January 10, 2011 | Volume 5 | No. 1

QUINLAN™

Zoning Bulletin

in this issue:

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In 2008, Eddins applied for a permit from the city's Community Development Department (the "Department"). Eddins sought the permit to allow one of his current tenants to replace an existing recreational vehicle with a newer recreational vehicle. The Department denied Eddins' requested permit. The Department told Eddins that the Ordinance prohibited him from placing additional recreational vehicles in his park.

Eddins appealed the Department's decision to the city's Planning and Zoning Commission (the "PZC"). He argued that he had a grandfather right to replace existing recreational vehicles with new or substitute recreational vehicles. The PZC upheld the Department's decision. The PZC concluded that Eddins' grandfather right under the Ordinance only permitted him to keep existing recreational vehicles in the mobile home park; it did not allow him to bring in additional or substitute recreational vehicles.

Eddins appealed to the city council. The city council upheld the PZC's decision.

Eddins then filed an action in district court. He argued that he had a due process right to continue his nonconforming use of renting spaces for both manufactured homes and recreational vehicles after the Ordinance was enacted.

The city argued that Eddins did not have a right to substitute new recreational vehicles because the grandfather right in the Ordinance did not allow it.

The district court upheld the PZC's decision.

Eddins appealed.

DECISION: Reversed.

The Supreme Court of Idaho held that Eddins' replacement of recreational vehicles constituted a continuation of his nonconforming use and thus was protected by due process.

The court explained that, under the due process clause of the United States Constitution and the Idaho State Constitution, individuals have a right to continue a "nonconforming use." In other words, due process requires that a nonconforming use be allowed to continue after a new zoning ordinance is enacted. Still, the right to continue a nonconforming use is "not without limitation." Nonconforming uses may not be expanded or enlarged.

The court further explained that in determining, on a case-by-case basis, whether a nonconforming use has been enlarged or expanded, the court focuses on: whether there has been some change in the fundamental or primary use of the property.

In this case, Eddins' fundamental or primary use of the property—"both before and after the [O]rdinance was passed—was to rent spaces for both manufactured homes and recreational vehicles." The court determined that replacing existing recreational vehicles with new recreational vehicles was "not an expansion or enlargement of Eddins' nonconforming use." This was because that act of replacement did "nothing

cial property in the town. He also held a mortgage on property abutting the Warringtons' property. He reportedly believed that "[i]nconsistent enforcement of zoning adversely affects the development and sale of [his] residential real estate and adversely affects the rental [value] of [his] commercial real estate."

The town's building inspector "agreed with Blair's position." However, he refused to issue the requested cease and desist order. Blair appealed to the town's zoning board of appeals (the "Board"). The Board eventually issued a cease and desist order against the Warringtons.

The Warringtons then appealed to the superior court. They argued that the Board's enforcement order was invalid because Blair did not have standing to appeal from the building inspector's denial of Blair's enforcement request. The Warringtons argued that there were no material issues of fact in dispute, and asked the court to issue summary judgment in their favor on the law alone.

The Board and Blair opposed the Warringtons' motion for summary judgment. They argued that the Warringtons had waived the issue of standing because they had failed to challenge Blair's standing during the administrative proceedings (i.e., when the enforcement issue was before the Board).

The judge agreed with the Board and Blair. Summary judgment was issued in favor of the Board and Blair.

The Warringtons appealed.

DECISION: Reversed.

The Appeals Court of Massachusetts held that the issue of whether Blair had standing as a "person aggrieved" was jurisdictional and thus could not be waived.

The court explained that, under Massachusetts statutory law—G.L. c. 40A, § 8—a "person aggrieved" has the right to "start an administrative proceeding seeking to compel enforcement" of zoning regulations. The same standing requirement—that the person be aggrieved—governs appeals from a zoning board to the court under G.L. c. 40A, § 17.

With the standing requirement of § 17, "[a] well-developed body of law holds that '[s]tanding is an issue of subject matter jurisdiction.'" Therefore, lack of standing cannot be waived and may be raised at any stage of the proceedings. Since "person aggrieved" means the same thing in § 8 as it does in § 17, the court concluded that just as status as an aggrieved person is a jurisdictional condition to maintaining an appeal to court under § 17, so too then status as an aggrieved person is a jurisdictional condition to maintaining an appeal to a board of appeals under § 8. The court concluded therefore that "the standing requirements of § 8, like the standing requirements of § 17, [cannot be] waived by failure to raise them before the board."

Second, because of this failure, it found that the FMP requirements were in excess of the county's police powers. Third, the trial court also found the FMP conflicted with state law prohibiting a local government entity from conditioning the issuance of land use approval on the granting of conservation easements (Civ. Code § 815.3).

The county appealed.

DECISION: Reversed.

The Court of Appeal, Fifth District, California, held that: (1) the FMP bore a reasonable relationship to the loss of farmland; and (2) therefore was within the county's police powers; and (3) the FMP did not violate § 815.3.

The court explained that in order to be valid on its face, the FMP's mitigation requirement—which was legislation that applied generally—had to be reasonably related to the negative public impact of the development project (i.e., the loss of farmland). The court found that the FMP's mitigation requirements bore a reasonable relationship to the loss of farmland. Agriculture was the county's leading industry. Thus, real estate development converting agricultural land to residential use had a "deleterious impact on this valuable resource." Although, under the FMP's mitigation requirements, the developed farmland was not replaced; an equivalent area of comparable farmland was "permanently protected from a similar fate." This additional protection of farmland that could otherwise have soon been lost to development promoted the county's objective to conserve agricultural land for agricultural uses. Furthermore, the court found that "the requirement of rough proportionality between the mitigation measure and the impact of the development project [was] met." The mitigation measure was roughly proportionate to the impact of development as the FMP required a one-acre: one-acre ratio of replacement.

Since a reasonable relationship existed between the FMP requirements and the impact of converting farmland, the FMP was within the county's police power, concluded the court.

BIA had also argued that the FMP violated § 815.3. That statute prohibited local governments from conditioning land use approval on the applicant's granting of a conservation easement. The court found that the FMP did not violate § 815.3 because the FMP did not require the "applicant" (i.e., the developer) to grant the easement. Rather, the FMP allowed the applicant to arrange for a third party to grant a conservation easement as an alternative to the applicant itself granting the easement.

See also: *San Remo Hotel L.P. v. City And County of San Francisco, 27 Cal. 4th 643, 117 Cal. Rptr. 2d 269, 41 P.3d 87, 32 Envtl. L. Rep. 20533 (2002).*

See also: *Pennisi v. Department of Fish & Game, 97 Cal. App. 3d 268, 158 Cal. Rptr. 683 (1st Dist. 1979).*

vate water system "due to the 18 years [(i.e., from 1990 to 2008)] of permission the Muths had been given to use their private water systems."

The Authority argued that the Muths' vested rights claim failed. The court of common pleas agreed and dismissed the Muths' complaint.

The Muths appealed.

DECISION: Affirmed.

The Commonwealth Court of Pennsylvania held that the Muths were not entitled, under the "vested rights doctrine," to recover against the Authority for requiring them to join the municipal water line.

The court explained that "[t]he vested rights doctrine permits a landowner to use his property without obtaining a variance." The doctrine applies only "to those cases where the applicant, in good faith, relies upon a permit issued in error and incurs significant non-recoverable costs," said the court. Here, the Muths did not incur significant costs in reliance upon a permit issued by either the township or the Authority. No related permit was ever issued to the Muths. Accordingly, the court concluded that the Muths could not claim nor recover against the Authority on the basis of vested rights.

See also: *Chateau Woods, Inc. v. Lower Paxton Tp., 772 A.2d 122 (Pa. Commw. Ct. 2001).*

Telecommunications Uses—Telecommunications Company Says Local Planning Commission Has Jurisdiction Over Its Proposed Tower

Adjacent property owner maintains the Public Service Commission instead has jurisdiction

Citation: *Kentucky Public Service Com'n v. Shadoan, 2010 WL 4679513 (Ky. 2010)*

KENTUCKY (11/18/10)—This case involves the construction of a Kentucky statute governing the siting of cellular antenna towers to determine whether jurisdiction over matters relating to cellular tower placement and construction rest with the local planning unit or the Kentucky Public Service Commission (an administrative body that regulates utilities in Kentucky).

The Background/Facts: In September 2005, Bluegrass Wireless filed with the Kentucky Public Service Commission (the "PSC") an application to secure a certificate of public convenience and necessity for the construction of a proposed cellular tower on certain property in a Kentucky city.

Adjacent property owners Glenn and Sue Shadoan sought to intervene in the application process. The PSC granted their request. Thereafter, however, Bluegrass Wireless asked the PSC to dismiss the application

The court interpreted § 100.987's provision that a planning unit "may plan for and regulate the siting of cellular antenna towers" as meaning that a planning unit has the "discretion to enact regulations pertaining to cellular antenna towers ... but this exercise of discretion is not a condition of jurisdiction." Thus, as long as the area of the proposed cellular tower has a planning unit that has adopted planning and zoning regulations, the planning commission of that planning unit has jurisdiction over matters relating to cellular tower placement and construction, not the PSC. This is true "regardless of whether the planning unit has enacted regulations specifically relating to cellular towers," said the court.

Here, the court concluded that because the local planning unit had adopted planning and zoning regulations that governed the area where Bluegrass Wireless proposed to construct a cellular tower, the local planning commission had jurisdiction over the proposed tower, not the PSC.

See also: *Kentucky Ins. Guar. Ass'n v. Jeffers ex rel. Jeffers, 13 S.W.3d 606 (Ky. 2000).*

See also: *Combs v. Hubb Coal Corp., 934 S.W.2d 250 (Ky. 1996).*

Case Note: In its decision, the court added that, where a planning unit has adopted planning and zoning regulations but has not enacted regulations specifically related to cellular towers: "the applicant will ... still need to meet the general restrictions of the particular zone in which the proposed cell tower is to be constructed." For example, the applicant will need to meet restrictions such as, among others, permitted uses within the zone or height and setback requirements.

Zoning News from Around the Nation

ARIZONA

In November, Proposition 204—the Arizona Medical Marijuana Act—was passed. Under the new law, cities and towns may adopt "reasonable regulations" regarding the location and operations of medical marijuana dispensaries and growing operations. Only 124 dispensaries will be allowed statewide, and every one of Arizona's 15 counties will have at least one dispensary. The law also permits qualifying patients who live more than 25 miles from a dispensary to grow up to 12 of their own plants.

Reportedly, the Arizona Department of Health Services hopes to present a final draft of related rules by February, with final rules published

January 25, 2011 | Volume 5 | No. 2

QUINLAN™

Zoning Bulletin

in this issue:

WEST®

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Pursuant to the County Code, landscape contracting was not permitted as of right in the RDT zone. However, it was allowed with the grant of a special exception. Butler had not obtained a special exception prior to establishing her landscape contracting business. After receiving a Notice of Violation from the County's Department of Permitting Services, Butler applied for a special exception in July 2007.

The county zoning hearing examiner recommended Butler's special exception application be denied. The county's Board of Appeals (the "Board") denied Butler's application. That denial was based on the finding that, in this particular location, Butler's landscape contracting business presented "non-inherent adverse effects sufficient to warrant denial ...."

County Code § 59-G-1.21 required the Board to "consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location." "Inherent adverse effects" were defined under the Code as those involving "the physical and operational characteristics necessarily associated with the particular use, regardless of physical size or scale of operations." "Non-inherent adverse effects" were defined as those involving "physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site."

The Board had found that Butler's landscape contracting business presented non-inherent adverse effects sufficient to warrant denial because (1) due to the proximity to a neighboring property owned by Cora Weeks (42 feet to Weeks' residence and 22 feet from her property line), the commercial traffic traveling on Butler's driveway would have "serious adverse consequences on [Week's] property"; (2) "the noise generated by trucks and Bobcats when operated in reverse, would have serious adverse consequences on both adjoining neighbors"; and (3) "the configuration of the lots and of the proposed use would produce traffic and noise on the property having immediate adverse effects on the adjoining neighbors."

Butler appealed the Board's decision to the county circuit court.

The circuit court reversed the Board's decision. The court found that all of the adverse effects noted by the Board were "inherent to the operation of a landscaping business ...." It held that the inherent effects of a landscaping company operation on surrounding property do not rise to the level of non-inherent effects. As such, the court concluded that the adverse effects from Butler's landscaping business were not sufficient to deny Butler's special exception application.

The county and Weeks appealed to the Court of Special Appeals. On its own initiative, the court of appeals issued a writ of certiorari and considered the appeal.

DECISION: Reversed.

Validity of Zoning Regulations-Signs—Sign Ordinance Prohibits Signs Above a Certain Size, But Exempts Categories of Signs

Resident challenges constitutionality of sign ordinance

Citation: *Bowden v. Town of Cary, 2010 WL 5071613 (E.D. N.C. 2010)*

NORTH CAROLINA (12/07/10)—This case addressed whether a sign ordinance was unconstitutional in violation of the First Amendment.

The Background/Facts: William David Bowden was a resident in the town. In July 2009, frustrated with what he considered an inadequate resolution of a road water runoff problem, Bowden painted a sign on the front of his house. The sign was approximately 48 square feet in size. In large fluorescent orange and pink letters, it read: "Screwed by the Town of Cary."

In July 2009, the town issued to Bowden a Notice of Zoning Violation. The town informed Bowden that his sign was in violation of the town's Sign Ordinance. More specifically, the town said that Bowden's sign violated § 9.3.2(S). That provision prohibited "residential signs" from exceeding five square feet.

In November 2009, the town issued to Bowden a second Notice of Zoning Violation. That notice informed Bowden that his sign was in violation of (1) § 9.3.2(X)(2) of the Sign Ordinance, which prohibited "wall signs" over two square feet in area; and (2) § 9.8.3(B) of the Sign Ordinance, which prohibited the use of fluorescent pigments in signs.

Bowden brought a civil rights action against the town. He asked the court to declare that the town's Sign Ordinance violated the First Amendment of the United States Constitution. Among other things, Bowden argued that the Sign Ordinance, as applied to his protest sign, was "an invalid content-based restriction on speech."

Bowden asked the court to find that there were no material issues of fact in dispute and to issue summary judgment in his favor based on the law alone.

DECISION: Motion granted.

The United States District Court, E.D., North Carolina, Western Division, held that the town's Sign Ordinance was constitutionally invalid.

In reaching this conclusion, the court first determined that the Sign Ordinance was content-based (as opposed to content-neutral). Whether the ordinance was content-based or content-neutral impacted the level of scrutiny the court would apply in deciding whether the challenged ordinance violated the Constitution. The court found that the Sign Or-

Permits-Voting/Disqualification—Board Approves STE Plan Application For Store Renovations

Neighbors argue for reversal of approval because testifying witness for store was former town planner

Citation: *Cortesini v. Hamilton Tp. Planning Bd., 2010 WL 5071068 (N.J. Super. Ct. App. Div. 2010)*

NEW JERSEY (12/14/10)—This case addressed the issue of whether a professional planner, who formerly was employed by the township planning board as its planner, was prohibited from testifying in front of the board in support of an application for site plan approval.

The Background/Facts: In 2009, Wal-Mart Real Estate Business Trust ("Wal-Mart") decided to renovate its store in the township. The proposed renovation would result in a net increase of 5669 square feet of store space and would add 46 parking spaces. The proposed renovation required a new site plan approval from the township's planning board (the "Board").

The Board approved Wal-Mart's application for site plan approval. Thereafter, other property owners (the "Neighbors") in the township challenged the Board's approval. Among other things, the Neighbors argued that the site plan approval must be reversed because one of the witnesses—Allen Schectel—who testified for Wal-Mart's application was a professional planner who was formerly employed by the Board as a planner.

The trial court affirmed the Board's approval.

The Neighbors appealed.

DECISION: Affirmed.

Among other things, the Superior Court of New Jersey, Appellate Division, held that Schectel was not prohibited from testifying in front of the Board in support of Wal-Mart's application.

The court explained that "[a]ny alleged conflict of interest by a present or former local government officer or employee is now governed by the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 to -22.5." The only subsection imposing restriction upon former government officers or employees was § 40A:9-22.5(b), said the court. That section prohibited former members of independent local authorities from representing or appearing on behalf of any other party before that authority for one year subsequent to termination of office of the member.

The court found this subsection did not prohibit Schectel from appearing as a witness before the Board. Even if the planning board was

The Background/Facts: William P. Johnson ("Johnson") was a developer. In August 2005, Johnson acquired "Lot 38" in the town. Lot 38 consisted of 21,867 square feet of land, or about one-half acre. Lot 38 was located in a zoning district that allowed single-family residential uses as of right on a minimum lot size of 43,560 square feet, or about one acre.

Lot 38 had historically been part of a larger parcel (25,770 square feet in area) made up of several lots held in common ownership. That larger lot had been recorded in an 1876 plan with the registry of deeds. The larger parcel had complied with the applicable dimensional requirements of the zoning by-law until 1965. At that time, it then became subject to the one-acre minimum requirement. Under Massachusetts statutory law—G.L. c. 40A, § 6, 4th paragraph—the larger lot (now nonconforming) was grandfathered from application of increased zoning restrictions (i.e., the new one-acre minimum requirement) from "the time of recording or endorsement"—which was 1876.

In 1971, the town took by eminent domain a portion of this larger parcel. That taking left Lot 38 totaling 21,867 square feet.

In 2005, Johnson sought to construct a single-family residence on Lot 38. He applied to the town for a building permit. He maintained that Lot 38 qualified for grandfather protection under G.L. c. 40 A, § 6. He contended that this allowed him to build on the lot despite its nonconformance with the one-acre minimum requirement.

The building inspector denied the permit on several grounds. Among other things, she found that Lot 38 did not qualify for grandfather protection under G.L. c. 40A, § 6. Lot 38 therefore was nonconforming. Johnson could build on it only if he obtained exemption, special permit, or variance.

Johnson appealed the denial of the building permit to the town's board of appeals (the "Board"). In August 2005, Johnson also applied to the Board for a variance and a special permit to allow a single-family residence on the property. The Board upheld the denial of the building permit. It also declined to issue a variance or special permit.

Johnson appealed.

The land court judge concluded that, in this case, the grandfathered status of the original larger parcel "did not carry over to the lot that remained after the taking."

Johnson appealed.

DECISION: Affirmed.

The Appeals Court of Massachusetts agreed with the land court judge. It held that "the portion of non-conforming property [(i.e., Lot 38)] that remained after taking was not exempt from existing zoning restrictions" by a statutory grandfather status.

protecting Westport's waterways"; and "will result in substantial changes to residential property zoning in the AA and AAA zones and specify how much a particular property may be 'covered' with buildings, structures, parking spaces, patios and other impervious surfaces such as tennis courts." Among other things, the "amendment caps the ability of homeowners in AA and AAA zones to build homes larger than 15 percent of the total size of their properties."

Source: *Minuteman News Center*; www.minutemannewscenter.com

MARYLAND

In January or February, the Howard County Council is expected to vote on proposed zoning regulations which would allow apiaries—clusters of beehives. The regulations would "reduce the minimum length apiaries must be placed from neighboring properties 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." Reportedly, the county's planning board recommended against adoption of the zoning amendment and suggests at least a 75-foot setback for apiaries.

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

MICHIGAN

A new version of a medical marijuana zoning ordinance is being considered by the Dearborn Heights Planning Commission. This new version would ban medical marijuana dispensaries. The city council directed the drafting of this version—which prohibits land use contrary to federal, state, and local laws. State law allows marijuana possession and use by authorized patients and caregivers. However, federal law classifies marijuana as a prohibited drug and prohibits businesses from manufacturing or distributing controlled substances.

Source: *Dearborn Press and Guide*; www.pressandguide.com

NEW JERSEY

The New Jersey Assembly has approved legislation that would amend the state's Fair Housing Act and eliminate the state's Council on Affordable Housing ("COAH"). The bill is expected to pass the state senate. However, Governor Chris Christie is reportedly expected to veto the legislation "for not going far enough to reduce municipalities' often costly housing burdens."

Source: *Burlington County Times*; www.phillyburbs.com

February 10, 2011 | Volume 5 | No. 3

QUINLAN™

Zoning Bulletin

in this issue:

WEST®

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based on a zoning ordinance—Ordinance 2836—that prohibited the use of a senior-living facility.

Parvati and Bethlehem then filed suit against the city, the Zoning Commission, and certain city officials (collectively, the "City"). The suit asked the court to reverse the Zoning Commission's decision under state-law administrative review. It also sought monetary damages under constitutional and statutory claims. Because of the constitutional claims (equal protection and due process under the 14th Amendment to the United States Constitution), the case was removed to federal court.

The federal district court affirmed the Zoning Commission's decision. It dismissed the state-law administrative review claim. Parvati and Bethlehem then moved for voluntary dismissal of the constitutional and statutory claims. That dismissal was granted and the case was terminated.

In July 2008, Parvati (alone) moved for postjudgment relief. It alleged that the City had misrepresented the validity of Ordinance 2836. Parvati maintained that proper legal procedures were not followed when Ordinance 2836 was enacted. Parvati asked the court to vacate the earlier order and to reevaluate the Zoning Commission's decision under the ordinance that existed prior to Ordinance 2836.

The district court ultimately reaffirmed its original order, upholding the Zoning Commission's decision.

Parvati appealed.

The City maintained that Parvati's appeal failed because Parvati now lacked standing to reopen the administrative-review claim. Parvati had transferred ownership of the property to its mortgage lender a few months earlier in order to resolve foreclosure proceedings.

DECISION: Vacated; matter remanded with instructions to dismiss Parvati's motions.

Agreeing with the City, the United States Court of Appeals, Seventh Circuit, held that Parvati's claims failed. The court said this was because Parvati lost standing to challenge the Zoning Commission's decision when it conveyed the property to its mortgage lender.

The court explained that it could only hear the case if Parvati had standing. Standing required: (1) an injury in fact; (2) fairly traceable to the defendant's (i.e., here, the City) action; and (3) capable of being redressed by a favorable decision from the court. Also, emphasized the court, "standing must be present at all stages of the litigation, including on appeal." The relief Parvati sought—a decision vacating the district court's earlier order and reversing the Zoning Commission's decision—was a remedy that could benefit only the property owner. Since Parvati no longer owned the property, it lacked standing to challenge the Zoning Commission's decision.

development district. At the meeting, the PZC discussed the number of units that the PZC would approve. In doing so, PZC members sought information from Anthony Panico, the town's planning consultant. Panico informed the PZC that, after PZC staff had pointed out "geometric spacing problems" to the Farrells, the Farrells had suggested removing one of the units. This brought the number of units down to six (from the seven originally proposed), "thereby addressing a number of other issues." Upon request from the PZC Commissioner, Panico showed the PZC the Farrells' revised "site plan for six [units]." Following a discussion, the PZC then approved the Farrells' district application with six units.

Neighboring property owners, the Buddington Park Condominium Association and individual unit owners (collectively, the "Association"), appealed the PZC's decision. Among other things, the Association maintained that the information Panico presented at the February meeting amounted to improper ex parte communications after the public hearing was closed. The Association complained that the Farrells' revised plan (eliminating one of the units) was not available for public comment and/or cross-examination at the public hearing by those opposed to the Farrells' proposed planned development district. The Association said this denied it due process. The Association further contended that it was prejudiced by this improper receipt of ex parte communications. It noted that the PZC may have denied the Farrells' application for a seven unit district.

The Farrells disagreed. They argued that the PZC did not receive an ex parte communication because Panico, the PZC's consultant, provided the information.

The superior court found in favor of the PZC. It dismissed the appeal.

The Association again appealed.

DECISION: Reversed; matter remanded with directions to sustain the Association's appeal.

The Appellate Court of Connecticut agreed with the Association. It held that the PZC improperly received ex parte information when Panico, the PZC's consultant, presented the PZC with the Farrells' revised site plan. The court also held that the Association was prejudiced by this improper ex parte communication.

The court explained that "planning and zoning commissions are entitled to technical and professional assistance in matters that are beyond their expertise, and that such assistance may be rendered in executive session ...." However, the court said that "[t]he use of such assistance ... cannot be extended to the receipt of ex parte, of information supplied by a party to the controversy without affording his opposition an opportunity to know of the information to offer evidence in explanation or rebuttal." Here, the court found that the information which Panico supplied to the PZC, and which the PZC considered in approving the

2006, BPG filed with the township's planning board (the "Board") an application for preliminary site plan approval. BPG proposed construction of eight buildings, as well as other improvements, on its property.

On May 29, 2008, the Board approved BPG's preliminary site plan.

On September 27, 2008, BPG caused to be published in a daily newspaper, notice of the site plan approval.

On October 2, 2008, the Board republished notice of the site plan approval in another, weekly newspaper.

In October, Sheila Fields, a member of Hopewell Valley Citizens' Group, Inc. ("Citizens"), inquired with the Board as to "when and where the Notice of Decision had been published to calculate the time for filing an appeal." The Board's secretary informed Fields that notice had been published on October 2, 2008.

Fields then calculated the 45-day period within which to appeal the Board's approval of BPG's site plan. New Jersey Court Rules, Rule 4:69 requires appeals from planning board decisions be brought within "45 days from publication of a notice once in the official newspaper of the municipality or a newspaper of general circulation in the municipality ...."

On November 17, 2008, Citizens filed in court a complaint against BPG and the township, challenging the site plan approval.

BPG and the township urged the court to dismiss the case. Among other things, they argued that Citizens' complaint was "untimely." The complaint had been filed within 45 days of the date the Board caused notice of the site plan approval to be published. However, it had been filed more than 45 days after the first publication—when BPG caused notice of the site plan approval to be published.

Citizens argued that the representation of the date of publication made by the Board's Secretary "justified enlargement of the limitations period." Rule 4:69-6(c) provided that: "The court may enlarge the period of time [to appeal local land use decisions] where it is manifest that the interest of justice so requires."

The trial court disagreed with Citizens, as did the Appellate Division.

Citizens again appealed.

DECISION: Reversed. Matter remanded.

The Supreme Court of New Jersey held that Citizens was entitled to an extension of the deadline to file the appeal. The court held that "the circumstances presented in this case satisf[ied] the standards in Rule 4:69-6(c) and warrant[ed] enlargement of the forty-five day period because 'it is manifest that the interest of justice so requires.'"

The court interpreted Rule 4:69-6(c) as allowing it discretion to enlarge a timeframe for filing an appeal of a local land use decision when the court "perceives a clear potential for injustice." The court found the

LOUISIANA (12/22/10)—This case addressed the ability of a department director to delegate authority to an employee to approve permits.

The Background/Facts: In September 2008, AHEPA 133/Penelope 55, Inc. ("AHEPA") applied for a building permit with the city's Department of Safety and Permits (the "Department"). AHEPA sought the permit for the construction of "Senior Independent Living Apartments (Multi-Family)". The permit was issued on May 19, 2009.

Thereafter, AHEPA made a "minor modification" to the construction plans, which "affected the building footprint." Because the modification affected most of the related documents, AHEPA submitted "revised plans" for approval by the Department. The Department's Chief Plan Examiner approved the revised plans on July 20, 2009.

AHEPA commenced work on the project in the first week of February 2010.

On February 19, 2010, Robert Asaro, who owned property adjacent to AHEPA's property, filed in court a petition for preliminary and permanent injunction. Asaro alleged that AHEPA's permit had expired. The city's zoning code provided that a building permit expired within six months after its issuance if construction had not commenced and no request for extension had been filed prior to such date.

AHEPA maintained that the building permit had not expired. Paul May, Director of the Department, testified that the six-month period for AHEPA to commence construction started over on August 21, 2009—when the Department released the letter authorizing the revised plans. AHEPA noted that because work commenced on the construction of the project in the first week of February 2010, six months had not elapsed between the issuance of the approval letter and the commencement of construction.

Eventually, the trial court granted Asaro's petition for preliminary injunction. Among other things, it found that: the approval of the plan revisions was invalid because the Director of the Department did not personally sign the approval. The city's building code required the Director's "written assent ... be obtained before [plan revisions] be made." The court "essentially found that the Building Code's requirement of the Director's written assent of the approval of plan revisions [could not] be delegated to other employees within his department." The August 21, 2009, approval of AHEPA's plan revisions issued from the Department's chief plan examiner, not the director. Having found the approval of the plan revisions was invalid, the court concluded that the time to commence construction had expired before AHEPA began construction.

AHEPA appealed.

DECISION: Reversed. Injunction vacated.

MARYLAND

Prince George's County Executive Rushern L. Baker III (Democrat) plans to submit two proposed bills to the Maryland General Assembly. The first bill, "a campaign finance ethics package" would "close a loophole in state law that allows developers with pending zoning applications to contribute to slates"; and "prevent slates that include the county executive from receiving those contributions." The second bill would "limit the circumstances under which a Prince George's County Council member could call for a review of a developer's site plan." "State law already prevents developers from making these contributions to individual council members and the county executive. But Baker's proposal goes further by expanding the proposed prohibition on contributions to slates by developers with pending applications to also include the county executive."

Source: *Business Gazette*; www.gazette.net

MICHIGAN

The City of Royal Oaks is considering zoning amendments that would "allow film industry developers to open without first going to the Zoning Board of Appeals for approval."

Source: www.hometownlife.com

NEW JERSEY

State lawmakers recently approved legislation that would expand the powers of the Casino Reinvestment Development Authority ("CRDA"). If the legislation is signed into law by Governor Christie, the CRDA will have control over Atlantic City's Tourism District. Atlantic City Mayor Lorenzo Langford reportedly intends to "fight" "to protect the city's sovereignty," insisting "local officials must have a say over what parts of the city the zone will include" and referencing "concerns about the city's authority over planning and zoning."

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

WASHINGTON

The State House of Representatives' Local Government Committee is considering House Bill 1013, which would "provide affected property owners written notice when a local government plans to change zoning classifications." The Committee is also considering House Bill 1012, which would "allow cities, counties and towns the ability to set terms of office for planning commissioners between six and four years."

Source: *The State Column*; www.thestatecolumn.com

February 25, 2011 | Volume 5 | No. 4

QUINLAN™

Zoning Bulletin

in this issue:

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The Background/Facts: Manatee County (the "County") enacted Ordinance 05-21 (the "Ordinance"), which regulated the manner in which sexually oriented businesses operated in the County. The Ordinance contained both zoning and public nudity provisions. The zoning provisions included: physical requirements for the premises of sexually oriented businesses; restrictions on the hours of operations of such businesses; and a prohibition on serving of alcoholic beverages at such businesses.

In September 2005, three adult dancing establishments, which operated in the County, including Peek-a-Boo Lounge of Bradenton, Inc. ("Peek-a-Boo"), filed a lawsuit challenging the Ordinance. They maintained that the Ordinance was unconstitutional on its face as applied to them. More specifically, they argued that the Ordinance violated the First Amendment because it restricted their freedom of expression and was not designed to serve a substantial government interest.

The County defended the Ordinance. It said it had a "substantial interest in preventing and abating [negative] secondary effects [associated with sexually oriented businesses]." It rationalized adoption of the Ordinance as necessary to prevent those negative secondary effects and "to promote the health, safety, and general welfare of the citizens of the County ...." The County supported the adoption of the Ordinance with a "voluminous record that included judicial opinions; multiple secondary-effects reports, including land use studies and crime reports; affidavits from [local law enforcement]; newspaper articles; and other materials."

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the district court issued final summary judgment in favor of the County. The district court held that the County's Ordinance "was reasonably designed to serve a substantial government interest—reducing the negative secondary effects associated with sexually oriented businesses."

Peek-a-Boo appealed. On appeal, Peek-a-Book argued that the Ordinance was not "designed to serve a substantial government interest."

DECISION: Affirmed.

The United States Court of Appeals, Eleventh Circuit, agreed with the County and the district court. It concluded that the County's Ordinance was reasonably designed to serve a substantial government interest. The court found the County's rationale for adopting the Ordinance (i.e., to prevent and abate negative secondary effects associated with sexually oriented businesses) was supported by a substantial body of evidence.

The court explained that "[z]oning ordinances that regulate the conditions under which sexually oriented businesses may operate are evaluated as time, place, and manner regulations, following a three-part test set forth by the Supreme Court." Under that test, a court must: (1) first determine whether the ordinance amounts to a total ban (which is

See also: *Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991).*

See also: *California v. LaRue, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972).*

Case Note: In its decision, the court noted that "adult entertainment zoning ordinances and generally applicable public nudity ordinances 'must be distinguished and evaluated separately.'" Zoning ordinances were constitutional and not in violation of the First Amendment if they survived the three-part test described in the decision. Content-neutral public nudity ordinances were constitutional if they met a different, four-part test: (1) whether the government acted within the bounds of its constitutional power in enacting the ordinance; (2) whether the ordinance furthers a substantial government interest; (3) whether the government interest is unrelated to the suppression of free expression; and (4) whether the ordinance restricts First Amendment freedoms no more than is essential to further the government's interests. Here, the court found the County also met its burden under the second prong of that former test.

Repeal of Regulations—County Rescinds Conditional Commercial Zoning Designation of Portion of Landowner's Land

Landowner says this rescission is an unconstitutional taking and deprives him of procedural due process

Citation: *Bettendorf v. St. Croix County, 2011 WL 167030 (7th Cir. 2011)*

The Seventh U.S. Circuit has jurisdiction over Illinois, Indiana, and Wisconsin.

SEVENTH U.S. CIRCUIT (WISCONSIN) (01/20/11)—This case involved the rescission of a commercial zoning designation of a portion of a landowner's property, in response to a court order to do so. The case addressed the issue of whether that rescission of the zoning designation: (1) amounted to a government taking without just compensation; and (2) deprived the landowner of his procedural due process rights.

The Background/Facts: John Bettendorf owned property in St. Croix County (the "County"). When Bettendorf acquired the property, it was zoned agricultural-residential. In 1984, Bettendorf applied to the County Planning, Zoning, and Parks Committee (the "Committee") for a rezone of a portion of his property to commercial so that he could operate a

the property "practically useless." Accordingly, the court concluded that there was no compensable taking.

Addressing Bettendorf's due process claims, the court acknowledged that the 14th Amendment protects against state action that deprives a person of property without due process of law. Bettendorf had argued that he was not afforded adequate procedural due process in the state court system. The court disagreed. It noted that, in order to prevail on his procedural due process claim, Bettendorf had to show that "he was deprived of a full and fair hearing to adjudicate his rights." The court found that was not the case here. Rather, here: Bettendorf initiated state court review of the Ordinance; and he knew the County's position on appeal was that the Ordinance was invalid in its entirety. Bettendorf had the opportunity to rebut that position before the court of appeals. In other words, Bettendorf was on notice that the Ordinance could be struck down and his commercial rights rescinded, and he had an opportunity to be heard on that issue before the court of appeals. Accordingly, the court concluded that Bettendorf's procedural due process rights were not violated.

See also: *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539, 16 Employee Benefits Cas. (BNA) 2265 (1993).*

See also: *Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) (overruled by, Daniels v. Williams, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)).*

Case Note: Bettendorf had also argued that the County's rescission of the conditional commercial zoning designation violated his substantive due process rights. The court said that for that to be the case, the County would have had to have "exercise[d] its power without reasonable justification in a manner that 'shocks the conscience.'" The court found that the County's decision to revoke the commercial designation could "hardly be considered conscious-shocking or arbitrary." The County was merely complying with a judgment from the court of appeals; its action was "utterly reasonable and not a violation of substantive due process," concluded the court.

The court explained that the burden rested on TALP, the challenger of the fee, to show that the fee was unreasonable. TALP had to show that the fee did not bear a reasonable relationship to the cost of regulating the industry. In other words, TALP had to show that the fee was being used to raise revenue for general governmental purposes by either: (1) establishing that "the fee was enacted for the purpose of raising revenues for the general fund"; or (2) demonstrating that "the fee was unreasonable because it was disproportionate to the cost of the services rendered or to the 'government's costs of regulating and policing a business or activity.'"

Here, the inspection fee was enacted for a proper purpose: to compensate the City for the costs of conducting civil inspections. Thus, it was TALP's burden to show the fee was unreasonable: TALP had to show that the City's civil inspection revenues exceeded the City's civil inspection expenses by an unreasonable amount. TALP failed to make that showing, found the court. Rather, the City's five-year analysis showed that the City's costs exceeded its revenues. TALP did not present any reliable evidence to dispute the City's five-year costs/revenue analysis, nor did TALP show how application of a different fee would have led to a more reasonable result. Therefore, the court concluded that the fee was reasonable and thus was not unconstitutional.

See also: *Home Builders Ass'n v. City of North Logan, 1999 UT 63, 983 P.2d 561 (Utah 1999).*

See also: *Home Builders Ass'n of Utah v. City of American Fork, 1999 UT 7, 973 P.2d 425 (Utah 1999).*

Case Note: In its decision, the court also held that a multiyear analysis of costs/revenue in determining the reasonableness of an inspection fee is "an appropriate approach for analyzing whether a [municipality's] costs exceed its revenues." The rationale for such an approach, explained the court, is that: "a city's disbursement for its regulatory expenses 'may so vary from time to time that the surplus of one year may be needed to supply the deficiency of another.'"

Rezoning—Town Rezones Property to Commercial

Nearby residential residents say rezone is invalid because it conflicts with comprehensive plan

Citation: *Ferraro v. Town Bd. of Town of Amherst, 79 A.D.3d 1691, 2010 WL 5395786 (4th Dep't 2010)*

Town had concluded that the proposed rezone was consistent with the Plan because of the Benderson Property's proximity to the University; the fact that Maple Road was a major arterial road; and the unlikely use of the Benderson Property for any other development based, in part, on its proximity to the sports arena and the University's stadium. The court agreed. It found that the Property was "in proximity to the University" and "close to the Plan's proposed location of a mixed-use center." Furthermore, the court noted that the Plan's proposed location of a mixed-use center was very similar to the layout of the Property: it was across the street from a residential area and buffered by a green area.

See also: *Bergstol v. Town of Monroe, 15 A.D.3d 324, 790 N.Y.S.2d 460 (2d Dep't 2005).*

Zoning News from Around the Nation

CALIFORNIA

The Foster City Council has "given preliminary approval to an ordinance" that would prohibit "any recreational or instructional school or business" such as "martial arts or dance studios, boxing gyms and fitness clubs" "from keeping their doors open during business hours." The proposed zoning change is in response to noise complaints.

Source: *San Mateo County Times*; 2011 WLNR 538360

LOUISIANA

The U.S. Department of Housing and Urban Development ("HUD") recently filed a complaint against St. Bernard Parish, alleging discriminatory zoning and housing ordinances. Critics have long alleged that the Parish ordinances are "racially discriminatory" and "designed to maintain the single-family residential character of the community." HUD has investigated Parish zoning ordinances (passed in December 2009) that eliminate any multifamily housing as a permitted use in five zoning areas (where that use was previously allowed). HUD says the ordinances have "created obstacles to those who want to provide and obtain affordable rental housing in the Parish, and that those obstacles discriminated in effect and intent based on race." One Parish councilman has said that the ordinances are not "against a group of people," but an attempt to protect property values.

Source: *New Orleans Times Picayune*; 2011 WLNR 1820888

MARYLAND

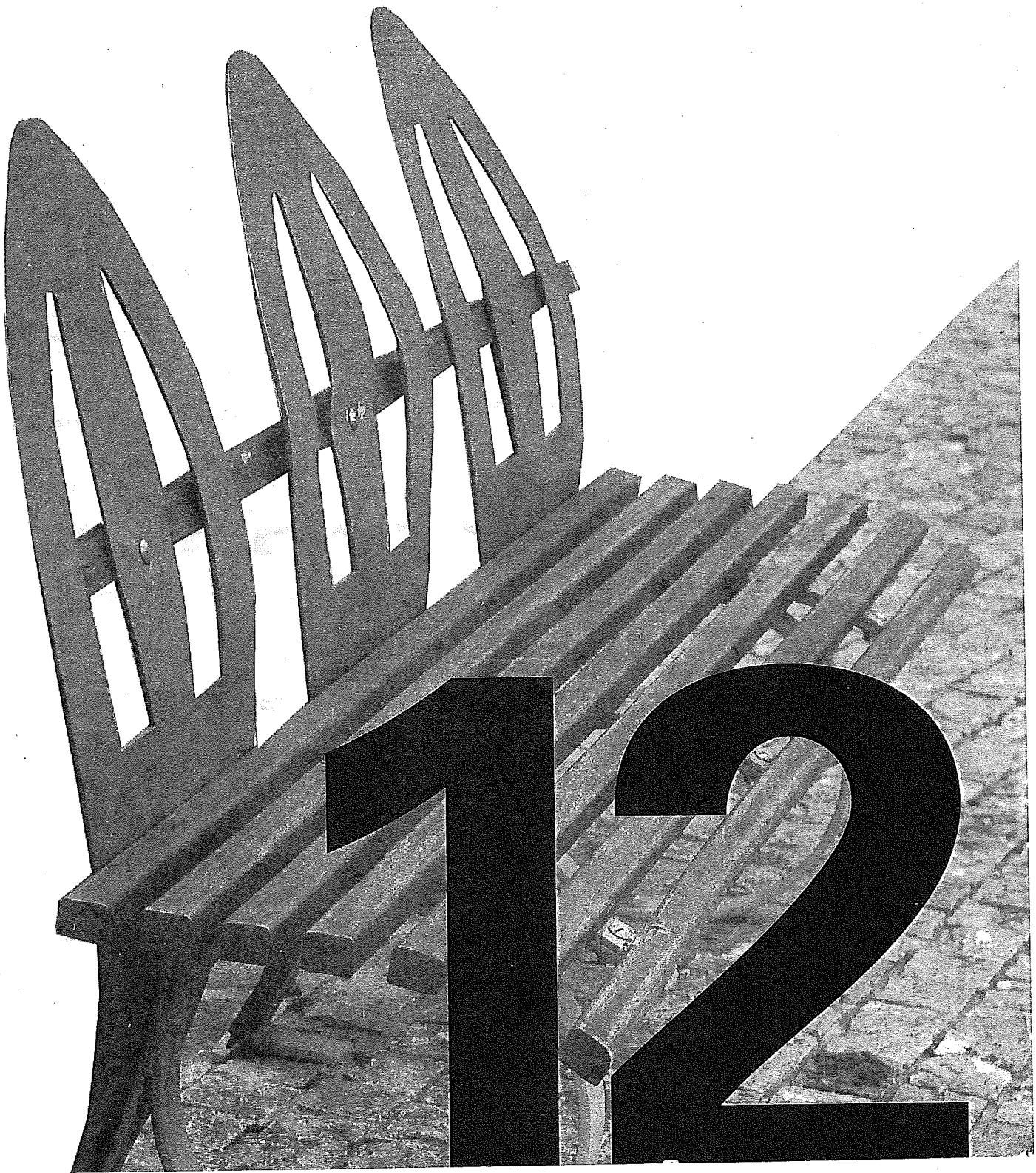
The state legislature is considering a bill that "would eliminate municipal authority to regulate county school construction." The bill "would subject county schools to the county planning process even when a fa-

ZONING PRACTICE DECEMBER 2010

AMERICAN PLANNING ASSOCIATION

ISSUE NUMBER 12

PRACTICE COMMUNITY CHARACTER



ASK THE AUTHOR JOIN US ONLINE!

Go online during the month of December to participate in our "Ask the Author" forum, an interactive feature of Zoning Practice. *Bret C. Keast, AICP, will be available to answer questions about this article. Go to the APA website at www.planning.org and follow the links to the Ask the Author section. From there, just submit your questions about the article using the e-mail link. The author will reply, and* Zoning Practice *will post the answers cumulatively on the website for the benefit of all subscribers. This feature will be available for selected issues of* Zoning Practice *at announced times. After each online discussion is closed, the answers will be saved in an online archive available through the APA* Zoning Practice *web pages.*

About the Author
Bret C. Keast, AICP, is president and owner of Kendig Keast Collaborative, a national planning firm with offices in Chicago; Sugar Land, Texas; Denver; Sturgeon Bay, Wisconsin; and Sacramento, California. Keast had more 20 years' experience with a regional planning commission, municipality, and international planning and design firm before forming his partnership with Lane Kendig in 2003. He has consulted local and county governments across the United States in the areas of comprehensive and small area planning, zoning and land development codes, and a broad array of other studies and master plans. Keast received his Bachelor of Science in Community and Regional Planning from Iowa State University and his Master of Urban Planning from the University of Kansas. He is a frequent speaker at national, state, and local planning conferences. He is co-author of *Community Character, Principles for Design and Planning* and *A Practical Guide to Planning for Community Character* (Island Press) and "Meeting Procedures and Liability Issues for Public Officials," published in the *Guide to Urban Planning in Texas Communities*.
The author extends his appreciation to Lane Kendig, Gary Mitchell, Todd Messenger, and Elizabeth Austin for their help and contributions to this article.

delineated by design types. These types include urban core, urban, and auto-urban within the urban class; suburban and estate within the sub-urban class; and countryside, agricultural, and natural within the rural class. Of course, there will be variations among the design types depending on a multitude of factors including, but not limited to, topography, geology and soils, climatic conditions, and the context of the environment, together with the laws and common practices of different states and places.

Use of a community character system is essential if a community is to achieve intentional outcomes. While land use and density are considerations by way of their influences on traffic, parking, and utility capacity, they are poor surrogates for character. Instead, it is how the use is designed and density is applied that determines its character. By using community character to organize development, better land-use and regulatory strategies may be formed and measures may be established to ensure deliberate outcomes.

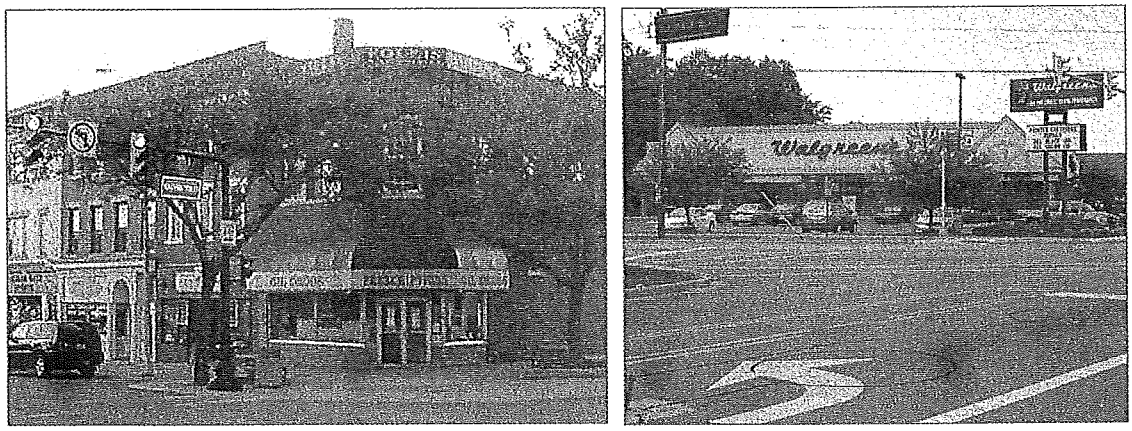
The Premise

Simply, community character is rooted in the premise that the same or similar land uses may be designed to meet a number of different character types. This is done by using landscaping, street design, lotting patterns, and the arrangement and amount of open space—together with land use and density—to create the desired character. In each case, if designed in context, land use does not necessarily disrupt or even determine development character. While the focus of this article is on residential development, Illustrative 1 depicts a relevant application of community character in a nonresidential context. In this illustration, the use is the same but the character is much different by way of the building scale, position, and orientation; provisions for parking; and its site design. In the same way, this use could also be designed to reflect a suburban character with increased open space and vegetation and different building and site standards.

Illustrative 2 on page 4 demonstrates that land use, lot size, and density are equally irrelevant as independent measures of character. The small-lot, single-family dwellings (left) are three times more dense than the detached single-family dwellings (right), yet the neighborhood shown on the left is perceived to be more rural in character. This goes against conventional wisdom to those (professionals and laypersons alike) who have been conditioned or unintentionally trained to think of increased density as being less desirable. Again, it is a multitude of design factors that relate to character.

Community character is based on a relative balance of design elements. This means that, within reason, development may have

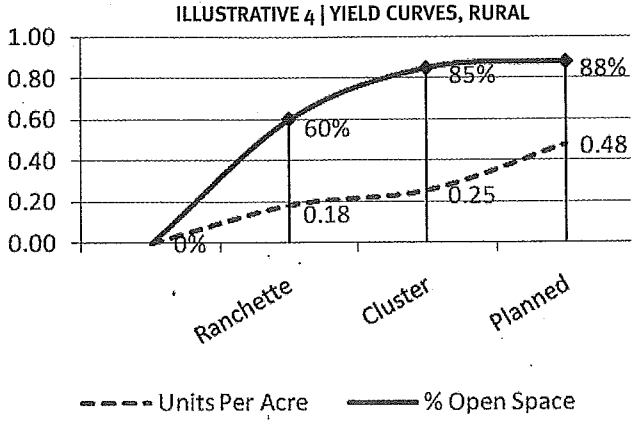
ILLUSTRATIVE 1 | SIMILAR USE, DIFFERENT CHARACTER:
Same use in urban and auto-urban settings (Valparaiso, Indiana)



(Left) Drug store, urban context

(Right) Drug store, auto-urban context

ILLUSTRATIVE 4 | YIELD CURVES, RURAL

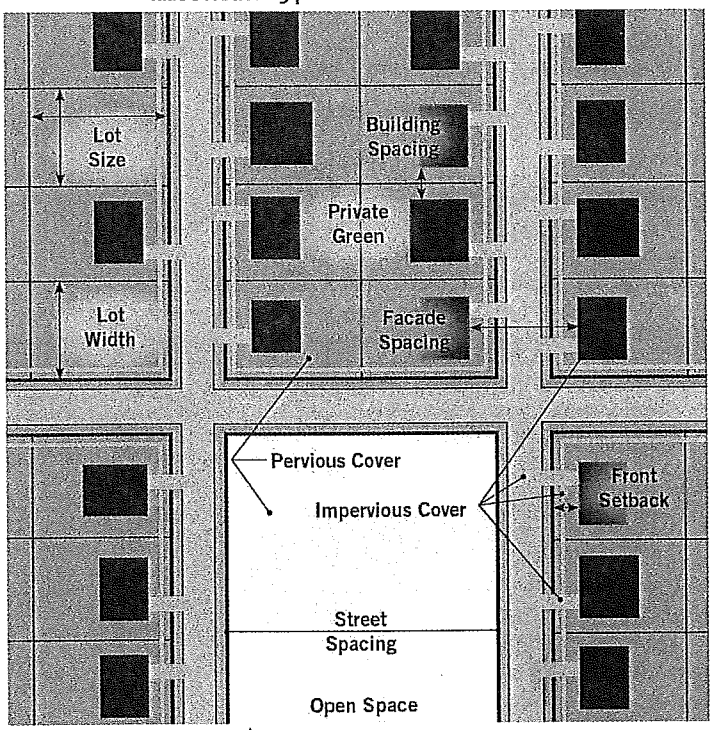


A development with a combination of density and open space that falls anywhere along the yield curve is of a rural character.

The control measures are generally defined as follows (see Illustrative 5):

- ***Green space*** refers to pervious surfaces that may include common spaces, such as nature reserves, conservation areas, and parks or other open spaces. In the rural and sub-urban classes they also relate to private, on-lot green spaces. Green space also refers to green mass representing the relative volume of vegetation. In a sub-urban context, green mass should exceed building mass. In an urban context, green mass may "tip the scales" to a suburban character. In the community character system, green space is defined by an open space ratio or, for nonresidential uses, a landscape surface ratio.
- ***Gray space*** relates to the impervious area of a lot or tract, generally those consumed by parking and loading areas, as well as the building footprint. In relationship to character, the amount of on-site surface parking is a significant determinant, as is its relationship to the building and street(s).
- ***Buildings*** relate to both two and three-dimensional space. The amount of site area they consume and their relationship to other buildings, open spaces, and the street is among the factors that determine character. The height and mass of buildings are equally important as they relate to scale, building enclosure, and intensity.

ILLUSTRATIVE 5 | APPLICATION OF MEASURES



Using Community Character

The dimensions and yields reflected below may be used to inventory and accurately categorize residential areas according to their character. By doing so, planners, public officials, and neighborhood leaders alike may better understand what elements produce a certain character. This may be used to develop a land-use plan that is more definitive as to the intended character outcomes of individual areas and the community. Ultimately, these dimensions and measures may be used to calibrate densities and open space percentages, establish dimensional standards, and determine yields in creating regulatory provisions that relate to character. Ordinances that fail to achieve their intended outcomes are due to an overemphasis on land use and lot size, a lack of emphasis on site and building design, use of uniform setbacks and lot dimensions across districts, and unrelated standards for resource protection, among many others.

Tipping Points

Sometimes character is not easy to categorize, particularly when a neighborhood was built according to standards that, at the time, did not relate to character. In this way community character is a tool to ensure that future neighborhoods have an identifiable character. Specifying character is also made difficult by unique site conditions that create tipping points. These are tangible and intangible variables that "tip the scales" from one character type to another. By way of example, what is an auto-urban neighborhood by reason of its street and lot layout and spacing may be classified suburban if there is significant open space; large, well-landscaped and treed front yards; and no garage or one situated to the rear or accessed via an alley. The most common tipping points include:

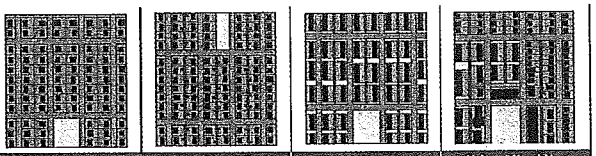
- Lot size and width, side yard setbacks, and building separation
- Front yard depth and amount of landscaping and green mass
- On- or off-street parking and front, rear, or alley-accessed garage
- Percentage and distribution of common open space

CHARACTER CLASS: RURAL

Natural and agricultural character types are defined by their uses: wooded or savannah lands, plus creeks and wetlands for the natural; crop and ranching, plus scattered, rural homesteads for the agricultural. Development within these areas is clearly accessory to the

KEYS TO URBAN CHARACTER

- Streets and other public spaces are framed by buildings
- Housing types range from small, narrower single-family lots dominated by driveways and front-loaded garages (auto-urban) to attached residential (e.g., brownstones, town houses) and multifamily dwellings with alley access or rear garages (urban). Yard and landscaped areas are reduced
- Higher lot coverage and floor area ratios leading to increased stormwater runoff
- Smaller front and side setbacks with a tighter building spacing
- Most conducive for pedestrian activity and interaction



Means and Metrics		Auto-Urban	Urban (with alley)	Urban Attached	Urban Mixed Use
Green Spaces	Visual	Secondary	Secondary	Predominant (with buildings)	Predominant (with buildings)
Buildings	Visual	Secondary	Predominant	Secondary (with open space)	Significant, but secondary
Grey Spaces	Visual	Predominant	Significant, but secondary	Secondary	Secondary
% Open Space	Dimensions	20%	15%	25%	12%
Lot Size	Dimensions	7,500 sf.	7,000 sf.	2,500 sf. (per unit)	Mixed
Lot Width	Dimensions	75'	70'	25'	Mixed
Front Setback	Dimensions	30'	25'	20'	15' average
Building Spacing	Dimensions	14'	12'	20'	20'
Façade Spacing	Dimensions	110'	90'	100'	130'
Street Spacing	Dimensions	200'	200'	150'	160'
Impervious Cover	Yield	33.36%	40.78%	39.09%	62.93%
Pervious Cover	Yield	66.64%	59.22%	98.94%	37.07%
Private Green	Yield	46.64%	44.22%	50.12%	25.07%
Density, Gross	Yield	3.177	3.250	8.513	19.00
Density, Net	Yield	3.971	3.824	11.351	--

CHARACTER CLASS: URBAN

There are three urban character types: auto-urban, urban, and urban core, each of which has increasing densities, heights, building coverage, and floor area, respectively, and less open space. Often, open space is in the form of civic squares, pocket parks, or urban plazas. The urban types are described as follows:

- ***Auto-urban neighborhoods*** are usually highly patterned and characterized by narrow—and often identical—lot widths with modest front yard setbacks, narrow side yard setbacks (meaning a tighter spacing of homes), and a high percentage of the lot devoted to driveways and on-lot parking. Depending on the width of lots, the location and visibility of garage doors and parked cars largely determines its character.
- ***Urban neighborhoods*** refer to those with smaller lots, setbacks, and building spacing, or those of attached or multiunit buildings with alley access or on-street or structured parking, all of which have an increased building coverage and floor area. Higher density buildings usually have a minimum of two or three stories.
- ***Urban core*** is reserved for intensive residential development including multistory or mid- and high-rise buildings. These may include vertical mixed use buildings with a mixture of commercial and residential uses. An urban core must have structured parking to achieve this character type.

Urban areas are characterized by the closeness of buildings, which encloses space—whether it is a street, alleyway, walkway, or public space. There is a strong relationship among and between buildings and the street, with an increased emphasis on building design and the pedestrian precinct. By nature of the uses and their relative intensity, urban areas are more connected and walkable. The difference between an auto-urban and urban character type, as illustrated above, is the handling of parking. An auto-urban type has a front-loaded garage, whereas the urban type is accessed via the alley. The lot size and open space is reduced to recover and slightly increase the density lost to the alley. Lots with on-street parking and alley access are typically urban in character, provided there is relatively high density and building cover.

COMMUNITY CHARACTER AND THE COURTS

Glisson v. Alachua County, 558 So. 2d 1030 (Fla. Dist. Ct. App. 1990)

In this case the court held: "The interests purportedly protected by the regulations at issue in this case are appropriate subjects for exercise of the police power. For example, among the interests deemed legitimate for exercise of the state's police power are such matters as: *(1) protection of aesthetic interests, . . . ; (2) preservation of residential or historical character of a neighborhood, . . . ; and (3) protection of environmentally sensitive areas and pollution control."*

Nectow v. City of Cambridge, 277 U.S. 183 (1928)

In this case the court held that zoning provisions must bear "a substantial relation to the public health, safety, morals, or general welfare." That said, the Supreme Court has broadly construed the public welfare as: "The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, *aesthetic* as well as monetary. *It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."*

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)

In this case the court held that a zoning ordinance will not violate equal protection if the law is *reasonable and bears a rational relationship to a permissible state objective.* Additionally, a zoning ordinance can withstand constitutional scrutiny upon a clear showing that *the burden imposed is necessary to protect a compelling and substantial governmental interest. (emphasis added)*

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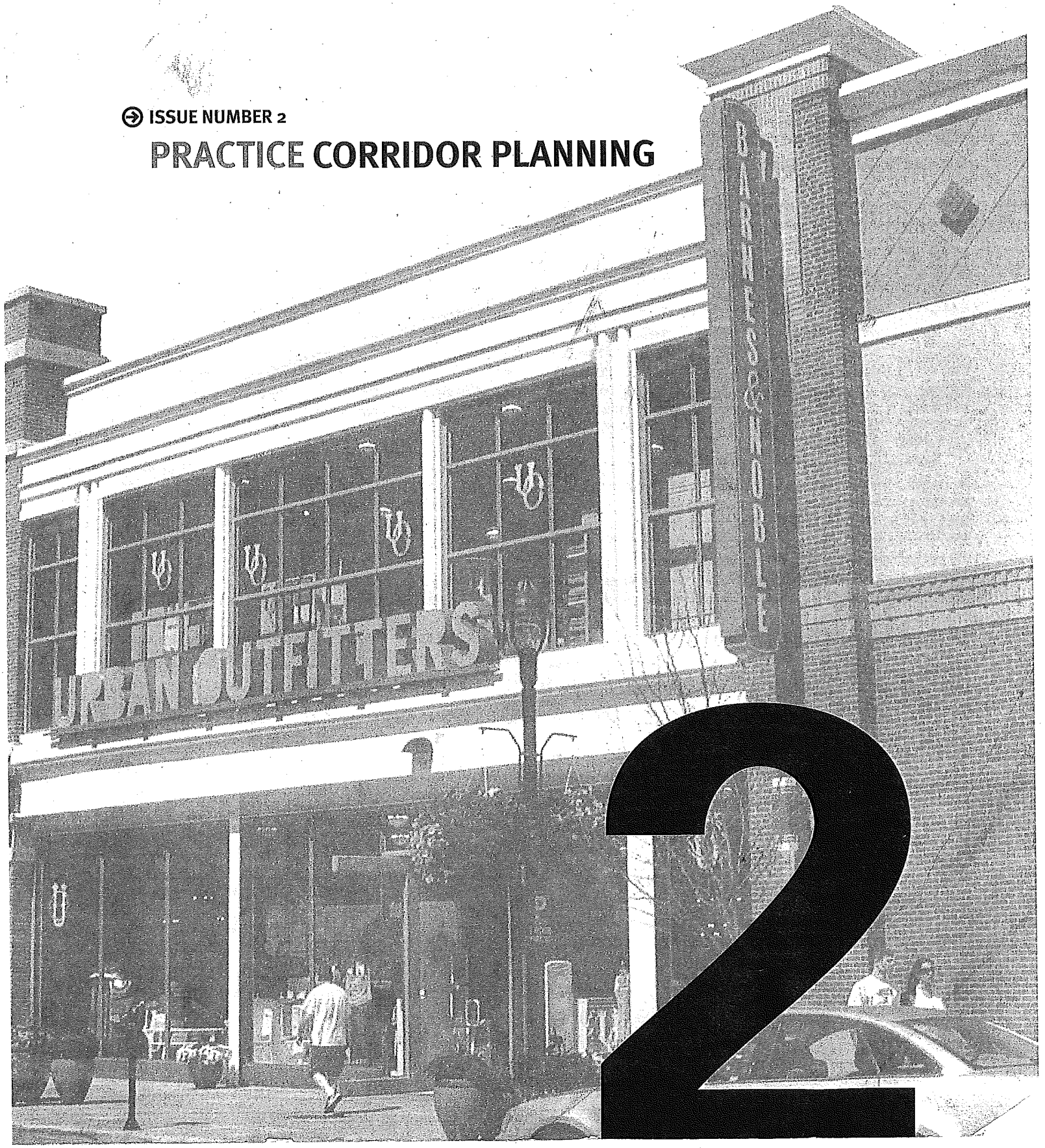
VOL. 27, NO. 12

Zoning Practice is a monthly publication of the American Planning Association. Subscriptions are available for $90 (U.S.) and $115 (foreign). W. Paul Farmer, FAICP, Chief Executive Officer; William R. Klein, AICP, Director of Research

Zoning Practice (ISSN 1548–0135) is produced at APA. Jim Schwab, AICP, and David Morley, AICP, Editors; Julie Von Bergen, Assistant Editor; Lisa Barton, Design and Production.

ZONING PRACTICE FEBRUARY 2011

AMERICAN PLANNING ASSOCIATION



ISSUE NUMBER 2

PRACTICE CORRIDOR PLANNING

2

ASK THE AUTHOR JOIN US ONLINE!

Go online during the month of February to participate in our "Ask the Author" forum, an interactive feature of Zoning Practice. *David Dixon will be available to answer questions about this article. Go to the APA website at www.planning.org and follow the links to the Ask the Author section. From there, just submit your questions about the article using the e-mail link. The author will reply, and* Zoning Practice *will post the answers cumulatively on the website for the benefit of all subscribers. This feature will be available for selected issues of* Zoning Practice *at announced times. After each online discussion is closed, the answers will be saved in an online archive available through the APA* Zoning Practice *web pages.*

About the Author
David Dixon is the principal-in-charge of planning and urban design at Goody Clancy and a coauthor of *Urban Design for an Urban Century* (Wiley, 2009).

use, walkable environments. Real estate consultant Sarah Woodworth of W-ZHA, LLC, foresees little net new demand over the next decade for larger floorplate, suburban office buildings along arterial corridors. However, she identifies significant growing demand from emerging "creative industries" (technology, design, communications) in amenity-rich, walkable environments characteristic of more urban environments. In December, 2010, the *Wall Street Journal* reported that during the first three quarters of 2010, 16 million square feet of suburban office space became vacant, while downtown office vacancy remained essentially unchanged.

Increased Demand for Multifamily Housing

As recently as the 1970s roughly three-quarters of households in the housing market included children. Today, housing analyst Laurie Volk of Zimmerman/Volk Associates reports that half to two-thirds of all households in most regions are singles and couples, and urban qualities like nearby stores, sidewalks, a variety of housing options, and transit now rate highly in neighborhood-preference surveys. Urban economist Chris Nelson points out that America faces a growing shortage of multifamily housing in more urban settings while the stock of large-lot, single-family houses in 2010 already exceeds 2030 demand.

Feasibility and Density

Woodworth notes that owners of older strip developments often have little incentive to redevelop because their developments produce steady, predictable cash flow. As a rough rule of thumb, Woodworth and Nelson both estimate that tripling, or increasing even more, the existing density of strip development is often necessary to incentivize redevelopment. While premiums associated with higher density redevelopment once represented an obstacle, Chris Leinberger, a visiting fellow at the Brookings Institution, reports that mixed use, walkable developments now claim a value premium of 30 to 50 percent over comparable single-use, auto-oriented development in many urban and suburban settings. Carol Coletta, who heads CEOs for Cities, reports that a survey of 24 major metropolitan areas indicates that values for comparable housing increases as walkability increases (as measured by the website www.walkscore.com).

Community Benefits of Corridor Redevelopment

In 2005, John Rahaim, then Seattle's planning director (now San Francisco's) estimated that because of demographic shifts the city of Seattle needed 35 percent more housing units to accommodate its 1960 population—and that while 80 percent of housing stock was single family, roughly half the demand was for multifamily housing. At the same time, the city lacked opportunities to accommodate new retail formats and "cool" office space. In many communities, low-density corridors represent the best opportunity to accommodate this demand, concentrate growth as an alternative to sprawl, and promote sustainability.

Higher value mixed use developments produce distinct fiscal benefits. A study for Asheville, North Carolina, by Joe Minacozzi, the new products director of Public Interest Projects, Inc., found that Asheville's higher density, mixed use redevelopment produced roughly six times more revenue per acre than auto-oriented strips. Goody Clancy planners hear about other advantages. A walkable main street is the top aspiration for many urban and suburban residents—to enhance neighborhood character, provide walk-to amenities, and offer healthier lifestyles. Human resource directors say they have an easier time recruiting educated, skilled employees to walkable, amenity-rich environments—an observation supported by CEOs for Cities research.

CASE STUDIES

There are many models for transforming arterial corridors. In Opa-locka, Florida, a depressed city just outside Miami, the Opa-locka Community Development Corporation has launched a community-based planning initiative to revitalize the Ali Baba Road corridor—now dominated by auto-repair shops—that is attracting significant federal investment. Prince George's County, Maryland, is completing plans to transform an anonymous stretch of Annapolis Road outside of Washington, D.C., into a transit-oriented district. A proposal in New Orleans's new Master Plan to remove an elevated expressway and restore the Claiborne Corridor adjacent to downtown is gaining popular support.

These and the three case studies below (located in urban Columbus, Ohio, mature suburbs at the edge of Atlanta, and rapidly growing, suburban Dublin, Ohio) draw on the author's direct experience. The case-study corridors offer lessons more readily transferable to other communities. They do not depend on federal dollars, major transit investment, or a citywide campaign. Instead they illustrate how three communities used market-driven strategies to redevelop arterial corridors to reap significant community benefits.

While contexts differ, transforming these corridors involved planning and urban design objectives that are applicable to many arterial corridors:

- Sufficient density to transform auto-oriented environments into walkable ones
- Replacing automobile-scaled corridors with defined walkable centers and street grids designed and scaled for pedestrians
- A lively public realm lined with retail or other activities that invite pedestrian use
- A mix of uses that take advantage of multiple markets and contribute to vitality
- Connectivity in terms of physical connections and uses valued by the larger community

Transportation. Strategies focused on managing impacts on adjacent neighborhoods; securing city support for reduced parking ratios, shared parking, and curbside parking to support retail and buffer pedestrians from traffic; and preserving the opportunity to introduce streetcars.

Management. The plan recommended that Campus Partners undertake the necessary analysis, prepare a business plan, and work with property owners to form a business improvement district.

Results to Date

More than $275 million has been invested in South Campus Gateway and elsewhere along High Street, and more than $150 million has been invested in mixed income housing, a new police station, a public elementary school, and an OSU early-childhood learning center.

The Campus Partner's University District Revitalization project received the American Planning Association's 2010 National Planning Excellence Award for Implementation in addition to awards from APA Ohio and the Society for College and University Planning.

CLIFTON CORRIDOR: CENTER FOR A VIBRANT COMMUNITY

Outside of Atlanta, a series of Native American pathways evolved into rural roads serving agricultural villages. In the late 19th century a founder of Coca-Cola developed an Olmsted-designed garden suburb, Druid Hills, and opened the area for development. By 1950 the Clifton Corridor was lined with verdant suburbs and bucolic campuses. By the 1980s the corridor was indistinguishable from other strip-development corridors.

Context

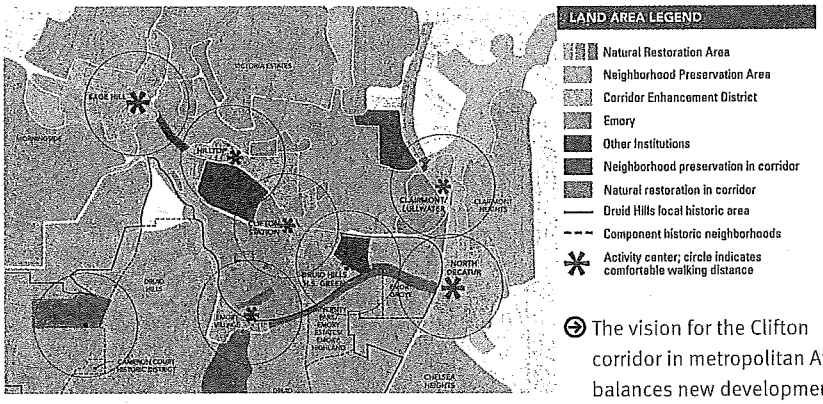
The Clifton Corridor consists of a series of connected arterial highways—Clifton Road, North Decatur Road, and Clairmont Road—which are constantly congested and not served by rail transit. It has some of America's highest pedestrian fatality rates and faces deteriorating air and water quality. Concerned that the corridor's auto-oriented setting would not appeal to the next generation of students, faculty, staff, and researchers—and eager to contribute to sustainable smart growth—Emory University reached out to nearby neighborhoods to form the Clifton Community Partnership in 2006. In 2008 the CCP published the Clifton Corridor Urban Design Guidelines—a vision and strategies for transforming the corridor "from a mid-20th-century automobile-centered suburb into a 21st-century walkable community," preserving the character of existing suburban neighborhoods, and restoring the degraded natural environment.

Development program

The preferred vision included approximately 10 million square feet of mixed use development. Community members requested multifamily housing options that enable younger people to move into the neighborhood and older residents to remain.

Planning framework

The guidelines called for the transformation of strip retail and shopping centers into 10 distinct character areas including five "activity centers" that form the vibrant heart of a community seeking to manage growth.



The vision for the Clifton corridor in metropolitan Atlanta balances new development ("enhancement districts"—including five activity centers) with preserving existing neighborhoods and restoring natural areas.

Implementation

The CCP lacks the funding and staffing that empower Campus Partners, but it has brought Emory and the community together around a single agenda to influence public policy and private investment. Key strategies include the following:

Education. Druid Hills has long found itself at odds with Emory. The CCP represents a conscious effort to bridge this divide. Initially skeptical, residents found that both sides aspired to walkable, mixed use environments. The guidelines represent a "social compact" that documents agreements on uses, character, and scale of development along the corridor.

Market. Participants and decision makers had confidence that Atlanta's closer-in suburbs face strong growth pressures. DeKalb County is expected to add 200,000 people (and roughly 75,000 housing units) by 2025.

Design and design review. The guidelines divide the corridor into 10 distinct character zones and provide for each one a vision, principles, development goals, public- and private-realm design guidelines, and conceptual plans and illustrative before-and-after studies.

Zoning. The DeKalb County comprehensive plan identifies policy goals for defined town centers, including walkability, buildings that frame streets with pedestrian-friendly uses, a "high-density mix of retail, office, services, and employment uses" in a compact center, and reduced dependence on autos. The guidelines provide specific direction for achieving these goals in each character zone and require new development to restore nearby degraded natural environments.

Partnerships. Emory formed a partnership to create the first redevelopment—an amenity-rich, mixed use development that includes 800 units of housing for faculty and staff within a five-minute walk of campus.

Transportation. Initial traffic concerns turned to support after a transportation study reported that mixed use developments generate roughly 44 percent less traffic than conventional strip development, noted that reducing lane width to accommodate bike lanes slowed travel speeds, demonstrated that traffic associated with community-oriented redevelopment displaced through-traffic to regional highways, and indicated that curbside parking and street trees (discouraged by Georgia DOT) could work along this heavily traveled corridor.

Management. The CCP will maintain ongoing responsibility as an advocate, convener, and sponsor for corridor initiatives. It has also set up a communitywide information network.

Results to date

The $250 million Emory-sponsored mixed use "Emory Point" LEED-ND development received zoning approval. DeKalb County

PLANNING AND URBAN DESIGN OBJECTIVES	HIGH STREET	CLIFTON CORRIDOR	BRIDGE STREET CORRIDOR
Densities that support walkability • Net densities of 40 to 60 housing units per acre and corresponding commercial FARs of 1.5 to 2.5 (threshold supports informal interaction, casual trips on foot) • Densities achieved using three- to five-story buildings (familiar scale, continuity to nearby neighborhoods, and avoiding high-rise cost premiums) • Shared parking strategies (enables increased densities on smaller lots and shared use for uses with different peak needs)	Tripled the retail and doubled the floor space lining High Street	Three activity nodes represent transit ready development opportunities	Five- to tenfold increase over recently approved auto-dependent development densities
Defined walkable centers and street grids scaled to pedestrians • One to four distinct centers created along each corridor—sized for a maximum 10-minute walk (half-mile) and connected by higher density, walkable redevelopment along arterial roads • Maximum block size in centers 300 to 400 ft.	Streets connecting to neighborhoods reopened—traffic management to avoid impacts	Two large shopping centers subdivided into more than 30 blocks—including square and parks	Street grid subdivided larger sites but avoided fragmenting small sites. Some blocks structured parking lined by housing (roughly 200- to 300-ft. width plus sidewalks)
A public realm that invites walkability • Retail or other "active" uses (artist studios, community spaces, lifelong learning, entertainment, etc.) encouraged everywhere and mandated along "main streets" in centers • Town houses with street entries at street level for multifamily housing • Parking structures located behind buildings or lined with housing and retail facing streets	Active uses mandated facing High Street (no internal atriums); drive-through businesses add outdoor seating and pedestrian-scaled signage	Emory buildings and campus will engage, rather than step back from, adjacent community	Higher density, mixed use buildings announce the transition to pedestrian-oriented environment
A mix of uses that contributes to vitality • Housing represents more than half of the mix (supports neighborhood-serving retail, day/night activity) • Cinemas, music, cafes, and similar amenities contribute to vitality attracts housing and office • Mix of uses responds to changing markets	Entertainment and arts created university-community character	New university bookstore is an integral to revitalizing an activity center	Mixed use, walk-to-work opportunities attract employees—and grow Dublin's employment base
Physical and social connectivity • Street, bike, and pedestrian connections to adjacent neighborhoods • Lively public squares, cultural, and civic uses make redevelopment integral to the life of the larger community	Arts cinema, supermarket, mom-and-pop retailers engage different demographics; jobs program benefits nearby residents	Mixed use centers located within a 10- to 15-minute walk of every neighborhood	Scioto River reserved as a "central park"; city hall and central library relocated to new "town green"
Transitions to adjacent neighborhoods • Building heights step down • Parking and other traffic generators located along busy streets	Reopened streets include neighborhood-oriented retail	Redevelopment preserves all residential blocks	Nearby subdivisions requested walkable connections to downtown
Planning and design that foster sustainability • Projects framed as a smart growth initiatives • New zoning offers opportunity to create model green districts • Centers form potential eco-districts (enable buildings to share energy and graywater)	More than half redevelopment replaces surface parking	Emory/community partnership will maintain area's tree canopy, restore natural areas and streams, and manage stormwater	Primary focus for Dublin's new sustainability manager

Design and design review. Dublin has asked Goody Clancy to prepare a pattern book. The city is also developing a new design review and approvals process that places greater stress on a "district" approach that emphasizes continuity, interaction between buildings and the public realm, the role that design and programming both play in placemaking, and similar qualities that focus on the quality of both the district as a whole and individual buildings and public spaces.

Zoning. Clarion Associates, Farr Associates, and McBride Dale Clarion are preparing new zoning that mixes form-based and performance requirements with a strong focus on defining uses and design appropriate for main street, neighborhood, and other types of streets. Dublin intends to simplify approvals by conveying intent as well as specific requirements for every part of the district. Where essential to achieve placemaking goals, the code will provide density incentives to aggregate fragmented ownerships.

Partnerships. Dublin will partner with developers to build, or fund, much of the shared infrastructure—street grids, parks, parking, a reconfigured highway interchange, bike paths, a "green stormwater system," and similar elements, and will recapture the costs of these investments through TIF and similar mechanisms.

Transportation. Nelson\Nygaard is preparing a district-transportation model that incorporates reduced trip-generation assumptions associated with mixed use development. The model will be used to identify phased transportation improvements and develop a transit strategy.

Management. A team that includes leaders from all city agencies involved in corridor redevelopment meets weekly to coordinate city policy, investment, and other actions.

Results to date

Two major landowners—a 50-acre failed shopping center and 75-acre nonprofit campus—have announced redevelopment plans totaling more than five million square feet. The nonprofit has selected Forest City as a master developer.

CONCLUSIONS

As America moves out of the recent recession, arterial corridors represent a new frontier—an opportunity to invest in reinforcing existing communities rather than draining resources to peripheral greenfields. None of these transformative plans moved forward without strong leadership, a commitment to community-based planning, and a willingness to explore innovative approaches to implementation that broke with familiar practices. These are resources that many communities already possess or can develop. The case study corridors demonstrate how many communities can tap growing markets to generate significant economic, social, and environmental benefits.

The 75-acre Crocker Park mixed use development has given suburban Westlake, Ohio, a pedestrian-oriented town center where none existed before. ©Dan Tasman; design concept by Lisa Barton.

VOL. 28, NO. 2

Zoning Practice is a monthly publication of the American Planning Association. Subscriptions are available for $90 (U.S.) and $115 (foreign). W. Paul Farmer, FAICP, Chief Executive Officer; William R. Klein, AICP, Director of Research

Zoning Practice (ISSN 1548–0135) is produced at APA. Jim Schwab, AICP, and David Morley, AICP, Editors; Julie Von Bergen, Assistant Editor; Lisa Barton, Design and Production.