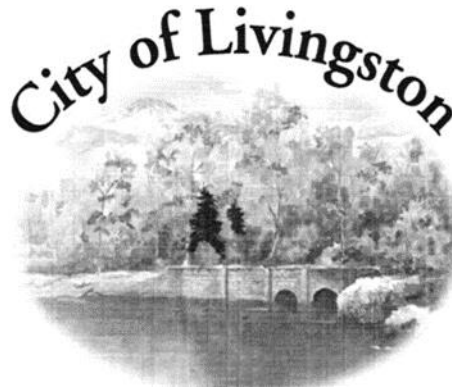


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October 31, 2020

MEMO

To: Mike Kardoes, City Manager

From: Courtney Lawellin, City Attorney

RE: Zoning

Question on ADU sizes. Should there be a difference in ADU square footage based solely on lot size?

Short Answer: No. Two different sizes may be a legal exercise of zoning power, but are not recommended based on the inequities to similarly situated property owners.

Legal Opinion:

Title: Because I said so. And, the rational basis test.

Does the authority to zone allow municipal government to pass any land-use regulation? The answer is, yes, within reason, based on the statutory standards and the case law that interprets them.

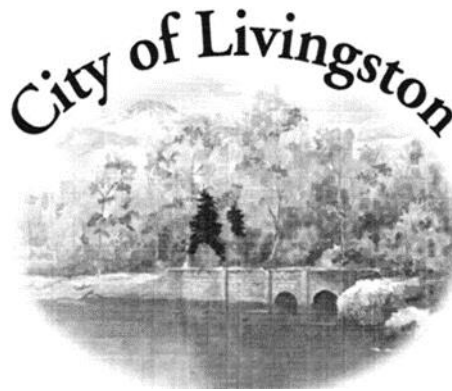
The Statutes state in relevant part: For the purpose of promoting health, safety, morals, or the general welfare of the community, the city or town council or other legislative body of cities and incorporated towns is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures; the percentage of lot that may be occupied; the size of yards, courts, and other open spaces; the density of population; and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes. 76-2-301 MCA.

Additionally, zoning regulations must be, made in accordance with a growth policy; and designed to: (i) secure safety from fire and other dangers; (ii) promote

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public health, public safety, and the general welfare; and (iii) facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.

In the adoption of zoning regulations, the municipal governing body shall consider:

- (a) reasonable provision of adequate light and air; (b) the effect on motorized and nonmotorized transportation systems; (c) promotion of compatible urban growth;
- (d) the character of the district and its peculiar suitability for particular uses; and
- (e) conserving the value of buildings and encouraging the most appropriate use of land throughout the jurisdictional area.

Zoning is a 20th century creation with regulations that were not tested in the Courts till the later part of the century. Initially, there was little understanding of how the regulations were going to affect growth and use over time and a, “because we say so”, rationale which was legally defensible early on, has shifted with general trend in court review of zoning regulations which demonstrate that zoning regulations must be tied to a statutory rational that is not arbitrary, capricious, or unreasonable.

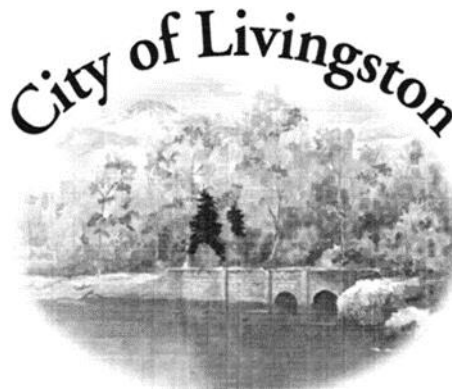
Substantive Due Process: Substantive due process is the legal basis for determining the reasonableness, capriciousness, and arbitrariness of zoning regulations, and therefore the constitutionality of a particular regulation. The Constitution of the United States declares that ‘no person shall be deprived of life, liberty, or property, without due process of law.’ “Lawyers and judges understood, since at least the Dred Scott decision, the half-substantive, half-procedural point that due process requires reasonable law. Arbitrary or irrational law is not due process. Nor may good law be applied unreasonably, either by officials or judges. Nor may officials take other arbitrary or irrational action. Such acts or laws are not the process that is due.” Louise Weinberg, An Almost Archeological Dig: Finding A Surprisingly Rich Early Understanding of Substantive Due Process, 27 Const. Comment. 163, 164 (2010)

There has been a trend during most of the last century, in land use cases, based in substantive due process, to give great deference to the governing body in the creation of zoning regulations. For example, in *Tannian v. City of Grosse Pointe Park*,

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1995 WL 871179, at *4–5 (E.D. Mich. July 31, 1995) Mr. Tannian claimed that a City zoning ordinance Section 1002 was unconstitutional because it made arbitrary and capricious distinctions between the sizes of objects to be allowed on city lots, in this case recreational vehicles. Tannian argued that the size distinctions raised in the regulation were not related to the health, safety, and welfare concerns outlined in the statutes. He made this claim because at a Council meeting, he asked each of the Council members if Section 1002 was passed for aesthetic reasons only and each Council member present said “yes.” Mr. Tannian also related that he had an opportunity to speak with the Director of Public Safety for the City, who informed him that there were no safety reasons for Section 1002. Tannian questioned the size limitations in Section 1002 as being arbitrary. Under the deferential standard of review in the Sixth Circuit, The City has established that Section 1002 is rationally related to legitimate state concerns such as the safety, health, and welfare of its citizens and the aesthetics of the neighborhood and the Court upheld the constitutionality of the regulation.

However, that trend providing a high degree of deference may be shifting.

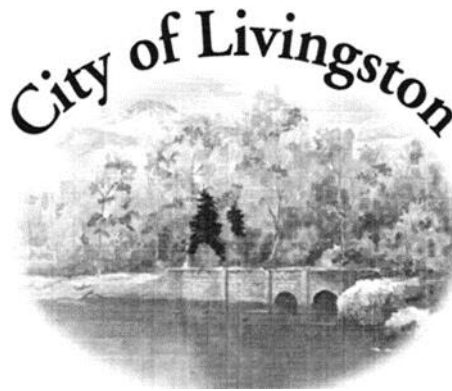
As the N.J. Supreme Court stated in *Home Builders, supra*, 81 N.J. at 138, 405 A.2d 381, “[t]he purposes sought to be accomplished [by a zoning ordinance] must justify the restrictions placed on the use of one's land [.]” and “[t]he means used to attain the ends must be reasonably related to those ends.” Those well-established criteria are not met here because defendant's zoning ordinance fails to accomplish its purposes when applied to plaintiff's property. The means-ends relationship is illusory. Plaintiff convincingly points to the lot immediately south and contiguous to its property as having essentially identical physical characteristics, yet that contiguous property is zoned to allow development at the one-and-one-half acre density that previously applied to plaintiff's property. The Township offers no justification for distinguishing between the two parcels. Indeed, at argument before this Court, the Township took the position that it encouraged plaintiff to apply for a variance. We find no justification for requiring plaintiff to seek variance relief.

Pheasant Bridge Corp. v. Twp. of Warren, 169 N.J. 282, 293–94, 777 A.2d 334, 341 (2001).

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A land use regulation does not effect a taking if it “substantially advance[s] legitimate state interest” and does not “den[y] an owner economically viable use of his land.” *Dolan v. City of Tigard*, 114 S.Ct. 2309, 2316 (1994). Since 2010 there have been arguments advocating the fully realized early expression of substantive due process, as it would emerge in the Supreme Court in the twentieth century, eventually bestowing upon the most intimate private human acts, relations, and choices a long hoped-for freedom from government interference.

Where much of the allowed size and design of buildings on City lots is guided by the standards implemented by the planning department, such as setbacks, orientation, etc., based on the plans which are required to be submitted to the department prior to the issuance of a building permit, the potential size of an ADU is largely dependent on the existing structure(s) on the property. The existing structures on a lot, structures on an adjacent lot(s), and building standards will control the size of an ADU more often than a size imposed by a zoning regulation. This is more particularly true in the City where increased density is encouraged. To provide the most flexibility for an ADU to be placed on an existing lot, setting a single maximum sq/ft limit on ADUs applicable to all lots, subject to design build standards, allows the most flexibility within the existing structure of the entirety of the rules and standards to be followed. Such a rule is also a limit on the chance that a property owner would engage in litigation because they were unreasonably disadvantaged by the ADU size limitation imposed by lot size and not the reasonableness of placing an ADU on a particular property.

While it is true that the commission has the authority to enact two standards for size of ADU’s with a rational basis for the ordinance based on lot size, the best practice would be to set a single standard that allows for the most flexibility for property owners, under the current design build standards.

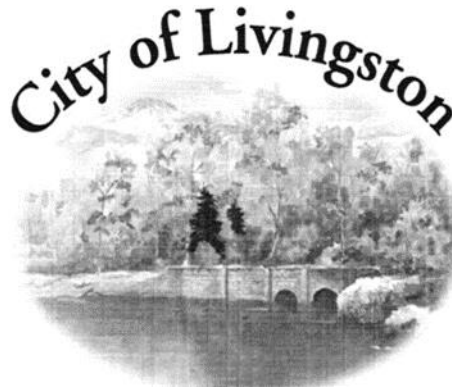
Sincere regards,

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Courtney Lawellin
City Attorney



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