

Who's Regulating the Regulators? A Proposal for State Oversight of Natural Resource Zoning Regulations in Pennsylvania

Clair E. Wischusen*

I. INTRODUCTION

In drafting zoning ordinances, municipalities make policy decisions that can have major economic consequences. Given the powerful effects of zoning, municipalities should strive to enact land use regulations that are based on sound science and reflect the policy goals of the entire community.¹ Traditionally, local governments tried to accomplish these goals by dividing the municipality into different districts, specifying certain compatible land uses within each district and then subjecting each district to its own set of zoning regulations.² Land use regulations are applied uniformly within each district to ensure that landowners of similarly situated parcels are subject to the same restrictions for the common benefit of one another.³ This

* Candidate for Juris Doctorate, May 2009, Temple University James E. Beasley School of Law. Special thanks to Robert W. Gundlach, Jr., Esq. of Fox Rothschild, LLP, and to Professor Jane B. Baron.

¹ See 53 PA. STAT. ANN. § 10603(a) (1997) (explaining that zoning ordinances should reflect the policy goals of the community and that they should “give consideration to the character of the municipality, the needs of the citizens and the suitabilities and special nature of particular parts of the municipality”).

² See 1 EDWARD H. ZIEGLER, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1:3 (4th ed. 1974) (stating that early zoning codes: 1) divided the municipality into several districts, usually residential, business and industrial; 2) set forth the allowable uses for each district; and 3) imposed fixed restrictions on the uses allowed in each district).

³ See *In re Realen Valley Forge Greenes Assocs.*, 838 A.2d 718, 729 (Pa. 2003) (“[Z]oning regulations

concept, known as Euclidean zoning, traces to the 1926 U.S. Supreme Court case *Village of Euclid, Ohio v. Ambler Realty Co.*⁴ In addition to providing for more equitable regulations, Euclidean zoning techniques are widely accepted because they generally do not upset established patterns of land use.⁵

Pennsylvania municipalities are increasingly adopting zoning regulations to preserve natural resources.⁶ Many municipalities adopted natural resource regulations by enacting environmental ordinances as separate chapters in their municipal zoning codes.⁷ These ordinances impose additional land use restrictions on properties containing such natural features as farmland soils, watercourses, wetlands, steep slopes and woodlands.⁸ Natural resource zoning regulations are inherently more difficult to implement on a uniform basis because natural resources are not equally dispersed among properties. The immediate effect is to subject similarly situated parcels to varying degrees of regulation, which in turn can have startling economic consequences. For example, suppose Landowners A and B have similarly sized parcels in the same zoning district. Both parcels are virtually identical except for the fact that Landowner A's parcel is largely composed of prime farmland soils, while Landowner B's parcel is not. If the township decides to adopt a natural resource regulation that requires a sixty percent set-aside of prime farmland soils, Landowner A's parcel may now be worth a third of the value of Landowner B's parcel because of the resulting loss of development potential.⁹

While in some instances this type of disparate treatment may be necessary to preserve natural resources, the potential for abuse is great. Courts in Pennsylvania generally uphold natural resource regulations without a close examination of their

must accomplish 'an average reciprocity of advantage' . . . by which '[a]ll property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another.'"(citations omitted).

⁴ 272 U.S. 365 (1926).

⁵ See ZIEGLER, *supra* note 2, at 1:3 (stating that traditional zoning techniques have been widely accepted because: 1) they generally do not threaten established land use patterns; 2) they help to preserve the character of residential areas; 3) they help to maintain, and even inflate, property values; and 4) they are perceived to pose little threat of being exercised in an arbitrary manner since they are exercised at the local level).

⁶ See GOVERNOR'S CENTER FOR LOCAL GOVERNMENT SERVICES, ZONING 1 (9th ed. 2003) (stating that local governments in Pennsylvania increasingly use zoning measures to preserve natural features, i.e., wetlands, forests, aquifers and farmland); see also John R. Nolon, *Creating a Local Environmental Law Program: Building a National Framework of Laws*, 36 REAL EST. L.J. 351, 351-52 (2007) (noting that in the 1960s local governments used large-lot zoning as a crude way of protecting natural resources but that recently local governments have shifted to using natural resource regulations to protect natural features such as trees, hillsides, stream beds, wetlands, viewsheds and wildlife habitat).

⁷ See, e.g., BEDMINSTER TOWNSHIP, BUCKS COUNTY, PA., ZONING ORDINANCE art. 6, § 601 (2005) ("Environmental Performance Standards"); SPRINGFIELD TWP., DELAWARE COUNTY, PA., ZONING ORDINANCE art. 5, § 509 (2007) ("Natural Resource Mapping and Site Capacity Calculations").

⁸ See, e.g., BEDMINSTER TOWNSHIP, BUCKS COUNTY, PA., ZONING ORDINANCE art. 6, § 601 (2005) (providing additional restrictions for properties containing flood plains, flood plain soils, steep slopes, woodlands, lakes, ponds, wetlands, swales, streams, lake and pond shorelines, hydric soils, prime farmland, topsoil, riparian buffers); SPRINGFIELD TOWNSHIP, DEL. COUNTY, PA., ZONING ORDINANCE art. 5, § 509 (2007) (providing additional regulations for floodplains, floodplain soils, lakes, ponds, wetlands, streams and watercourses, steep slopes, woodlands, tree protection areas and carbonate geology areas).

⁹ The above hypothetical is based on an example provided by real estate attorney Robert W. Gundlach, Jr., during a panel discussion set forth in Sarah Larson, *Our Land, Our Future*, THE INTELLIGENCER, June 5, 2002, at A9.

scientific validity. As a result, municipalities can use overly stringent natural resource regulations with little to no scientific merit as a means to prevent or stifle development without attracting much judicial scrutiny. In addition to violating constitutionally protected property rights, these exclusionary practices harm the region as a whole by promoting sprawl, displaced development and a lack of affordable housing.¹⁰

This comment examines the use of natural resource zoning regulations by Pennsylvania municipalities and concludes that additional oversight is necessary to protect individual property rights. Part II examines the scope of municipal authority to adopt natural resource zoning regulations and identifies the legal standard Pennsylvania courts use to determine abuses of municipal discretion. Part III discusses the mechanics of several types of natural resource regulations adopted by Pennsylvania municipalities and analyzes appellate court decisions addressing challenges to each of these types of regulations. Part IV evaluates the effectiveness of judicial review and discusses the problems with local control over natural resource regulations. Part V proposes that state agencies promulgate natural resource regulations with additional oversight by the Independent Regulatory Review Commission. This comment argues that although state oversight of natural resource regulations will require significant up-front time and expenditures, this approach will protect property rights by ensuring that natural resource regulations are based on sound scientific data.

II. LEGITIMATE POLICE POWER PURPOSES

In Pennsylvania, as in most states, municipalities have no inherent authority, but can only exercise powers that are expressly granted or implied by the state's enabling legislation.¹¹ The majority of Pennsylvania municipalities derive their zoning authority from the Pennsylvania Municipalities Planning Code (the "MPC"),¹² which lodges the authority to adopt and revise zoning measures with the governing body of a municipality¹³ and grants advisory authority to the township planning commission.¹⁴ The MPC provides municipalities with the authority to enact zoning measures for a variety of police power purposes, including, the promotion and protection of "the public health, safety, morals and the general welfare."¹⁵

The MPC's broad mandate requires municipalities to accommodate numerous competing interests in the promulgation of zoning ordinances.¹⁶ For example,

¹⁰ See *infra* Part IV.B.

¹¹ This classic principle which has been adopted by the courts of most states is found in 1 DILLON, MUNICIPAL CORPORATIONS 448-55 (5th ed. 1911). The Pennsylvania Supreme Court's adoption of this principle can be found in *In re Gagliardi's Appeal*, 163 A.2d 418, 419 (Pa. 1960) ("A municipality is a creature of the state and possesses only such powers of government as are expressly granted to it and as are necessary to carry the same into effect.").

¹² 53 PA. STAT. ANN. §§ 10101-11202 (West 1997). The MPC governs all of Pennsylvania with the exception of Pittsburgh and Philadelphia, which are instead governed by home rule charters. See ROBERT S. RYAN, PENNSYLVANIA ZONING LAW AND PRACTICE § 2.1.4 (2001) (citing same).

¹³ 53 PA. STAT. ANN. § 10601.

¹⁴ *Id.* § 10209.1.

¹⁵ *Id.* § 10604(1).

¹⁶ See *id.* § 10604. Section 10604 of the MPC requires that provisions of municipal zoning ordinances

section 10604(1) of the MPC requires that zoning provisions promote, protect and facilitate “coordinated and practical development . . . as well as preservation of the natural, scenic and historic values in the environment and preservation of forests, wetlands, aquifers and floodplains.”¹⁷ Similarly, section 10603(g)¹⁸ instructs municipalities to protect “prime agricultural land” and “natural and historic features and resources,” while section 10604(5) states that municipalities need to accommodate “reasonable overall community growth . . . and opportunities for development of a variety of residential dwelling types and nonresidential uses.”¹⁹ Because the legislature failed to clearly direct municipalities on how to weigh these competing interests, courts become the final arbiters in determining whether a zoning regulation constitutes a valid exercise of municipal police power.

Most challenges to natural resource regulations are brought as substantive validity challenges, which may also be coupled with a proposed curative amendment to the ordinance.²⁰ Substantive validity challenges must be brought before either the municipal governing body responsible for adopting the regulation or a zoning hearing board, the latter of which is composed of members appointed by the governing body.²¹ Landowners can appeal the decision of either municipal entity to

be designed:

(1) To promote, protect and facilitate any or all of the following: the public health, safety morals, and the general welfare; coordinated and practical community development and proper density of population; emergency management preparedness and operations, airports, and national defense facilities, the provisions of adequate light and air, access to incident solar energy, police protection, vehicle parking and loading space, transportation, water, sewerage, schools, recreational facilities, public grounds, the provision of a safe, reliable and adequate water supply for domestic, commercial, agricultural or industrial use, and other public requirements; as well as preservation of the natural, scenic and historic values in the environment and preservation of forests, wetlands, aquifers and floodplains.

(2) To prevent one or more of the following: overcrowding of land, blight, danger and congestion in travel and transportation, loss of health, life or property from fire, flood, panic or other dangers.

(3) To preserve prime agriculture and farmland considering topography, soil type and classification, and present use.

(4) To provide for the use of land within the municipality for residential housing of various dwelling types encompassing all basic forms of housing, including single-family and two-family dwellings, and a reasonable range of multifamily dwellings in various arrangements, mobile homes and mobile home parks, provided, however, that no zoning ordinance shall be deemed invalid for the failure to provide for any other specific dwelling type.

(5) To accommodate reasonable overall community growth, including population and employment growth, and opportunities for development of a variety of residential dwelling types and nonresidential uses.

Id.

¹⁷ 53 PA. STAT. ANN. § 10604(1).

¹⁸ *Id.* § 10603(g)(1)-(2).

¹⁹ *Id.* § 10604(5).

²⁰ Although challenges may also be brought as regulatory takings claims, the Fifth Amendment does not play a leading role in limiting natural resource regulations in Pennsylvania because the burden of proof under such claims is even more exacting than under Pennsylvania law. *See* ROBERT S. RYAN, PENNSYLVANIA ZONING LAW AND PRACTICE § 3.1.2 (2005) (explaining that the Federal Constitution does not play a leading role in Pennsylvania because the limitations it imposes on zoning are generally less than the more restrictive doctrines of Pennsylvania).

²¹ *See* 53 PA. STAT. ANN. §§ 10916.1, 10609.1 (providing that a landowner who desires to challenge the

the Commonwealth courts,²² but under most circumstances the courts can only reverse the decision below under the high standard of manifest abuse of discretion.²³

Zoning regulations carry a strong presumption of validity under Pennsylvania law.²⁴ A zoning ordinance is presumed valid unless a challenging party can show that the ordinance is unreasonable, arbitrary or not substantially related to the police power interest the ordinance purports to serve.²⁵ Courts have explained that “an ordinance will be found to be unreasonable and not substantially related to a police power purpose if it is shown to be unduly restrictive or exclusionary,” and that “an ordinance will be deemed to be arbitrary where it is shown that it results in disparate treatment of similar landowners without a reasonable basis for such disparate treatment.”²⁶ In reviewing the validity of a zoning ordinance, Pennsylvania courts employ a substantive due process approach that analyzes whether the public purpose served by the regulation sufficiently outweighs the landowner’s right to make free use of his land.²⁷ However, given the uncertainty that accompanies the use of a balancing test and the fact-specific nature of most zoning cases, assessing the validity of land use restrictions is far from straightforward.²⁸

Natural resource regulations are especially difficult for courts to analyze. The burdens posed by these types of regulations vary greatly among landowners because

validity of an ordinance restricting the use of development of land shall submit the challenge to either: (1) the zoning hearing board; or (2) where accompanied by a curative amendment, the governing body).

²² See *id.* § 11001-A (providing that all land use appeals shall be taken to the court of common pleas of the judicial district where the property at issue is located).

²³ See *id.* § 11005-A (providing that unless additional evidence is taken or the record below does not contain findings of fact, the decision below shall not be disturbed by the court if supported by substantial evidence); see also *Ramondo v. Zoning Hearing Bd. of Haverford Twp.*, 434 A.2d 204, 206 (Pa. Commw. Ct. 1981) (holding that scope of review of decisions by local zoning boards is limited to a determination of whether the board committed an error of law and whether its findings are supported by substantial evidence; the court may not reverse the decision unless the board manifestly abused its discretion).

²⁴ See *C & M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 820 A.2d 143, 150-51 (Pa. 2002) (stating that a zoning ordinance is presumed valid unless a challenging party can show that it is unreasonable, arbitrary, or not substantially related to the police power interest that the ordinance purports to serve); see also *McGonigle v. Lower Heidelberg Twp. Zoning Hearing Bd.*, 858 A.2d 663, 668 (Pa. Commw. Ct. 2004) (explaining that a challenge of a zoning ordinance poses a heavy burden to the challenging party since the ordinance is presumed valid).

²⁵ See *C & M Developers*, 820 A.2d at 151.

²⁶ See *id.* at 151; see also *In re Realen Valley Forge Greenes Assocs.*, 838 A.2d 718, 728 (Pa. 2003) (citing same).

²⁷ See *Hopewell Twp. Bd. of Supervisors v. Golla*, 452 A.2d 1337, 1342 (Pa. 1982) (explaining that in determining the validity of an ordinance, courts must employ “a substantive due process inquiry, involving a balancing of landowners’ rights against the public interest sought to be protected by an exercise of the police power”). The Pennsylvania Supreme Court in *Hopewell Twp.* goes on to explain that:

[Courts must] engage in a meaningful inquiry into the reasonableness of the restriction on land use in light of the deprivation of landowner’s freedom thereby incurred. A conclusion that an ordinance is valid necessitates a determination that the public purpose served [by the ordinance] adequately outweighs the landowner’s right to do as he sees fit with his property, so as to satisfy the requirements of due process.

Id.

²⁸ See ROBERT S. RYAN, *PENNSYLVANIA ZONING LAW AND PRACTICE* § 3.1.5 (2005) (“Resolution of ‘validity’ claims is not centered on the selection of any one ‘proper’ theory of zoning, but involves instead a case by case definition of the limits of zoning . . .”).

of the varied distribution of natural resources among parcels.²⁹ Additionally, because of the cumulative effect of land use regulations, courts must analyze zoning ordinances in their entirety.³⁰ For example, while a court may find a regulation requiring landowners to set aside fifty percent of the farmland soils on their tracts to be reasonable, when such a regulation is coupled with a one-acre minimum lot size requirement the court may find the resulting restriction unreasonable.³¹ Moreover, courts are not well-equipped to make scientific inquiries,³² and therefore may have difficulty determining whether natural resource regulations have a valid scientific basis.

III. NATURAL RESOURCE PROTECTION STANDARDS

A. Farmland Soils

Of all the natural resource restrictions, zoning ordinances designed to protect farmland soils give rise to the most litigation.³³ This may result from the fact that farmlands are prevalent throughout Pennsylvania, comprising approximately 7.7 million acres,³⁴ or twenty-seven percent of the state,³⁵ with approximately 3.8 million of such acres constituting prime farmland.³⁶ In addition, unlike many other types of natural features, such as steep slopes and wetlands, agricultural soils do not pose actual physical impediments to development since they tend to be flat and well-

²⁹ See *supra* Part I.

³⁰ See *C & M Developers*, 820 A.2d at 156 (explaining that restrictions of zoning ordinances must be looked at as a whole, finding that while a fifty percent agricultural soils set aside restriction may be reasonable, when considered in conjunction with a one-acre minimum lot size requirement the restriction unreasonably infringes upon a landowner's constitutionally protected property rights).

³¹ See *id.* at 157 (finding that while a farmland soils set-aside provision was reasonable, it resulted in an unreasonable restriction when coupled with a one good acre minimum lot size).

³² See Robert L. Schwartz, *Judicial Deflection of Scientific Questions: Pushing the Laetrile Controversy Toward Medical Closure*, in *SCIENTIFIC CONTROVERSIES: CASE STUDIES IN THE RESOLUTION AND CLOSURE OF DISPUTES IN SCIENCE AND TECHNOLOGY* 355, 357 (H. Tristram Englehardt, Jr. & Arthur L. Caplan eds., 1987) (explaining that courts are not well-equipped to make scientific inquiries because they do not contain laboratories and judges are rarely trained as scientists).

³³ See, e.g., *In re Dolington Land Group*, 839 A.2d 1021, 1037 (Pa. 2003) (involving a challenge to a zoning ordinance requiring landowners to set aside 80-90% of agricultural soils); *C & M Developers*, 820 A.2d at 143 (involving a challenge to a zoning ordinance requiring 50-60% land set-aside of agriculturally productive soils and one clear acre lot size restriction); *Hopewell Twp. Bd. of Supervisors v. Golla*, 452 A.2d 1337, 1339 (Pa. 1982) (regarding a challenge to regulations permitting the creation by subdivision of up to a maximum five residential lots out of an existing farm property regardless of the property's size); *Ethan-Michael, Inc. v. Bd. of Supervisors of Union Twp.*, 918 A.2d 203 (Pa. Commw. Ct. 2007) (involving a challenge to a zoning ordinance requiring a 75% set-aside of Class I and II soils and minimum lot sizes as large as fifty acres depending on the size of the parcel); *Gross v. New Britain Twp.*, 75 Pa. D. & C.4th 76, 103-04 (C.P. 2005) (regarding a challenge to a zoning ordinance requiring, *inter alia*, a 50% set aside for agricultural soils).

³⁴ NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., 2002 CONSENSUS OF AGRICULTURE – STATE DATA 15 tbl.8 (2002), available at http://www.nass.usda.gov/census/census02/volume1/pa/st42_1_008_008.pdf.

³⁵ *The Dirt on Pennsylvania Agriculture*, TRENDS IN RURAL PA UPDATE (Center for Rural Pa., Harrisburg, Pa.), Mar.-Apr. 2004, at 1, available at <http://www.ruralpa.org/dirtonpaag.pdf>.

³⁶ NATURAL RESOURCE CONSERVATION SERV., U.S. DEP'T OF AGRIC., SUMMARY REPORT: 1997 NATURAL RESOURCES INVENTORY 44 tbl.9 (rev. Dec. 2000), available at http://www.nrcs.usda.gov/Technical/NRI/1997/summary_report/report.pdf.

drained.³⁷

Farmland soils are delineated by the Natural Resource Conservation Service (the "NRCS"), an agency of the U.S. Department of Agriculture.³⁸ The designation "prime farmland" refers to farmland soils that have the best combination of physical and chemical characteristics for producing food, feed, forage, fiber and oilseed crops, and that have the best combination of soil quality, growing season and moisture supply to sustain high yields of crops when managed according to acceptable farming practices.³⁹ Other lesser soil designations used by the NRCS include farmland of statewide importance, farmland of local importance and unique farmland.⁴⁰

Pennsylvania municipalities' authority to zone for agriculture is found in the MPC, which sets forth that municipalities shall "preserve prime agriculture and farmland considering topography, soil type and classification, and present use."⁴¹ The MPC defines the term "prime agricultural land" as "land used for agricultural purposes that contains soils of the first, second or third class, as defined by the United States Department of Agriculture Natural Resource and Conservation Services County Soil Survey."⁴² Interestingly, the MPC is silent on protecting agricultural land that is not considered "prime,"⁴³ yet municipalities increasingly enact ordinances that restrict the use of non-prime farmland as well.⁴⁴

In recent years, Pennsylvania municipalities have generally chosen to protect farmland soils by implementing agricultural soil set-aside requirements.⁴⁵ For

³⁷ See *Why Save Farmland?*, FARMLAND INFO. CENTER, (Am. Farmland Trust, Northampton, Mass.), Jan. 2003, [http://www.farmlandinfo.org/documents/29493/WhySaveFarmland Color.pdf](http://www.farmlandinfo.org/documents/29493/WhySaveFarmland%20Color.pdf) (explaining that agricultural land is desirable for building because it is generally flat, well-drained and affordable).

³⁸ See 7 C.F.R. § 657.4 (2000) (designating each NRCS State Conservationist as responsible for providing an inventory of important farmlands).

³⁹ *Id.* § 657.5; see also NATURAL RESOURCES CONSERVATION SERV., U.S. DEP'T OF AGRIC., NATIONAL SOIL SURVEY HANDBOOK tit. 430-VI, pt. 622.04 (2007), available at <http://soils.usda.gov/technical/handbook>.

⁴⁰ See 7 C.F.R. § 657.5(b)-(d) (noting that unique farmland consists of land other than prime farmland that is used for the production of certain high value food and fiber crops such as citrus fruits, tree nuts, olives, cranberries, and vegetables; additional farmland of statewide importance consists of land in addition to prime and unique farmlands that is of statewide importance for the growing of food, feed, fiber, forage, and oils seed crops; additional farmland of local importance exists in local areas where there is concern for certain additional farmlands for the production of food, feed, fiber, forage, and oilseed crops, even though these lands have not been identified as having national or statewide importance).

⁴¹ 53 PA. STAT. ANN. § 10604(3) (West 1997); see also *id.* § 10603(g)(1) ("[Z]oning ordinances shall protect prime agricultural land.").

⁴² *Id.* § 10107.

⁴³ See ZEIGLER, *supra* note 2.

⁴⁴ See, e.g., TINICUM TOWNSHIP, BUCKS COUNTY, PA., ZONING ORDINANCE § 806(i) (2005) (requiring a land set-aside of 75% for prime farmland and agricultural soils to include additional farmland of statewide importance and locally important soils). Recently, the Pennsylvania Supreme Court endorsed the enactment of zoning ordinances to preserve non-prime farmlands, stating, "we find that the evidence indicates that farmland of local importance is valuable farmland and therefore, may be preserved as such." *C & M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 820 A.2d 143, 156 n.21 (Pa. 2002).

⁴⁵ See, e.g., BEDMINSTER TOWNSHIP, BUCKS COUNTY, PA., ZONING ORDINANCE art. 6, § 601(8) (2005) (requiring a 60% land set-aside for land capability classes I, II, and III); EAST ROCKHILL TOWNSHIP, BUCKS COUNTY, PA., ZONING ORDINANCE § 27-1900(k) (2007) (requiring a 60% land set-aside for land capability classes I, II, and III); NEWTOWN TOWNSHIP, UPPER MAKEFIELD TOWNSHIP, WRIGHTSTOWN TOWNSHIP, BUCKS COUNTY, PA., JOINT MUNICIPAL ZONING ORDINANCE § 903(7) (1983) (requiring a

example, section 903(7) of the Newtown Township Joint Municipal Zoning Ordinance uses a sliding-scale approach based on soil classification: the higher the grade of soil, the greater the required land set-aside percentage.⁴⁶ Although the provision applies only in the conservation district, and only for single-family cluster use or performance subdivisions, the set-aside percentage is quite high.⁴⁷ Depending on the soil classification, the regulation effectively forecloses a landowner from developing seventy to eighty percent of his parcel. This restriction is in addition to any other zoning regulations that may apply. While section 903(7) effectively preserves farmland soils, a regulation that prevents landowners from using up to eighty percent of their property hardly seems to achieve a reasonable balance.

Although the use of agricultural soil set-aside restrictions is prevalent, requiring landowners to set-aside a portion of their parcels for future agricultural use runs counter to traditional Euclidean zoning techniques, which generally favored separating incompatible uses.⁴⁸ For example, various land use conflicts can occur when non-farm communities are situated near agricultural operations.⁴⁹ Residents may have concerns about the noise and odors associated with farming practices, which can lead to the filing of costly and time-consuming nuisance suits.⁵⁰ Similarly, farmers may have concerns about the traffic associated with residential uses and the possibility of vandalism or trespass.⁵¹

Despite this potential for conflicts, in *C & M Developers, Inc. v. Bedminster*

land set-aside of 70-80% depending upon the soil classification); WARWICK TOWNSHIP, BUCKS COUNTY, PA., ZONING ORDINANCE § 195-59(K) (2001) (requiring a 50% land set-aside of land capability classes I, II, and III on tracts containing twenty acres or more).

⁴⁶ See NEWTOWN TOWNSHIP, UPPER MAKEFIELD TOWNSHIP, WRIGHTSTOWN TOWNSHIP, BUCKS COUNTY, PA., JOINT MUNICIPAL ZONING ORDINANCE § 903(7) (1983). Section 903(7) states the following:

AGRICULTURAL SOILS:

In the CM District, in areas of agricultural soils as listed in the Soil Survey of Bucks and Philadelphia, Counties, Pennsylvania, U.S. Department of Agriculture, Soil Conservation Service, July, 1975 (or as revised), the following standards shall apply to the determination of required open space areas for Use B-12 Single-family Cluster and Use B-14 Performance Subdivision developments.

- a. Class I soils: no more than twenty percent (20%) of these areas shall be developed.
- b. Class II soils: no more than twenty-five percent (25%) of these areas shall be developed.
- c. Class III soils: no more than thirty percent (30%) of these areas shall be developed.

Id.

⁴⁷ *Id.*

⁴⁸ See ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* 87 (2003) (noting the segregation of residences from polluting industries under Euclid's zoning plan).

⁴⁹ See GOVERNOR'S CENTER FOR LOCAL GOVERNMENT SERVICES, *PLANNING FOR AGRICULTURE* 21 (2d ed. 2006) [hereinafter *PLANNING FOR AGRICULTURE*] (providing that effective agricultural zoning protects agricultural land by minimizing land-use conflicts). When nonagricultural uses are located in close proximity to agricultural operations conflicts can arise between farming activities such as spreading manure and non-farming activities. *Id.*

⁵⁰ See AMERICAN FARMLAND TRUST, *SAVING AMERICA'S FARMLAND: WHAT WORKS* 62 (1997) (stating that the noise, dust, and pesticides generated from farms may distress new rural residents and thus cause them to issue complaints).

⁵¹ *Id.*

Township Zoning Hearing Board,⁵² the Pennsylvania Supreme Court specifically upheld a township's use of set-aside restrictions to preserve farmland soils for possible future agricultural use.⁵³ However, the court invalidated the minimum lot size restriction, finding that the township had exceeded the lawful scope of its authority by subjecting landowners to multiple layers of regulation.⁵⁴

In *C & M Developers* the township had amended its zoning ordinance to establish an agricultural preservation ("AP") district that covered approximately ninety percent of the municipality and eliminated two residential districts.⁵⁵ Several provisions of the zoning ordinance severely limited development of parcels greater than ten-acres.⁵⁶ First, the ordinance required landowners to set aside sixty percent of prime farmland and fifty percent of both farmland of statewide importance and farmland of local importance.⁵⁷ Second, development on the remainder of the tract was restricted to single-family residences on lots of one-clear acre free from floodplains, floodplain soils, wetlands, lakes, ponds, or watercourses.⁵⁸ Third, the ordinance required a contiguous, ten-thousand square-foot building envelope around single-family residences.⁵⁹

A developer appealed to the Pennsylvania Supreme Court after the zoning hearing board, trial court, and Pennsylvania Commonwealth Court denied the developer's substantive validity challenge to the township's amended zoning ordinance.⁶⁰ The thrust of the developer's argument was that the AP district regulations, taken as a whole, were unreasonably restrictive.⁶¹ The developer contended that the re-zoning of its property reduced its development potential by approximately seventy-two percent,⁶² and also argued that the regulations were not substantially related to the township's interest in preserving agriculture, but instead were impermissibly aimed at preventing development.⁶³

The Pennsylvania Supreme Court first considered evidence on the significant loss of farmland throughout the township and the surrounding municipalities.⁶⁴ As a result, the Court concluded that, pursuant to the township's police power, it could enact zoning regulations to preserve agricultural lands and activities.⁶⁵ Next, the court examined the set-aside restrictions and found that they were substantially related to the township's interest in preserving agricultural lands because: (1) they were directly based upon soil classifications recognized by the federal, state, and

⁵² 820 A.2d 143 (Pa. 2002).

⁵³ *Id.* at 156.

⁵⁴ *See id.* at 157 (finding that while the agricultural soil set-aside provision was reasonable, the impact of the one clear acre minimum lot size requirement was unreasonable).

⁵⁵ *Id.* at 147-48.

⁵⁶ *Id.*

⁵⁷ *C & M Developers*, 820 A.2d at 148.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 146.

⁶¹ *Id.* at 154.

⁶² *C & M Developers*, 820 A.2d at 150.

⁶³ *Id.* at 154-55.

⁶⁴ *Id.* at 155.

⁶⁵ *Id.*

local governments as agriculturally productive; (2) they required a sufficient set-aside to ensure the land could actually be used for farming; and (3) they required the land to be maintained or used for agricultural purposes.⁶⁶ Moreover, the court found that the agricultural set-aside, when viewed alone, reasonably balanced the township's interest in preserving its agricultural lands with an individual landowner's interest in using his property since the restriction permitted a landowner to develop or subdivide nearly half of his parcel.⁶⁷

Despite the Pennsylvania Supreme Court's approval of the agricultural soil set-aside restrictions, the court concluded that the township exceeded its authority by restricting a landowner to building only single-family homes on a minimum lot size of one clear acre.⁶⁸ The court held that these restrictions, when combined with the agricultural soil set-asides, not only unreasonably limited a landowner's ability to sell, subdivide or develop his land, but also did not have a substantial relationship to the township's interest in preserving its agricultural lands.⁶⁹ Central to the court's holding was testimony that the township's planning commission had enacted the one-clear acre lot restriction because it was a "good number" and because the commission felt that large homes on small lots were inconsistent with the character of the township.⁷⁰ The court explained that these exclusionary purposes were matters of private desire that failed to rise to the level of general welfare, and, as such, were beyond the township's police power to effectuate.⁷¹

Although *C & M Developers* establishes that agricultural soils restrictions must be clearly designed to preserve agricultural lands and that overly-restrictive regulations motivated by private desires exceed municipalities' scope of authority,⁷² it remains unclear whether any degree of agricultural soils set-asides would be found unreasonable. One year after *C & M Developers*, the Pennsylvania Supreme Court decided *In re Dolington Land Group*,⁷³ where the court upheld an agricultural soils provision that required landowners to set-aside eighty to ninety percent of their land.⁷⁴

In *Dolington Land Group*, eight landowners filed a substantive validity challenge to the township's Conservation Management District regulations.⁷⁵ The zoning

⁶⁶ *Id.* at 156.

⁶⁷ *C & M Developers*, 820 A.2d at 156.

⁶⁸ *Id.* at 157.

⁶⁹ *Id.*

⁷⁰ *See id.* at 157-58 (providing that the chairman of the planning commission testified that he had seen "some things that looked like very large houses on very small lots that we just didn't think was the character of Bedminster and wasn't the kind of thing that we thought made a good development" and that "we felt that one acre was a good number").

⁷¹ *See id.* at 158 ("[T]here is no doubt many of the residents are highly desirous of keeping [the community] the way it is, preferring, quite naturally, to look upon land in its natural state rather than on other homes. These desires, however, do not rise to the level of public welfare. This is purely a matter of private desire which zoning regulations may not be employed to effectuate." (quoting *Nat'l Land & Inv. Co. v. Kohn*, 215 A.2d 597, 611 (Pa. 1965))).

⁷² *C & M Developers*, 820 A.2d at 156 ("While the Township undoubtedly has an interest in preserving its agricultural lands, that interest does not completely outweigh a landowner's right to use his property as he sees fit.").

⁷³ 839 A.2d 1021 (Pa. 2003).

⁷⁴ *Id.* at 1037.

⁷⁵ *Id.* at 1024-25. The developer also brought a "fair share" challenge, which asserts that the

ordinance at issue required landowners to set-aside a shocking 90% of Class I agricultural soils, 85% of Class II soils, and 80% of Class III soils, and significantly restricted other areas containing natural resources.⁷⁶ Echoing the charge made in *C & M Developers*, the landowners in *Dolington Land Group* argued that the aggregate effect of the agricultural soils set-asides and natural resource regulations unreasonably restricted the rights of landowners to develop and use their land.⁷⁷ Specifically, the landowners contended that compliance with the zoning regulations would allow achievement of only one-third of the permitted density yield for a conventional subdivision.⁷⁸ After a lengthy battle involving experts in land planning, civil engineering, soil and wetland science, and farmland preservation, which generated hundreds of pages of evidence, the zoning hearing board rejected the landowners' challenge.⁷⁹ Both the court of common pleas and the Pennsylvania Commonwealth Court denied the landowners' appeal.⁸⁰

The Pennsylvania Supreme Court upheld the township's zoning regulations despite testimony from the landowners' land planning expert that out of the 292.02 acres of subject property, the regulations required over 242 acres be preserved, leaving only about 50 acres, or 16%, available for development purposes.⁸¹ The court upheld the large set-aside restrictions on the grounds that the restrictions primarily controlled the subdivision's design or layout, but had no impact on the maximum number of permitted dwelling units.⁸² The court found that because the maximum density limitation was based on the base site area before the deduction of any of the large set-asides, the landowners could use a performance or cluster subdivision to achieve close to the maximum density yield.⁸³ In addition, the court found that although the large set-asides prevented the landowners from achieving the maximum density yield for a conventional subdivision, such inability was a function of the "pervasive natural constraints" and did not invalidate the regulations.⁸⁴

Although the Pennsylvania Supreme Court differentiated *Dolington Land Group* from *C & M Developers* on the grounds of permissible density under the ordinance, the court's holding presupposes that density is the true measure of the reasonableness of a land use restriction. The holding also further endorses the use of stringent agricultural soil set-aside restrictions that prohibit landowners from using the majority of their parcels. Alarmingly, in reaching its conclusion the *Dolington*

municipality has failed to provide for its reasonable share of growth. However, this type of challenge is beyond the scope of this paper.

⁷⁶ Brief of Petitioner-Appellant at 14-15, *Dolington Land Group v. Zoning Hearing Bd. of Upper Makefield Twp.*, 804 A.2d 762 (Pa. Commw. Ct. 2002) (No. 0137 CD 02), *aff'd*, 839 A.2d 1021 (Pa. 2003).

⁷⁷ *In re Dolington Land Group*, 839 A.2d at 1025.

⁷⁸ *Id.* at 1033.

⁷⁹ *See id.* at 1025-26 (noting that the proceedings were so extensive that when the validity challenge was heard by the zoning hearing board, several newly appointed board members initially expressed their intent to review the entire record but, because it was so voluminous, they were unable to successfully complete the endeavor).

⁸⁰ *Id.* at 1025-26.

⁸¹ *Id.* at 1033.

⁸² *In re Dolington Land Group*, 839 A.2d at 1036.

⁸³ *Id.*

⁸⁴ *Id.*

Land Group court failed to consider if the public interests served by the stringent set-aside restrictions outweighed the landowners' property rights or whether less restrictive means could serve such interests.

B. Steep Slopes

Steep slopes and their associated natural resources have a direct influence on development capacity, storm-water runoff, and site erodibility.⁸⁵ Excessive removal of trees and other vegetation on steep slopes can result in losses of ground cover that anchors soil and dissipates precipitation.⁸⁶ The severity of flood and run-off effects from vegetative loss correlates to the grade of the slope.⁸⁷ As a result, municipalities generally enact steep slopes regulations in the form of a sliding scale that bases the allowable disturbance upon the degree of slope.⁸⁸ For example, the Bedminster Township Zoning Ordinance limits development to 30% for areas with a 15-25% slope grade and to 15% for areas with a 25% slope grade or more.⁸⁹

Although the Pennsylvania Supreme Court has not had the opportunity to review many challenges to steep slope regulations, in two cases the Commonwealth Court upheld zoning ordinances that restricted disturbances on steep slopes. In *Jones v.*

⁸⁵ STEPHEN FARBER, *ECONOMICS OF HILLSIDE SLOPE DEVELOPMENT 1* (2004), available at http://alleghenylandtrust.org/special_projects/hillsides/pdf/198603EconomicsReport20041130.pdf.

⁸⁶ *Id.* at 5.

⁸⁷ *See id.* at 1 (explaining that the character of the slopes – steepness, elevation, geophysical composition – along with ecological conditions such as rainfall and climate will define the hydrology of the landscape).

⁸⁸ *See, e.g.*, BEDMINSTER TOWNSHIP, BUCKS COUNTY, PA., ZONING ORDINANCE § 601(3) (2005) (15-25% grade, no more than 30% can be disturbed; over 25% grade, no more than 15% can be disturbed); BUCKINGHAM TOWNSHIP, BUCKS COUNTY, PA., ZONING ORDINANCE § 3100 (B)(3) (2006) (8-15% grade, no more than 40% can be disturbed; 15 to 25% grade, no more than 30% can be disturbed; 26% or greater grade, no more than 15% can be disturbed; areas less than 3000 square feet are exempt from this provision); HAYCOCK TOWNSHIP, BUCKS COUNTY, PA., ZONING ORDINANCE § 504(c) (2001) (8-15% grade, no more than 40% can be disturbed; 15-25% grade, no more than 30% can be developed; over 25% grade, no more than 15% can be disturbed; areas less than 3000 square feet are exempt from this provision); NOCKAMIXON TOWNSHIP, BUCKS COUNTY, PA., ZONING ORDINANCE § 234-36B2(e) (2002) (15-24% grade, no more than 30% can be disturbed; 25-30% grade, no more than 20% can be disturbed; over 30% grade, no more than 15% can be disturbed); PLUMSTEAD TOWNSHIP, BUCKS COUNTY, PA., ZONING ORDINANCE § 27-2401(8) (2006) (15-25% grade, no more than 30% can be disturbed; 25-60% grade, no more than 15% can be disturbed; areas less than 3000 square feet are exempt from this provision); RICHLAND TOWNSHIP, BUCKS COUNTY, PA., ZONING ORDINANCE § 27-514(C) (2005) (8-15% grade, no more than 40% can be disturbed; 15-25% grade, no more than 30% can be disturbed; over 25%, no more than 15% can be disturbed).

⁸⁹ *See* BEDMINSTER TOWNSHIP, BUCKS COUNTY, PA., ZONING ORDINANCE § 601(3) (2005). Section 601(3) provides the following:

(3) Steep Slopes - In areas of steep slopes, the following standards shall apply:

a. Fifteen percent to twenty-five percent (15%-25%) - No more than thirty percent (30%) of such areas shall be developed and/or regraded or stripped of vegetation, except for tracts ten (10) acres or greater in the AP District where no more than seventy-five percent (75%) of such areas shall be developed and/or regraded or stripped of vegetation.

b. Twenty-five percent (25%) or more - No more than fifteen percent (15%) of such area shall be developed and or regraded or stripped of vegetation, except in the AP District for parcels which are ten (10) acres or greater in size, in which case no more than seventy percent (70%) of such area shall be developed and/or regraded or stripped of vegetation.

Id.

Zoning Hearing Board of the Town of McCandless,⁹⁰ a landowner challenged a newly enacted township zoning ordinance that established standards for the preservation of natural features including steep slopes, woodlands, and streams.⁹¹ The ordinance provided a sliding scale provision that decreased the permissible lot area as the slope percentage increased,⁹² and also restricted the area of woodlands that could be cleared and developed depending upon the age of the trees.⁹³ The landowner argued that the definition of woodlands and the related restrictions lacked a scientific or engineering basis, and thus rendered the ordinance arbitrary and unreasonable.⁹⁴ Without taking additional evidence, and relying solely on the findings from the zoning hearing board, the trial court upheld the validity of the ordinance.⁹⁵

On appeal to the Commonwealth Court, the landowner also challenged the ordinance as a regulatory taking.⁹⁶ The court did not indicate whether any scientific or engineering basis existed for the regulation, and instead summarily concluded that the ordinance was not arbitrary or unreasonable and that it was substantially related to the purposes it purported to serve.⁹⁷ In drawing this conclusion, the only evidence the court cited were vague findings that, in enacting the ordinance, the township had consulted with an architect and that “a number of different characteristics were examined.”⁹⁸ The court quickly disposed of the takings claim, finding that the landowner had not been deprived of all economic use of the property since he could still build 89 of the 100 units he had originally planned to construct.⁹⁹

A similar steep slopes ordinance came under review in *Chrin Brothers, Inc. v. Williams Township Zoning Hearing Board*.¹⁰⁰ In *Chrin Brothers*, a timber operation challenged a steep slopes ordinance that prohibited the clear cutting of timber on its property.¹⁰¹ Like the landowner in *Jones*, the timber operation argued that although the township had the authority to regulate forests and steep slopes, the ordinance should be invalidated because it was arbitrary and unreasonable.¹⁰² The Commonwealth Court rejected the operation's challenge and explained that an ordinance based on an engineering study and enacted to prevent soil erosion is not arbitrary or unreasonable, and necessarily possesses a sufficient relationship to the public welfare.¹⁰³

In both *Jones* and *Chrin Brothers*, the Commonwealth Court demonstrated its unwillingness to engage in a close review of the adequacy of scientific and

⁹⁰ 578 A.2d 1369 (Pa. Commw. Ct. 1990).

⁹¹ *Id.* at 1369-70.

⁹² *Id.* at 1370 n.4.

⁹³ *Id.* at 1370 n.5.

⁹⁴ *Id.* at 1371.

⁹⁵ *Jones*, 578 A.2d at 1370.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1371.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1372.

¹⁰⁰ 815 A.2d 1179 (Pa. Commw. Ct. 2003).

¹⁰¹ *Id.* at 1181.

¹⁰² *Id.* at 1186.

¹⁰³ *Id.*

engineering standards used by townships in the adoption of natural resource regulations. While steep slope protection standards involve important public safety considerations, the court's deferential stance gives considerable latitude to municipalities.

C. Riparian Corridors

Riparian corridors, which consist of the forested or vegetated land on both sides of a stream, help prevent erosion and reduce sediment run-off into adjoining water bodies.¹⁰⁴ They also serve as a natural reservoir by storing run-off and then releasing it over time to help maintain base-flow and reduce run-off velocity.¹⁰⁵

Municipalities vary in their regulatory approaches to protect riparian corridors.¹⁰⁶ Common approaches include heightened impervious surface limitations, setbacks, buffers, and septic system regulations.¹⁰⁷ While some municipalities include riparian corridor regulations as distinct sole-purpose provisions in their zoning ordinances, others use overlay zones that serve almost as separate zoning districts to protect riparian corridors.¹⁰⁸ For example, the Plumstead Township Zoning Ordinance creates a "riparian buffer zone" that extends seventy-five feet from the bank of any watercourse.¹⁰⁹ Under the ordinance, areas within such buffer zones cannot be disturbed or developed with the exception of roads, pedestrian paths, and utility crossings that the township has approved and that represent the least possible disturbance.¹¹⁰

¹⁰⁴ See MONTGOMERY COUNTY PLANNING COMMISSION, GUIDEBOOK FOR RIPARIAN CORRIDOR CONSERVATION 3 (2006), available at http://planning.montcopa.org/planning/cwp/filesserver/Path,PLANNING/2006Guidebook_RiparCorrCons.pdf,assetguid,24c7f069-fa80-47a9-beddbfa0f1746c3.pdf.

¹⁰⁵ *Id.* at 3-4.

¹⁰⁶ Joel Russell, *Overlay Zoning to Protect Surface Waters*, PLANNING COMMISSIONERS JOURNAL, Spring 2004, at 2, available at <http://bayareawatersheds.org/hosted-groups/sfbjv/creeks/buffers/resources/Planning%20Commissioners%20Journal%20-%20Overlay%20Zoning%20to%20Protect%20Surface%20Waters.pdf>.

¹⁰⁷ See *id.* (explaining that: (i) impervious surface requirements protect water quality by limiting the total percentage of impervious surface coverage, which includes buildings, pavements and highly compacted soil; (ii) setbacks establish a required minimum distance between building and waterways to prevent runoff and other types of environmental degradation; (iii) buffers are similar to setbacks except that they also restrict the types of permissible land uses; and (iv) while all septic systems are regulated under health codes, some municipalities establish greater setbacks or more stringent design standards than would otherwise apply to protect water quality).

¹⁰⁸ See *id.* (explaining that overlay zones cross conventional zoning district boundaries to protect stream corridors).

¹⁰⁹ PLUMSTEAD TOWNSHIP, PA. ZONING ORDINANCE § 27-2401(10) (2006). Section 27-2401(10) states the following:

Riparian Buffer Zone. A riparian buffer shall be preserved along all intermittent and perennial streams of water, rivers, creeks, brooks, or swales identified on the USGS (U.S. Geodetic Survey) maps; Natural Resources Conservation Service maps; delineated as Waters of the Commonwealth, and/or identified on the official map prepared by the Township. The riparian buffer shall be the transitional area extending 75 feet outward from the top of bank of the watercourse. Riparian buffers shall remain undisturbed and permanently protected. Riparian buffer areas shall not be altered, graded, filled, piped, diverted, or built upon except for roads, pedestrian paths and utility crossings where approved by the Township, the design represents the least possible disturbance, and no other alternative access is available.

Id.

¹¹⁰ *Id.*

In one of the few successful challenges to riparian buffers, *Zoning Hearing Board of Willistown Township v. Lenox Homes, Inc.*,¹¹¹ a landowner challenged a township zoning ordinance that required a 100 foot buffer between any dwelling or appurtenance and the high water mark of a body of water.¹¹² The ordinance flatly prohibited the construction of any dwelling or appurtenance within 100 feet of a stream,¹¹³ but did not provide for the consideration of site factors such as soil composition, elevation, and stream depth in determining whether development at the proposed site would actually pose a risk to the general welfare.¹¹⁴ The township contended that its legislature enacted the ordinance pursuant to a valid police power to prevent flooding and siltation of the stream.¹¹⁵

The court found that the regulation did not constitute a valid police power because the regulation failed to provide for the consideration of site factors to determine whether development at the proposed site would actually pose a risk.¹¹⁶ After balancing the flat prohibition's impact on landowners against the public benefit derived from a generalized protection against flooding and siltation, the court found that the regulation was arbitrary and incomplete.¹¹⁷

The court's decision in *Lenox Homes* illustrates that while riparian buffer regulations are a proper exercise of municipalities' police power, overly broad setbacks may not be an appropriate means because they place too great a burden on affected landowners without establishing a clear public benefit. The court's reasoning suggests that a riparian buffer regulation that rests on sound data and that takes into account site-specific conditions would better effectuate the municipality's police power purpose without impermissibly infringing on the rights of landowners.¹¹⁸

IV. ANALYSIS

A. Limitations of Judicial Review

As the cases discussed in Part III reveal,¹¹⁹ natural resource protection standards can have significant consequences on individual property rights. Our current system relies upon judicial review to ensure that local governments enact zoning regulations that are fair and reasonable. In the context of natural resource regulations, several factors indicate that the availability of judicial review is an insufficient safeguard to protect individual property rights.

First, the deference courts accord local governments in enacting zoning ordinances poses a problem in the context of natural resource regulations. Following

¹¹¹ 439 A.2d 218 (Pa. Commw. Ct. 1982).

¹¹² *Id.* at 219.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Lenox Homes*, 439 A.2d at 222.

¹¹⁷ *Id.*

¹¹⁸ *See id.* (noting that the regulatory scheme failed to consider site specific data to determine whether disturbance of the area would pose a public safety risk).

¹¹⁹ *See supra* Part III.

the U.S. Supreme Court's example in *Village of Euclid v. Ambler Realty Co.*,¹²⁰ courts traditionally regard zoning ordinances as "legislative" acts that should be upheld unless they are clearly arbitrary and unreasonable.¹²¹ The problem with this approach is that the traditional reasonableness standard is too broad to treat seriously the fairness claims of individual property owners against natural resource regulations that may appear on the surface as relatively small regulatory changes.¹²² In addition, because of the potential for natural resource regulations to result in disparate treatment of landowners, as well as, the cumulative effect of land use regulations, courts may fail to appreciate their full impact. Although cases like *Lenox Homes*¹²³ demonstrate that the reasonableness standard is adequate to invalidate clearly arbitrary regulations, in the majority of natural resource regulation cases the court's standard of review is too broad to sufficiently protect individual property rights.

Second, courts are unable to provide the type of scientific review that is necessary to evaluate the reasonableness of natural resource regulations. Consequently, courts are likely to defer to the township's experts.¹²⁴ Such was the case in *Chrin Brothers*, where the court accepted expert testimony provided by the township and flatly rejected contradictory testimony provided by the landowners without providing any basis for its decision.¹²⁵

Third, although courts can act to reduce arbitrary and unreasonable regulation, litigation provides improper incentives.¹²⁶ The time and expense associated with litigation deters many otherwise viable claims, and courts can only review regulations when they are challenged by landowners.¹²⁷ The validity challenge procedure can be especially lengthy because the MPC designates the municipal legislative body as an adjudicative tribunal empowered to decide the validity of its own zoning ordinance before a challenger can even step foot in a court room.¹²⁸ In addition, this system fails to promote innovative planning of regulations because it

¹²⁰ 272 U.S. 365 (1926).

¹²¹ See Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 849 (1983) (explaining that courts generally have done little to advance proper planning as a valid basis in land use regulations because, following the Supreme Court's jurisprudence in *Village of Euclid v. Ambler Realty Co.*, courts have generally upheld regulations unless they were clearly arbitrary and unreasonable).

¹²² *Id.* at 842.

¹²³ 439 A.2d at 222 (finding 100 foot riparian corridor to be arbitrary and incomplete).

¹²⁴ See James H. Wickersham, Note, *The Quiet Revolution Continues: The New Emerging Model for State Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 535 (1994) (contending that courts' lack of science and planning expertise often leads to deference to local officials).

¹²⁵ See *Chrin Bros., Inc. v. Williams Twp. Zoning Hearing Bd.*, 815 A.2d 1179, 1186 (Pa. Commw. Ct. 2006) (upholding steep slopes ordinance solely on the basis of the engineering study conducted by the township's expert).

¹²⁶ See Note, *State-Sponsored Growth Management as a Remedy for Exclusionary Zoning*, 108 HARV. L. REV. 1127, 1133 (1995) (explaining that although courts may be the only institution that can act to reduce exclusionary zoning, the costs of litigation deters many otherwise meritorious suits and the enforcement takes place only to the extent litigants challenge zoning ordinances).

¹²⁷ *Id.* Land use appeals can indeed be very lengthy. In *C & M Developers* it took the landowner multiple appeals over six years to get the ordinance invalidated. See *C & M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 820 A.2d 143, 149 (Pa. 2002) (noting that the landowner filed its initial substantive challenge on August 20, 1996 and the Pennsylvania Supreme Court's decision invalidating the ordinance is dated November 1, 2002).

¹²⁸ See *supra* text accompanying notes 27-32.

motivates local governments to adopt natural resource regulations they consider defensible in court, rather than regulations that reflect up-to-date scientific practices.

Finally, given the fact-specific nature of most zoning challenges, it is difficult to rely on prior case law to gauge the validity of other zoning ordinances.¹²⁹ This is best illustrated by comparing the Pennsylvania Supreme Court's decisions in *C & M Developers* and *Dolington Land Group*. In both cases municipalities had enacted regulatory schemes to protect agricultural soils and other natural resources that included a substantial set-aside restriction.¹³⁰ In *C & M Developers*, the court concluded that a 50 to 60% agricultural soils set-aside achieved a reasonable balance because landowners could still use half of their land.¹³¹ Conversely, in *Dolington Land Group*, the court glossed over the astonishing 80 to 90% set-aside and upheld the regulation because it found the maximum permitted density to be reasonable.¹³²

B. Problems with Local Control

Traditionally, land use controls in the United States have been the province of local governments.¹³³ However, in recent years judges and legal scholars show increasing doubt that local governments are capable of making land use decisions fairly and rationally.¹³⁴ Local legislatures are generally an ineffective forum for different interests to trade off against each other to effectuate regulations that take into account the general welfare of the entire community.¹³⁵ The local forum is necessarily a small entity in which a single issue may divide an entire jurisdiction and where a minority interest group may have no leverage or ability to influence the community.¹³⁶ For example, a quickly-assembled majority for increasing farmland soil restrictions may totally defeat local builders without any future threat of a political retaliation at election time.¹³⁷ As a result, the regulatory process can simply become a device for one group to dominate the other, instead of a forum for achieving a reasonable balance among competing interests.¹³⁸

In his book, *The Economics of Zoning Laws*, William Fischel uses an economics approach to illustrate the importance of achieving a reasonable balance in land use controls.¹³⁹ Fischel sets out a Coasian bargain model in which "landowner-

¹²⁹ See *supra* text accompanying notes 28-30.

¹³⁰ *C & M Developers*, 820 A.2d at 147-48; *In re Dolington Land Group*, 839 A.2d 1021, 1024-25 (Pa. 2003).

¹³¹ *C & M Developers*, 820 A.2d at 156.

¹³² *Dolington Land Group*, 839 A.2d at 1036.

¹³³ See Rose, *supra* note 121, at 839 ("Land use control in America has always been an intensely local area of the law.").

¹³⁴ *Id.*

¹³⁵ See *id.* at 872-73 (explaining that local legislatures are not comparable to "extended republics" where the legislature serves as a forum for many different interests and where different interests must trade off against each other ultimately resulting in regulations that take into account the general welfare interests of the community).

¹³⁶ *Id.* at 872.

¹³⁷ See *id.* (providing a similar example where a quickly-assembled majority aimed at precluding commercial development can defeat owners of gas stations and grocery store without the threat of later political retaliation by the losers).

¹³⁸ See Rose, *supra* note 121, at 873.

¹³⁹ WILLIAM A. FISCHEL, *THE ECONOMICS OF ZONING LAWS* 125 (1985); see also JOHN CORKINDALE, *REFORMING LAND-USE PLANNING: PROPERTY RIGHTS APPROACHES* 15 (1998) ("The principal

developers” benefit from more lenient zoning, whereas “preexisting residents of the community” derive benefit from more restrictive zoning.¹⁴⁰ Each party faces declining marginal benefits if it succeeds in moving the restrictiveness of zoning levels in the direction that it prefers.¹⁴¹

Fischel’s analysis matches up well in the context of natural resource regulations. Developers typically oppose more stringent natural resource regulations while existing homeowners, with little interest in developing their holdings, generally support increased restrictions. A lack of appropriate regulations can result in depletion of natural resources, loss of open space, and pollution.¹⁴² These effects can lower property values, cause health problems, and damage surrounding ecosystems.¹⁴³ On the other hand, overly stringent natural resource regulations can potentially harm the region as a whole.¹⁴⁴ Such harm results when a municipality enacts a land use restriction that inherently reduces the overall supply of available land by lowering the density of permissible development within its boundaries.¹⁴⁵ However, reducing the supply of land through regulation generally does not serve to quell the demand for new commercial and residential development within the market area.¹⁴⁶ Instead, development gets zoned out of one site and occurs at another, possibly less suitable location, which results in sprawl or “displaced development.”¹⁴⁷ Overly restrictive land use regulations may also increase the price of development, which inflates housing prices,¹⁴⁸ and thus contributes to the shortage of affordable housing.¹⁴⁹

V. IS THERE A BETTER WAY?

A. State Control

In light of Pennsylvania courts’ deference to local decisions regarding natural resources, and the potential for local control to result in overly restrictive

justification for bringing economic analysis to bear on the problem of land use is that land is a scarce resource and that economics is the study of the allocation of scarce resources between competing human wants.”).

¹⁴⁰ *Id.* at 126-31.

¹⁴¹ *Id.* at 128-29.

¹⁴² See generally LINCOLN INSTITUTE OF LAND POLICY, *MANAGING LAND AS ECOSYSTEM AND ECONOMY* (1995).

¹⁴³ See *id.*

¹⁴⁴ See Note, *supra* note 126, at 1127-28 (explaining that local control of land-use planning can lead to exclusionary ordinances that harm the region as a whole); see also LINCOLN INSTITUTE OF LAND POLICY, *supra* note 142, at 4 (explaining that ironically some of the current efforts to protect natural resources resemble the effects of exhausting them).

¹⁴⁵ George Lefcoe, *Should CEQA Require Local Governments to Analyze the Impacts of Development Displaced by Restrictive Land Use Planning?*, 33 *ECOLOGY L.Q.* 1015, 1016 (2006).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See Elizabeth Rhodes, *UW study: Rules add \$200,000 to Seattle House Price*, THE SEATTLE TIMES, Feb. 15, 2008 (citing study by University of Washington economist Theo Eicher, which analyzed the University of Pennsylvania’s Wharton Residential Land Use Regulatory index and found that restrictive land use regulations increased average home prices in Seattle by up to \$200,000), available at http://seattletimes.nwsourc.com/html/business/technology/2004181704_eicher14.html.

¹⁴⁹ See *id.* (explaining that land use regulations that require land owners to keep 50-65% of their property in its natural state lower density and create greater demand which in turn increases home prices).

regulations, the promulgation of natural resource regulations at the state level is a logical solution. State governments, while still relatively close to municipalities, are far enough removed from local politics as to be less affected by the parochialism that afflicts local governments.¹⁵⁰ States are also better positioned to undertake natural resource regulation because state environmental agencies have greater access to reliable scientific information about the effects of land use on the environment.¹⁵¹

Other state governments already claim a substantial role in land use planning and natural resource regulation.¹⁵² In 1985, New Jersey passed the State Planning Act, which established a State Planning Commission and an Office of State Planning.¹⁵³ Although local governments maintain authority over land use, the New Jersey state plan attempts to harmonize agreements on development principles.¹⁵⁴ Similarly, Oregon has an extensive history in statewide planning and continues to expand its role,¹⁵⁵ while Vermont has established a regional permitting process for large developments by implementing state-wide standards.¹⁵⁶

By preventing sharp differences in regulatory effects among local jurisdictions, Pennsylvania state control will also help prevent the displaced development that occurs when developers opt to build in less-regulated outlying fringe areas as opposed to in-lying areas where restrictive regulations control open spaces.¹⁵⁷ Moreover, unlike natural resource regulations enacted by municipalities, state-issued natural resource regulations will respond to state, rather than local, interests and will stifle any attempts to burden shift among localities.¹⁵⁸ Of course, Pennsylvania agencies can not apply a one-size fits all approach to natural resource regulations. Rather, state regulators need to implement a scaled approach that provides different levels of regulation depending on the specific conditions of the municipality. To provide a greater amount of protection to natural resources, municipalities with sensitive environmental features in outlying areas should fall into a different category than urban municipalities. Regulators must periodically review each municipality's conditions to determine whether they warrant a change in that municipality's category level. Although this will initially be a time-consuming and expensive process, it will alleviate duplicative efforts among municipalities and provide an effective long-term strategy for balancing the equities between

¹⁵⁰ See STEPHEN M. WHEELER, *PLANNING FOR SUSTAINABILITY: CREATING LIVABLE, EQUITABLE, AND ECOLOGICAL COMMUNITIES* 125 (2004).

¹⁵¹ See *PLANNING FOR AGRICULTURE*, *supra* note 49, at 31 (noting that Pennsylvania, through its Department of Environmental Protection, has long been a leader in environmental regulation).

¹⁵² See WHEELER, *supra* note 150, at 126 (citing Vermont, Oregon, Florida, Hawaii, New Jersey and Rhode Island as the forerunners of state land use planning).

¹⁵³ New Jersey State Planning Act, 1985 N.J. Laws 398 (codified as amended at N.J. STAT. ANN. §§ 52:18A-196 to 52:18A-207 (West 2008)).

¹⁵⁴ *Id.*

¹⁵⁵ WHEELER, *supra* note 150, at 128.

¹⁵⁶ *Id.* at 126.

¹⁵⁷ See Eran Ben-Joseph, *Subdivision Regulations: Practices & Attitudes* 25 (Lincoln Inst. of Land Policy, Working Paper No. WP03EB1, 2003), available at <http://www.lincolninst.edu/pubs/PubDetail.aspx?pubid=846> (observing that the incidence of overly restrictive suburban land use regulations push developers to build in green-field locations away from major urban areas where restrictions and objections are less onerous).

¹⁵⁸ See Note, *supra* note 126, at 1136-37 (noting that unlike local ordinances, state control responds to state rather than local interests and thus avoids the "Not-In-My-Backyard" syndrome and attempted cost shifting among localities).

conservation and individual property rights.

The logical Pennsylvania state agency to accept responsibility for the promulgation of natural resource protection standards is the Department of Environmental Protection (“DEP”). The DEP already maintains a central role in administering land use and development regulations, including the Pennsylvania Sewage Facilities Act¹⁵⁹ and the Storm Water Management Act.¹⁶⁰ Both acts require the DEP to coordinate with local authorities to establish land use regulations.¹⁶¹ However, local government authority is not completely preempted under either act and local governments play a key role in carrying out state objectives.¹⁶² Thus, while municipalities are free to promulgate local regulations, the standards and practices must comply with DEP regulations.¹⁶³ This is the type of coordinated approach that the Pennsylvania General Assembly should implement to provide state control over natural resource regulations. Such an approach would also serve to lessen initial local resistance to state authority and promote integration between various state and local actors.¹⁶⁴

B. Independent Regulatory Review

State control by itself may be insufficient to ensure fair and reasonable regulation of natural resources. State agencies are also subject to undue political pressures that can result in overly restrictive regulations. However, independent regulatory review of natural resource regulations could act as an added measure to ensure that land use restrictions are based on sound scientific data.

In 1982, Pennsylvania’s General Assembly passed the Regulatory Review Act, which established an Independent Regulatory Review Commission (IRRC) to provide independent oversight of Pennsylvania agency regulations.¹⁶⁵ The General Assembly adopted the Act because it found it necessary to establish an oversight procedure to “curtail excessive regulation” and to ensure “conformity to legislative intent.”¹⁶⁶ The IRRC consists of five commissioners appointed by the Governor and several members of the legislature.¹⁶⁷ Commissioners are independent, as they must not hold a position within the General Assembly or any other office of the

¹⁵⁹ 35 PA. STAT. ANN. §§ 750.1 to 750.20a (West 2003).

¹⁶⁰ 32 PA. STAT. ANN. §§ 680.1 to 680.17 (West 1997).

¹⁶¹ 35 PA. STAT. ANN. § 750; 32 PA. STAT. ANN. § 680.

¹⁶² 35 PA. STAT. ANN. § 750.5 (noting that a municipality’s official sewage plan must comply with the rules and regulations of the DEP).

¹⁶³ 32 PA. STAT. ANN. § 680.5 (stating that municipalities are required to submit storm water plans that are consistent with state environmental land use plans).

¹⁶⁴ One important issue that Pennsylvania’s General Assembly would need to resolve upfront is exactly what constitutes a “natural resource,” in order to establish a clear delineation between natural resource regulations and the other types of land use regulations that local governments would maintain control over. This would help to minimize conflicts between local and state governments.

¹⁶⁵ See 71 PA. STAT. ANN. § 745.1 (West 1990) (“An Act providing for independent oversight and review of regulations, creating an Independent Regulatory Review Commission, providing for its powers and duties and making repeals.”).

¹⁶⁶ *Id.* § 745.2.

¹⁶⁷ See *id.* § 745.4 (designating that the Governor, President pro tempore of the Senate, Speaker of the House of Representatives, Minority Leader of the Senate, and the Minority Leader of the House of Representatives each appoint one IRRC commissioner).

Pennsylvania government.¹⁶⁸ When a state agency submits a proposed regulation, it must also submit a copy of the regulation to the IRRC along with a regulatory analysis.¹⁶⁹ The IRRC first determines whether the state agency has the authority to promulgate the regulation and whether it conforms with the intention of the legislature.¹⁷⁰ If the IRRC finds that the regulation is consistent with the agency's authority and with legislative intent, the IRRC then considers a variety of enumerated factors to determine whether the regulation furthers the public interest.¹⁷¹

Currently, Pennsylvania agencies are not required to detail the scientific underpinnings of their regulations with the Independent Regulatory Review Commission.¹⁷² This provides agencies with substantial discretion in adopting environmental regulations. However, presently before the General Assembly is Senate Bill 752, Pennsylvania's "Data Quality Act,"¹⁷³ which proposes to amend the

¹⁶⁸ *Id.*

¹⁶⁹ *See id.* § 745.5 (noting that the regulatory analysis must provide, *inter alia*: (1.1) specific state or federal authority that the regulation is designed to implement; (2) a concise explanation of the regulation; (3) an explanation as to why the regulation is needed; (4) an estimate of direct and indirect costs to the Commonwealth; (5) an explanation of administrative and implementation procedures; (7) a schedule for review of the regulations; and (12) a description of alternative regulatory provisions and a statement that the least burdensome alternative has been selected; (14) an evaluation plan for monitoring the continued effectiveness of the regulation).

¹⁷⁰ 71 PA. STAT. ANN. § 745.5b.

¹⁷¹ *Id.* § 745.5b. The factors to be considered include:

- (1) Economic or fiscal impacts of the regulation, which include the following:
 - (i) Direct and indirect costs to the Commonwealth, to its political subdivisions and to the private sector.
 - (ii) Adverse effects on prices of goods and services, productivity or competition.
 - (iii) The nature of required reports, forms or other paperwork and the estimated cost of their preparation by individuals, businesses and organizations in the public and private sectors.
 - (iv) The nature and estimated cost of legal, consulting or accounting services which the public or private sector may incur.
 - (v) The impact on the public interest of exempting or setting lesser standards of compliance for individuals or small businesses when it is lawful, desirable and feasible to do so.
- (2) The protection of the public health, safety and welfare and the effect on this Commonwealth's natural resources.
- (3) The clarity, feasibility and reasonableness of the regulation to be determined by considering the following:
 - (i) Possible conflict with or duplication of statutes or existing regulations.
 - (ii) Clarity and lack of ambiguity.
 - (iii) Need for the regulation or rule.
 - (iv) Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors.
- (4) Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review.
- (5) Comments, objections or recommendations of a committee.
- (6) Compliance with the provisions of this act or the regulations of the commission in promulgating the regulation.

Id.

¹⁷² *Id.* § 745.

¹⁷³ S.B. 752, Gen. Assem., Reg. Sess. (Pa. 2007).

Regulatory Review Act to provide for scientific review.¹⁷⁴ Under the proposed amendments, state agencies must include a description of any data that was used to promulgate the regulation, a detailed explanation of how the data was obtained, and an explanation as to why the agency considers the data to be acceptable.¹⁷⁵ The bill defines “acceptable data” as “[e]mpirical, replicable and testable data as evidenced in supporting documentation, statistics, reports, studies of research.”¹⁷⁶

The federal government has its own Data Quality Act, which is uncodified and amends the Paperwork Reduction Act.¹⁷⁷ The federal Data Quality Act permits only a limited comparison because it does not provide for independent regulatory review, but instead requires federal agencies to issue guidelines to ensure that the data they use meets certain quality standards and provides a mechanism for affected persons to correct such information.¹⁷⁸ However, the implementation of the federal Data Quality Act illustrates federal recognition of the importance of ensuring that regulatory agencies promulgate regulations based on sound scientific data.

While it is uncertain whether Pennsylvania’s Data Quality Act will pass in the state’s House of Representatives, it has received unanimous support in the Senate. Should it pass, state agencies will be required to utilize recognized standards that are peer reviewed and replicable in order to offer a more consistent method of establishing regulatory requirements.

In the context of natural resource protections standards, an independent regulatory review will promote sound public policy and prevent the impact of undue political pressures. Rather than benefiting a particular interest group, data quality reform will be accessible to a wide variety of interests. By setting high standards for the quality of information that the DEP will use to promulgate natural resource regulations, the Data Quality Act will enable land owners and local government officials to feel confident that regulations are based on sound science that is objective and fair. This will build public trust in state issued natural resource regulations and assure that regulations are not arbitrary or politically motivated.

VI. CONCLUSION

At its most fundamental level, this debate turns on what level of regulation best achieves a reasonable balance between the public’s interest in preserving natural resources and individual landowners’ interests in making use of their land. While natural resource regulations serve important general welfare purposes, the inherent disparate treatment of landowners and the potential for abuse by local governments make it imperative that these types of regulations be established by sound scientific data and reflect the policy goals of the entire community.

The availability of judicial review has traditionally served as a safeguard to ensure that municipalities do not exceed their legitimate police power purposes. However, the time, expense, and unpredictability of litigation prevent judicial review from providing a comprehensive long-term solution. Furthermore, courts cannot

¹⁷⁴ 71 PA. STAT. ANN. § 745.1 (West 2008).

¹⁷⁵ S.B. 752.

¹⁷⁶ *Id.*

¹⁷⁷ See Treasury and General Government Appropriation Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515 app. C, 114 Stat. 2763A-153 (2000) (amending 44 U.S.C. §§ 3501-3520 (1995)).

¹⁷⁸ See *id.*

No. 2]

Who's Regulating the Regulators?

337

provide the meaningful review necessary to ensure that natural resource regulations have a valid scientific basis.

While state control might be a start, ensuring sound regulation will require more than curtailing local authority. An effective solution will employ independent scientific review to make sure that natural resource protection standards are based on the latest acceptable data and are not subject to undue political pressures. Although this would initially be a time-consuming process, the state can eventually develop a standardized system to promote both uniformity and efficiency. This proposal will provide an effective long-term strategy to protect both natural resources and property rights by ensuring that natural resource regulations are based on sound scientific data.