

CPLN 509 Law of Planning and Urban Development
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Analysis of Downzoning in Society Hill in Philadelphia

1 Facts on the Rezoning Activity in Society Hill

Society Hill is a registered historic district in the Center City of Philadelphia, which used to be a slum but now becomes one of the most expensive neighborhoods with the highest average income and real estate values in Philadelphia due to urban renewal. Now, Society Hill is a predominantly white neighborhood with 88.93% of White living here and a primarily single-family residential area as well.

As Philadelphia's Housing Action plan states, the development of strong market neighborhoods like Society Hill should accompany with higher density and guaranteed affordability instead of displacement and exclusion¹. However, as opposed to the city's goal towards affordability, Society Hill proposed a downzoning master plan in 2018 for historic-preservation protections. In the plan, the Society Hill civic association stated that high-density redevelopment would threaten the historic character of the neighborhood. Therefore, the plan recommended rezoning of multi-family areas to single family, purged specific sites from probable taller and denser construction, and proposed a zoning overlay covering substantial portion of the neighborhood for a more restrictive zoning regulation regarding height, parking spaces, etc².

Followed by the proposal of the zoning overlay is the Bill No. 200094, introduced by City Councilmember Mark Squilla in January 2020. The Bill would limit building height

in the lots zoned CMX-2 in the Society Hill no more than 45 ft, running from the Delaware River to 8th Street, between Walnut and Lombard, which was used to 55 ft under the regulation of Center City Commercial District Control Area, increase parking spaces to at least three per every 10 dwelling units and exempt the neighborhood from bonuses and exemptions designed to encourage preservation in Philadelphia neighborhoods³. The bonuses and exemptions are pushed forward by Mayor Jim Kenney in Historic Preservation Task Force project, including removal of parking minimums⁴, allowing accessory dwelling units⁵ and more uses in “special purpose” historic buildings⁶. The bill was approved by City Council with 17:0 over the objections of Philadelphia Planning Commission who is concerning about the affordability within the neighborhood, and then vetoed by Mayor, and finally City Council override the veto and approve it with 13:4.



Figure 1 Map of Existing Zoning



Figure 2 Proposed Rezoning of Multi-Family Areas to Single Family

Downzoning and restrictive zoning regulation in the Society Hill has raised a debate among different group of people, like planners, preservationists, residents in and outside the neighborhood, regarding the conflict of historic preservation and affordability and the rationality of councilmanic prerogative. This paper will examine the legal aspects of the rezoning in the Society Hill from the perspective of historic preservation, Fair Housing Act and councilmanic prerogative.

2 Conflict between Historic Preservation and Affordability

Philadelphia Historic Commission (PHC) has been charged with powers and duties to identify buildings, public interior portions of buildings, structures, sites, and objects as historically significant to the city and review projects that involve the alteration or demolition of historic buildings, structures, sites, or objects within historic districts since 1955. Historic preservation in Philadelphia is regulated by zoning process based on *City of*

Philadelphia Historic Preservation Ordinance. In the Ordinance, it states that the preservation and protection of buildings, structures, sites, objects, and districts of historic, architectural, cultural, archaeological, educational, and aesthetic merit are public necessities and are in the interests of **the health, prosperity, and welfare of the people of Philadelphia**⁷. Furthermore, one of the purposes is encouraging **the restoration and rehabilitation** of historic buildings, structures, sites, and objects⁷. Restoration and rehabilitation, as mentioned in the *National Historic Preservation Act of 1966* as amended, are both defined as the act or process of making possible a compatible or new use for a property through different extent to preserve the historic characteristics⁸. In other words, although historic preservation is at the advocacy position, other competing goals should be considered, such as affordability.

Philadelphia Historic Preservation Task Force is a project leading the city from mandated historic preservation into incentive historic preservation starting from 2017 and comes into the realty in 2019. Requested by Mayor Jim Kenney, Councilman Mark Squilla introduced three bills to make reusing historic buildings in Philadelphia easier. However, the Society Hill steps in the opposite direction to the City's incentive historic preservation along with density and affordability. One of the reasons is that they affirmed density could not be compatible with historic preservation and would even ruin historic characteristics within the historic district.

Downzoning in historic districts is not unique in Philadelphia, but many cities, especially in metro area, such as Chicago and Seattle, are wrestling with the tension

between the needs of preserving historic places with the needs of growing city. Since preserving a community's historic heritage is a reasonable and legitimate purpose for the public interest, the court usually sides with the neighborhood. So did in the case between the Pioneer Square neighborhood in Seattle and the developer who proposed a 200-unit apartment building within the neighborhood. *UV 316 Alaskan Way, LLC, et al, No. 16-2-06040-4 SEA*.

Pioneer Square neighborhood has similar situation as the Society Hill. It is one of the largest historic districts located in the south end of downtown in Seattle, where is a major transit hub and employment center. In this case, the developer Gerding Edlen proposed a 12-story, 200-unit apartment (**including 40 affordable housing units**) on a site that currently occupied by a parking garage, which has no historic or architectural significance to the city. The proposal was first rejected by the Pioneer Square Preservation Board in July 2015, who contended that the building was out of scale with the height and historic character of the surrounding neighborhood. Two weeks later, the Director of the Department of Neighborhoods reversed the decision, finding that the project is consistent with Seattle Municipal Codes, the Pioneer Square historic district's Rules and Secretary of Interiors Standards, and approved the project with several conditions on October 22, 2015⁸. Then, the residents in the neighborhood appealed the decision to the city hearing examiner, an office functioning as Zoning Board of Adjustment in Philadelphia. The hearing examiner Anne Watanabe reversed the Director's decision because there was enough evidence to demonstrate that the scale of the proposed building's facades would be

incompatible with surrounding structures and therefore the decision of the Director was arbitrary and capricious⁹. So, the proponents of the proposed building appealed to the King County Superior Court, Judge Bill Bowman ruled against the appellants and reaffirmed that the proposed building is out of scale under SMC 23.66.180.B¹⁰. Even though the decision by court is totally based on the interpretation of Seattle Municipal Code, the 200 homes with 40 affordable units has gone for good because of the strict scrutiny of the compatibility of new development in a historic district.

The case in Seattle raises a question: Could the intention to preserve one historic preservation override the city's overall preservation zoning codes? My answer is no. Add a zoning overlay over the Society Hill with more restricted limits on new development not only transfers the burden on residents inside the district, also puts the burden to increase affordable housing supply to nearby neighborhoods instead. And when other 14 historic districts imitate what the Society Hill is doing, the affordability in Philadelphia would become a catastrophe and the poor families are left nothing they could afford in the area, typically in the center of the city, with a sufficient number of opportunities, transit options and jobs, and hence exacerbates the outdated national housing policies once shaped by discrimination and segregation.

Historic preservation should have limits and boundaries and some enhancements in the law could balance preservation with the city's effort on affordability. First, reviewing the criteria of designation of a historic structure or district in the Ordinance §14-1004(1), the shortcoming of the historic review process in Philadelphia, and in many other cities

like Seattle, is that it isolates preservation with other competing city goals, especially housing affordability. Hence, the Ordinance should be amended to acknowledge that historic preservation can sabotage other goals of the city and must be considered alongside with other city programs, like Housing Action Plan. Second, the Historical Commission should examine the consequence of preservation on affordability during the review process. In addition, working with the Department of Licenses and Inspections (L&I), Zoning Board of Adjustment, Philadelphia Planning Commission and City Council, the Historical Commission should identify the area, which would be designated to be historic district, if it is appropriate for redevelopment, growth and densification considering its locations, conditions of historic buildings within the district and the public's willing, etc. Third, the proposal to a more restrictive zoning in the historic district than the current zoning allows needs greater scrutiny to ensure that it is not replicating structural inequalities.

Although the current ordinance supports historic preservation over affordability, there are some practical exercises in the historic district in Philadelphia that prove density could be married with preservation. Before the Bill No. 190613 allowing Accessory Dwelling Units (ADUs) on lots occupied by single-family use, the mansion at 264 West Walnut Lane in the Tulpehocken Station Historic District had transformed into a six-unit multifamily residence before the zoning changed to RSA-1, remaining its historic elements. This feasible path towards increasing the housing supply and affordability in historic district inspires how the Society Hill could transfer some of underutilized, large single-family housing into a multi-family housing without demolition of historic buildings, notably when

Society Hill row houses are home to multiple families prior to urban renewal in 1960s which displaced the low-income family with mostly white, upper middle class. The influence of downzoning in the Society Hill on housing affordability should have an offsetting change on other available housings in the neighborhood to promise the affordability and accessibility.

3 Fair Housing Act and Zoning

Title VIII of the Civil Rights Act of 1968, as amended in 1988, known as the Fair Housing Act (FHA), aims to prevent illegal discrimination in housing transaction based on race, color, religion, national origin, sex, disability, familial status and reverse housing segregation in the United States¹¹. On November 10, 2016, Departments of Justice and Housing and Urban Development (HUD) released an updated guidance on the application of the FHA to state and local land use and zoning laws. Discrimination in zoning may violate FHA when a facially neutral ordinance has disparate impact on a protected class, such as density requirements that make residential development prohibitively expensive or preclusion of further multifamily housing development.

To examine whether zoning in the Society Hill violates federal Fair Housing Act, we need to find out if there is discriminatory intent or disparate impact in its downzoning policies. The restriction on certain uses is not consist of discriminatory intent because it is the exercise of police power for the public welfare; However, if its intent is to exclude certain classes of people, the zoning ordinance could be alleged to be exclusionary. *BAC, Inc. at 384-85, 633 A.2d at 146-47*. Since the Society Hill civic association stated their

purpose to rezone is for better protecting historic characteristics in the official documents, there is not enough evidence to prove its discriminatory intent.

When examining the neighborhood zoning policies' disparate impact on certain protected classes, there are several cases to review. In 2017, The Equal Rights Center ("ERC") sued Mid-America Apartment Communities, Inc., and Mid-America Apartments, L.P. collectively, ("MAA") that the criminal records screening policy when submitting an application violated the FHA. When people submitted an application online and acknowledged a felony conviction, they could not submit the application successfully. ERC alleged that this practice had disparate impact on African American and Latinx individuals to apply to live in the apartment that they are twelve times harder than the White, though the policy is race-neutral on the face, due to the over representation of people of color in the U.S. criminal legal system. The case is resolved against MAA through creating a new criminal records screening policy that offer a fair chance to individuals. *Equal Rights Center V. Mid-America Apartments, L.P. et al. US District Court for the District of Columbia. Case Number: 1:2017cv02659.*

As applied to the zoning ordinance in the Society Hill, it could be proved to have disparate impact using evidence of a statistical disparity. First, from the population by race changes from 2010 to 2019, the percentage of White increases from 88.93% to 90.89%, intensifying its character as a predominately white neighborhood. Compared to Philadelphia, Society hill's White population is relatively 50.8% more than that of the City, while the black population is 40.4% lower than that of the City; Compared to the Center

City, although the gap of Black population is smaller, Society Hill minority's population is still 15.72% lower than the Center City. Second, from the affordability across Philadelphia, single-family homes that are affordable should have household income at least over \$50,000 (figure 3). Based on 2019 ACS 5-year estimate, White household with over \$50,000 in Philadelphia is 62.6% of total White population, and the number for the Black or African American and for American Indian is 37.6% and 30.9%. Third, considering the living pattern by race in block groups in the Society Hill, most of the White are living on single-family lots in the center and around Washington Square (figure 4); most of the Black are living at the east edge of the neighborhood, occupied by multi-family apartments (figure 5); and most of the Hispanic are living along the multi-family apartments along Lombard Street (figure 6). These statistics proves that although downzoning in the Society Hill is neutral of intent, it could cause a harder access than the present for the Black, American Indian and other minorities to the neighborhood when most of multi-family lots turn into single-family lots because of the system of race-linked disparity in the United States.

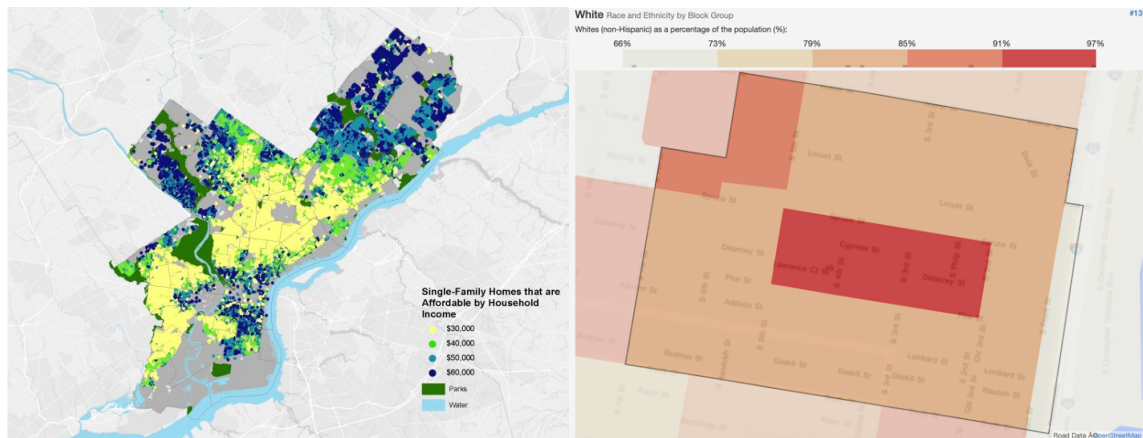


Figure 3 affordable housing for different income levels.
(Sources: Econsult Solutions Inc.)

Figure 4 White living pattern in Society Hill
(Sources: statisticalatlas.com)

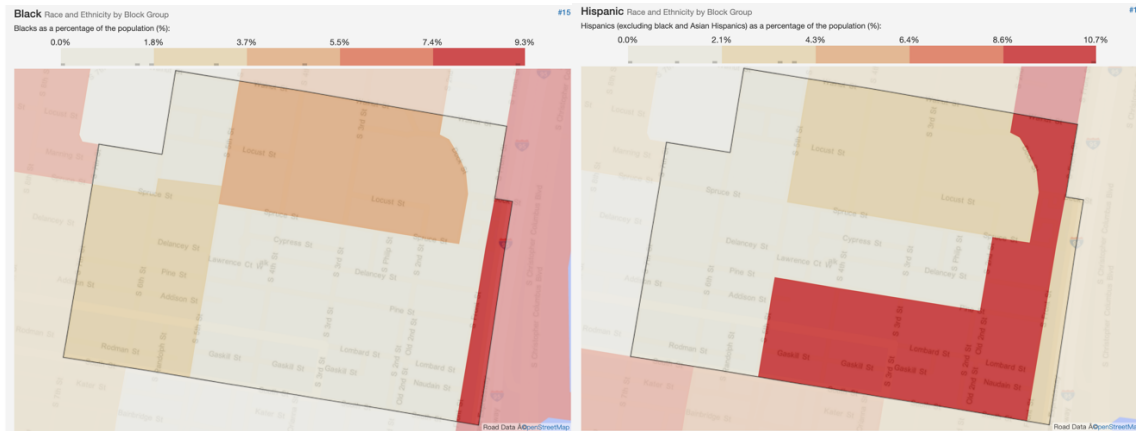


Figure 5 Black living pattern in Society Hill
(Sources: statisticalatlas.com)

Figure 6 Hispanic living pattern in Society Hill
(Sources: statisticalatlas.com.)

Although the statistic above could illustrate the disparate impact on the race minority, statistical evidence could not support disparate impact statement anymore due to the change of the FHA's disparate impact standard issued by HUD on September 3, 2020, influenced by the case *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* In the case, the non-profit organization, Inclusive Communities Project claimed that Texas Department of Housing and Community Affairs' policies on the distribution of tax credits resulted in discrimination against African Americans and violated the FHA. The case not only reaffirmed that disparate impact is valid under the federal FHA, it limited the application of disparate impact. First, the court stated that Plaintiffs could not depend solely on statistical evidence to demonstrate disparate impact. As Justice Kennedy writes,

“disparate impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the Fair Housing

Act...for instance if such liability were imposed based solely a showing of statistical disparity.”

Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519, 135 S. Ct. 2507, 192 L. Ed. 2d 514, 545 (2015). Page 3.

Second, the court undertook the method of “robust causality”, other than HUD’s disparate impact standard, to demonstrate the connection between the challenged policy or procedure and alleged disparity, as Justice Kennedy asserted that “a robust causality requirement is important in ensuring that defendants do not resort to the use of racial quotas.” *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 135 S. Ct. 2507, 192 L. Ed. 2d 514, 545 (2015). Page 3.

Third, defendant as governmental agencies and private developers would have opportunities to “state and explain the valid interest served by their policies” and “housing authorities and private developers [must] be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest.” *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 135 S. Ct. 2507, 192 L. Ed. 2d 514, 545 (2015). Page 22.

After the *Inclusive Communities case*, HUD issued the proposed rule of disparate impact in August 2019 to better align with the standards and limitations applied by the Supreme Court in the case and finalized the new disparate impact standard in September 2020. The new disparate impact standard makes it significantly difficult for Plaintiffs to bring disparate impact suits successfully. First, “the perpetuation of segregation” is

eliminated from the definition of “discriminatory effects”, which means that law or policies resulting in segregation would not be deemed as unconstitutional. However, low-income families across the United States are still suffering from an exacerbated trend of housing segregation due to rising housing costs, shortfall of affordable housing supply and more restrictive zoning in downtown. Low-income people, which largely is the minority, are pushed to the edge of the city again. Second, plaintiffs need to allege disparate impact with evidence supporting five required elements during the pleading stage before pushing the case into the legal process. The five required elements are: (1) The challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law; (2) The policy or practice has a disproportionately adverse effect on members of a protected class; (3) There is a robust causal link between the policy or practice and the adverse effect on members of a protected class, meaning the specific policy or practice is the direct cause of the discriminatory effect; (4) The disparity is significant; (5) There is a direct relation between the injury asserted and the injurious conduct alleged¹². The five-step burden for Plaintiffs makes them hardly to claim a disparate impact case due to the difficulty to obtain enough evidence and documents from developers or agencies before the legal process. Furthermore, the new standard is vague on the words “profit” and “significant”. For the word “profit”, the standard does not illustrate if the profit is unreasonable and for the word “significant”, the standard is lack of objective standard to judge if the disparity is significant. Third, the burden on Plaintiffs to prove discriminatory effect is overwhelming

more than Defendants, since Plaintiffs are requested to provide the preponderance of the evidence while Defendants are only requested to provide the evidence.

Back to the Society Hill, the new disparate standard hinders vulnerable groups from claiming their rights under the Fair Housing Act. Although the starting point of the Supreme Court to limit the application of disparate impact is to avoid race being used and considered in a pervasive way, the standard does not take the situation that historic preservation is prevailing over affordability and other goals in the current judicial system. Without the improvements on the existing historic preservation law mentioned in Part 2, the new disparate impact standard would enlarge the gap between the rich communities, which are mostly occupied by the White, and the poor communities where live the people who are forced to move in by the restrictive zoning ordinance and unaffordable rental price.

4 Councilmanic Prerogative in Philadelphia

Another thing needs to be noticed in the downzoning of the Society Hill is councilmanic prerogative. The Bill No. 200094, which adds an overlay over the neighborhood, is introduced by Councilmember Mark Squilla, who represents the First District, which includes Old City and Society Hill. He is also the person who introduced Historic Preservation Task Force's three bills to the council. As mentioned above, Bill No. 200094 is designed to exempt the Society Hill from Task Force's bonuses, so it raises a question: How is the words of Mark Squilla convincing when he introduced two totally different bill for a same purpose — historic preservation?

Councilmanic prerogative is a practice grounded in legislative tradition rather than

written in law, in charge of final land use and zoning decisions. Since Council members are selected from different districts of neighborhoods, it is believed that they have closed connection with neighborhood residents and better understand their needs to make appropriate decisions.

Despite those benefits, I would focus on the weakness of councilmanic prerogative in Philadelphia. In the report of Philadelphia Councilmanic Prerogative, the author finds that since the informal but enduring agreement among district council members that they will not intervene into other districts' matters, the decisions of one district council member would pass unanimously and that is how the Bill No. 200094 was passed with 17:0 vote when the Bill is against by the Mayor, Philadelphia Planning Commission, and residents in the city. Under most situations, the Zoning Board of Adjustment has the right to vote against the proposal of council members in most zoning legislation, however, they hardly do so since the closed relationship between board members and council members¹². It is also common that the City Council could bypass the ZBA when large development exceeds the power of ZBA or developers could ask for approvals from their council members directly. As a result, councilmanic prerogative is lack of supervision to investigate if the proposal harms other groups' interests while protecting its own neighborhood's interests.

One of the examples is when Council member Curtis Jones used prerogative to prohibit the construction of 48 homes in Germany Hill because Ridge Park neighborhood didn't want the lots to be residential although it was zoned residential. He was alleged of "de facto eminent domain" by refusing to introduce an ordinance to extend and pave the street to the

site and introducing another ordinance to prevent further development on the set which the petitioner bought. The trial court of Common Pleas Court of Philadelphia affirmed the action of the Property has been expropriated via a de facto taking through City Council. *Parker Ave., L.P. v. City of Philadelphia, 2014 Phila. Ct. Com. Pl. LEXIS 302 (2014)*. Such situation might emerge in the Society Hill when new development is coming in while the residents would be against it for protecting historic character within the neighborhood. And we should pay attention to the abusive use of councilmanic prerogative, which requires a visible, transparent zoning legislation process and a powerful supervisor agency. Comments from public and professionals should be taken into account when reaching the final decision.

5 Conclusion

Downzoning in the Society Hill is a common instrument in the neighborhoods which desperate to protect the historic character of the neighborhood and remain residents' living standards within the neighborhood when facing the intervention of rapidly development of the city center. Historic heritage is certainly the irreplaceable treasure for every generations of citizens in the United State and for the human beings that we need to preserve, we do confront complex goals to provide a brighter future for all the citizens, regardless of race, gender or other labels. What we could do is not putting historic preservation and affordability on a conflicting position, deciding which one is the priority, but we should alleviate the crashes and find the balance of historic charm and contemporary urban needs. During the efforts to the balance, we need various voices from different organizations,

occupations and places to finalize recommendations to the planning in cities and review the process whether exists the abusive use of powers or other actions that may violate law.

Reference

1. Housing for Equity: An Action Plan for Philadelphia, City of Philadelphia. (2018).
2. Society Hill Civic Association, Society Hill Neighborhood Plan 2018. (2017), 60-66.
3. Bill No. 200094, City Council of Philadelphia. (2020)
4. Bill No. 190611-A, City Council of Philadelphia. (2019)
5. Bill No. 190612, City Council of Philadelphia. (2019)
6. Bill No. 190613, City Council of Philadelphia. (2019)
7. Philadelphia, Pennsylvania, City of Philadelphia Historic Preservation Ordinance §14-1000.
8. Certificate of Approval, Department of Neighborhoods, Seattle. PSB 324/15.
<https://assets.documentcloud.org/documents/2695873/Certificate-of-Approval-10-22-15.pdf>
9. Finding and Decision of the Hearing Examiner for the City of Seattle in the Matter of the Appeals of York Wong, et al., Save Our Square and Jessico Lucio. HE Files: MUP-15-019(W) R-15-005 and R-15-006.
(2016)<https://assets.documentcloud.org/documents/2719734/MUP-15-019-Findings-an-Dec-2-24-16.pdf>
10. UV 316 Alaskan Way, LLC, et al, Petitioners v. City of Seattle, a Washington municipal corporation, Respondent. York Wong, et al, Additional Parties. No. 16-2-06040-4 SEA.
11. The Fair Housing Act, 42 U.S.C. 3601 et seq. (1988).

12. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard. Docket No. FR-6111-F-03. Page 168. https://www.financialservicesperspectives.com/wp-content/uploads/sites/6/2020/09/Sup-Materials.Blog_.FSP_.-Disparate-Impact-Final-Rule-9-3-20.-Sept-2020.pdf.
13. The PEW Charitable Trusts. (2015). Philadelphia's Councilmanic Prerogative: How it works and why it matters, 3-20.

Acknowledgement

Dear Professor Sharon Barr and Dina Schlossberg,

I am so glad that I chose this course, Law of Planning and Urban Development, in the last year of study at the University of Pennsylvania. At the very beginning of the semester, I was very afraid to convey my thoughts and ask some “stupid” questions because I never had experience with the US law system before. Actually, I have little knowledge of planning laws in my country, since the law of planning is not mature yet in China.

Thanks to the case materials you assigned to us. Many of them are milestones in the planning law and worth reading. The cases help me better understand the content in the class. I also appreciate the discussion during class. We have many classmates in the class are professional, experienced and willing to share. I’ve learned a lot from them.

Thank you for bringing me such a wonderful class to understand how the laws are guiding city planning in the United States and protect citizen rights. It inspired me a lot in which direction of city planning in China should step in.

Thank you so much! And Merry Christmas!

Best regards,

Xinyi Qiu