968, the Pennsylvania legislature enacted the first land use enabling statute, the Pennsylvania Municipalities Planning Code (the MPC).[1] The MPC applies to

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1. 53 P. S. §10101 *et seq*.

boroughs, townships of the first and second class, and home rule communities, but not to Pittsburgh and Philadelphia.[2] Despite that distinction, Pennsylvania courts have cited provisions of the MPC in deciding appeals arising from land use cases in those two cities. For example, in *Hertzberg v. Zoning Bd. of Adjustment of City of Pittsburgh* (1998), the Pennsylvania Supreme Court cited the MPC's standards for granting a variance, with no suggestion that those standards do not apply to Pittsburgh.[3]

The enabling legislation of the MPC gives authority to local governments to enact land use ordinances—zoning and subdivision/land development ordinances.[4] At the same time as the MPC's passage, the Commonwealth Court was established as the second statewide intermediate appellate court. The Commonwealth Court assumed the jurisdiction of what was known as the Commonwealth Docket in the Court of Common Pleas of Dauphin County.[5] Under the Judicial Code, the Commonwealth Court has exclusive jurisdiction over certain appeals involving:

> ***(4) Local government civil and criminal matters.***
> **(i)** All actions or proceedings arising under any municipality, institution district, public school, planning or zoning code. . . .[6]

There are gaps, inconsistencies, and anomalies in the Pennsylvania Municipalities Planning Code. This article identifies key day-to-day issues and offers statutory amendments.

The MPC is not a lengthy statute, and it has been amended several times over the years. One important provision resolves unclear statutory language in favor of the landowner:

> In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.[7]

No statute is perfect, and those who wage zoning and land use battles, typically in the evenings, have encountered certain provisions, or the lack thereof, that a seasoned practitioner would suggest be examined. This article will focus on some of those land use anomalies that warrant attention.

II. ZONING

A. THE ZONING HEARING BOARD AND THE SUNSHINE ACT

Starting with the zoning hearing board, addressed in articles VI and IX of the MPC, aspects of their proceedings have caused uncertainty and confusion. The zon-

2. 53 P.S. §10107.
3. Hertzberg v. Zoning Board of Adjustment of City of Pittsburgh, 721 A.2d 43, 46-47 (Pa. 1998).
4. 53 P.S. §§10105, 10108.
5. The first president judge of the Commonwealth Court was James S. Bowman, a former state legislator and judge of the Court of Common Pleas of Dauphin County. This author has it on good authority that President Judge Bowman would remark that when he served in the state's legislature, he was considered the constitutional law expert, since it was his understanding that he may have been the only legislator who actually read the Constitution.
6. 42 Pa.C.S. §762(a)(4).
7. 53 P.S. §10603.1.

ing hearing board is a quasi-judicial body required to conduct public hearings. In *Kennedy vs. Upper Milford Township Zoning Hearing Board*,[8] the Pennsylvania courts grappled with the applicability of the Sunshine Act to deliberations of a zoning hearing board (ZHB). Under the Sunshine Act,[9] as a general rule, "with exceptions there enumerated: 'Official action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public. . . .'"[10] In this case, the objectors argued that the board had violated the Sunshine Act when it took a recess after hearing evidence and argument, then came back and announced its decision. The trial court found no violation of the Sunshine Act, but a panel of the Commonwealth Court reversed. The panel "rejected the Board's contention that the recess was a lawful executive session." It reasoned that:

> the ZHB's quasi-judicial deliberations were not the sort that, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law. Therefore, the ZHB's recess does not constitute an executive session under section 708(a)(5) of the [1998] Sunshine Act.[11]

The Pennsylvania Supreme Court "granted allowance of appeal . . . in order to clarify the relationship between the 'open meeting' requirement of the Commonwealth's Sunshine Act and the quasi-judicial deliberative responsibilities of local zoning hearing boards."[12]

There was no question that the board had deliberated in private:

> The Board here concedes, as it has conceded at every stage of these proceedings, that it conducted quasi-judicial deliberations during the recess noted in the transcript. Relying on section 708 of the 1998 Sunshine Act, 65 Pa.C.S. §708, the Board argues that such deliberations are expressly permitted by the Sunshine Act to be conducted in a private executive session. The legislative provision cited includes in pertinent part, the following:
> §708. Executive Session
> (a) Purpose.-An agency may hold an executive session for one or more of the following reasons:
> ....
>
> (5) To review and discuss agency business which, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law, including matters related to the initiation and conduct of investigations of possible or certain violations of the law and quasi-judicial deliberations.[13]

The court unanimously upheld the board's position, finding that, "quasi-judicial deliberations are a proper subject of private executive sessions."[14] The court reasoned that:

> To the extent that the Board members discussed, during the recess, the pending application looking toward the rendering of a decision, the discussions constituted deliberations by an agency possessed only of quasi-judicial authority within the intendment of the 1998 Sunshine Act.[15]

8. 834 A.2d 1104 (Pa. 2003).
9. 65 Pa.C.S. §§701–716.
10. Kennedy, *supra* note 9 at 1105-06, n.1.
11. *Id*. at 1109.
12. *Id*. at 1105-06.
13. *Id*. at 1113.
14. *Id*. at 1106.
15. *Id*. at 1117.

B. PUBLIC VS. PARTY

Section 908 of the MPC[16] addresses "parties to the hearing." A zoning hearing board hearing requires public notice, which the MPC defines in section 107.[17] At a minimum, public notice is published once each week for two successive weeks in a newspaper of general circulation. Some municipalities add to those requirements the posting of the property and individual notice to property owners within a certain radius of the subject property.

The public aspect of these hearings leads to the question of the rights and role of members of the public who are not parties. Section 908(5) of the MPC affords parties ". . . the right to be represented by counsel and . . . the opportunity to respond and present evidence and argument and cross-examine adverse witnesses on all relevant issues."[18] What are the rights of members of the public attending the hearing who do not seek party status? A related issue is the procedure for becoming a party. This varies from board to board.

Many zoning hearing boards blur the line between parties and non-parties, allowing all members of the public to testify under oath and to question the witnesses for the applicant and other parties. The sworn testimony of a non-party member of the public presents all sorts of problems. For example—

- Can the zoning hearing board rely upon that testimony in its findings of facts and ultimate decision?
- Do sworn comments and/or participation by a non-party member of the public transform that member of the public into a *de facto* party?
- Can the landowner question the non-party?

One suggestion is to clarify the MPC to confirm and confine the role of members of the public to providing unsworn comments with no evidentiary value.

C. WHAT CONSTIUTES A LAND USE DECISION?

What constitutes a land use decision? A "decision" is defined in MPC section 107(b).[19] In a case arising from one municipality's opposition to a land development application in the abutting municipality, the objecting municipality filed its appeal 30 days from the date of the township's written decision to the developer. The developer challenged the timeliness of the appeal (a questionable strategy consuming several years of litigation), contending that the 30-day appeal period for the objecting municipality ran from the vote at a public meeting. The Pennsylvania Supreme Court rejected that contention, emphasizing that in land use appeals a decision is a writing and not a vote at a public meeting.[20] [Note that in routine subdivision and land development proceedings, there is no requirement to send objectors notice of the decision. In *Narberth*, the solicitor for the objecting municipality did receive a copy of the notice of decision sent to the landowner in time to file the appeal within 30 days from the date of that notice.]

Then we come to the decision of the zoning hearing board. It has been established by common law that the vote of a zoning hearing board does not constitute a land

16. 53 P.S. §10908(3).
17. 53 P.S. §10107.
18. 53 P.S. §10908(5).
19. 53 P.S. §10107(b).
20. Narberth Borough v. Lower Merion Township, 915 A.2d 626 (Pa. 2007).

use decision. In the case of *Seipstown Village, LLC v. Zoning Hearing Board of Weisenberg Township*,[21] the zoning hearing board had voted in favor of the developer and announced that vote at the hearing, then was persuaded by objectors to reopen the hearing, did so, then publicly voted to reject the developer's application and issued a written decision to that effect. All of this transpired before any decision was committed to writing. On appeal to the Commonwealth Court, the developer raised three issues, but of concern here was its contention that the board's oral vote constituted a final decision by the MPC and therefore the subsequent actions of the board were improper, the Commonwealth Court firmly rejected this position, reasoning:

> Under the MPC a "decision" is defined as a "final adjudication" of a zoning hearing board. Section 107(b) of the MPC, 53 P.S. §10107(b). The board is required to render a "written decision" within 45 days after the last hearing, otherwise an applicant's application is deemed approved, and such decision must be personally delivered to the applicant or mailed to him. Sections 908(9)-(10) of the MPC, 53 P.S. §§10908(9)-(10). The decisional law of this Commonwealth confirms that a final order of a zoning hearing board must be reduced to writing. *See, e.g.*, *Mountain Protection Alliance v. Fayette County Zoning Hearing Board*, 757 A.2d 1007, 1008 n. 1 (Pa.Cmwlth.2000) (where zoning hearing board orally denied applicant's request for special exception but failed to reduce its decision to writing, applicant's request deemed automatically granted under section 908(9) of the MPC); *Relosky v. Sacco*, 514 Pa. 339, 523 A.2d 1112 (1987) (holding that the language of section 908(9) of the MPC explicitly directs a zoning board to render a written decision). In light of the foregoing, we conclude that the Board's written decision dated June 22, 2004, was the official, final decision in this matter and not the oral vote taken May 12, 2004.

Therefore, continued the court:

> Once it is established that the Board's May 12, 2004, oral vote was not a final decision, it is clear that the Board did not improperly "reconsider" that decision. Rather, at that point in the proceedings, there was no decision to reconsider. The Board simply continued the proceedings to allow Objectors their opportunity to be heard, a right guaranteed to them under section 908(5) of the MPC, 53 P.S. §10908(5) (all parties before a zoning hearing board "shall be afforded the opportunity to respond and present evidence and argument."). The members of the Board were free to take this, or virtually any other action, up until the time they executed a final written decision. They certainly did not abuse their discretion in this case by correcting a glaring oversight within minutes of their oral vote and allowing Objectors an opportunity to present their case.[22]

This is an important practice point if the oral vote does not go your client's way. You might try to persuade the board for a 2nd bite of the land use apple.

Section 908(9) of the MPC requires that the zoning hearing board render its written decision within 45 days from the date of the last hearing. If the application is contested or denied, the zoning board must render a decision with findings of fact, conclusions of law, and reasons.[23] A copy of the final decision must be ". . . delivered to the applicant personally or mailed to him not later than the day following its date."[24] Some zoning hearing boards send two different written confirmations of the oral vote.

- The first is a short ***notice of decision*** which tells the applicant whether the application was granted or denied.

21. 882 A.2d 32 (Pa. Cmwlth. 2005).
22. *Id*. at 36-37.
23. 53 P.S. §10908(9).
24. 53 P.S. §10908(10).

- Where the application is contested or denied, that same zoning board issues the required findings of fact, conclusions of law, and reasons.

Which date of mailing begins the 30-day appellate countdown: the notice of decision and/or the decision with findings of fact conclusions of law, and reasons?

The difference between a notice of a decision and a decision with findings of fact, conclusions of law, and reasons was discussed by the Commonwealth Court in *Pendle Hill v. Zoning Hearing Bd. of Nether Providence Twp*.[25] The court ultimately relied upon the Supreme Court decision in *Narberth Borough v. Lower Merion Township*:

> There, the court held that the 30–day appeal period set forth in section 1002–A of the MPC,[8] 53 P.S. §11002–A ("All appeals from all land use decisions rendered pursuant to Article IX shall be taken to the court of common pleas of the judicial district wherein the land is located and shall be filed within 30 days after entry of the decision as provided in 42 Pa.C.S. §5572 (relating to time of entry of order) . . ."") begins to run from the mailing of the *written decision*. *See* 2 ROBERT S. RYAN, PENNSYLVANIA ZONING LAW AND PRACTICE §11.3.2 (2016 cumulative supp.) ("Where a written decision is entered, the rule remains that the 30–day appeal period runs from the date of the written decision, notwithstanding that the protestant was present at the earlier formal vote.") (citing *Narberth Borough*).[26]

Commonwealth Court cited two of its own earlier decisions: *Bishop Nursing Home, Inc. v. Zoning Hearing Board of Middletown Township*[27] *and Border v. Zoning Hearing Board of City of Easton*.[28] *Border* and *Bishop Nursing* held that for objectors the entry of decision is the decision with findings, *etc.* But cases have also held that the brief notice of the decision satisfies the requirement to render a decision within 45 days from the last hearing.[29] Further complicating this issue is the absence of a deadline for rendering of the decision with findings of fact, conclusions of law, and reasons when the zoning hearing board first sends a notice of decision. A writing may be a decision in one context, but not in another.

Montgomery County addressed this problem in its revised local rule governing land use appeals. Rule 14.a(ii) now states:

> Where appeals are filed from both a notice of decision and a decision containing findings of fact, conclusions of law, and reasons, the appeals shall be filed under the same case number assigned to the appeal filed first. The second filed notice of appeal, if any, shall be titled "Supplemental Notice of Appeal."[30]

This local rule tracks the practice of land use lawyers who out of caution appeal both the notice of decision and the decision with findings of fact, conclusions of law, and reasons.

Is there a legislative fix to this uncertainty? Should the law require a decision with findings of fact, conclusions of law, and reasons for every zoning hearing board application? A pushback against such a requirement would be the imposition and extra expense imposed on municipal boards in issuing more detailed decisions and the difficulty in justifying a decision where the burden of proof was not met but the zoning stars were aligned, sometimes referred to as a "winker."

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25. 134 A.3d 1187 (Pa. Cmwlth. 2016).
26. *Id*. at 1201 The *Pendle Hill* court also cited with approval the article by this author, "Avoiding Pitfalls in Assuring Timeliness of Appeals in Land Use Cases," which appeared in this journal at 78 Pa. B.A.Q. 77 (2007).
27. 638 A.2d 383, 386 (Pa. Cmwlth. 1994).
28. 460 A.2d 918, 920 (Pa. Cmwlth. 1983).
29. *See, e.g*., Heisterkamp v. Zoning Hearing Board of City of Lancaster, 383 A.2d 1311 (Pa. Cmwlth. 1978).
30. *Available at* https://www.montcopa.org/DocumentCenter/View/5540/Rule--14-Zoning-Appeals.

D. NOTICE TO OBJECTORS

Related to this decisional anomaly is the lack of a requirement for notice to objectors when an appeal to the court of common pleas is filed. MPC section 109(1) provides for notice to landowners with regard to public hearings: "An owner of a tract or parcel of land . . . may request that the municipality provide written or electronic notice of a public hearing which may affect such tract or parcel of land." This applies to both zoning hearing board and subdivision/land development matters, particularly in the latter where hearings are not conducted unless the municipality exercises its discretion to hold a hearing in a subdivision and land development matter authorized by section 508(5) of the MPC.[31]

Montgomery County addresses this concern in Rule 14.b(i), requiring the appellant to serve a copy of the notice of appeal upon ". . . all persons granted party status before the zoning hearing board or governing body."[32] Note that this might not be crystal clear, since an objector may not be deemed a party in a subdivision/land development matter where an optional hearing is not conducted.

E. ZONING DETERMINATION/PRELIMINARY OPINION

Another vexing situation concerns a landowner's request for a zoning determination or preliminary opinion which is within the discretion of the municipality. An uncooperative municipality may not oblige the landowner by responding to the request. The MPC mentions zoning determinations in the definition section 107(b)[33] and in delineating the zoning hearing board's appellate jurisdiction in MPC section 909.1(a)(3).[34] MPC section 916.2 provides for a "preliminary opinion" to avoid a challenge to the zoning ordinance or map.[35]

The court decisions and ramifications are diverse:

- Failure to appeal a determination within 30 days renders the determination final and unassailable.[36]
- There is no publication requirement for issuance of a determination. In practice, determinations are communicated by a letter to the landowner, or as noted below, in conversations.[37]
- An oral determination qualifies.[38]
- A recent decision distinguished between a determination and an unappealable "report," an MPC defined term in section 107(b).[39,40]

Should a landowner have a right to a determination or a preliminary opinion thereby providing a foundation for a civil action in mandamus? MPC section 910.1 provides "Nothing contained in this article shall be construed to deny the appellant the right to proceed directly to court where appropriate, pursuant to the Pennsylva-

31. 53 P.S. §10508(5).
32. *Supra* note 31.
33. 53 P.S. §10107(b).
34. 53 P.S. §10909.1(a)(3).
35. 53 P.S. §10916.2. *See* Borough of Jenkintown v. Board of Commissioners of Abington Township, 858 A.2d 136 (Pa. Cmwlth. 2004).
36. Johnson v. Upper Macungie Township, 638 A.2d 408 (Pa. Cmwlth. 1994).
37. Moy v. Zoning Hearing Board of Municipality of Monroeville, 912 A.2d 373 (Pa. Cmwlth. Ct. 2006).
38. North Codurus Township v. North Codorus Township Zoning Hearing Board, 873 A.2d 845 (Pa. Cmwlth. 2005).
39. 53 P.S. §10107(b).
40. *In re*: Provco Pinegood Sumneytown, LLC, 216 A.3d 512 (Pa. Cmwlth. 2019).

nia Rules of Civi Procedure No. 1091 (relating to action in mandamus." Is this consistent with the line of cases imposing the duty of good faith on a municipality (and a corresponding duty of the developer)? Should those obligations be codified?

III. SUBDIVISION AND LAND DEVELOPMENT

A. THE NATURE OF ADMINISTRATIVE PROCEEDINGS

Everyday issues are not restricted to zoning. In subdivision/land development matters, if the optional hearing is not held by the municipality, does the landowner have the right to cross-examine persons who speak in opposition to the application? The Commonwealth Court rejected the landowner's desire to cross-examine.[41] This echoes the Commonwealth Court's previous holding that at a legislative hearing on a proposed zoning amendment under section 609 of the MPC,[42] members of the public have no right to cross-examine persons called to speak for the municipality or to call members of the municipality's governing body as witnesses.[43]

As noted previously with regard to zoning matters, unless a local rule provides otherwise, where objectors seek to participate in an appeal relating to a subdivision/land development matter, there is no MPC requirement that the objectors receive notice of the filing of an appeal. In zoning matters, even if an objector has been granted party status before the zoning hearing board, if the objector is not the appellant, the objector must intervene in the court of common pleas by petition in accordance with the Pennsylvania Rules of Civil Procedure. This is one of the few applications of the Pennsylvania Rules of Civil Procedure to land use appeals which are statutory appeals and not civil actions.[44]

B. WAIVERS AND MODIFICATIONS

Another topic warranting discussion relates to large, complex, and contested land use projects which inevitably entail requests for waivers or modifications from the subdivision and land development regulations. The provisions of waivers themselves can be problematic. Section 512.1(b) of the MPC requires that all requests ". . . state in full the grounds and facts of unreasonableness or hardship on which the request is based. . . ."[45]

The bar of proving hardship is a high one. Some municipalities rely solely on proof of hardship while others provide looser standards for the grant of the request. The policy is not always consistently applied. In an unreported opinion, the Commonwealth Court has held that in addition to the express standard in section 512.1 of the MPC, ". . . a waiver [is] proper where development offers a substantial equivalent to a subdivision requirement, where an additional requirement would offer little or no additional benefit, and where literal enforcement of the requirement would frustrate the effect of improvements."[46] Can a landowner rely on this opinion to convince the municipality that hardship is not the sole standard? As a matter of practice, we know that waivers/modifications are granted in exchange for concessions, fees in lieu, or off-site improvements which are otherwise *verboten*.

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41. *Id*.
42. 53 P.S. §10609.
43. Perin v. Board of Supervisors of Washington Township, 563 A.2d 576 (Pa. Cmwlth. 1989).
44. *See* 53 P.S. §11004-A.
45. 53 P.S. §10512.1(b).
46. Ellzey v. Upper Gwynedd Township Board of Commissioners, No. 990 C.D. 2019 (Pa. Cmwlth. 2020), opinion not reported. [Regarding unreported opinions, *see* Commonwealth Court Internal Operating Procedures, §414.]

There is a further procedural problem for large projects that require or seek waivers or modifications. This is particularly true in light of the one-good-reason principle that applies to rejection of subdivision and land development applications.[47] There is no procedure that requires or even allows a municipality to hold a separate meeting and consider waivers or modifications in advance of the decision on the underlying application for subdivision and land development. One can see how a municipality's refusal to consider waivers or modifications in advance of the decision weaponizes the municipality that wants to reject the application. If the disposition of waivers and modifications is not decided until the date of the meeting at which the underlying application will be considered, a denial of a waiver/modification will provide the municipality with the one good reason to justify the rejection of the application. This denies the landowner the reasonable opportunity to revise the application and plans which the appellate courts have affirmed. *Nextel Partners, Inc. v. Clarke Summit Borough*, 958 A.2d 587 (Pa. Cmwlth. 2008).

C. COMPILING A RECORD

Establishing a procedure for larger, more complicated, and controversial applications merits consideration. Should a landowner have the right to a hearing to create a record? Without a hearing, what is the evidentiary record? In a hotly contested matter in Delaware County, the landowner argued that there was an "administrative record" which automatically was part of the record to be filed with the court. Without a hearing and an evidentiary record, the landowner or objector is left with seeking additional evidence under the provisions of section 1005-A of the MPC.[48] The applicable standards include the rejection of relevant evidence, the preclusion of the introduction of relevant evidence, bad faith claims, and whatever the trial court might deem appropriate.

Once again, Montgomery County has tried to address this in local Rule 14.c(iii):

> The record in an appeal of a decision of the governing body or planning commission involving a subdivision, land development, or planned residential development shall include, but not be limited to a copy of the complete municipal zoning ordinance, zoning map, subdivision and land development ordinance, the application, transcripts, meeting minutes, plans, drawings, other materials submitted by the applicant, municipal staff and consultant review letters, county review letters, and the written decision or approval. The return of record shall include a certification from the zoning officer or other designated municipal officer that the return is the complete and accurate record and that the ordinances are those in effect and applicable to the subject matter of the appeal.[49]

IV. RECOMMENDED AMENDMENTS TO THE MPC

For the land use practitioner, there are difficulties at the outset in familiarizing oneself with the ordinances, regulations, policies, protocols, and personalities of each municipality. The mission is rendered more complicated by anomalies in land use law and procedure, some of which are identified in this article. Below are suggested edits to the MPC which, if enacted, should clarify several problem areas. (Note: suggested amendments are in **bold**.)

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47. Shelbourne Square Associates, L.P. v. Board of Supervisors of Township of Exeter, Berks County, 794 A.2d 946 (Pa. Cmwlth. 2002).
48. 53 P.S. §11005-A.
49. *Supra* note 31.

Section 107. Definitions.
(b) The following words and phrases when used in Articles IX and X-A shall have the meanings given to them in this subsection unless the context clearly indicates otherwise:

"Board," any body granted jurisdiction under a land use ordinance or under this act to render final adjudications.

"Decision," final adjudication of any board or other body granted jurisdiction under any land use ordinance or this act to do so, either by reason of the grant of exclusive jurisdiction or by reason of appeals from determinations. All decisions shall be appealable to the court of common pleas of the county and judicial district wherein the municipality lies. **The decision of a zoning hearing board contains findings of fact, conclusions of law, and reasons.**

"Determination," final written action by an officer, body or agency charged with the administration of any land use ordinance or applications thereunder, except the following:

(1) the governing body.

(2) the zoning hearing board.

(3) the planning agency, only if and to the extent the planning agency is charged with final decision on preliminary or final plans under the subdivision and land development ordinance or planned residential development provisions.

Determinations shall be appealable only to the boards designated as having jurisdiction for such appeal. "Hearing," an administrative proceeding conducted by a board pursuant to section 909.1.

"Land use ordinance," any ordinance or map adopted pursuant to the authority granted in Articles IV, V, VI and VII.

"Report," any letter, review, memorandum, compilation or similar writing made by any body, board, officer or consultant other than a solicitor to any other body, board, officer or consultant for the purpose of assisting the recipient of such report in the rendering of any decision or determination. All reports shall be deemed recommendatory and advisory only and shall not be binding upon the recipient, board, officer, body or agency, nor shall any appeal lie therefrom. Any report used, received or considered by the body, board, officer or agency rendering a determination or decision shall be made available for inspection to the applicant and all other parties to any proceeding upon request, and copies thereof shall be provided at cost of reproduction.

Section 508. Approval of Plats. All applications for approval of a plat (other than those governed by Article VII), whether preliminary or final, shall be acted upon by the governing body or the planning agency within such time limits as may be fixed in the subdivision and land development ordinance but the governing body or the planning agency shall render its decision and communicate it to the applicant not later than 90 days following the date of the regular meeting of the governing body or the planning agency (whichever first reviews the application) next following the date the application is filed, or after a final order of the court remanding an application, provided that should the said next regular meeting occur more than 30 days following the filing of the application, or the final order of the court, the said 90-day period shall be measured from the 30th day following the day the application has been filed.

(5) Before acting on any subdivision plat, the governing body or the planning agency, as the case may be, ~~**may hold a public hearing thereon after public notice**~~**, and as requested by the landowner, shall hold a public hearing thereon after public notice. A landowner shall also have the right to a public hearing after public notice for a determination of requested modifications or waivers. An appeal of an adverse determination on**

the request for modification or waiver shall be deferred until the decision on the underlying subdivision or land development application.

Section 512.1. Modifications/waivers.

(b) All requests for a modification **or waiver** shall be in writing and shall accompany and be a part of the application for development. The request shall state in full the grounds and facts of unreasonableness or hardship on which the request is based, the provision or provisions of the ordinance involved and the minimum modification necessary. **Notwithstanding a provision to the contrary in the subdivision and land development ordinance, a modification or waiver shall be granted where a development offers a substantial equivalent to a subdivision or land development requirement, where an additional requirement would offer little or no additional benefit, and where literal enforcement of a requirement would frustrate the effect of improvements.**

§10603.1. Interpretation of ordinance provisions

In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.

Upon written request of a landowner, the municipal zoning officer or municipal engineer shall provide a written determination within 30 days from the date of mailing of the request.

Section 908. Hearings. The board shall conduct hearings and make decisions in accordance with the following requirements:

(5) The parties shall have the right to be represented by counsel and shall be afforded the opportunity to respond and present evidence and argument and cross-examine adverse witnesses on all relevant issues. **Members of the public who are not granted party status shall have the right to offer unsworn comment but cannot present evidence or question witnesses.**

(9) The board or the hearing officer, as the case may be, shall render a written decision ~~**or, when no decision is called for, make written findings on the application within 45 days after the last hearing before the board or hearing officer. Where the application is contested or denied, each decision shall be**~~ accompanied by findings of fact and conclusions based thereon together with the reasons therefor **within 45 days after the last hearing before the board or hearing officer**. Conclusions based on any provisions of this act or of any ordinance, rule or regulation shall contain a reference to the provision relied on and the reasons why the conclusion is deemed appropriate in the light of the facts found. **The board or hearing may issue a summary notice of the decision, but that notice shall not constitute the decision of the board or hearing officer.** If the hearing is conducted by a hearing officer and there has been no stipulation that his decision or findings are final, the board shall make his report and recommendations available to the parties within 45 days and the parties shall be entitled to make written representations thereon to the board prior to final decision or entry of findings, and the board's decision shall be entered no later than 30 days after the report of the hearing officer. Except for challenges filed under section 916.1 where the board fails to render the decision within the period required by this subsection or fails to commence, conduct or complete the required hearing as provided in subsection (1.2), the decision shall be deemed to have been rendered in favor of the applicant unless the applicant has agreed in writing or on the record to an extension of time. When a decision has been rendered in favor of the applicant because of the failure of the board to meet or render a decision as hereinabove provided,

the board shall give public notice of said decision within ten days from the last day it could have met to render a decision in the same manner as provided in subsection (1) of this section. If the board shall fail to provide such notice, the applicant may do so. Nothing in this subsection shall prejudice the right of any party opposing the application to appeal the decision to a court of competent jurisdiction.

Section 916.2. Procedure to Obtain Preliminary Opinion. In order not to unreasonably delay the time when a landowner may secure assurance that the ordinance or map under which he proposed to build is free from challenge, and recognizing that the procedure for preliminary approval of his development may be too cumbersome or may be unavailable, the landowner may advance the date from which time for any challenge to the ordinance or map will run under section 914.1 by the following procedure:

(1) The landowner may submit plans and other materials describing his proposed use or development to the zoning officer for a preliminary opinion as to their compliance with the applicable ordinances and maps. Such plans and other materials shall not be required to meet the standards prescribed for preliminary, tentative or final approval or for the issuance of a building permit so long as they provide reasonable notice of the proposed use or development and a sufficient basis for a preliminary opinion as to its compliance.

(2) The zoning officer shall provide a written preliminary opinion within 30 days of the request.

(3) If the zoning officer's preliminary opinion is that the use or development complies with the ordinance or map, notice thereof shall be published once each week for two successive weeks in a newspaper of general circulation in the municipality. Such notice shall include a general description of the proposed use or development and its location, by some readily identifiable directive, and the place and times where the plans and other materials may be examined by the public. The favorable preliminary approval under section 914.1 and the time therein specified for commencing a proceeding with the board shall run from the time when the second notice thereof has been published.

Section 1003-A. Appeals to Court; Commencement; Stay of Proceedings.

(c) If the appellant is a person other than the landowner of the land directly involved in the decision or action appealed from, the appellant, within seven days after the land use appeal is filed, shall serve a true copy of the land use appeal notice by mailing said notice to the landowner or his attorney at his last known address. For identification of such landowner, the appellant may rely upon the record of the municipality and, in the event of good faith mistakes as to such identity, may make such service nunc pro tunc by leave of court. **If the appellant is the landowner, the landowner shall serve a copy of that appeal on all persons granted party status and to all persons who have sent written requests to the municipality to be notified of a land use decision.**

…

(e) **The record in an appeal of a decision of the governing body or planning commission involving a subdivision, land development, or planned residential development shall include, but not be limited to a copy of the complete municipal zoning ordinance, zoning map, subdivision and land development ordinance, the application, transcripts, meeting minutes, plans, drawings, other materials submitted by the applicant, municipal staff and consultant review letters, county review letters, and the written decision or approval. The return of record shall include a certification from the zoning officer or other designated municipal officer that the return is the complete and accurate record and that the ordinances are those in effect and applicable to the subject matter of the appeal.**