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Telecommunications Act—Preemption—Town Ordinance Gives Preference to Applicants Using Less-Intrusive "Alternate Technologies"

Wireless telecommunications providers say ordinance is preempted by federal Telecommunications Act

Citation: *New York SMSA Ltd. Partnership v. Town of Clarkstown, 2010 WL 2598310 (2d Cir. 2010)*

The Second U.S. Circuit has jurisdiction over Connecticut, New York, and Vermont.

SECOND U.S. CIRCUIT (New York) (06/30/10)—This case addressed the issue of whether a local ordinance providing preferences to wireless telecommunication provider applicants that used "preferred alternate technology" was preempted by the federal Telecommunications Act.

The Background/Facts: In 2007, the town passed an ordinance (the "Ordinance") governing the installation of wireless telecommunications facilities. Among other things, the Ordinance provided a preference in residential areas for smaller and less intrusive antennas. Under the Ordinance, wireless telecommunications provider applicants were placed into four categories based on their point score in the application process. The

Contributors
Corey E. Burnham-Howard

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higher the score, the lower the scrutiny—thus entitling applicants to "a faster and less rigorous evaluation by the Planning Board." The Ordinance gave applicants that used "preferred alternate technology," such as "microcell" or "distributed antenna systems"—resulting in smaller towers—a preference by way of a significant award of points.

In August 2007, several telecommunication carriers (the "Carriers") sued the town. They asked the court to declare that the Ordinance was preempted by the federal Telecommunications Act.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the district court issued summary judgment in favor of the Carriers. The court held that the provisions in the Ordinance granting a preference for certain "alternative technologies" were preempted by the Telecommunications Act. Federal regulations implemented under the Act regulate the use of technical and operational aspects of wireless telecommunications service. The court found that the Ordinance interfered with this federal regulatory scheme for wireless technology.

The town appealed.

DECISION: Affirmed.

Agreeing with the reasoning of the district court, the United States Court of Appeals, Second Circuit, held that the Ordinance was impliedly preempted by the federal Telecommunications Act.

The court explained that, in general, there were three types of preemption: "(1) express preemption, where Congress has expressly preempted local law; (2) field preemption, 'where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law'; and (3) conflict preemption, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives."

The district court had concluded that the Ordinance was preempted by field preemption. The court of appeals agreed. Federal law clearly occupies the field of the regulation of the technical and operational aspects of wireless telecommunications service, found the court. Federal regulations set technical standards for wireless technology, including antennas. The Ordinance's provisions setting forth a preference for "alternate technologies" interfered with this federal field of regulation, said the court. Because by establishing a "preference" for certain wireless technology (i.e., microcell and distributed antenna systems), the Ordinance "relegate[d] other technology—including technology that would meet the FCC's [Federal Communications Commission] standards—to an inferior and decidedly disadvantaged status." "As a consequence," said the Court, the Ordinance "interfere[d] with Congress's goal of facilitating the spread of new technologies and the growth of wireless telephone service."

See also: *Wachovia Bank, N.A. v. Burke, 414 F.3d 305 (2d Cir. 2005).*

See also: *Omnipoint Communications, Inc. v. City of White Plains, 430 F.3d 529 (2d Cir. 2005).*

Case Note: It its decision, the court addressed the fact that § 332(c)(7) of the Telecommunications Act "preserves the authority of State and local governments over zoning and land use matters." The court said that "this authority does not extend to technical and operational matters, over which the FCC and the federal government have exclusive authority." Here, the Ordinance went beyond the authority granted it by the § 332(c)(7) "into the area of technological and operational standards" regulated by the federal government.

Case Note: In the decision, the court also differentiated the case at hand from those where the court had held that a local government could reject an application for approval of the construction of a wireless service facility on the grounds that "less intrusive means" for providing service could be utilized. Those other cases were "individual permit cases involving specific applications to build specific facilities on specific sites." In those cases, "[p]articular aesthetic concerns over specific sites were at stake." In comparison, here, the Ordinance applied "to *all* applications for the construction of wireless service facilities within the [t]own, and the [t]own's legislated preference for alternate technologies .... [was] very much in issue..... ."

Spot Zoning—City Rezones Individual Property as a "Historic Preservation Overlay District"

Adjacent property owners contend this is illegal spot zoning that decreases the commercial value of nearby properties

Citation: *Ely v. City Council Of City Of Ames, 2010 WL 2598244 (Iowa Ct. App. 2010)*

IOWA (06/30/10)—This case involved the issue of spot zoning.

The Background/Facts: Since 1920, the Martin family owned a home in the city. From approximately 1920 to the late 1940s, the Martins provided room and board to African-American students attending Iowa State University who were denied housing elsewhere.

Over time, the area where the Martin home was located became a major commercial artery. It was designated as a "Highway-Oriented Commercial" zoning district. The Martin home continued to be used as residential rental property. Since it was used as a household living space prior to enactment of the commercial zoning legislation, the Martin home's residential use was permitted as a nonconforming use.

Sometime before 2008, the Archie A. and Nancy C. Martin Foundation submitted an application requesting that the city designate the Martin house as an historic landmark.

Neighboring commercial property owners, the Elys, objected to the Martin property being designated as a historical landmark. They contended that the designation would "make it impossible to remove the house or change its residential use." They also argued that the "end result without a requirement to improve the property"—which they said was poorly maintained—was "that it would decrease the commercial value of nearby properties, including their lot."

Despite the Elys' objections, the city rezoned the individual Martin property as a "Historic Preservation Overlay District."

The Elys appealed this designation. Among other things, they argued that the designation was "illegal spot zoning."

The trial court concluded that the rezoning of the Martin property was not spot zoning, and "even if it were, the spot zoning was valid."

The Elys appealed.

DECISION: Affirmed.

The Court of Appeals of Iowa held that the designation of the Martin property as an historic landmark did not constitute illegal spot zoning.

The court explained that "[s]pot zoning is the creation of a small island of property with restrictions on its use different from those imposed on surrounding property." Spot zoning is illegal, said the court, when it "results in the reclassification of one or more like tracts or similar lots for a use prohibited by the original zoning ordinance and out of harmony with [it]." Still, explained the court further, spot zoning is legal and valid if it is "in line with proper police power objectives and there are reasonable grounds to treat the subject property differently." Whether or not there is a reasonable basis for the spot zoning depends on the consideration of factors such as: "size of the spot zoned, the use of surrounding properties, the changing conditions of the area, the current use of the subject property, and its suitability for alternative uses." Primarily, the court said it looked to whether the rezoned tract "has a peculiar adaptability to the new classification as compared to the surrounding property."

Here, the court of appeals found that the designation of the Martin property as an historic landmark was not illegal spot zoning; it was actually a "continuation of a permissible nonconforming use." This was because the owner of the Martin property had a vested right to continue using the property as a rental unit whether it was given historic landmark status or not. Continuing this nonconforming use did not, said the court, constitute illegal spot zoning.

In any case, even if this amounted to spot zoning, the court found it was valid/legal spot zoning. This was because there was "a reasonable basis for distinguishing the use of the Martin house from the surrounding area." The property had historical and cultural significance to the

city. Also, the city could legally make a zoning classification to achieve the objective of preserving this heritage.

See also: *Kane v. City Council of City of Cedar Rapids, 537 N.W.2d 718 (Iowa 1995).*

See also: *Little v. Winborn, 518 N.W.2d 384 (Iowa 1994).*

Case Note: The Elys had also argued that: the city ordinances related to designating property as historical landmarks denied the Elys due process; and the Elys were denied equal protection when the city designated the Martin property a historic landmark. The district court concluded that the designation did not violate the due process or equal protection clauses. The court of appeals agreed.

Revocation (of Approval)—Subdivision Plans Are Constructively Approved by Planning Board's Failure to Act Within Statutory Time Period

Planning board then rescinds approval, saying it was unintended

Citation: *Czyoski v. Planning Bd. of Truro, 77 Mass. App. Ct. 151, 928 N.E.2d 987 (2010)*

MASSACHUSETTS (06/29/10)—This case addressed the issue of whether a planning board can rescind constructive approval (implemented under state law because of the board's procedural error) based only on the reasoning that the approval was unintended.

The Background/Facts: Judith Czyoski and Andrew Czyoski, as trustee of A & B Realty Trust (collectively, the "Owners"), owned property in the town. They sought to develop the property into a 15-lot subdivision. In furtherance of that plan, they filed a definitive subdivision plan on June 13, 2005, and revised it later that month. After various continuances in the proceedings, the town's planning board (the "Board") voted to deny the approval of the plan.

The Owners appealed the denial. They argued that the Board had already constructively approved the subdivision plan because it had failed to act on it within a 90-day period, as required by state statutory law. Under Mass. Gen. L. c. 41, § 81U, planning boards must follow "strict rules" lest their inaction result in subdivision plans being constructively approved. "For example, to avoid constructive approval of a definitive subdivision plan, a planning board must file with the city or town clerk a certificate of the action that it has taken on that plan within ninety

days after the plan has been filed, or by an extended date requested by the applicant."

Eventually, the Board stipulated to dismissal of that action. Thus, whether the plan was constructively approved was no longer an issue; it was constructively approved.

Subsequently, however, the Board voted to rescind its approval of the Owner's definitive subdivision plan. In doing so, it cited four grounds for its action: (1) the unavailability of a private road as access; (2) "inherent" safety problems; (3) the failure to adequately protect some of the views of the Owners' property from a local pond; and (4) the fact that the Board never intended to approve the plan, "and was led to believe by [the Owners] that delay in acting on the plan was acceptable to [them]."

The Owners appealed to the land court the Board's decision to rescind the approval of the subdivision plan.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the land court granted summary judgment in favor of the Owners. The court concluded that "none of the grounds provided by the [B]oard supported its decision to rescind the constructive approval."

The Board appealed.

DECISION: Affirmed.

The Appeals Court of Massachusetts upheld the land court's decision to vacate the Board's rescission of the constructive approval of the Owners' definitive subdivision plan. Agreeing with the land court, the appeals court concluded that the Board had "not supplied any valid basis for its decision to rescind the constructive approval."

In so concluding, the court reiterated that under Mass. Gen. L. c. 41, § 81U, planning boards must follow "strict rules" lest their inaction result in subdivision plans being constructively approved. The court said that in light of those "strict rules," "[t]he fact that an applicant is willing to extend the ninety-day period is not by itself sufficient to prevent a constructive approval; rather the board must file notice of the extension with the clerk before the period has expired."

The court noted that there was a separate provision of the state subdivision control law, § 81W, allowed planning boards to "modify, amend or rescind" their approvals. Planning boards could, under § 81W, rescind constructive approvals. However, in order to rescind constructive approvals, boards had to provide "good reason" for doing so. In other words, here, in order to rescind the constructive approval of the Owners' subdivision plan, the Board had to "provide a defensible substantive reason for denying the application."

The court determined that the first three reasons for rescission provided by the Board were not defensible. The Owners had provided affidavits regarding those issues and the Board failed to counter those affidavits. Thus, the court found the Board failed to "substantiate its stated concerns over traffic and views."

As for the last reason for rescission—that the constructive approval was unintended—the court concluded that alone did "not supply 'good reason'" for the rescission. Rather, the Board had to provide a substantive basis for the rescission. Rescinding the constructive approval resulted in the denial of the Owners' application, and that denial "ha[d] to be defended on its own merits," said the court. Because the Board failed "to provide a defensible substantive reason for denying the application, its rescission decision [could] not stand."

See also: *Young v. Planning Bd. of Chilmark, 402 Mass. 841, 525 N.E.2d 654 (1988).*

Weight Given to Other Board Reports—Zoning Commission Approves Revised Site Plan Application

In doing so, commission does not resubmit revised plan to wetlands commission for secondary approval

Citation: *Vine v. Planning and Zoning Com'n of Town Wallingford, 122 Conn. App. 112, 2010 WL 2365674 (2010)*

CONNECTICUT (06/22/10)—This case discussed the level of consideration that must be given to the report of an inland wetlands agency given the statutory requirement that such report be given "due consideration."

The Background/Facts: In February 2007, Ilia Athan filed an application with the town's zoning commission (the "Zoning Commission") for site plan approval to construct a commercial kennel and a dwelling house on property (the "Property") in the town. The Property contained 6.25 acres, including approximately two acres of wetlands. Because of the wetlands on the Property, Athan's application also required review by the town's inland wetlands and watercourse commission (the "Wetlands Commission").

The Wetlands Commission approved Athan's site plan.

Subsequently, Athan amended his application. He diminished the scope of the project by withdrawing the request to construct a dwelling house on the Property.

Ultimately, the Zoning Commission voted to approve the site plan application for the kennel.

A town citizen, Alan Vine, appealed the Zoning Commission's approval of Athan's site plan application for the kennel. He opposed the kennel, citing concerns that it would "create noise, change the rural character of the area and have an adverse effect on property values." In his appeal to the court of the approval of the plan, he argued that the Zoning Commission failed to give due consideration to the Wetlands Commission, as required under state law—Conn. Gen. Stat. § 8-3(g).

Section 8-3(g) provides, in relevant part, that: "The decision of the zoning commission shall not be rendered on the site plan application until the inland wetlands agency has submitted a report with its final decision. In making its decision the zoning commission shall give due consideration to the report of the inland wetlands agency ...."

Vine said the Zoning Commission failed to give the required "due consideration" to the Wetlands Commission because after the site plan application was amended, the new application was never resubmitted to the Wetlands Commission. He maintained that under § 8-3(g), the Zoning Commission was required to: notify the Wetlands Commission of all changes to the application; and receive secondary approval from the Wetlands Commission before approving the modified site plan. He argued that the Zoning Commission's failure to do this violated § 8-3(g), thus invalidating the approval of Athan's site plan.

The trial court dismissed Athan's appeal.

Athan appealed.

DECISION: Affirmed.

The Appellate Court of Connecticut held that, in approving Athan's site plan application, the Zoning Commission gave due consideration to the Wetlands Commission's report, as required by § 8-3(g).

The court explained that § 8-3(g)'s requirement of "due consideration" was not "a statutory mandate that the [Z]oning [C]ommission's decision be based on the wetlands report." Rather, it meant that the Zoning Commission had to "give such weight or significance to [the report] as under the circumstances it seem[ed] to merit ...." How much weight or significance the Zoning Commission had to give the Wetlands Commission's report was "a matter of discretion for the [Zoning] [C]ommission."

Vine had essentially argued that § 8-3(g) mandated that a zoning commission was required to receive secondary approval from the wetlands commission when a site plan was amended. The court disagreed, finding "[s]uch a procedural mandate is not supported by the plain language of § 8-3(g) ....." Rather, the court said that § 8-3(g) merely required that "[t]he final decision contained in the wetlands report [be] one of the many factors the zoning commission must consider in rendering its own decision ...."

Here, the court found that the Zoning Commission "discussed the [W]etlands [C]ommission's prior approval and determined that removing the dwelling house from the site plan would not affect the [P]roperty's wetlands." The court determined that this constituted the necessary "due consideration" of the Wetlands Commission's report, as required by § 8-3(g). Thus, the court concluded that the trial court had properly dismissed Vine's appeal.

See also: *Arway v. Bloom, 29 Conn. App. 469, 615 A.2d 1075 (1992), appeal dismissed, Arway v. Bloom, 227 Conn. 799, 633 A.2d 281 (1993).*

Standing—Citizens of Another State, Owning Nearby Property, Appeal Commission Approvals of Land Use Applications

Applicants argue citizens lack standing because they are not in-state landowners

Citation: *Abel v. Planning and Zoning Com'n of Town of New Canaan, 297 Conn. 414, 2010 WL 2650519 (2010)*

CONNECTICUT (07/13/10)—This case addressed the issue of whether "any person aggrieved"—given the right to appeal a land use decision under Connecticut statutory law—includes persons that do not own land in Connecticut.

The Background/Facts: Grace Property Holdings, LLC, and Pacific Farm, LLC, (the "Owners") applied to a Connecticut town's planning and zoning commission (the "Commission") for: a subdivision of property (the "Property") located in the town and for a special permit to build a church on a newly created parcel. The Commission approved the applications.

Sanjit Shah, Mary Shah, Daniel Cooper, and Karen Cooper owned land in New York within 100 feet of the Property. The Shahs and Coopers appealed separately from each approval. Their appeals were made under Conn. Gen. Stat. § 8-8(b). Section 8-8(b) provides in relevant part that: "[A]ny person aggrieved by any decision of a board, including... a special permit or special exception... may take an appeal to the superior court for the judicial district in which the municipality is located." Section 8-8(a)(1) further provides that, in the case of a decision of planning commission, an "'aggrieved person' includes any person owning land that abuts or is within a radius of one hundred feet of any portion of the land involved in the decision of the [commission]."

The Owners filed with the trial court motions to dismiss the appeals. They argued that the Shahs and Coopers did not have standing to appeal because their properties were not located in the State of Connecticut. The trial court agreed, granting the motions to dismiss the appeals.

The Shahs and Coopers then appealed from the judgments of dismissal. They maintained that pursuant to §§ 8-8(b) and 8-8(a)(1), "any person aggrieved" "plainly and unambiguously encompasses all person who own land within 100 feet of the land involved in a board or commission's decision, regardless of whether they own land within [the State of Connecticut]."

On appeal, the Owners countered that "there is a strong presumption against" the application of statutes outside of the state. They said that presumption could only be overcome if the legislature expressly states that the statute has an extraterritorial affect (i.e., an affect outside of the state). Accordingly, the Owners argued that "any person"—allowed standing to appeal planning commission decisions—is limited to persons who own land in Connecticut.

DECISION: Reversed.

The Supreme Court of Connecticut held that, even though they did not own land in Connecticut, the Shahs and Coopers had statutory standing to appeal the approvals of the Owners' subdivision application and special permit. In so holding, the court concluded that § 8-8(a)(1) confers standing to appeal on persons who do not own land within the State of Connecticut.

In reaching its decision, the court found that the phrase in § 8-8(a)(1) "any person" did "not plainly and unambiguously refer to persons outside the state's territorial jurisdiction." This was because the court "presume[d]" that the legislature in drafting § 8-8(a)(1) was "aware of the constraints of its power to regulate conduct [outside of the state]."

In determining the scope of "any person," the court looked to the legislative history and the intent of the legislature in adopting § 8-8(a)(1). The public policy underlying the statutes authorizing municipalities to adopt planning regulations was: "to promote .... the coordinated development of the municipality and the general welfare and prosperity of its people" and "to secure the uniform and harmonious growth of [municipalities]." Given these purposes, the court found no reason why, in authorizing nearby landowners to use the appeal process, "the legislature would have intended to exempt... properties in locations where the greatest and most immediate effect of a proposed development would be on the owners of property that is located in another state." Nor did the court find evidence that the legislature intended that an out-of-state landowner would face the burdens of a land use within a Connecticut municipality without having recourse. Accordingly, the court concluded that the phrase "any person" in § 8-8(a)(1) included persons who own land (within 100 feet of the involved land) in another state.

Given that conclusion, the court determined that the Shahs and the Coopers did not lack standing to appeal from the Commission's decision on the ground that they did not own land in Connecticut.

See also: *Diamond Multimedia Systems, Inc. v. Superior Court, 19 Cal. 4th 1036, 80 Cal. Rptr. 2d 828, 968 P.2d 539 (1999).*

Zoning News from Around the Nation

MARYLAND

Howard County is considering proposed legislation that "would allow farmers markets or produce stands in residential areas if they are located on lots between one and two acres, the stand or market would be the sole use of the property, and it faces and has direct access to a road."

Source: *Howard County Times*; *www.explorehoward.com*

MASSACHUSETTS

Recently, the state House of Representatives approved legislation, H 4687, which "would expedite the process of siting wind energy facilities in cities and towns." Under the legislation, mayors, city managers, or boards of selectman could "create and appoint a three-member wind energy permitting board comprised of one member each of the zoning board of appeals, the conservation commission and the planning board. The wind energy permitting board would make the decision whether a permit should be issued to a developer."

In passing the legislation, the House rejected an amendment that would have prohibited "the siting of a wind energy project unless the voters of the city or town approve it at a city or town election." It also rejected an amendment that would have "increase[d] from 120 days to 180 days the amount of time that a city or town's local wind energy permitting board has to decide whether to approve an application for the siting of a wind energy project."

Source: *Pembroke Express*; *www.pembrokexpress.com*

NEW YORK

East Hampton is considering a plan to "change how bluff setbacks are measured [in one area of town]." Currently, bluff setbacks are measured from the top/crest of the bluff. With the proposed changes, the setback would instead be measured from the base/toe of the bluff.

Source: *The East Hampton Star*; *www.easthamptonstar.com*

NORTH CAROLINA

The state legislature has passed House Bill 1829, which "mandate[s] that property donated for conservation for which State tax credits are issued must be held in perpetuity for the use for which the property was intended." The bill awaits the governor's signature.

Source: *The Outer Banks Sentinel*; *http://obsentinel.womacknewspapers.com*

UTAH

The state legislature recently passed two pieces of legislation, which affect municipal zoning. House Bill 381, "Municipal Land Use Provisions," "requires a rental unit to conform to the standards in place when it was built, rather than current standards." Senate Bill 45, "Utah Fit Premises Act," limits the number of unrelated individuals who can live in a single-family dwelling to three.

Source: *Deseret News*; *www.deseretnews.com*

Editorial Questions or Comments: west.quinlan@thomsonreuters.com

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Constitutionality of Zoning Regulation—City Ordinance Prohibits "Advertising Signs" But Allows "Identification Signs"

Sign applicant challenges ordinance as violative of the First Amendment

Citation: *Melrose, Inc. v. City of Pittsburgh, 2010 WL 2814284 (3d Cir. 2010)*

The Third U.S. Circuit has jurisdiction over Delaware, New Jersey, Pennsylvania, and the Virgin Islands.

THIRD U.S. CIRCUIT (PENNSYLVANIA) (07/20/10)—This case addresses the constitutionality (First Amendment) of a sign ordinance.

The Background/Facts: Melrose, Inc. (Melrose) leased five buildings in the city. As part of its lease agreements, Melrose had the right to name the leased buildings.

In March 2001, Melrose submitted to the city's zoning administrator applications to rename each of the five buildings. The proposed building names included: "wehirenurses.com building" and "palegal-

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Corey E. Burnham-Howard

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help.com". In submitting its applications, Melrose sought to have the signs, with the proposed new names, remain classified as "identification signs."

The city's zoning code distinguished between three categories of signs. Identification signs were defined as signs "used to identify the name of the individual or organization occupying the premises; the profession of the occupancy; the name of the building on which the sign is displayed; or the name of the major enterprise or principal product or service on the premises." Advertising signs were defined in the zoning code as signs that direct attention to "a business, commodity, service or entertainment, conducted, sold or offered." Business signs were defined as signs that direct attention to "a business, organization, profession or industry located upon the premises where the sign is displayed," or the products sold, or services offered.

The five buildings were in zoning districts where the city's zoning code generally: prohibited advertising signs, but allowed business signs and identification signs. Additionally, advertising signs were subject to more rigorous regulations.

Ultimately, the city's zoning board rejected Melrose's applications to change the identification signs on the five buildings. The zoning board determined that the proposed signs were advertising signs, prohibited in the zoning districts where the buildings were located. In reaching this decision, the zoning board applied four criteria it had previously used for determining whether a sign with advertising aspects could still be classified as a genuine identification sign. To avoid being characterized as an advertising sign, an identification sign with an advertising component had to: (1) have a major purpose of establishing a destination point generally recognized by the public at a specific location; (2) have an established location that was important to a material segment of the public (e.g., sports, cultural, commercial, or artistic venue); (3) have evidence of intended longevity of the sign "adequate to sustain the designation point concept"; and (4) have either the owner of the facility or its principal user in control of the destiny of the sign, rather than a third party.

Melrose challenged the rejection of its applications in district court. It argued that the zoning board's rejection of its applications violated its First Amendment free speech rights.

The district court rejected Melrose's claims.

Melrose appealed.

DECISION: Affirmed.

The United States Court of Appeals, Third Circuit, held that the zoning board's application of the four criteria did not violate Melrose's First Amendment free speech rights. The court said the application of the criteria was a "permissible 'context-sensitive' analysis."

In reaching this decision, the court explained that First Amendment analysis first requires a determination of whether a statute (i.e., here the zoning code and the application of the four criteria) is content-based or content-neutral. If the statute is content-based, it is valid only if the government can show "that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." If the statute is content-neutral—in that it "merely restricts the total quantity of speech by regulating the time, the place or the manner in which one can speak"—it is valid only if the government shows that the restrictions: (1) are justified without reference to the content of the regulated speech; (2) are narrowly tailored to serve a significant governmental interest; and (3) leave open ample alternative channels for communication of the information.

Here, the court found the identification signs allowed under the city's zoning code were an example of "context-specific signs." "Such signs clearly better convey their information at the location they are intended to identify, rendering them similar to address signs." The court explained that context-specific signs do not constitute content-based restrictions. The court said this was because allowing such "context-sensitive signs" while banning others is "not discriminating in favor of the content of th[ose] signs; rather it is accommodating the special nature of such signs so that the messages they contain have an equal chance to be communicated." Thus, the court analyzes their First Amendment validity under the content-neutral test.

Here, the court found that the ordinance was valid under the content-neutral test because: (1) the city had important aesthetic interest in limiting advertising signage and important interest in allowing the public to identify a particular name with a geographic location—public order and traffic safety; and (2) the ordinance was narrowly tailored to serve those interests, by allowing for a small number of identification signs containing advertising when they also identified their locations, and "impinging as little as possible" on the overall goal of the city's sign regulations.

Finally, the court concluded that "Melrose's signs clearly failed to satisfy [the four criteria applied by the zoning board]." Accordingly, it upheld the zoning board's rejection of Melrose's sign applications.

See also: *Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994).*

See also: *Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800, 16 Env't. Rep. Cas. (BNA) 1057, 11 Envtl. L. Rep. 20600 (1981).*

Case Note: Melrose had also argued that the four criteria applied by the zoning board were impermissibly vague or subjective. The court disagreed, finding instead that the criteria represented "narrow, objective and definite standards" to guide the zoning board's decision making.

Case Note: Melrose had also argued that application of the zoning code to its sign applications violated its equal protection rights. The court found this allegation failed as Melrose "clearly failed to establish that it [was] similarly situated to those entities whose signs ha[d] been approved."

Spot Zoning—Protestor Claims Rezone is Illegal Spot Zoning

County says claim fails because an alternative special use permit option rendered the zone change unnecessary

Citation: *Plains Grains Ltd. Partnership v. Board of County Com'rs of Cascade County, 2010 MT 155, 2010 WL 2796441 (Mont. 2010)*

MONTANA (07/16/10)—This case addressed the issue of whether the rezoning of certain land constituted impermissible spot zoning.

The Background/Facts: Duane and Mary E. Urquhart and Scott and Linda Urquhart (collectively, the "Urquharts") owned 668 acres of land in the county. They agreed to sell the land to Southern Montana Electric (SME), which sought to construct a natural gas fired electric generating station (the "Electric Station") on the land.

In furtherance of those plans, in October 2007, the Urquharts submitted a rezoning application to the county. They requested a zone change of the 668 acres of land from Agricultural (A-2) to Heavy Industrial (I-2).

In reviewing the rezone request, the county's planning department (the "Department") noted that the A-2 zone permitted electrical generation facilities through the special use permit process.

Thus, the Department concluded that although the operation of the Electric Station would be "out of character with the existing agricultural land uses in the vicinity of the proposed rezoning," it would not necessarily be "out of character with the land uses allowed under the existing A-2 zoning district."

Ultimately, the Board of Commissioners of the County (the "County") approved the requested rezone.

Plains Grains Limited Partnership (Plains Grains) challenged the rezone in district court. Among other things, it alleged that the zone change constituted impermissible spot zoning.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the district court issued summary judgment in favor of the County. In so deciding, the district court concluded that the availability of the special use permit option rendered unnecessary the Urquhart's zone change request.

Plains Grains appealed.

DECISION: Reversed.

The Supreme Court of Montana held that the rezoning of the Urquhart's land constituted illegal spot zoning.

In so holding, the court disagreed with the district court, saying: "[t]he fact that SME arguably could have pursued a special use permit [did] not undermine Plains Grains' spot zoning claim." Whether a special use permit would have been granted to SME would have been at the discretion of the county's board of adjustment. Also, the Urquharts and SME opted to pursue the rezoning option rather than the special permit option. Therefore, said the court, the special use permit option did not render unnecessary the zone change request.

The court then set to determine whether the rezone constituted illegal spot zoning by applying a three-part test. A rezone constitutes illegal spot zoning, explained the court, "regardless of variations in factual scenarios," if the following three conditions are met: (1) the requested use differs significantly from the prevailing land use in the area; (2) the area requested for rezone is "'rather small' in terms of the number of landowners benefitted by the requested zone change"; and (3) the requested zone change is "in the nature of 'special legislation' designed to benefit one or a few landowners at the expense of the surrounding landowners or the public."

Here, the court found these three conditions were met: (1) The proposed rezone to facilitate construction of the Electric Station would have "create[d] an island of heavy industrial zoning within a

large area zoned for agricultural use." The requested use of the 668 acres for the Electric Station would have "differ[ed] significantly from surrounding uses." (2) The 668 acres "comprise[d] a ... small percentage of the land zoned for agriculture in [the county]." Also, the number of landowners affected by the rezone was one—"viewed either as the Urquharts or SME." (3) Given the number of landowners affected, the zoning constituted "special legislation designed to benefit one person" at the expense of others since "[n]o discernible benefit for the rezone would [have] accrue[d] to the neighboring farmers and ranchers."

See also: *Little v. Board of County Com'rs of Flathead County, 193 Mont. 334, 631 P.2d 1282 (1981).*

See also: *North 93 Neighbors, Inc. v. Board of County Com'rs of Flathead County, 2006 MT 132, 332 Mont. 327, 137 P.3d 557 (2006).*

Case Note: The court's decision also addressed allegations that the illegal spot zoning challenge had been rendered moot. The court found it had not.

Zoning Enforcement-Equitable Estoppel—City Employee Errs in Telling Building Permit Applicant He Is Using Correct Survey of Lot

After construction, city seeks court order to move structure to conform with setback requirements

Citation: *City of North Oaks v. Sarpal, 2010 WL 2813496 (Minn. Ct. App. 2010)*

MINNESOTA (07/20/10)—This case addressed the issue of whether a city was prevented by the doctrine of equitable estoppel from enforcing zoning regulations against a homeowner.

The Background/Facts: In 2006, Rajbir Sarpal sought to construct a garden/pool shed on property he owned in the city. In furtherance of that plan, Sarpal sought a building permit from the city. As part of the permit process, Sarpal needed an "as-built survey" of his lot. He asked a city employee for an as-built survey, and the employee handed him a survey and affirmed it was what Sarpal needed.

As it turned out, the survey showed proposed structures, which were not built as shown. Sarpal was not aware of this fact. Sarpal

drew the proposed shed on the survey, depicting the shed as avoiding a 30-foot setback area. Also, the city ultimately approved the building permit for the shed.

Sarpal constructed the shed. However, because the house was not built as proposed on the survey, the shed ultimately encroached onto the setback approximately 15 feet.

In September 2007, the city sent a letter to Sarpal, explaining the encroachment and requesting that he move the shed.

Sarpal instead applied for a variance, which was denied. Sarpal did not move the shed.

In April 2008, the city brought a petition for injunctive relief, asking the court to order Sarpal to relocate the shed. Sarpal argued that the city should be estopped from enforcing the zoning ordinance setback requirement against him. He argued this equitable estoppel should be applied so as to prevent an injustice.

The district court agreed with, and ruled in favor of, Sarpal.

The city appealed.

DECISION: Affirmed.

The Court of Appeals of Minnesota held that equitable estoppel should apply, prohibiting the city from enforcing the zoning ordinance setbacks against Sarpal. Sarpal did not have to move the shed.

In so holding, the court explained that "[e]stoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of the estoppel." The court said that in order for Sarpal to successfully allege equitable estoppel against the city, he had to prove that: (1) the city engaged in wrongful conduct; (2) Sarpal reasonably relied on the city's conduct; (3) Sarpal incurred a unique expenditure; and (4) a balancing of the equities favored estoppel.

Here, the parties had agreed as to the third element—Sarpal incurred a unique expenditure. The court held that the other three elements were also met: (1) The city engaged in "wrongful conduct by providing [Sarpal] with inaccurate documentation, failing to competently review the building permit application, failing to place [Sarpal] on notice of the error, and approving the Shed application ...." (2) Sarpal relied on the city's representation that the survey provided to him was the correct survey to use. This reliance was reasonable given that: Sarpal, in measuring the shed's distance from the house, did not know the house was not built as proposed; and the mistake was "not recognized by any of the experienced

land-use officials who were involved in the approval process." Also, (3) a balancing of the equities favored estoppel because: the city failed to show evidence of harm to an adjoining landowner or any other public interest and there had been no complaints to the city; but Sarpal would have faced costs of $10,000 to $20,000 to move the shed.

See also: *Ridgewood Development Co. v. State, 294 N.W.2d 288 (Minn. 1980).*

See also: *Matter of Westling Mfg., Inc., 442 N.W.2d 328 (Minn. Ct. App. 1989).*

Case Note: The court noted that, "standing alone, the approval of a building permit based on an incorrect submission would [not necessarily] be sufficient to estop the city from enforcing its zoning law once the error was discovered." In that situation, the "wrongful-conduct" element may not be met as the city would be entitled to rely on the accuracy of the documents submitted by the contractor or the landowner. The situation here, however, differed in that a city employee told Sarpal that he was using the correct survey.

Prohibited Use—Corporation Records Images at Residence and Sells Them From Another Address

City says activities at residence violate prohibition against operating a business in a residential zone

Citation: *Flava Works, Inc. v. City of Miami, FL, 609 F.3d 1233 (11th Cir. 2010)*

The Eleventh U.S. Circuit has jurisdiction over Alabama, Florida, and Georgia.

ELEVENTH U.S. CIRCUIT (FLORIDA) (06/25/10)—This case addressed the question of whether activities taking place in a residence violated the local prohibition against operating a business in a residential zone.

The Background/Facts: Flava Works, Inc. (Flava Works) was a Florida Corporation doing business as CocoDorm.com. It operated an Internet-based Web site of the same name. The Web site transmitted images, via webcam, of the residents of 503 Northeast 27th

Street (the "Residence") in the city. The Residence was owned by Angel Barrios and leased to Flava Works. The Residence was located in a district zoned multifamily high-density residential (R-4). The persons residing at the Residence were independent contractors of Flava Works. In exchange for $1,200 per month plus free room and board, the residents were "expected to engage in sexual relations which [we]re captured by the webcams located throughout the house." Individual subscribers paid Flava Works, through the Web site, for access to video feeds from the Residence.

Flava Works' principal place of business, where accounting and financial aspects of the business were conducted, was at a different address. The computer servers, which housed the digital content and provided access to the Web site, were also located at a different address.

In June 2007, the city notified Barrios that Flava Works was illegally operating a business in a residential zone. In August 2007, the city's code enforcement board (the "Board") found Barrios and Flava Works violating a city ordinance prohibiting the operation of a business in a residential zone.

Barrios and Flava Works filed an action in federal district court, seeking to quash the decision of the Board.

The district court held that "the activities taking place at [the Residence] [did] not amount to the unlawful operation of a business in a residential zone."

The city appealed.

DECISION: Reversed.

The United States Court of Appeals, Eleventh Circuit, held that the activities taking place at the Residence violated the city ordinance prohibiting operation of a business in a residential zone. Flava Works was illegally operating a business in the residential zone.

Flava Works had argued that no "business" was being conducted at the Residence because "no goods were bought or sold and nothing was manufactured on the premises." The court disagreed. It noted that the activities taking place at the Residence were "part and parcel" to Flava Works' business operations. "The fact that certain aspects of the business [were] performed at other locations [did] not alter th[at] analysis." Images, which were later sold over the Internet, were created at the Residence. While those images were not "tangible goods," the court found they had a "commercial value" and enabled Flava Works to "earn a profit." The court found those characteristics

fit into the "common definition of a business, which is '[a] commercial enterprise carried on for profit.'"

The court concluded that: "the activities taking place at [the Residence] [were] a clear violation of the prohibition against operating a business in a residential zone."

See also: *Voyeur Dorm, L.C. v. City of Tampa, Fla., 265 F.3d 1232, 29 Media L. Rep. (BNA) 2373 (11th Cir. 2001).*

Case Note: In reaching this conclusion, the court first explained that the city's zoning ordinance did allow for a variety of specific home occupations in residential zones. The activities at the Residence did not fall within those limited exceptions.

Case Note: The city had also found Barrios and Flava Works guilty of violating an ordinance prohibiting adult entertainment in C-1 zoned property. The district court held that since the city's zoning ordinance was "designed to restrict establishments that offer adult entertainment services to the public at their physical location, that ordinance [could] not be 'applied to a particular location that does not, at that location, offer adult entertainment' or services to the public." The city did not appeal that portion of the district court's decision.

Zoning News from Around the Nation

ALASKA

The Kenai City Council is considering a proposed ordinance that would "allow residents to keep [bee] hives in neighborhoods." Currently, beekeeping is considered an agricultural use that is not allowed in certain zoning districts.

Source: *Peninsula Clarion*; www.peninsulaclarion.com

MARYLAND

The Howard County Council recently approved numerous land use-related bills. The recently passed legislation now: "enable[s] a community-loved farm stand to continue operation on Route 99"; "permit[s] windmills on private property"; "amend[s] the county's adequate public facilities laws in downtown Columbia"; and

"move[s] forward on an agreement designed to govern development at historic Doughoregan Manor in Ellicott City."

Source: *Columbia Flier*; *www.explorehoward.com*

The state's highest court recently ruled that a referendum challenging zoning for construction of a slots casino at Arundel Mills mall "should be placed on the [November] ballot."

Source: *The Baltimore Sun*; *http://articles.baltimoresun.com*

PENNSYLVANIA

The Northampton Township Board of Supervisors recently "approved an ordinance that will regulate the construction of alternative and emerging energy systems in the township." Among other things, the new law "bans wood-fired burners"; "essentially relegates wind turbines" to a less dense R-1 zoning district; and "eases traditional setback requirements for residents and businesses contemplating systems like solar panels." Solar panels, allowed in all zoning districts, are restricted under the ordinance to "behind the front façade of a building" with no systems permitted in front yards.

Source: *Bucks Local News*; *www.buckslocalnews.com*

WISCONSIN

A new state health plan reportedly "suggests that municipalities use zoning regulations to limit the number and density of fast-food restaurants, particularly in low-income neighborhoods." State health officials say this is a strategy that can help reduce obesity in Wisconsin.

Source: *The Cap Times*; *http://host.madison.com*

Editorial Questions or Comments: west.quinlan@thomsonreuters.com

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Liabilities—Sign company sues city and zoning official for damages related to their interpretation of zoning ordinance

City and official claim substantive immunity

Citation: *Bill Salter Advertising, Inc. v. City of Atmore, 2010 WL 4151989 (Ala. Civ. App. 2010)*

ALABAMA (10/22/10)—This case addressed the issue of whether a city and city zoning official were entitled to substantive immunity from a sign company's action for damages arising out of interpretation and enforcement of a zoning ordinance.

The Background/Facts: Bill Salter Advertising, Inc. ("BSA") was a company that erected and maintained advertising signs in several locations in Alabama, including the City of Atmore (the "City"). In 2004, Hurricane Ivan struck the City. Several of BSA's signs were damaged in the hurricane. Subsequently, BSA contacted city officials regarding BSA's desire to rebuild the damaged signs. The city's building official, Allen Nix, allegedly refused to allow BSA to rebuild the signs. Nix based this refusal on the City's sign ordinance (the "Or-

Contributors
Corey E. Burnham-Howard

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dinance"). Nix interpreted the Ordinance as preventing off-premise signs that were more than 50% destroyed from being rebuilt. On appeal, the City's Board of Adjustment (the "Board") eventually determined that, pursuant to the Board's interpretation of the Ordinance, BSA could rebuild its off-premise signs.

In the meantime, BSA had sued the City and Nix. Among other things, it asked the court to award it damages related to Nix's interpretation of the Ordinance, initially precluding BSA from rebuilding its signs.

The City and Nix argued that BSA's claim failed under the doctrine of substantive immunity. That doctrine "shields municipalities from liability for the negligent acts of their employees" in certain governmental activities.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the trial court issued summary judgment in favor of the City and Nix.

BSA appealed to the Alabama Supreme Court. That court transferred the appeal to the Court of Civil Appeals of Alabama.

The Court's Decision: Judgment of trial court affirmed.

The Court of Civil Appeals of Alabama held that the City and Nix were entitled to substantive immunity from BSA's claim for damages related to the interpretation of the Ordinance precluding BSA from rebuilding its signs.

In so holding, the court acknowledged that judicial municipal immunity from tort liability has been abolished since 1975. Municipalities therefore are generally subject to liability from the negligent acts of their employees. However, the doctrine of substantive immunity continues to shield municipalities from liability for the negligent acts of their employees "in those narrow areas of governmental activities essential to the well-being of the governed ...." It also shields municipal employees involved in rendering "those services 'essential to the well-being of the governed.'" Thus, neither a municipality nor a municipal official can be liable under a negligence claim brought by an individual citizen for a "breach of duty owed to the general public." Municipalities and municipal officials can only liable under a negligence claim brought by an individual citizen if the municipality or municipal official owe a duty to that particular individual.

In the context of zoning, the court explained, "zoning powers are a public-service activity and may not be exercised for the benefit of individual landowners to the exclusion of the interests and well-being of all citizens of a county or municipality." Although zoning decisions may provide an incidental benefit to an individual citizen, when municipal officials exercise their zoning power for the benefit of the municipality, the zoning decision creates no duty owed by the officials to

the individual. In such a case, the individual citizen can not prevail on tort claims against the municipality or municipal officials.

Here, the court found that the Ordinance was "not enacted to provide a benefit to [BSA]." "Instead, the [O]rdinance was enacted to benefit the municipality as a whole." Thus, the court concluded, "[BSA] failed to establish a duty owed to them by the City or Nix, in his official capacity." Therefore, under the doctrine of substantive immunity, BSA's claim for damages arising out of the City and Nix's interpretation and enforcement of the Ordinance failed.

See also: *Rich v. City of Mobile, 410 So. 2d 385 (Ala. 1982).*

See also: *Hilliard v. City of Huntsville, 585 So. 2d 889 (Ala. 1991).*

See also: *Payne v. Shelby County Com'n, 12 So. 3d 71 (Ala. Civ. App. 2008).*

See also: *Tutwiler Drug Co., Inc. v. City of Birmingham, 418 So. 2d 102 (Ala. 1982).*

Case Note: BSA had also brought a claim against Nix, alleging "intentional interference" with BSA's business relations. The court found that claim failed because BSA had failed to present "substantial evidence of damages" flowing from that allegation.

Standing—Adjacent landowners appeal township decision to approve subdivision and land development application

Township says landowners lack standing to bring appeal because they failed to first appear in proceedings below

Citation: *Miravich v. Township of Exeter, 2010 WL 4242559 (Pa. Commw. Ct. 2010)*

PENNSYLVANIA (10/28/10)—This case addressed whether appeals from a subdivision and land use decision require procedural standing (i.e., a requirement that the appealing party first appear before the Board of Supervisors) in order to bring the appeal.

The Background/Facts: In 2005, the Metropolitan Development Group ("MDG") submitted to the Township an application for Preliminary Subdivision and Land Development approval of a proposed 34-lot development. The application was considered at a number of meetings of the Township Planning Commission. It was also con-

sidered at one meeting of the Township Board of Supervisors (the "Board"). The Board approved the application in 2008.

Within 30 days of the Board's approval, several adjacent landowners (the "Neighbors") filed a land use appeal with the court of common pleas. The Township asked the court to dismiss the matter. It argued that the Neighbors did not have standing (i.e., the legal right) to bring the appeal. It said this was because the Neighbors had not appeared in any of the proceedings below. There was no evidence that the Neighbors received notice of or attended the Township Planning Commission meetings or the Board meeting.

The court agreed with the Township. It held that the Neighbors lacked standing because they had not appeared before the Board or the Planning Commission.

The Neighbors appealed. They maintained they did have standing to bring their appeal.

The Court's Decision: Judgment of court of common pleas reversed and remanded.

The Commonwealth Court of Pennsylvania held that parties appealing from subdivision and land development decisions are not required to first appear before the Board of Supervisors in order to have standing to bring the appeal. Thus, here, the court concluded that the Neighbors did have standing to appeal the Board's approval of MDG's preliminary subdivision and land development application.

In so holding, the court explained that there were two concepts of standing: (1) substantive standing; and (2) procedural standing. To have substantive standing, a party has to show he/she was "aggrieved" by the decision sought to be reviewed. Procedural standing requires a party to show he/she has asserted his right to participate sufficiently early.

The court acknowledged that appeals from zoning decisions of a Zoning Hearing Board ("ZHB") require both types of standing. "[O]ne who does not appear or object on the record before a ZHB does not have standing to appeal the ZHB's decision ...." However, the court held that appeals from subdivision and land development decisions of a Board of Supervisors requires only substantive standing—not procedural standing. The court said this was because: while Pennsylvania's Municipalities Planning Code ("MPC") prescribed rules and procedures for ZHB hearings, including requirements of notice and appearance, the MPC "places virtually no procedural requirements on a Board of Supervisors considering subdivisions and land development proposals. In fact, the statute makes clear that public hearings themselves are not required." With ZHB decisions, where procedural rules require notice, hearings, and formal appearances, requiring procedural standing "serves both judicial economy and is fair to all interested parties," said the court. In

contrast, the court found that "because similar procedural protections are not required in subdivision and land development proceedings, it would be manifestly unfair, if not a denial of due process, to impose such a stringent rule as a prerequisite to subdivision and land development appeals."

Here, the court found that because the Board had not provided "procedural protections" (i.e., a notice and hearing on the record with clear procedures for entering an appearance), the only applicable standing requirement the Neighbor's had to meet was substantive (i.e., whether the Neighbors were "persons aggrieved").

See also: *Leoni v. Whitpain Tp. Zoning Hearing Bd., 709 A.2d 999 (Pa. Commw. Ct. 1998).*

See also: *Application of Rouse & Associates Ship Road Land Ltd. Partnership, 161 Pa. Commw. 52, 636 A.2d 231 (1993).*

Case Note: The court noted that "[h]ad the Board voluntarily followed the procedures required of a ZHB and provided notice and a hearing on the record with a clear procedure for entering an appearance, [the court] would [have] agree[d] ... that [the Neighbors] were required to meet both [standing requirements—substantive and procedural]" in order to appeal.

Case Note: The court also noted that "it is well-established that adjacent property owners have substantive standing to object to subdivision plans both before the governing body and in land use appeals to common pleas." Thus, the court concluded that the Neighbors, as adjacent landowners, had substantive standing to appeal the Board's decision.

Vested Rights—Relying on zoning allowing their desired use, auto dealerships purchase property

After that property's zoning classification is later changed prohibiting the use, dealerships claim vested right in use

Citation: *MLC Automotive, LLC v. Town of Southern Pines, 2010 WL 4286390 (N.C. Ct. App. 2010)*

NORTH CAROLINA (11/02/10)—This case addressed the issue of whether the fact that property owners purchased property in good

faith reliance on a then-current zoning categorization was sufficient to confer a vested right in the ordinance as it existed preamendment.

The Background/Facts: Leith of Fayetteville, Inc. and MLC Automotive, LLC (the "Dealerships") were in the business of developing and operating automobile dealerships. In 2000, the Dealerships became interested in purchasing a 21-acre tract of land (the "Property") in the town. They intended to develop on the Property an auto park consisting of several automobile dealerships. The Property was zoned General Business ("GB"). At that time, the town's Unified Development Ordinance (the "UDO") allowed property in GBs to be used for "Motor Vehicle and Boat Sales or Rental or Sales and Service" without a special or conditional use permit.

In January 2002, the Dealerships purchased the property for $1,553,90. Between 2001 and 2005, the Dealerships spent an additional $518,156 in preparations to develop the Property.

After the Dealerships began the process to obtain the required permits, the town rezoned the Property. The new zoning classification no longer permitted motor vehicle sales.

The Dealerships sued the town. Among other things, they claimed they had a common law vested right to develop the auto park on the Property.

Finding there were no material issues of fact in dispute and deciding the matter on the law alone, the trial court issued summary judgment to the Dealerships on their claim of common law vested rights. The court concluded that the Dealerships had a vested right to develop the auto park on the Property.

The town appealed.

The Court's Decision: Judgment of trial court revered and remanded.

The Court of Appeals of North Carolina concluded that the Dealerships did not have a vested right to develop the auto park on the property. In so concluding, the court found that the Dealerships did not make substantial expenditures in good faith reliance on town approval of their proposed auto park—as required for a vested right to establish.

The court explained that generally, "[t]he adoption of a zoning ordinance does not confer upon citizens ... any vested rights to have the ordinance remain forever in force, inviolate and unchanged." North Carolina does, however, recognize two methods under which a landowner can establish a vested right in an ordinance: "(1) qualify with relevant statutes ...; or (2) qualify under the common law."

In this case, the Dealerships only claimed a vested right arising under the common law. The court explained that a party claiming a common law vested right in a nonconforming use of land must show:

"(1) substantial expenditures; (2) in good faith reliance; (3) on valid governmental approval; (4) resulting in the party's detriment."

The Dealerships maintained that they acted in reliance on "valid governmental approval" and made substantial expenditures in reliance on that approval. The Dealerships claimed that the original GB zoning was sufficient governmental approval to give rise to a vested right when they made substantial expenditures in reliance on that zoning. The court disagreed. It said that: "[O]ne does not acquire a vested right to build, contrary to the provisions of a subsequently enacted zoning ordinance, by the mere purchase of land in good faith with the intent of so building thereon ...." Therefore, the fact that the Dealerships purchased the Property in good faith reliance on the GB zoning was not sufficient to give rise to a vested right.

The court explained that a party could acquire a vested right to build when the party, relying on required and obtained permits other than a building permit, makes substantial expenditures in reliance on the permit. Here, the Dealerships were required to obtain various permits (i.e., zoning, grading, erosion, and architectural compliance permits) but did not obtain any of those permits prior to making those expenditures. Since the Dealerships expenditures were not in reliance on any permits required to proceed with the auto park, the court concluded that no common law vested right to complete the auto park arose.

See also: *Town of Hillsborough v. Smith, 276 N.C. 48, 170 S.E.2d 904, 49 A.L.R.3d 1 (1969).*

See also: *Browning-Ferris Industries Of South Atlantic, Inc. v. Guilford County Bd. of Adjustment, 126 N.C. App. 168, 484 S.E.2d 411 (1997).*

Case Note: In its decision, the court noted that: "A vested right can arise, however, if 'a property owner makes expenditures in the absence of zoning' or without governmental approval when, at the time of the expenditures, no prior approval was required."

Case Note: The Dealerships had argued that governmental approval other than a permit could give rise to a vested interest. They pointed to two letters sent by the town's planning department as proof of governmental approval that gave rise to their vested interest in the auto park. A June 28, 2001 letter (the "June Letter") from the town's Code Enforcement Officer (the "CEO") explained that a car dealership could be located in the

GB district "so long as all zoning requirements [were] met." A November 30, 2001 (the "November Letter") letter from the CEO acknowledged that the Property was located in the GB district and that automobile sales were a permitted use in the GB district. The court found these letters were insufficient to give rise to a vested right. To be sufficient to give rise to a vested right, the letters would have had to approve a specific project. They did not. The June Letter did not even address a specific parcel of land. The November Letter simply reiterated (and did not interpret) the UDO, and it did not address a specific project since it was sent three years before the Dealerships even proposed the auto park to the town. Additionally, the letters indicated that all zoning requirements would still have to be met.

Case Note: The Dealerships had also sued the town for "tortious interference with contract and tortious interference with prospective economical advantage." The trial court issued summary judgment on those claims in favor of the town. The Dealerships appealed. The appellate court affirmed the trial court's judgment. It held that the town was not liable for tortious interference because it did not act without justification in amending the zoning ordinance. The town had concern that the prior zoning (allowing auto sales) was not appropriate for the location, which was surrounded by residential districts. Also, the town acted within its authority to amend the zoning ordinance and reclassify the Property's zoning.

Nonconformity—Developer divides conforming lot, rendering it nonconforming

Abutting property owner argues newly created lot is invalid because its creation rendered original lot nonconforming

Citation: *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline, 78 Mass. App. Ct. 233, 2010 WL 4398719 (2010)*

MASSACHUSETTS (11/09/10)—This case addressed the issue of whether the division of an existing conforming lot—rendering that previously developed lot nonconforming—"infected" the new building lot so as to render it invalid. In other words, may a developer form a new building lot by dividing an existing conforming lot if as a result the latter is rendered nonconforming by such a division?

The Background/Facts: In June 2004, 81 Spooner Road, LLC ("LLC") acquired property known as 81 Spooner Road. 81 Spooner Road was then comprised of 22,400 feet of land, on which stood a

1910 colonial revival home with six bedrooms and 3,812 square feet of living space. 81 Spooner Road conformed with local zoning. The home was situated in an S-10 residential zoning district.

Section 5.20 of the city's zoning bylaw established a maximum floor area ratio ("FAR") requirement. That requirement provided that: "For any building or group of buildings on a lot the ratio of gross floor area to lot area shall not exceed the maximum specified" in the bylaw's dimensional requirements table. That table provided that a maximum .30 FAR was allowed for all single-family dwellings in the S-10 district.

In February 2005, the city endorsed LLC's approval-not-required ("ANR") subdivision plan. The plan allowed LLC to divide 81 Spooner Road into two separate lots: a smaller 81 Spooner Road lot, comprised of 10,893 square feet of land, with the vintage home; and a larger land lot, known as 71 Spooner Road, with 11,648 square feet of area.

LLC later sold 81 Spooner Road to the Verlanders. LLC retained 71 Spooner Road. LLC then obtained a building permit authorizing construction of a single-family home at 71 Spooner Road.

Abutting property owners, Frances K. Fogg and George P. Fogg, III (the "Foggs") filed an appeal with the city's zoning board of appeals (the "Board"). Among other things, the Foggs argued that LLC's overall plan to divide 81 Spooner Road resulted in two invalid lots. The lot division resulted in 81 Spooner Road having a .36 FAR—above the maximum allowed in the S-10 district. The Foggs also argued that 71 Spooner Road was therefore also an invalid lot because "its creation, as a result of LLC's ANR plan, had rendered 81 Spooner Road nonconforming as to the bylaw's FAR requirement."

The Board rejected the Foggs' argument. On appeal, a land court judge agreed with the Foggs' argument. The judge ruled that 71 Spooner Road was an invalid building lot, "based on the common law infectious invalidity doctrine ...."

LLC appealed.

The Court's Decision: Judgment of land court affirmed.

The Appeals Court of Massachusetts agreed with the Foggs' argument. It held that "71 Spooner Road was infected by the resulting violation on the contiguous 81 Spooner Road parcel"—rendering 71 Spooner Road an invalid lot.

With little explanation, the court concluded that: LLC could "not form a new building lot by dividing an existing conforming lot if as a result the latter [was] rendered nonconforming by such a division."

See also: *Alley v. Building Inspector of Danvers, 354 Mass. 6, 234 N.E.2d 879 (1968).*

See also: *Planning Bd. of Nantucket v. Board of Appeals of Nantucket, 15 Mass. App. Ct. 733, 448 N.E.2d 778 (1983).*

See also: *Murphy v. Kotlik, 34 Mass. App. Ct. 410, 611 N.E.2d 741 (1993).*

Zoning News from Around the Nation

CONNECTICUT

At a recent town meeting, Salisbury residents narrowly voted to reject a proposed ordinance that would have allowed the town's Planning and Zoning Commission to impose fines of $150 per day for violation of the zoning regulations.

Source: *Litchfield County Times*; www.countytimes.com

MASSACHUSETTS

The town of Dedham is considering a new "adult use" zoning district. The zoning district would "allow strip clubs and stores selling sex toys and X-rated materials."

Source: *Boston Globe*; www.boston.com

On November 2, Massachusetts voters rejected a ballot initiative that would have repealed the state's main affordable housing law—Chapter 40B. The law gives developers in communities where less than 10% of the housing stock is "affordable" a more-streamlined permitting process to build multi-unit housing developments, as long as a percentage of the units are affordable. Repeal supporters "had argued that the law helps produce affordable housing but forces the growth of mostly high density, market-rate housing and that it destroys open space and stretches local infrastructure and services." Those who support the law and opposed the initiative to repeal it claim it is "the single most effective tool for creating affordable housing for the seniors and working families."

Source: *State House News Service*; www.wickedlocal.com

MICHIGAN

The City of Hazel Park is being sued in U.S. District Court by Salvation Temple Church. The church alleges that a 2005 city zoning ordinance "knowingly excluded any new religious institution from

opening in the city, violating rights to freedom of speech, assembly, exercise of religion and equal protection." The ordinance at issue "prohibits any new religious institutions from opening on industrial or commercial property within Hazel Park city limits. It allows for religious institutions to open, with approval from the city, in residential areas." However, as of March 3, 2010, "there is no collection of parcels of land within the residential districts that is available for a religious use property"; "[t]he city is 100 percent developed for residential use." The church is asking the court "to find the ordinance in question is unconstitutional, and ... to invalidate the ordinance so that the church can purchase and assemble in [a particular building in the city.]"

Source: *C&G Newspapers*; www.candgnews.com

NEW JERSEY

The state Legislature is considering an affordable housing bill (A3447) and amendments. Among other things, the bill would allow "towns that fall short on their affordable-housing obligation [to] rezone 20 percent of their developable land to allow for housing for people who earn up to 150 percent of their region's median income." The bill would also eliminate the Council on Affordable Housing. One legislator has said the bill provides a "zoning obligation," not an "affordable-housing obligation."

Source: *The Star-Ledger*; www.nj.com

Editorial Questions or Comments: west.quinlan@thomsonreuters.com

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Vested Rights—Sign company applies for permit for digital billboard two days before city adopts ordinance prohibiting digital billboards

Sign company claims vested right to digital billboard use

Citation: *Lamar Co., LLC v. City of Kansas City, 2010 WL 4449294 (Mo. Ct. App. W.D. 2010)*

MISSOURI (11/09/10)—This case addressed the issue of whether if a permit is applied for under one ordinance and then amendments are adopted to that ordinance, the permit applicant has a vested right to the application of the prior zoning ordinance.

The Background/Facts: On September 4, 2007, the Lamar Company LLC ("Lamar") submitted to the city a sign permit application. Lamar sought to convert its existing billboards in the city to digital billboards.

Two days later, on September 6, 2007, the city passed the "Digital Sign Ordinance" (the "DSO"). The DSO prohibited outdoor adver-

Contributors
Corey E. Burnham-Howard

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tising signs from having any of the following characteristics: "revolving, moving, flashing, blinking, or animated."

Subsequently, Lamar filed a referendum petition on the DSO, which ultimately failed. This delayed the effective date of the DSO until November 9, 2007.

In the meantime, on September 27, 2007, while the effective date of the DSO was delayed, the city passed the "Pending Sign Legislation Ordinance" (the "PSL"). The PSL provided that during the consideration of an amendment to the zoning code and "until such amendment is enacted (effective) or rejected," the building official was prohibited from acting on any application for a permit that would allow a sign that would be prohibited by the proposed amendment if enacted. The PSL effectively held Lamar's sign permit application in abeyance.

Lamar filed a legal action. It challenged the city's basis for refusing to process its pending sign permit application. Lamar argued that the city should have processed the pending sign permit applications based upon the ordinances in effect at the time the permit applications were presented (i.e., prior to the passage of the DSO). Lamar asked the court to declare that the PSL was invalid and unenforceable. Lamar maintained that the city had failed to comply with zoning ordinance notice requirements prior to passing the PSL.

The city asked the court to find that there were no material issues of fact in dispute and to issue summary judgment in its favor on the law alone. The city argued that Lamar's legal action was moot because, at the time the court was hearing the issue, the PSL was no longer applicable. The DSO had been enacted. Under the terms of the DSO, Lamar was not entitled to its applied-for sign permits.

Lamar countered that: (1) it had established a vested right to the application of the prior zoning ordinance (in effect prior to the DSO); and (2) therefore, it was not subject to the DSO.

The trial court granted summary judgment in favor of the city, dismissing the appeal as moot. Lamar appealed.

The Court's Decision: Judgment of trial court affirmed.

The Missouri Court of Appeals held that Lamar had no vested right in its applied-for sign permits.

The court explained that under Missouri law, submission of an application for permit under a prior zoning ordinance is "not enough to establish a vested right to the continued application of the prior zoning ordinance." The fact that Lamar filed its application for a sign permit before the DSO went into effect was "no reason why [the

DSO] should not be held applicable to [Lamar] from and after it became operative." The filing of its sign permit application, gave Lamar no vested right. Even if the city had issued Lamar a sign permit, with the enactment of the DSO, it could have revoked or canceled the permit if there was no vested right in the permit.

Lamar could only have a vested property right (to have a digital sign) if it had a valid nonconforming use of the property prior to the enactment of the DSO. This is known as the "nonconforming use exception." To establish such a valid, prior nonconforming use, Lamar had to show either "actual use or a substantial step toward that use." In other words, the use of digital signs had to be "substantially established prior to the enactment of [the DSO]." Additionally, Lamar had to have "reasonably relied upon a belief that the existing law [(i.e., the ordinance existing prior to enactment of the DSO)] would continue to be in force." Such reasonable reliance cannot be established, said the court, where a permit application is filed "not in good faith, but 'in anticipation of the enactment of a zoning law.'" Here, Lamar applied for its sign permits, knowing that the DSO was scheduled for adoption two days later. Lamar was "seeking to obtain permits in anticipation of the enactment of [the DSO]." The court found this was not sufficient to establish a vested right in Lamar's proposed nonconforming use of digital signs.

The court concluded that because Lamar had not acquired a vested right in the sign permits at the time the DSO was passed and became effective, the issue of whether the PSL was valid or not "had no practical effect upon the controversy with the city after [the enactment of the DSO, which prohibited Lamar's proposed signs]." Thus, the court agreed with the city that Lamar's action was moot.

See also: *State ex rel. Oliver Cadillac Co. v. Christopher, 317 Mo. 1179, 298 S.W. 720 (1927).*

See also: *Fleming v. Moore Bros. Realty Co., 363 Mo. 305, 251 S.W.2d 8 (1952).*

See also: *Veal v. Leimkuehler, 249 S.W.2d 491 (Mo. Ct. App. 1952).*

Case Note: The court said that, under Missouri law, "even the issuance of a permit under a prior zoning ordinance" was not enough to establish a vested right to the continued application of the prior zoning ordinance.

Variance—Resident seeks area variance to allow his front-yard parking

Board denies variance, finding it would have detrimental impacts on the neighborhood

Citation: *Russo v. City of Albany Zoning Bd., 2010 WL 4342202 (N.Y. App. Div. 3d Dep't 2010)*

NEW YORK (11/04/10)—This case addressed: the balancing test that a zoning board must apply in considering a variance application; and the judicial deference that must be given to a board's decision on a variance application.

The Background/Facts: Kenneth Russo ("Russo") owned residential property in the city. Since approximately 1978, he had parked his vehicle on his front lawn. In September 2007, he received from the city a cease and desist order notifying him that his front-yard parking violated the city's zoning ordinance. As of 1968, the city's zoning ordinance restricted front-yard parking.

After receiving the cease and desist order, Russo applied to the city's Zoning Board (the "Board") for an area variance. The Board denied his application.

Russo then brought an action in court challenging that denial. He asked the court to find that he was entitled to the variance, which would allow him to park his vehicle on his front lawn.

The Supreme Court determined that the Board had "acted rationally in denying [Russo] an area variance."

The Court's Decision: Judgment of Supreme Court affirmed.

The Supreme Court, Appellate Division, Third Department, held that the Board's denial of Russo's requested area variance was "not irrational, arbitrary or an abuse of discretion."

In reaching this conclusion, the court explained that "[l]ocal zoning boards have broad discretion in considering applications for variances." The court could only overturn the Board's denial of Russo's requested area variance if it found the denial was: "illegal, arbitrary or an abuse of discretion." The Board's decision would not be disturbed if the court found it had a "rational basis" "supported by substantial evidence in the record."

The Board was required to apply a balancing test of the benefit to Russo against the detriment to the health safety and welfare of the neighborhood or community if the variance was granted (along with five other statutory factors). The court explained that as long as the

Board properly applied the balancing test and considered the relevant factors in reaching its determination, the court would not overturn the denial.

Here, the court found the Board had properly applied the balancing test and considered the relevant factors in deciding to deny Russo's requested variance. The Board had found that the proposed variance for front-yard parking would: "produce an undesirable change in the character of the neighborhood;" and "have detrimental impacts on the neighborhood [that were] substantial in nature." Only a minority of properties in the neighborhood had front-yard parking. And, unlike those properties, Russo's parking area was not on the side of his residence, but was in the middle of the lot. Furthermore, Russo's front-yard parking resulted in his vehicle being parked over the city sidewalk. This "constant impediment to the [c]ity's right-of-way" created "potential safety issues to other drivers ... as well as pedestrians." In light of these findings, the court concluded that "it was not an abuse of discretion for the Board to determine that the substantial nature and negative impact of [Russo's requested variance] weighed against granting it."

See also: *Ifrah v. Utschig, 98 N.Y.2d 304, 746 N.Y.S.2d 667, 774 N.E.2d 732 (2002).*

See also: *Pecoraro v. Board of Appeals of Town of Hempstead, 2 N.Y.3d 608, 781 N.Y.S.2d 234, 814 N.E.2d 404 (2004).*

Case Note: Russo had also argued he should be granted the variance to allow his front-yard parking for his "health reasons." The court disagreed. It found that there were "other feasible alternatives to the variance" such as "on-street parking spaces and the reservation of a handicapped spot in front of his property."

Variance—Borough grants height variance for communications tower

Neighbors challenge variance, arguing communications company had to show hardship

Citation: *In re Holtz, 2010 WL 4348136 (Pa. Commw. Ct. 2010)*

PENNSYLVANIA (11/04/10)—This case addressed whether a communications company, in seeking a height variance, was required to show hardship under an ordinance governing variances generally.

The case involved the interpretation of a zoning ordinance that contained both a general provision governing variances and another provision governing variances for certain structures such as communications towers.

The Background/Facts: In December 2004, Pegasus Tower Company ("Pegasus") applied to the borough's Zoning Hearing Board ("ZHB") for a variance to build a proposed 195-foot communications tower on property it leased in the borough. The property was located in the A-1 Conservation zoning district, which had a height restriction of 15 feet. The ZHB eventually granted the variance.

Subsequently, neighboring property owners (the "Neighbors") appealed to the trial court the ZHB's grant of the variance to Pegasus. The Neighbors argued that: "the ZHB should not have granted the variance as to the height of the tower because Pegasus failed to establish that the requirements for a variance set forth in section 908 of [the borough's] Zoning Ordinance were met." Section 908 provided that the ZHB: "may grant a variance" provided that all of the specified findings were made "where relevant in a given case." Among the required findings was that the applicant (here Pegasus) show hardship. The Neighbors argued that Pegasus had not shown hardship and therefore the variance should not have been granted.

The trial court affirmed the ZHB's action and dismissed the Neighbors' appeal.

The Neighbors again appealed.

The Court's Decision: Judgment of trial court affirmed.

The Commonwealth Court of Pennsylvania held that, in seeking the height variance, Pegasus was not required to show hardship under § 908 of the borough's Zoning Ordinance. The court found that the requirements of § 908 were in conflict with another special provision in the same ordinance. Section 406.2 of the Zoning Ordinance allowed the ZHB to authorize a variance to the height regulations in any district if: (1) all front, side and rear yard depths were increased one foot for each additional foot of height; and (2) the structure was, among other particular structures, a television or radio tower.

The court held that "[w]henever a general provision in an ordinance shall be in conflict with a special provision in the same ordinance, and the conflict is not reconcilable, the special provision shall prevail and shall be construed as an exception to the general provision." Here, the court found § 908 was a general provision governing variance. And the court found § 406.2 was a special provision governing height variance for particular structures. To the extent the provisions were irreconcilable, the court said that § 406.2 must be construed as an exception to § 908.

The court concluded that § 406.2 addressed the concerns associated with particular structures such as communications towers. Section 406.2 allowed certain structures—with sufficient setbacks—not because of hardship to the applicant but because, by their very nature, those structures necessarily had to be "unusually tall."

Having found § 406.2—not § 908—applied to Pegasus' proposed tower, the court concluded that the "hardship" requirement of § 908 was inapplicable. Since Pegasus met both requirements of § 406.2, the ZHB's grant of the variance to Pegasus was proper.

See also: *In re Thompson, 896 A.2d 659 (Pa. Commw. Ct. 2006).*

Case Note: In construing the Zoning Ordinance, the court also noted that since the ordinance allowed communications towers by special exception, to then limit the height of such towers to 15 feet unless the applicant can show hardship would produce an "absurd result"—since no tower limited to a height of 15 feet "could possibly be effective."

Reasonableness of Zoning Decision—City grants conditional use permit for electrical substation expansion despite opposition

Neighbors challenge grant as "unreasonable" because it did not mandate restrictions related to potential hazards

Citation: *Evans v. City of Emporia, 2010 WL 4674186 (Kan. Ct. App. 2010)*

KANSAS (11/19/10)—This case discusses the factors courts may use in determining whether a zoning authority's final decision was "reasonable."

The Background/Facts: Westar Energy, Inc. ("Westar") owned property in the city, which it used as an electric substation since 1937. In 2008, Westar sought to expand the equipment coverage of its electric substation 100 feet and add a forth transformer. To that end, Westar filed with the city an application for a conditional use permit ("CUP"). Eventually, the city's planning commission recommended Westar's CUP be approved with two conditions: (1) Westar would construct a nine-foot decorative concrete wall on a specified part of the property; and (2) further expansion of the substation

would require an amendment of the CUP. The city commission adopted the planning commission's recommendation and granted Westar's CUP with the two suggested restrictions.

Thereafter, neighboring property owners, Jeffrey and Joanne Evans (the "Evans") appealed to court the city's grant of the CUP to Westar. The Evans argued that the city's approval of Westar's CUP was "unreasonable." The Evans maintained that it was "unreasonable for the [c]ity to grant Westar's CUP without mandating additional restrictions or modifications for noise abatement, aesthetic concerns, stray voltage, and [electronic magnetic fields] EMFs."

The court found the city had "balanced the interest of Westar with the interest of the surrounding owners and the interest of the community." The court found the Evans "failed to prove the unreasonableness of the [c]ity's decision."

The Evans appealed.

The Court's Decision: Judgment of district court affirmed.

The Court of Appeals of Kansas held that the city's decision to grant the CUP to Westar to upgrade the electrical substation was reasonable.

The court explained that in hearing an appeal of a zoning decision, the court looks to whether the decision was "reasonable." In determining whether a zoning authority's final decision is reasonable, the court explained that it could look to several "suggested" factors, including:

> (1) [t]he character of the neighborhood; (2) the zoning and uses of properties nearby; (3) the suitability of the subject property for the uses to which it has been restricted; (4) the extent to which removal of the restrictions will detrimentally affect nearby property; (5) the length of time the subject property has remained vacant as zoned; (6) the gain to the public health, safety, and welfare by the possible diminution in value of the developer's property as compared to the hardship imposed on the individual landowners; (7) [t]he recommendations of a permanent or professional planning staff; and (8) the conformance of the requested change to the city's master or comprehensive plan.

Additional factors may also be important to review in an individual case.

Here, with regard to the Evans' concerns (i.e., noise abatement, aesthetic concerns, stray voltage, and EMFs), the court found the city took many of those reasonableness-test-factors into consideration. Factors 1 and 2 were met as the city was aware of the character of

the neighborhood and the zoning uses of nearby properties. Factor 4 was met in that the city required the nine-foot wall for noise abatement, and the city found it "had no way to address the other issues of EMFs and stray voltage." Factor 6 was met as meeting minutes revealed that city commissioners "considered and recognized the gain to the public [i.e., meeting increased electrical needs] versus the hardship on the individual property holders [i.e., increased noise on the Evans' property]." Factor 7 was met as the planning commission recommended the city grant the CUP.

Having found these factors were considered by the city in granting the CUP to Westar, the court concluded that the city's decision was "reasonable"; it was "not so wide of the mark that it l[ay] outside the realm of fair debate."

See also: *Golden v. City of Overland Park, 224 Kan. 591, 584 P.2d 130 (1978).*

See also: *McPherson Landfill, Inc. v. Board of County Com'rs of Shawnee County, 274 Kan. 303, 49 P.3d 522 (2002).*

Case Note: As the court noted in its decision: "No one wants to have an electrical substation for a neighbor, but the city commission had to balance all the interests involved, including Westar's, the Evans' and other neighbors', and the community as a whole." The court found it was "reasonable for the [c]ity to plan for the increasing electrical needs of the community" and reasonable to make the restrictions it did in granting Westar's CUP.

Zoning News from Around the Nation

FLORIDA

The Third District Court of Appeals recently "upheld the constitutionality of the City of Coral Gables Zoning Code pertaining to trucks parked in residential and commercial areas." The city's zoning law "prohibits the parking of trucks in residential areas unless parked in an enclosed garage. It also prohibits the parking of trucks, trailers, commercial or recreational vehicles upon the streets or other public places in the City between the hours of 7:00 p.m. and 7:00 a.m. of the following day." Reportedly, the city's code enforcement officers will now begin issuing warning notices for the overnight

parking of trucks in residential areas of the city. Violators will have 72 hours to comply or face citation.

Source: *Miami Herald*; www.miamiherald.com

ILLINOIS

The City of Evanston is considering a "controversial zoning ordinance" that would affect religious institutions. The ordinance "would require houses of worship to apply for special use permits in order to set up shop in the city's business or commercial districts." Proponents of the ordinance say it would help balance zoning uses in certain areas of the city. On the other hand, opponents of the ordinance reportedly say the ordinance "forbid[s] the gathering of people because of their religious values."

Source: *Chicago Tribune-TribLocal*; http://triblocal.com

MARYLAND

Howard County beekeepers are reportedly "battling a county zoning law that prohibits beekeeping on properties without significant yard space and have convinced two County Council members to introduce legislation that would ease the limits." The existing zoning law requires there be at least 200 feet between a "farm animal shelter"—which includes beehives—and any neighboring house. A proposed zoning amendment "would allow residents to keep bees on smaller properties, even most townhouse lots." It would change the required distance between beehives and neighboring property from "200 feet to 25 feet, and 10 feet if the hive is surrounded by a fence, hedge or a structure that forces bees to fly higher than they otherwise would."

Source: *Howard County Times*; www.explorehoward.com

NEW JERSEY

The Newark City Council recently voted unanimously "to limit tattoo parlors, pawn shops, and truck and automobile repair shops in the downtown district ... The council also unanimously approved legislation that limits the ability of the Board of Zoning Appeals to grant a density variance beyond 5 percent."

Source: *Newark Advocate*; www.newarkadvocate.com

The state Senate is considering a bill, S-11, that would create a "tourism district" around Atlantic City's major tourism areas. The district would be managed by the Casino Reinvestment Develop-

ment Authority ("CDRA"). "The tourism district bill would give the CRDA power over marketing, public safety, zoning, redevelopment and aesthetics in the tourism zone, the boundaries of which would be defined by the CRDA." Another bill under consideration is S-12, which would "transfer casino regulatory powers from the Casino Control Commission to the Division of Gaming Enforcement as well as reduce regulators' presence in the casinos."

Source: *Press of Atlantic City*; *www.pressofatlanticcity.com*

Jersey City officials reportedly have adopted multiple zoning ordinances that block the installation of natural gas pipelines in specified redevelopment zones.

Source: *The Jersey Journal*; *www.nj.com*

VIRGINIA

The Martinsville City Council recently amended the city's zoning ordinance to regulate the operation of Internet gaming parlors. Among other things, the ordinance now: limits the operating hours of such businesses to between 10:00 a.m. and 7:00 p.m. daily; prohibits those under 18 years of age from being at the businesses; and prohibits bladed weapons at the businesses.

Source: *Martinsville Bulletin; www.martinsvillebulletin.com*

Editorial Questions or Comments: west.quinlan@thomsonreuters.com

