

## Substantive Due Process

In addition to the requirement that municipalities provide “procedural due process,” municipalities also are impacted by the correlative doctrine of “substantive due process.”

Substantive due process involves a right that the courts have construed as being derived from the protections afforded by the Fifth and Fourteenth Amendments to the United States Constitution and the Declaration of Rights or Article I of the Pennsylvania Constitution. It is meant to ensure that a person’s life, freedom or property cannot be taken without appropriate governmental justification.

The substantive due process requirement for appropriate justification exists independently from the procedural due process requirement that there be constitutionally adequate procedures through which an individual can protest the government action; i.e., the right to substantive due process does not depend on the fairness of the procedures provided to challenge the government’s action.

If government action is taking away something of value that could be considered “life,” “liberty” or “property,” then, regardless of the procedures used, the questions remain concerning whether the goal being pursued by the government constitutes a valid state interest, and whether there is a sufficient relationship between the means being used to reach that goal and the goal itself.

There are different tests for substantive due process, depending on whether fundamental or non-fundamental rights are involved:

- In the case of governmental action impairing fundamental rights (e.g., the rights to marry, to have children, to direct the education and upbringing of one's children), a strict scrutiny test is used.

The strict scrutiny test requires that, if government action impairs a fundamental right, the objective being pursued by the government must be “compelling” and not merely “legitimate.” The strict scrutiny test also requires that the means chosen to achieve that compelling end must be “necessary”; i.e., there must not be any less restrictive means that would do the job just as well.

- In the case of governmental action impairing nonfundamental rights (e.g., nearly all economic and “social welfare” regulation), the “mere rationality” test is used.

This “mere rationality” or rational basis test requires that the government is pursuing a legitimate objective (e.g., most economic and social welfare regulation), and that it do so with a means that is rationally related to that objective.

*Illustration:* In the context of municipal zoning law, a substantive due process analysis might be utilized to determine questions of the constitutionality of a zoning ordinance. Generally, a zoning ordinance will be found to be a constitutional and valid exercise of the police power so long as it promotes public health, safety and welfare and is substantially related to the purpose it purports to serve. A specific example of this kind of analysis is provided in *Kirk v. Zoning Hearing Board of Honey Brook Township*,<sup>1</sup> in which it was found that a specific minimum lot size requirement for single-family detached dwellings in an agricultural zoning district was reasonably related to the legitimate government goal of preserving agricultural land in the township, and, for this reason, the lot size requirement did not violate substantive due process.

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<sup>1</sup> 713 A.2d 1226 (Pa. Cmwlth. 1998), *appeal denied*, 558 Pa. 624, 737 A.2d 745 (1999). *See also Southeastern Chester County Refuse Authority v. Zoning Hearing Bd. of London Grove Tp.*, 898 A.2d 680 (Pa. Cmwlth. 2006) (zoning ordinance setback requirements do not violate landfill operator's right to substantive due process).