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Remedy of Consent Judgment—County and Applicant Enter Into Consent Judgment, Allowing Applicant to Construct Cell Phone Tower

Homeowner's association argues consent judgment violates state law by compelling issuance of permit without regard to zoning regulations

Citation: *St. Charles Tower, Inc. v. Kurtz, 643 F.3d 264 (8th Cir. 2011)*

The U.S. Court of Appeals, Eighth Circuit, has jurisdiction over Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

EIGHT CIRCUIT (MISSOURI) (06/28/11)—This case addressed the issues of: (1) whether a consent judgment entered into between a county and a cell tower applicant violated state law by compelling issuance of permits without following county land use regulation procedures; and (2) if so, whether the consent judgment remained valid as "necessary" to correct a violation of federal law (the Telecommunications Act of 1996).

The Background/Facts: In 2008, St. Charles Tower, Inc. ("St. Charles") applied for a conditional use permit ("CUP") to build a cell phone tower in Franklin County, Missouri (the "County"). The County's Planning and

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Zoning Commission denied the application. St. Charles Tower appealed to the County's Board of Zoning Adjustment (the "Board"). The Board also denied the appeal because "the proposed location of the tower would primarily serve areas outside of Franklin County, not providing an adequate amount of benefit to Franklin County residents."

St. Charles sued the Board and the County (hereinafter, collectively, the "County"). It claimed that the Board's decision violated the federal Telecommunications Act of 1996 ("TCA"). The TCA requires local board denials of requests to construct personal wireless service facilities to be "in writing and supported by substantial evidence contained in a written record." St. Charles alleged that the Board's denial of the CUP was not supported by substantial evidence.

Ultimately, St. Charles and the County agreed to a consent judgment that required the issuance of the CUP, as well as "any other permits necessary for [St. Charles] to being construction of its proposed facility."

Trustees of the homeowners' association (the "Intervenors") of the subdivision in which St. Charles proposed to build the cell-phone tower had intervened in the litigation. They also moved to "alter, amend, or vacate the consent judgment." Among other things, they argued that the consent judgment violated Missouri law because it compelled the Board and the County to issue a CUP without following the procedures specified in the County's Land Use Regulations.

The district court denied the Intervenors' motion for relief from the consent judgment. The court held that the consent judgment did not violate state law. It further held that, even if the consent judgment did violate state law, the Board's denial of the CUP had violated the TCA and the consent judgment's remedy was "necessary to correct this violation of federal law."

The Intervenors appealed.

DECISION: Reversed and matter remanded.

The United States Court of Appeals, Eighth Circuit, held that: (1) the consent decree's remedy violated Missouri law in that it compelled issuance of permits without regard to procedures specified in the County's Land Use Regulations; and (2) the consent decree's remedy was not necessary to remedy the alleged TCA violations, and thus, the consent judgment's violation of state law rendered the consent judgment invalid and unenforceable.

The court explained that "[w]hile parties can settle their litigation with consent decrees, they cannot agree to 'disregard valid state laws.'" In other words, "[s]tate actors cannot enter into an agreement allowing them to act outside of their legal authority, even if that agreement is styled as a 'consent judgment' and approved by a court." "While parties can settle their litigation with consent decrees, they ... cannot consent to do something together that they lack the power to do individually."

Here, the County's Land Use Regulations required, among other things: actions of the Board be taken by a four-fifths vote; and written findings be made with respect to certain issues before the issuance of a CUP. None of these procedural requirements were fulfilled before the consent judgment,

and an attempt to comply with them afterward would be an "empty formalism." Since the Land Use Regulations were adopted pursuant to Missouri statutory law, the consent judgment's circumvention of them violated state law, concluded the court.

The district court had concluded that even if the consent judgment violated state law, such a violation was "not fatal to the consent judgment because 'the granting of the permit was a necessary remedy to rectify the violation of the TCA.'" The U.S. Court of Appeals disagreed. The court explained that "[s]uch judicial action [approving a consent judgment that violates state law] is authorized only when the federal law in question mandates the remedy contained in the settlement. Even then, '[r]emedies that override state law must be narrowly tailored so as to infringe state sovereignty as minimally as possible.'" Here, the TCA prescribed no particular remedy. In any case, the court found that the consent judgment not only provided for issuance of the CUP, but issuance of "any other permits necessary" as well. The court said it "fail[ed] to see how requiring the issuance of other permits, such as a building permit, [was] necessary to remedy the alleged TCA violation at issue here." Accordingly, "[b]ecause the consent judgment's remedy [was] not 'narrowly tailored so as to infringe state sovereignty as minimally as possible,' its violation of state law [could] not be excused on the ground that it [was] necessary to rectify a violation of federal law." The court concluded that the unexcused state law violation rendered the consent judgment invalid and unenforceable.

See also: *Perkins v. City of Chicago Heights, 47 F.3d 212 (7th Cir. 1995).*

See also: *League of Residential Neighborhood Advocates v. City of Los Angeles, 498 F.3d 1052 (9th Cir. 2007).*

Postdeprivation Due Process—Administrative Agency Suspends Developer's Permits Without Hearing

Agency claims that postdeprivation remedies were sufficient to satisfy constitutional due process

Citation: *San Geronimo Caribe Project, Inc. v. Acevedo-Vila, 2011 WL 2436607 (1st Cir. 2011)*

The United States Court of Appeals, First Circuit, has jurisdiction over Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

FIRST CIRCUIT (PUERTO RICO) (06/17/11)—This case addressed the issue of whether postdeprivation (of due process) remedies were sufficient to meet the (constitutional) requirements of due process.

The Background/Facts: In January, 2000, the Puerto Rico Planning Board approved a proposal from San Gerónimo Caribe Project, Inc. ("San Gerónimo") to develop the Paseo Caribe Project. The Paseo Caribe Project (the "Project") is a mixed residential, commercial, and tourism project located in San Juan, Puerto Rico. In July, 2000, San Gerónimo purchased two parcels of land

on which it planned to construct the Project. The Regulations and Permits Administration of Puerto Rico (the "ARPE," for its Spanish acronym) issued all necessary permits for the development of the Project. San Gerónimo began construction in August 2002. By 2007, San Gerónimo had invested over $200 million in construction of the Project, which was nearing completion.

During construction, a persistent group of citizens raised concerns that the Project obstructed access to the San Gerónimo del Boquerón Fort. There had been some controversy regarding whether the lands on which the Project was being built were part of the public domain and had therefore been improperly sold to a private party without necessary legislative action. In 2002, a Department of Justice of Puerto Rico opinion determined that the lands were not part of the public domain. However, in December 2007, that opinion was reversed. Based on that reversal, on December 12, 2007, the governor of Puerto Rico, Aníbal Acevedo Vilá, ordered the pertinent administrative agencies to suspend all permits for the Project and to freeze all construction for an initial period of 60 days. On December 14, 2007, the administrator of ARPE invoked Puerto Rico's emergency adjudicatory procedure and issued an order to show cause why the Project permits should not be held in abeyance and the construction suspended for 60 days. The ARPE scheduled a hearing for December 20, 2007. At that hearing, the ARPE did not introduce any evidence against San Gerónimo and did not charge it with any violations. On December 27, 2007, the ARPE's administrator issued a resolution and order holding the permits in abeyance and ceasing construction for a period of 60 days, subject to extension "in the public interest."

San Gerónimo appealed the ARPE's order. Eventually, the Puerto Rico Supreme Court held that the ARPE violated San Gerónimo's due process rights under the Puerto Rico Constitution "by deviating from the ordinary procedure and failing to hold a meaningful hearing before depriving San Gerónimo of its permits." In a separate decision, that court also declared that San Gerónimo had valid title to the land underlying the Project.

San Gerónimo later filed a procedural due process complaint under 42 U.S.C.A. § 1983 in federal district court. It sought damages of $38 million due to the 70-day delay in construction that the Secretary of the Puerto Rico Justice Department, the governor, and the administrator of ARPE (collectively, the "Defendants") allegedly caused.

The district court dismissed San Gerónimo's due process claims. It found they were barred by the *Parratt-Hudson* doctrine. That doctrine provides that: where "a deprivation of property interest is occasioned by random and unauthorized conduct by state officials," postdeprivation remedies can be sufficient to satisfy due process. The district court determined that was the case here. Moreover, the court also dismissed San Gerónimo's claims under the doctrine of qualified immunity. That doctrine shields government officials from personal liability for damages arising from actions taken while performing discretionary functions.

San Gerónimo appealed.

DECISION: Affirmed as to the dismissal of San Gerónimo' complaint.

The United States Court of Appeals, First Circuit, held: (1) that the postdeprivation remedies available to San Gerónimo could not be sufficient to satisfy due process; but that (2) the Defendants were entitled to qualified immunity on San Gerónimo's due process claim.

The court explained that for San Gerónimo to establish a procedural due process claim under 42 U.S.C.A. § 1983, it had to allege that the Defendants: (a) deprived it of a property interest that is recognized under state law; (b) while acting under color of state law; and (c) without providing constitutionally adequate process (i.e., without due process of law). The court further explained that, "[t]ypically, due process requires that an opportunity for a hearing be provided prior to the deprivation." However, "'the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process' may render a postdeprivation remedy constitutionally adequate in some circumstances."

Here, all parties agreed that San Gerónimo was denied an adequate hearing prior to being deprived of its permits (which constituted a property interest). The Defendants, however, argued that San Gerónimo was not unconstitutionally denied due process because, here, postdeprivation remedies were sufficient. The First Circuit disagreed.

The court acknowledged the *Parratt-Hudson* doctrine. Again, that doctrine provides that: where "a deprivation of property interest is occasioned by random and unauthorized conduct by state officials, ... the due process inquiry is limited to the issue of adequacy of postdeprivation remedies provided by the state." However, the court emphasized that doctrine "has no application where a loss is the result of an 'established state procedure,' even if due in part to negligent official conduct." It also, said the court, has no application "where a deprivation of a liberty or property interest occurs under the auspices of a state law that gives government officials 'broad power and little guidance'" when: (1) the deprivation was not "unpredictable"; (2) a predeprivation process was not impossible; and (3) the defendants "could not rightly characterize their conduct as 'unauthorized' ... because [their powers were] delegated to them [under State law]."

The court found the latter rationale applied here, and thus, the postdeprivation remedies available to San Gerónimo could not be sufficient to satisfy due process. Here, ARPE chose an "emergency procedure," which the court found departed from state law protocols. The *Parratt-Hudson* doctrine did not apply because the Defendants' actions were not "random and unauthorized." Rather: (1) the point at which San Gerónimo would be deprived of property was predictable—"it was the point where [the ARPE] chose between regular and emergency procedures"; (2) additional processes could have been implemented "to 'limit[] and guide[]' the defendants' power to effect deprivations of property under the emergency adjudicatory procedure"; and (3) the Defendants could not rightly claim their conduct as "unauthorized" because ARPE purported to act under the authority given to it for emergency procedures.

The court concluded that this was not a case where postdeprivation remedies could satisfy due process. Here, San Gerónimo was not denied its permits due to "random and unauthorized conduct by state officials." Instead, the court concluded that this was a case of: "predictable overreaching by government officials given broad discretion to choose the manner by which property interests might be deprived."

Nevertheless, although San Gerónimo had made out a valid procedural due process claim, the court concluded that it had to be dismissed. The court found the Defendants were entitled to qualified immunity because the state law at the time did not put them "on clear notice that their failure to provide predeprivation process violated [San Gerónimo]'s constitutional rights." The court found that statements in its prior decisions "could have easily led the [D]efendants to believe that they were not required to provide a meaningful predeprivation and hearing and that, under *Parratt* and *Hudson*, providing postdeprivation remedies was all the process that was due."

See also: *Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984).*

See also: *Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 265, 28 Fair Empl. Prac. Cas. (BNA) 9, 28 Empl. Prac. Dec. (CCH) P 32433 (1982).*

See also: *Zinermon v. Burch, 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990).*

Standing—Individual Owners of Corporations That Operate Gas Stations in County Challenged Permit Issued for New Gas Station

County says owners lack standing as individuals to bring challenge

Citation: *Gosain v. County Council of Prince George's County, 2011 WL 2462950 (Md. 2011)*

MARYLAND (06/22/11)—This case addressed the issue of whether stockholders and employees of corporations which owned businesses and paid property taxes in the county had standing to challenge a county land use determination.

The Background/Facts: Atapco Ritchie Interchange, Inc. ("Atapco") sought to develop a portion of business park property it owned in Prince George's County (the "County"). Among the proposed construction was a gasoline service station with a convenience store.

The County's Planning Board approved Atapco's site plan for the parcel with conditions.

The County's District Council "elected to review the Planning Board's approval." Subsequently, several individuals filed with the District Council an appeal of the Planning Board's approval. Among those individuals appealing was Rishi Gosain ("Gosain") and Abid Chaudhry ("Chaudhry").

The District Council ultimately affirmed the Planning Board's decision to approve Atapco's site plan.

Gosain and Chaudhry appealed to the circuit court. They argued that the District Council's approval was based upon an earlier invalidated text amendment to the County's zoning ordinance and was not supported by substantial evidence.

Atapco joined the action. Thereafter, it filed a motion to dismiss the action. It argued that Gosain and Chaudhry lacked standing (i.e., the legal right to bring the action) under the Regional District Act, Article 28, § 8-106(e) (Ann. Md. Code, Art. 28, § 8-106(e)). They argued that to have standing under § 8-106(e), one must: (1) be a resident of the County; or (2) be a County taxpayer; and (3) be aggrieved.

Gosain was a resident of Springfield, Virginia. He operated an Exxon gasoline service station in the County. That business was owned by a corporation named "Sona Auto Care, Inc." Gosain was the president of the corporation. The corporation leased the building and land from Exxon Mobil corporation. Sona Auto Care, Inc. paid taxes in connection with the business.

Chaudhry did not reside in the County. He operated a BP-Amoco gasoline service station in the County. Until 2005, the service station property was owned by BP-Amoco. As of December 2005, the property was owned by another corporation, MNA, LLC. Chaudhry was co-owned that corporation.

The Circuit Court dismissed Gosain and Chaudhry's action, finding they lacked standing.

Gosain and Chaudhry appealed.

DECISION: Affirmed (on different grounds).

The Court of Appeals of Maryland held that Gosain and Chaudhry (hereinafter, collectively, the "Objectors") were not required to be aggrieved in order to have standing to seek review of the District Council's decision. The court also held that the Objectors were not required to be domiciled in the County in order to have standing. However, the court held that the Objectors were required, in order to have standing, to: (a) reside in the County; or (b) have a property interest in the County; or (c) pay property taxes in the County.

The court based its decision on the interpretation of Art. 28, § 8-106(e). It reads as follows:

> In Prince George's County, any incorporated municipality located in Prince George's County, any person or taxpayer in Prince George's County, any civic or homeowners association represent-

> ing property owners affected by a final district council decision, and, if aggrieved, the applicant may have judicial review of any final decision of the district court.

Applicable here was the phrase "any person or taxpayer in Prince George's County." Finding that this phrase reached the "height of ambiguity," the court looked to legislative history to interpret its meaning. Based on that history, the court concluded as follows: First, the court found it was clear that, except for the applicant, aggrievement is not required for standing to bring a § 8-106(e) judicial review action. Thus, the court rejected the argument that Gosain and Chaudhry could not maintain this action because, allegedly, they were not aggrieved by the District Council's decision. Second, the court that "any person ... in the [County]" did not mean "domiciled" in the County.

The court noted that "[t]raditionally, standing to challenge in court governmental decisions regarding the use of land has been based on the challenger's having some type of interest in real property in the area." Consequently, the court determined that "a reasonable interpretation of 'any person ... in [the County]'" meant "a person or entity having some type of interest in real property in the County." This, said the court, would include: a person residing in the county; and businesses or other entities owning or leasing real estate in the County. Similarly, the court found it "reasonable to conclude that 'any ... taxpayer in [the County]'" meant "any person or entity which pays property taxes to the [the County]."

Here, the court found that neither Gosain nor Chaudhry resided or had a property interest in a residence in the County. Neither owned or leased any real property in the County, nor paid property taxes to the County. While both were owners of corporations which leased or owned property in the County and paid property taxes to the County, the court emphasized that in Maryland: "a corporation is a distinct legal entity, separate and apart from its stockholders." Gosain and Chaudhry could not gain standing to challenge the District Council's decision "based on employment in the same area or owning stock in a corporation doing business and owning property in the same area," concluded the court.

See also: *Egloff v. County Council of Prince George's County, 130 Md. App. 113, 744 A.2d 1083 (2000).*

See also: *Superior Outdoor Signs, Inc. v. Eller Media Co., 150 Md. App. 479, 822 A.2d 478 (2003).*

Case Note: The court also found it would be unreasonable to give the phrase "any person ... in the [County]" its broadest literal meaning.

Case Note: Neither corporation owned by Gosain and Chaudhry was a party to the litigation.

First Amendment—Homeowner Alleges First Amendment Violations After Borough Orders Her To Remove Biblical Message From Roof

Borough says homeowner's right of free expression was not infringed since she did not remove the message

Citation: *Trask v. Ketchikan Gateway Borough, 253 P.3d 616 (Alaska 2011)*

ALASKA (06/17/11)—This case addresses the elements needed to successfully: have standing to assert a 42 U.S.C.A. § 1983 claim (i.e., here, a claim of violation of free speech rights under the First Amendment to the United States Constitution) in Alaska against a municipality; and state a § 1983 claim (i.e., here, for violation of a right to free speech under the First Amendment) against a municipality.

The Background/Facts: Leta Trask owned a house in the Ketchikan Gateway Borough (the "Borough" or "KGB"). She planned to refresh and modify a painted Biblical message on her roof. She asked the Borough if she would need a permit. The Borough informed Trask that she would not need a permit because the message as she described it was not a "sign" under the KGB Code.

Trask subsequently painted a message on her roof. It read: "DO UNTO OTHERS ... BY YOUR DEEDS YOU'RE KNOWN: LOVE YOUR NEIGHBOR: YOU'RE WELCOME." The roof also displayed a cross and two hearts. The roof was mainly visible to Trask's uphill neighbors.

After some of Trask's neighbors complained to the Borough about the message, the Borough informed Trask that the message violated the KGB Code. The Borough instructed Trask to remove the message. It also threatened Trask that citations might issue if Trask did not remove the message.

Trask did not remove the message. The Borough filed a legal action in court to enjoin Trask from displaying the message and seeking the imposition of a $200 fine. The Borough alleged that the message violated the KGB Code.

Trask counterclaimed. Among other things, she alleged that the ordinance, as applied to her, violated the First Amendment of the United States Constitution by restricting her freedom of speech. Trask sought relief under 42 U.S.C.A. § 1983.

The Borough asked the court to dismiss Trask's counterclaim. Trask asked the court to find that there were no material issues of fact in dispute and to issue summary judgment in her favor on the law alone.

The superior court found that Trask's roof message was not a "sign" as defined by the KGB Code. As a result, the court dismissed the Borough's enforcement action. The court also dismissed Trask's § 1983 claim. It concluded that Trask lacked standing to challenge the sign ordinance because: her message was not a "sign" under the ordinance; and her right of free expression was not infringed since she did not remove the message.

Trask appealed. She argued that she was entitled to relief under § 1983 because: "the actions of [the Borough] in using the ordinance to demand removal of the painting and then file suit again[st] [her] was an overbroad and unconstitutional application of the ordinance that had the effect of curtailing her speech."

DECISION: Reversed, and matter remanded.

The Supreme Court of Alaska held that Trask had "interest-injury standing" and her allegations were sufficient to state a § 1983 claim.

The court explained that, in Alaska, a litigant has interest-injury standing when she has "an interest adversely affected by the conduct complained of." The court found that, here, Trask had "articulated enough of an injury to confer interest-injury standing" by: "alleging that the Borough infringed on her right to free speech through an enforcement action that was aimed directly at her." The court noted that, although Trask was not prosecuted, the Borough: ordered her to remove her message; threatened her with citations for violating the ordinance; and filed a complaint against her in which it requested injunctive relief prohibiting her from displaying the message, the imposition of a $200 civil penalty, and attorney's fees and costs. Trask also had alleged that, although she did not remove the message, as a result of the enforcement actions, she did not refresh or modify her roof paintings.

As to whether Trask's § 1983 claim was sufficient, the court said that a successful § 1983 claim required: (1) allegations that the plaintiff's (i.e., here, Trask) harm was caused by a constitutional violation; and (2) allegations that the municipality (i.e., here, the Borough) was responsible for that violation.

The court found that Trask did allege a set of facts consistent with constitutional violation; she alleged a set of facts consistent with stating a claim that her speech was protected: "Trask alleged that the actions of the Borough in applying the ordinance to her were 'an overbroad and unconstitutional application of the ordinance that had the effect of curtailing her speech" and that 'fear of further prosecution kept her from making any modifications or performing any upkeep.'"

The court also found that Trask did allege facts consistent with stating a claim that the Borough was responsible for that violation. The court explained that "[t]o show municipal liability, a litigant must 'demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." Here, Trask expressly alleged that the Borough's enforcement of the ordinance against her violated her First Amendment right to free speech. The court found this claim was "clear and straightforward": she set forth facts stating a claim that the Borough was responsible for the constitutional violation.

The court concluded by reversing the superior court's dismissal of Trask's § 1983 claim because: Trask had standing to assert a § 1983 claim; and Trask had alleged a set of facts stating a claim that the Borough violated her right to free speech.

See also: *State v. Planned Parenthood of Alaska, 35 P.3d 30 (Alaska 2001).*

See also: *Collins v. City of Harker Heights, Tex., 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261, 7 I.E.R. Cas. (BNA) 233, 15 O.S.H. Cas. (BNA) 1513 (1992).*

Case Note: The Borough had argued that it was entitled to absolute immunity from Trask's claims. The said that "[t]he Supreme Court has clearly stated that 'municipalities have no immunity from damages liability flowing from their constitutional violations ....'"

Zoning News from Around the Nation

CALIFORNIA

Malibu is considering adopting a "formula retail ordinance" that "would limit chain stores."

Source: *The Malibu Times*; *www.malibutimes.com*

NEW YORK

The state's Department of Environmental Conservation ("DEC") recently released revised recommendations on mitigating the environmental impacts of high-volume hydraulic fracturing related to natural gas extraction. Among the recommendations is that: high-volume fracturing be prohibited in New York City and Syracuse watersheds, including a buffer zone; drilling be banned within all primary aquifers and on state-owned land; drilling be permitted on other private land with rigorous and effective protections. Also among the recommendations: DEC would notify local government of each well permit application for high-volume fracturing; and applicants must certify that a proposed activity is consistent with local land use and zoning laws.

Source: *New York State Department of Environmental Conservation via Read Media; http://readme.readmedia.com*

RHODE ISLAND

The state legislature has passed legislation "that would require the operators of construction and debris demolition facilities located near residential neighborhoods around Rhode Island to get clearance from the municipalities where they operate." The measure recently passed the house. A companion bill passed the senate in April. Before becoming law, the legislation requires the governor's signature.

Source: *East Providence Patch*; *http://eastprovidence.patch.com/articles/state-lawmakers-pass-legislation-to-restrict-construction-and-demolition*

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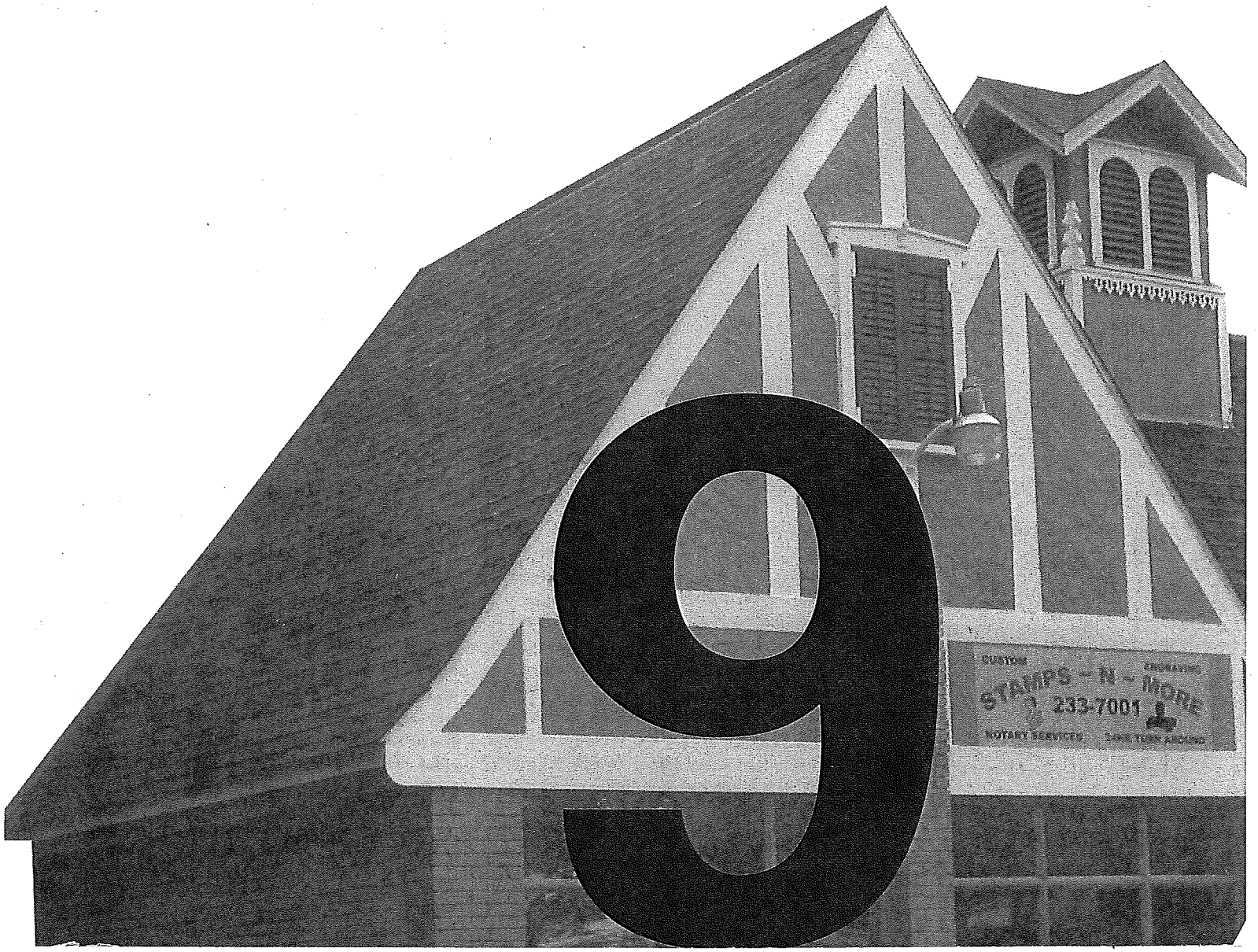
PRACTICE RELAXED ZONING OVERLAY



The Relaxed Zoning Overlay: A Tool for Addressing the Property Vacancy Cycle

By Stephen Pantalone and Justin B. Hollander, AICP

The relaxed zoning overlay (RZO) is a planning tool for municipalities anticipating declining populations, either communitywide or within individual neighborhoods.

All images by Justin Hollander

This partially boarded-up building in Flint, Michigan, sits next to a vacant lot overrun with vegetation.

Significant population decline may lead to an excess supply of residential, commercial, or industrial structures, and evidence has shown that even a small concentration of vacant property brings a host of economic and social problems.

The purpose of the RZO is to mitigate these impacts by anticipating decline and adapting the property supply in a given community. For example, if a residential neighborhood is consistently losing population, there will be a point at which the housing supply exceeds housing demand. At this point housing prices in these neighborhoods will begin to fall along with the respective property's profitability. Without the prospect of recovery, the continued maintenance of the residential property may become economically burdensome to owners. However, in such circumstances there may be a demand for other uses that are not currently zoned, such as cold storage facilities or agricultural uses. Currently, the inflexibility of zoning restricts the ability of communities to quickly react to decline by expanding the legally allowable uses of property. In the example above, the property will remain restricted to a residential use despite falling housing prices and may ultimately become derelict and abandoned—blighting the surrounding neighborhood. The RZO addresses this issue by expanding the list of by-right uses in a given community when it faces declining residential demand, thereby providing owners the flexibility to adapt their properties to a use that will continue to be productive.

The RZO concept is a combination of a normal zoning overlay and an urban growth boundary (UGB). It is similar to a UGB in that it relies on a trigger mechanism designed through a planning process. And, like other overlays, the RZO sits on top of the underlying zoning. The RZO is triggered when the vacancy rate in the respective community reaches a certain level, and once it is activated, expands the scope of permitted uses.

The RZO concept was introduced in Justin Hollander's *Sunburnt Cities*, and is part of a larger body of scholarly research on planning for decline. The research has focused primarily on Rust Belt cities with large inventories of vacant property. It has taken decades for some cities to develop regulatory and market tools to acquire and demolish or reuse these properties. There is now evidence that some of the Sun Belt cities that have seen staggering growth in the last several decades are also facing decline. The RZO offers a prospective tool for these cities and others to curtail and even take advantage of decline. This is accomplished by keeping property in use and improving

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Go online during the month of September to participate in our "Ask the Author" forum, an interactive feature of Zoning Practice. *Stephen Pantalone and Justin B. Hollander, 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 Authors

Stephen Pantalone is a recent graduate of the Tufts University Urban and Environmental Policy and Planning program. His studies focused on land-use policy issues and particularly on the regulatory environment. He is currently interning with the Ipswich (Massachusetts) Planning Department and will begin a fellowship program at the City of New York Department of Housing Preservation and Development this fall.

Justin Hollander, AICP, is an assistant professor of Urban and Environmental Policy and Planning at Tufts University and a research scientist at the George Perkins Marsh Institute at Clark University. He is the author of three books and more than 20 refereed journal articles, with most of his work focused on the challenges of planning for declining postindustrial cities.

the quality of the community for the existing residents, thereby reducing the inevitable costs of would-be vacant property.

In this article we will briefly review the research on declining cities and vacant properties, making the case that these properties are tremendously harmful to communities because of the criminal activity and disinvestment they encourage. Then we will discuss tools applied by municipalities to address their large inventories, including the utilization of the property or site for alternative uses. Finally, we will introduce the basics of an RZO, including its legal foundation, its trigger mechanism, and examples of permitted uses communities might adopt.

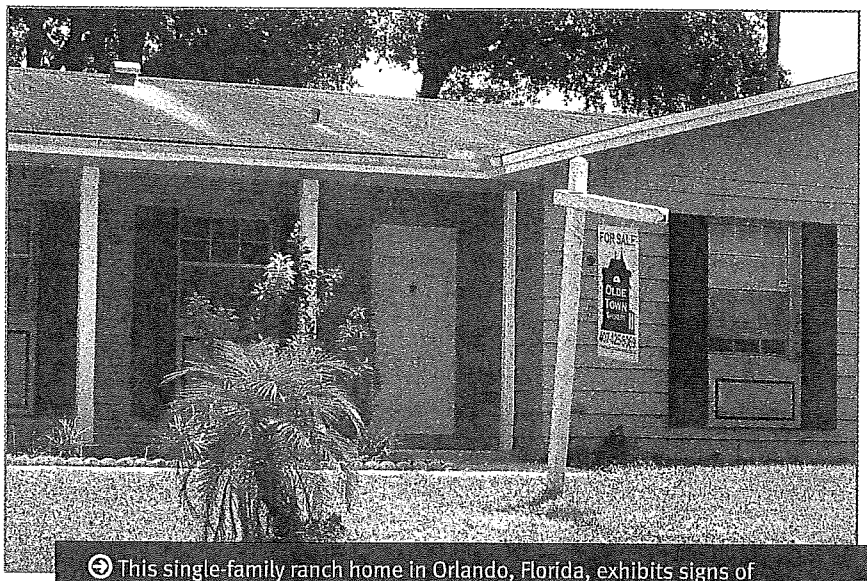
THE PROBLEM OF VACANCY

The lifecycle of vacant property often follows a similar series of events. In the instance of a residential home, an owner may be forced to leave the neighborhood to find another job as the employment market deteriorates. However, as the excess supply of housing grows, prices continue to drop, making it more difficult for that owner to sell the property without taking a loss. When the owner is not able to pay off the remaining mortgage, the property ends up in foreclosure. The patterns for rental property and commercial real estate are similar. Rents decrease; owners defer maintenance. And eventually the property is abandoned.

Vacant properties are a significant drain to a city's resources both in terms of lost revenue from falling property values and in increased expenses from crime and vandalism. The Center for Community Progress has issued several reports documenting the costs of vacant and abandoned property. In the 2005 report *Vacant Properties: The True Costs to Communities*, they note that "Such properties produce no or little property tax income, but they require plenty of time, attention, and money." Over time these properties continue to be contaminated, further increasing the costs of redevelopment or demolition.

In the past, property vacancy was considered a problem confined to the old industrial cities of the Midwest and Northeast. However, the recent foreclosure crisis is bringing the issue to Sun Belt cities that, until recently, were experiencing staggering growth. The same real estate speculation that fueled rapid construction of residential housing and commercial and retail development is now resulting in growing inventories of vacant properties. These cities present an opportunity to address decline earlier in the cycle.

Edward Glaeser uses the City of Buffalo as an example of the strategies municipalities have historically used to fight decline. During the urban renewal period of the 1960s Buffalo spent almost $60 million to rebuild a downtown neighborhood and redevelop its waterfront (Glaeser 2007). The goal was to attract private development and new residents. Yet the city continued to lose population in most neighborhoods despite



This single-family ranch home in Orlando, Florida, exhibits signs of dereliction after an extended period of vacancy.

these growth strategies. The problem with redevelopment in some cases is that cities are simply replacing the old inventory of property with a new inventory of the same property (albeit better), without increasing demand or lowering maintenance costs.

The failings of the growth strategy led to the "smart decline" (planning for decline) movement. The goal of planning for decline is to concentrate on improving the quality of life for the existing residents and to reduce the future infrastructure costs of the city. This can mean concentrating populations into smaller geographic areas and returning other land to its natural and more efficient state. To date, smart decline has generally been applied in cities that have already undergone significant population loss, such as Youngstown, Detroit, and Cleveland. Using these principles, cities have employed regulatory, administrative, and market-based tools to target vacant property for acquisition or reuse.

Regulatory approaches include requiring owners to maintain unoccupied properties, enforcing code violations, using tax foreclosure for acquisition, and creating land banks to facilitate reuse. Administrative strategies include instituting better monitoring systems to manage the inventory of vacant property and fast-tracking the permitting process for temporary or permanent reuse. Finally, market-based approaches might focus on adaptive reuse or the creation of management agreements between nonprofit organizations and landowners.

Realizing that their populations are not going to return to previous levels, cities are increasingly acquiring vacant property with the intent of demolition. Detroit had demolished approximately 3,000 homes by the end of September 2010, with the eventual goal of reaching approximately 10,000 demolitions. Even though it is the last resort for a city, demolition creates an opportunity to remove excess supply and reuse the land for more productive uses, such as recreational facilities, agricultural uses, or even renewable energy systems. And as cold as it sounds, demolition also allows a city to plan its decline strategically, deciding the geographic layout of the city in the future and determining which neighborhoods should be preserved.

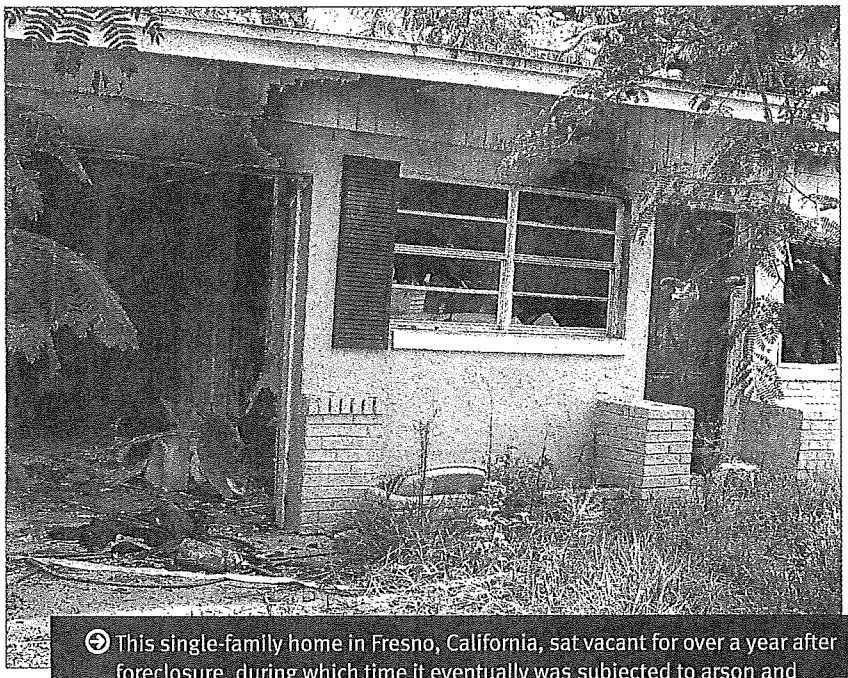
THE LEGAL PRECEDENT FOR THE RELAXED ZONING OVERLAY

Federal and state courts have consistently upheld the constitutionality of zoning overlays because the public benefit purpose satisfies the rational basis test. However, it is important to review certain legal concepts relevant to the RZO. These concepts include procedural and substantive due process and "void for vagueness."

Procedural due process is satisfied during the community engagement process, where local planning officials hold workshops and public meetings with residents. These meetings provide an opportunity for residents to gather information, share their opinions, and create a vision for the future of their neighborhood. There are two critical reasons why the RZO depends on community participation more so than a typical overlay. First, the expanded list of permitted uses should not create intolerable nuisances to residents. If it does, the municipality may face resource-intensive legal challenges on the back end. Secondly, the purpose of the RZO is to fill a void in the market by allowing property owners or the city to bring in services that were previously unavailable. The expanded list of uses should reflect the needs of the community or the properties will continue to remain vacant.

Substantive due process examines the public policy purpose of a regulation and its presumed effectiveness in achieving that purpose. The courts give tremendous deference to the local governments in determining what is deemed a "rational relationship." Whether the RZO works in practice is not critical, only that it is rational to think that it would work. Considering the logical relationship between allowing more uses and reducing vacancy rates, and the well-researched relationship between vacancy and community disinvestment, the RZO should also pass the substantive due process test.

To avoid "void for vagueness" the zoning language has to be worded clearly enough for a reasonable property owner to understand. The RZO passes the test of void for vagueness but is an area for caution. In adding flexibility to the zoning regulations, the RZO must be clear in defining its trigger mechanism and identifying the expanded types of permitted uses.



This single-family home in Fresno, California, sat vacant for over a year after foreclosure, during which time it eventually was subjected to arson and vandalism.

In addition to the legal precedent for the RZO in overlay zoning cases, it is also useful to look to other land-use regulations that use trigger mechanisms. Donald Elliot's (2008) dynamic development standards concept provides a solid legal ground for using standards that change over time in predictable ways. Another good model in land-use regulations are Oregon's urban growth boundaries. The UGB process allows the respective cities to move the boundaries that determine developable land and den-

sity based on projected growth numbers for different land-use needs. These tools create flexibility in zoning for future demographic changes and provide precedent for the RZO.

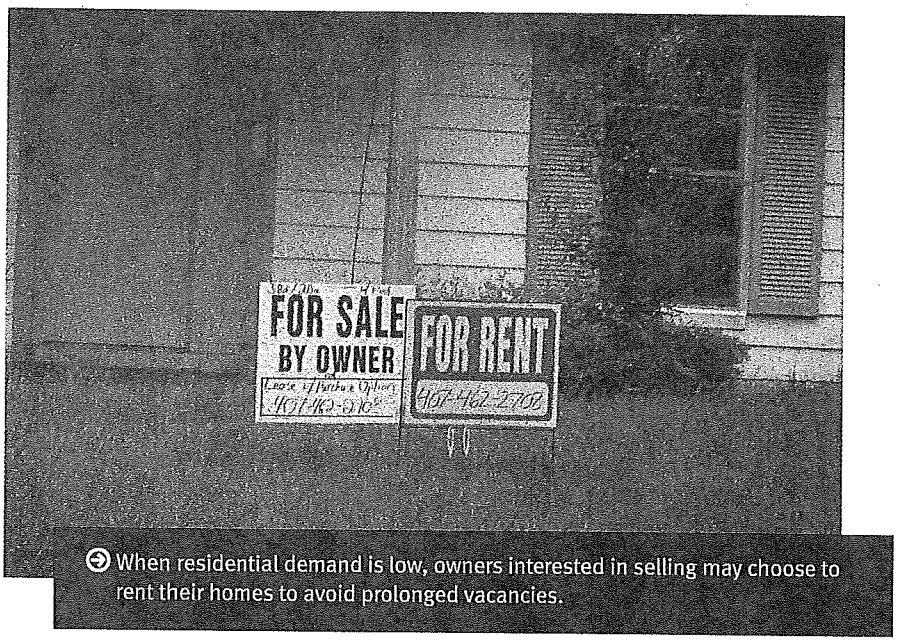
CREATING THE RELAXED ZONING OVERLAY

The trigger mechanism for the RZO is based on the vacancy rate for a given geographic area. There are several decisions required in creating the trigger, including the geographic scope of the vacancy rate (i.e., certain neighborhoods, certain zip codes, or entire metropolitan areas), defining which properties will be included in the calculation of the vacancy rate (e.g., occupancy, tenure, and land use), and determining a vacancy rate that signals the onset of decline.

Because this is a new concept, there are no case studies on an appropriate trigger rate. However, there is some research cited by John Accordino that suggests a vacancy rate as low as three percent can signal the onset of decline, and there is a greater body of research that suggests that the domino effect of vacant property occurs quickly. Adequate planning, forecasting, and community involvement is important in creating a trigger rate that is low enough to be effective in addressing decline but not so low as to affect a relatively healthy neighborhood.

Once triggered, the RZO expands the list of by-right uses in the zoning code, essentially acting as a new use table. The community identifies the new uses in a typical planning/visioning process. This can both allow new uses that the community wants, or in a situation where the community must unhappily face the facts of decline, it allows them to identify uses that are at least tolerable and will keep the properties or land active. Decline offers a special opportunity in situations where the community desires new uses that are economically infeasible for property owners. An example of this is urban agriculture, which in any vibrant community would not be economically viable without subsidies. Yet it may make sense in a community with a declining population and falling property values.

The new uses will be unique to each situation because every community will have a different property inventory mix. The point from the research on vacant properties is that inactivity is the worst-case scenario, as there are tremendous costs to the community. The RZO, in combination with the existing tools such as land banks and fast-track permitting, allows the reuse to happen quickly and in advance of serious decline. Instead of rezoning after abandonment happens, the RZO is a prospective tool. And while any community, whether healthy or unhealthy, could always go through a rezoning process, the RZO is most suited for cities experiencing or expecting decline. While each situation may be different, these could be communities that are generally happy with single-family neighborhoods without any commercial activity. However, if faced with the prospect of vacant properties next door, they are willing to explore new uses that may even benefit their neighborhoods. This is important in the case of decline because the reality is that expanding the list of by-right uses will not save every property from abandonment. Some properties may be abandoned, razed, and then reused for agricultural, forestry, or recreational uses.



When residential demand is low, owners interested in selling may choose to rent their homes to avoid prolonged vacancies.

The following examples represent uses that could benefit the community from an economic, social, and environmental perspective; they include the reuse of both vacant property and vacant land. The examples of new uses are tailored to three general scenarios.

Single-family neighborhoods with excess housing supply:

- Allowing commercial activities or open space, such as small grocery/convenience stores, day care centers, home offices, markets, or seasonal temporary uses
- Demolition of housing for urban agriculture or recreation centers, pocket parks, and vacant land for renewable energy

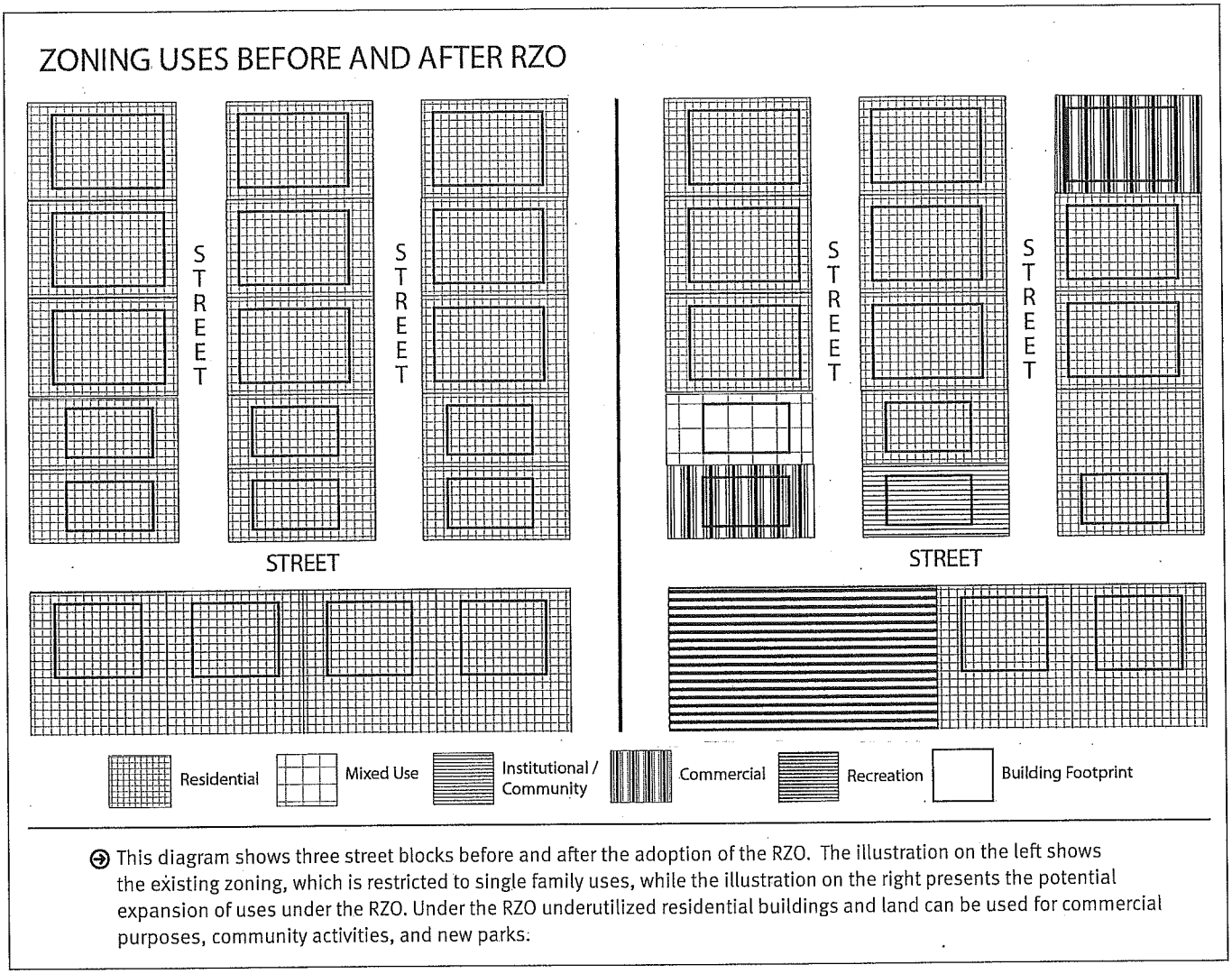
Urban multifamily neighborhoods with excess housing supply:

- Allowing commercial activity and nonprofit groups, such as incubation or training centers, medical offices, small businesses (law offices, travel centers), nonprofits, artist studios
- Potential demolition for pocket parks/ recreation

Large suburban-type retail centers with excess commercial or institutional space:

- Allowing all uses, such as outdoor/ indoor markets, distribution centers, industrial uses, renewable energy production, mixed use housing, parks and recreation (e.g., paintball/indoor rock climbing), reforestation, transportation centers, and music venues

In the best-case scenario, the activation of the RZO will reduce vacancy rates to a point where the neighborhood is stable. This may require a reverter rate, which causes the RZO to become dormant again so as to limit commercial development opposed by residents. A reverter rate itself creates zoning issues with respect to nonconforming uses with the underlying base code. This will create obvious problems for property owners as they seek changes in



This diagram shows three street blocks before and after the adoption of the RZO. The illustration on the left shows the existing zoning, which is restricted to single family uses, while the illustration on the right presents the potential expansion of uses under the RZO. Under the RZO underutilized residential buildings and land can be used for commercial purposes, community activities, and new parks.

the future. The likely solution is a special legal mechanism whereby new uses are essentially grandfathered in and allowed future zoning relief. Municipalities could also choose to simply leave the RZO in place by not adopting a reverter rate. This decision will again depend on each community and how they see their future, rather than on planning that focuses on growth and increased revenues.

A potential abuse of the RZO could be collusion between property owners to purposely increase vacancy rates even in situations when decline is not imminent. Their goal would be to trigger the RZO and transform their properties into more profitable uses. This may be particularly true in cases with larger property owners outside of the community that can afford to keep their properties vacant. Safeguarding against such abuse would be difficult to do through zoning changes or other legal mechanisms. These are areas to be explored further by the respective municipality as they create trigger rates, geographic boundaries, and monitoring systems for vacant properties.

A final issue with the RZO is how it will interact with business licenses, building codes, and design standards. Zoning regulations require certain setbacks, height limits, and other physical dimensions, and business licenses and building codes are often specific to the use. While this article focuses on by-right uses under the RZO, it is clear that physical zoning regulations and other general business regulations will also need to be addressed.

SUMMARY

Whereas most of the planning tools for shrinking cities focus on post-decline problems, the RZO is a prospective tool. The RZO seeks to attack the issue of excess supply early by establishing an expanded list of permitted uses in advance of decline. As a result, the RZO will allow property owners to react quickly to decline with the goal of reprogramming the uses of their buildings or land.

The most important aspect of the RZO is that its creation relies heavily on a community-driven process. The RZO will only be successful if there is demand for the expanded list of permitted uses or if it adds value from a cost or environmental perspective. Therefore, the input of residents on the type of uses they would like to see in their neighborhoods is critical. This article has shown that the details of the RZO will require a number of difficult decisions, such as how to measure vacancy and the vacancy rate, how to select the proper trigger and reverter rates, the geographic scope of the

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overlay, and the allowable by-right uses. These questions require additional research and the answers will be unique to each community. However, there are a few general benchmarks that can be established to start the conversation. The following ordinance framework summarizes the key aspects of the RZO.

RZO ORDINANCE FRAMEWORK

Purpose

The ordinance should include a stated public policy goal. An example may be "to fight the onset of blight, and specifically vacant property, in the respective neighborhood by increasing the ability of property owners and residents to make continued use of their property."

Applicability (Geographic Scope)

The ordinance should identify the geographic scope of the RZO; the demographic/economic projections and vacancy rates should be measured at this level, as should the application of expanded by-right uses. It is noted that information necessary for doing projection and trends may not be available at the desired level.

Defining Vacancy Rate

The ordinance must determine a vacancy rate that will trigger the RZO. A potential definition for a vacant property counted in the trigger rate could be any building that has been completely unoccupied for at least one year. Evidence of vacancy could be based on U.S. Postal Service information, and addresses that are no longer receiving mail could be deemed unoccupied. In addition to defining what is included in the calculation of the vacancy rate, the ordinance must also define the trigger rate itself.

Reverter Rate

The ordinance should address whether there is a "reverter" rate that would trigger the original zoning. If there is a reverter rate, the ordinance should address the issue of new nonconforming uses created under the RZO, and what the protections are for owners seeking physical changes to their properties in the future.

Permitted Uses

The ordinance should include an expanded use table with the new community-determined uses. The structure of the use table would mirror other use tables. Depending on the scope of the RZO in terms of the number of affected neighborhoods, a zoning map may be necessary.

Dimensional Requirements

The ordinance should address situations where the conversion of a property to a new use (e.g., a residence to an office or convenience store) does not meet the dimensional requirements for that new use. The ordinance should ensure that roadblocks are removed in these situations.

The historic Carriage Town neighborhood in Flint, Michigan, is an eclectic mix of urban prairie, derelict or abandoned residences, restored Victorian and Craftsman homes, and residential to commercial conversions. Cover photo © Sarah Razak; design concept by Lisa Barton.

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HOW COULD THE RELAXED ZONING OVERLAY HELP CITIES IN TRANSITION?

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