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Religious Discrimination—City Zoning Code Requires Religious Organizations to Obtain Conditional Use Permit

Code does not require such a permit for other secular membership organizations

Citation: *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 2011 WL 2685288 (9th Cir. 2011)*

The Ninth Circuit has jurisdiction over Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

NINTH CIRCUIT (ARIZONA) (07/12/11)—This case addressed the issue of whether a local zoning ordinance violated the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA"). In addressing this issue, the United States Court of Appeals, Ninth Circuit, set forth criteria for analyzing whether a municipal zoning code treats religious organizations "on less than equal terms" than similarly situated nonreligious assemblies, in violation of RLUIPA.

The Background/Facts: Centro Familiar Cristiano Buenas Nuevas (the "Church") was a Christian congregation of around 250 members.

Contributors
Corey E. Burnham-Howard

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In 2007, the Church bought a vacant building on Main Street in the city of Yuma, Arizona (the "City").

The City's zoning code (the "Code") required "religious organizations" and "educational services" to obtain a conditional use permit ("CUP") to operate in the zoning district. Many other uses, including "membership organizations (except religious organization)" and entertainment venues, were permitted as of right (not requiring a CUP). Apparently, the reason for requiring the CUP for religions organizations and educational services was that the City had been attempting to revitalize its Main Street into an "entertainment district." Under state law in effect in 2007, liquor licenses for bars, nightclubs and liquor stores were prohibited within 300 feet of a "church" or a K through 12 school.

The Church applied for a CUP, which the City denied. That denial was based on the finding that the use of the building as a church would be inconsistent with a "24/7 downtown neighborhood involving retail, residential, office and entertainment." The liquor license problem was the "pivotal factor."

The Church subsequently sued the City. It asked the district court to declare that the City Code provision subjecting religious organizations but not secular membership organizations to CUPs was invalid under RLUIPA. RLUIPA prohibits: (1) governments from implementing land use regulations that impose "a substantial burden" on religious exercise unless the government demonstrates that they further a "compelling government interest" by the "least restrictive means" (42 U.S.C.A. § 2000cc(a)); and (2) governments from imposing a land use restriction on a religious assembly "on less than equal terms" with a nonreligious assembly (42 U.S.C.A. § 2000cc(b)). The Church argued that the "equal terms" provision was violated by the City Code. The Church also asked the court to require the City to issue it a CUP, and the Church sued for damages for the financial consequences it suffered from the CUP denial.

The district court concluded that the different treatment of churches did not violate RLUIPA. It entered judgment for the City.

The Church appealed. Notably, while the appeal was pending: the church lost the property to foreclosure; and the state of Arizona passed a state version of RLUIPA which allowed for a waiver on the statutory ban on liquor licenses within 300 feet of a church. These subsequent events made moot the Church's claims for declaratory judgment and injunction. However, the Church's damages claims were not moot so the matter proceeded on appeal.

DECISION: Reversed, and matter remanded.

The United States Court of Appeals, Ninth Circuit, held that the relevant City Code provision violated RLUIPA.

In so holding, the court first concluded that monetary damages may be awarded against municipal entities under RLUIPA.

The court next analyzed the "equal terms" provision of RLUIPA against the language of the City Code. The statutory text of the equal terms provision says:

> No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

The City Code said that "religious organizations" were permitted only upon the granting of a CUP. Meanwhile, numerous other uses were permitted as of right and did not need a CUP. Among the uses not requiring a CUP were "membership organizations (except religious organization)." The court found it "hard to see how an express exclusion of 'religious organizations' from uses permitted as of right by other 'membership organizations' could be other than 'less than equal terms' for religious organizations."

In reaching its conclusion, the court noted a municipality cannot treat a religious organization "on less than equal terms with a nonreligious assembly" based on a compelling government interest. The language of the equal terms provision does not allow for it. Moreover, Congress mandated that the RLUIPA be interpreted "in favor of a broad protection of religious exercise."

The court made clear that a municipality would be found to have violated the equal terms provision only if it treated a church on a less than equal basis with a secular comparator that was similarly situated with respect to an accepted zoning criteria. In other words, a city ordinance that, on its face, treated a church on "less than equal terms" would not be in violation of RLUIPA only if the distinction was based on "accepted zoning criteria"—such as parking, vehicular traffic, or generation of tax revenue. Thus, a city "may be able to justify some distinctions drawn with respect to churches, if it can demonstrate that the less-than-equal-terms are on account of a legitimate regulatory purpose, not the fact that the institution is religious in nature."

Here, the court found that the City Code's exclusion of religious organizations was "not reasonably adapted to the zoning criteria it [was] purported to serve" (i.e., preventing a damper on liquor license issuances). The court found that the "300-foot restriction on liquor [did] not vitiate the inequality" because: (1) the language of the City Code said "religious organizations," not "uses which would impair issuance of liquor licenses"; (2) the Code's exception was "too broad to be explained away by a liquor license restriction," as it excluded not only churches and K-12 schools (which affected liquor licenses), but also "religious organizations that were not churches" (and thus did not affect liquor licenses); and (3) "many of the uses permitted as of right [—such as a post

office or prison—] would have the same practical effect as a church of blighting a potential block of bars and nightclubs."

The court concluded that the City Code provision violated RLUIPA's equal terms provision because: it required religious assemblies to obtain a CUP and did not require similarly situated secular membership assemblies to do the same.

The court remanded the matter to the district court to adjudicate the Church's claim to damages.

See also: *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3d Cir. 2007).*

See also: *River of Life Kingdom Ministries v. Village of Hazel Crest, Ill., 611 F.3d 367 (7th Cir. 2010).*

Case Note: In its decision, the court noted that RLUIPA's equal terms provision did not necessarily require that "anything allowable for any institution ... be allowed for a church." Again, the court reiterated that a distinction in the treatment of churches and nonreligious assemblies may be based on "accepted zoning criteria."

Housing Discrimination—City Enacts Ordinances Forbidding Conversion of Mobile Home Park from "Senior-Only" to "All-Age"

Park owners charge ordinances violate the Fair Housing Act

Citation: *Waterhouse v. City of American Canyon, 2011 WL 2197977 (N.D. Cal. 2011)*

CALIFORNIA (06/06/11)—This case addressed the issue of whether a city ordinance creating a "Senior Mobile Home Park Overlay Zone" violated the Fair Housing Act by discriminating against non-seniors based on familial status.

The Background/Facts: Ken Waterhouse, Ron Ubaldi, Napa Olympia I, LLC, Waterhouse Management, Inc., and Napa Olympia (collectively, "Waterhouse") assumed ownership of a 201-unit mobile home park (the "Park") in the City of American Canyon (the "City") in May 2005. Prior to Waterhouse's ownership, the Park rules defined the Park as "a park for older person[s], 55 years & older," with "at least 85% of the households within the Park [to] be occupied by at least one person age 55 years or older." When Waterhouse purchased the Park, it conducted due diligence to ensure the Park was complying with, among other laws, the federal Fair Housing Act ("FHA").

Among other things, the FHA prohibits discrimination against any person in the sale or rental of a dwelling based on familial status (i.e., FHA prohibits discrimination in housing against families with children). Discrimination based on familial status is, however, permitted in housing developments that qualify as "housing for older persons" (42 U.S.C.A. § 3617). To qualify as "housing for older persons," "at least 80 percent of [the Park's] occupied units [had to be] occupied by at least one person 55 years of age or older." (24 C.F.R. 100.305). Additionally, to qualify for the senior exemption from the prohibition on discrimination based on familial status, the Park had to "comply" with certain requirements. Specifically, the Park had to: publish and adhere to policies and procedures that demonstrate its intent to operate as housing for persons 55 years of age or older (24 C.F.R. 100.306); and identify methods for verification of occupancy required by the exemption from housing for older persons (24 C.F.R. 100.307).

Through due diligence, Waterhouse apparently determined that Park rules were not in compliance with the FHA. The Park had no historical records to provide verification that at least 80% of the Park's spaces were occupied by at least one person 55 years or age or older. The Park did not have procedures in place for routinely determining the occupancy of each unit. Waterhouse subsequently "endeavored to change the [P]ark rules so that the rules would be consistent with the [P]ark's existing operation as an all-age park."

Seeking to maintain housing for seniors, the City enacted a series of moratoria forbidding the conversion of the Park from what the City considered a senior park to an all-age park. In March 2010, the City adopted a Senior Mobile Home Park Overlay Zone "to maintain senior residency status in areas that already maintain at least 80 percent senior residency." A City survey determined that the Park had 91% senior residency. Accordingly, under the new ordinance, the Park had to "maintain senior residency status" of at least 80%.

The Park sued the City. The Park argued that the City's ordinances violated the FHA.

The City countered that the Park was always a senior park and that is ordinances merely protected seniors—consistent with the FHA—from Waterhouse's attempted conversion.

Each party asked the court to find there were no material issues of fact in dispute and to issues summary judgment on the law alone in their favor.

DECISION: Waterhouse's motion for partial summary judgment granted.

The United States District Court, N.D. California, held that the City's ordinances violated the FHA. Although the Park had, prior to Waterhouse ownership, had rules stating that it was a seniors-only park, the

Park had not adhered to the requirements of the FHA necessary to qualify as "housing for older persons." Accordingly, the court found that the "housing for older persons exemption" never applied to the Park. Waterhouse attempted to amend Park rules to make clear it was open to all applicants on a nondiscriminatory basis. Instead, found the court, the City "forced [Waterhouse] to violate federal law by directing them specifically to lock in their discriminatory rule."

Specifically, the court held that the City's ordinances violated the FHA by: "'mak[ing] unavailable ... dwelling[s] to any person because of familial status,' 42 U.S.C. 3604(a); by 'discriminat[ing] against any person in the terms conditions, or privileges of sale or rental of a dwelling ... because of ... familial status,' 42 U.S.C. 3604(b); and by 'interfer[ing] with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, ... any right granted or protected by [the FHA's prohibitions on discrimination],' 42 U.S.C. 3617." In other words, "[t]he restrictions contained in the subject ordinances necessarily impede[d] non-seniors from obtaining housing in the [Park] and thus discriminate[d] on the basis of familial status," concluded the court. Having found the ordinances "purported to require or permit actions that [were] discriminatory under the [FHA]" (i.e., requiring the continued operation of a seniors-only park that had not been adhering to FHA requirements regarding policies and verification of senior occupancy), the court found the ordinances were invalid.

Home Rule Powers—Municipalities Challenge State Agency Regulatory Amendments

Municipalities claim amendments "steal" their legislative capacity for enacting land use controls

Citation: *New York Blue Line Council, Inc. v. Adirondack Park Agency, 86 A.D.3d 756, 927 N.Y.S.2d 432 (3d Dep't 2011)*

NEW YORK (07/14/11)—This case addressed the issue of whether municipalities can challenge state agency interpretation of statutes and regulations where the result impacts the municipality in its governmental capacity. It also addressed whether certain state agency rule making violates municipal home rule powers.

The Background/Facts: The Adirondack Park Agency (the "APA") is charged with regulating land use and development within the Adirondack Park. The APA is empowered to, among other things, adopt, amend, and repeal rules and regulations consistent with the Adirondack Park Agency Act (the "Act"). In 2008, the APA adopted nine such regulatory amendments. Thereafter, counties, towns, persons, and entities brought legal actions challenging four of those 2008 amendments. The

four challenged amendments all increased regulatory review for certain activities within the Adirondack Park.

The municipalities had asserted that the challenged amendments affected them in their governmental capacity. More specifically, they had asserted that the amendments "directly [stole] ... their legislative capacity for enacting land use controls."

The Supreme Court determined that the municipal petitioners lacked the capacity to sue on all claims except that related to the alleged violation of their home rule powers. As to that issue the Supreme Court found the municipalities' arguments lacked merit and dismissed their claim.

The municipalities appealed.

DECISION: Affirmed as to that issue.

The Supreme Court, Appellate Division, Third Department, New York, held that the APA's 2008 rule making did not violate municipal home rule powers.

In so concluding, the court first reiterated the lower court's conclusion that the municipal petitioners lacked the capacity to sue on all claims other than that alleging a violation of their home rule powers. The court noted that it was "well settled" that municipalities "cannot contest the actions of the state which affect them in their governmental capacity or as representatives of their inhabitants." The municipalities had argued that rule did not apply to the actions of state agencies (as compared to the actions of the state). The court rejected that argument, noting that, to the contrary, the rule applied "with equal force to the actions of state agencies: 'a municipality lacks the capacity to challenge a state agency's interpretation of statutes and regulations where ... the result impacts the municipality in its governmental capacity."

Next, the court acknowledged that the municipalities did have the capacity to raise the claim that the 2008 amendments violated the home rule protections contained in article IX of the New York Constitution. However, the court found the claim lacked merit. The Act "addressed an issue of substantial [s]tate concern": the "comprehensive zoning and planning program for all of the public and private lands with the [Adirondack] [P]ark." The Act related to a "matter reserved to the state," as it was not related to the property, affairs or government of a local government. Accordingly, the court found the 2008 amendments did "not impermissibly infringe upon the home rule powers of municipalities with the Adirondack Park."

See also: *County of Oswego v. Travis, 16 A.D.3d 733, 791 N.Y.S.2d 189 (3d Dep't 2005).*

See also: *Town of Black Brook v. State, 41 N.Y.2d 486, 393 N.Y.S.2d 946, 362 N.E.2d 579 (1977).*

See also: *Wambat Realty Corp. v. State, 41 N.Y.2d 490, 393 N.Y.S.2d 949, 362 N.E.2d 581, 7 Envtl. L. Rep. 20363 (1977).*

Case Note: The court also found that the challenges of the persons and entities failed because "none of their allegations constitute[d] concrete injuries sufficient to state a justiciable claim." "The mere fact that petitioners may have to endure the APA review process [was] not sufficient, without more, to constitute injury for this purpose."

Modification—Developer Receives Approvals for One Project, Then Obtains Approvals for Different Project

Objector says subsequent project approvals resulted in automatic rescission of prior project approvals

Citation: *Price v. Martinetti, 2011 WL 2977124 (N.J. Super. Ct. App. Div. 2011)*

NEW JERSEY (07/25/11)—This case addressed the issue of whether subsequent land use approvals for a development site result in automatic rescission of any prior approvals.

The Background/Facts: A developer, 315, 7th St., LLC (the "Developer"), owned property (the "Property") in the city of Union City (the "City"). The previous owner of the Property had received from the City's Board of Adjustment (the "Board") site plan approval and associated variances. The site plan approval and variances were for the proposed construction of a seven-story, 20-unit apartment building on a 5,000-square-foot property ("Project 1"). Thereafter, the Developer took steps to proceed with construction of Project 1, demolishing existing buildings and performing site preparation work on the Property.

In January 2006, the Developer decided to change its development plan. It acquired adjacent lots, and sought approval for construction of an 18-story, 84-unit apartment building on the now 10,000-square-foot property ("Project 2"). The Board granted the Developer's application for site plan approval.

An objector, Larry Price ("Price") then brought a legal action challenging the approval of Project 2. That action resulted in a Law Division decision invalidating the approvals for Project 2.

Subsequently, the Developer again decided to change its development plan. It purchased additional adjacent property. It applied to the Board for the site plan and variance approvals required to construct a 14-story,

129-unit apartment building on the now 20,000-square-foot property ("Project 3"). The Board granted the application. Price again challenged the approvals. Ultimately, the approvals for Project 3 were invalidated in court.

The Developer then decided to revert to its original plan for Project 1. In 2008 and 2010, the Developer applied for and received necessary construction permits.

In September 2010, Price once again filed a legal action seeking to stop construction of the apartment building. This time, Price argued that the Developer had "abandoned" the land use approvals for Project 1 by applying for and obtaining approvals for Projects 2 and 3.

The Superior Court, Law Division rejected Price's argument.

Price appealed.

DECISION: Affirmed.

The Superior Court of New Jersey held that, under New Jersey's Municipal Land Use Law (the "MLUL") (N.J.S.A. 40:55D-1 to -163), subsequent land use approvals for a development site do not result in automatic rescission of any prior approvals, unless the subsequent approvals were conditioned upon such rescission.

In so holding, the court clarified the issue: "[Does] a landowner who obtains the land use approvals required for a development project, and subsequently obtains the land use approvals for a different form of development project on the site, lose[] the benefit of the approvals authorizing construction of the originally planned project?" The court said the MLUL (and not case law) governed the issue as it relates to site plan approvals and variances. The court found "[t]here is no express authorization in the MLUL for a municipality to condition the grant of site plan approval upon a developer agreeing to rescission of a previously granted approval for the same site." The court also found nothing in the MLUL's provisions dealing with the granting of variances that "indicat[es] that a property owner who has obtained the variance required for one form of development loses the benefits of those variances simply by obtaining the variance required for a different form of development."

The court also found the City had not adopted an ordinance providing that: subsequent land use approvals for a site result in rescission of any prior approvals; or the Board condition its grant of a subsequent application for land use approvals upon the landowner's agreement to rescission of any prior approvals. The court further found that the Board had not imposed such a condition in this case when it granted the approvals for Projects 2 and 3.

The court did acknowledge that a variance could be lost by "abandonment." However, the court explained that it was "only the actual use of the property in a manner different from the one authorized by the [variance] that resulted in its abandonment." In any case, here, the court found that

the Developer never used its property in the manner authorized by the approvals for Projects 2 and 3 because Price had successfully challenged the validity of those approvals. "Thus, even assuming a property owner could be found to have abandoned a site plan approval and associated variances if it actually developed the property in accordance with subsequent land use approvals, that [was] not what occurred in this case."

See also: *Stop & Shop Supermarket Co. v. Board of Adjustment of Tp. of Springfield, 162 N.J. 418, 744 A.2d 1169 (2000).*

See also: *Dimitrov v. Carlson, 138 N.J. Super. 52, 350 A.2d 246 (App. Div. 1975).*

Case Note: In its decision, the court found additional support for its conclusion in "substantial policy considerations." The court noted that one of the purposes of the MLUL is to "encourage the most appropriate use of land." Consequently, the court said that a landowner should not be "precluded from seeking the approvals required for an alternative, [more productive,] form of development"; or "inhibited [from seeking such approval] out of a concern that it will forfeit the prior approvals."

Zoning News from Around the Nation

CALIFORNIA

The U.S. Justice Department recently settled a religious discrimination lawsuit against the Southern California city of Walnut. The Justice Department had alleged that Walnut violated federal law prohibiting religious discrimination in land use and zoning decisions when it denied a permit to a group seeking to build a Buddhist center. The Justice Department alleged that Walnut treated the Zen Center differently than the city had treated other religious facilities.

Source: *San Francisco Chronicle*; *http://articles.sfgate.com/*

MICHIGAN

A bill (HB 4746 and SB 470), recently signed into law by Governor Rick Snyder, amends the state Zoning Enabling Act by prohibiting local governments from restricting mining activities unless "very serious consequences" would result. The new law negates a 2010 Michigan Supreme Court decision that held that Leelanau County's Kasson Township may restrict gravel mining through zoning.

Source: *Leelanau Enterprise*; *www.leelanaunews.com*

MICHIGAN

A Wayne County judge recently upheld a Livonia city zoning ordinance that forbids violating any federal law—including drug laws that criminalize possession of marijuana. The American Civil Liberties Union had reportedly argued that the ordinance amounted to a ban on state sanctioned medical-marijuana use.

Source: *Detroit Free Press*; *www.freep.com*

SOUTH DAKOTA

The South Dakota Supreme Court was expected to hear arguments in late August on a Sioux Falls zoning ordinance. The ordinance, which would make much of the city off-limits to new video lottery casinos, was struck down by a circuit judge last year. The judge ruled that the South Dakota Constitution and state laws allowed only the state to regulate video lottery. The city appealed the decision.

Source: *Rapid City Journal*; *http://rapidcityjournal.com*

WASHINGTON

As of early August, Tacoma was considering a ban on digital billboards, which include signs bigger than 72 square feet.

Source: *The News Tribune*; *www.thenewstribune.com*

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Rezoning—Statute Requires County Approval of City Rezone Within One Mile of Airport

When county rejects rezone, landowner says "approval" means review, not independent determination

Citation: *143rd Street Investors, L.L.C. v. Board of County Com'rs of Johnson County, 2011 WL 3366451 (Kan. 2011)*

KANSAS (08/05/11)—This case addresses the interpretation and application of Kansas statutory law, K.S.A. 3-307e, which relates to the rezoning of property within one mile of an airport. More specifically, the case addresses whether the statute's requirement of both city and county "approval" of a proposed rezoning, authorizes the county to make an independent, discretionary rezoning determination or simply gives the county the role of reviewing the city's action.

The Background/Facts: "Landowners" owned approximately 95 acres of land (the "Property") in the City of Olathe (the "City"), in Johnson County (the "County"). A portion of the Property lay within the "primary flight corridor subarea A" of the Johnson County Executive Airport (the "Airport"). Most of the Property was located adjacent to this corridor.

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Corey E. Burnham-Howard

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For several decades, the Property had been zoned agricultural. Landowners sought to develop the Property with a 230-lot subdivision. In furtherance of that proposal, Landowners filed an application with the City to rezone the Property as "RP-1" (planned single-family residential).

Because the Property was located within one mile of an airport, it was subject to Kansas statutory law, K.S.A. 3-307e. That statute provides that any changes in existing city zoning within one mile of public airports that is approved by a city "must have the approval of the board of county commissioners."

Here, the City approved the Landowners' rezoning request for the Property. A copy of the Landowner's application was then sent to the County for consideration. The County Commissioners denied the Landowners' rezoning application. The Johnson County Executive Airport Comprehensive Compatibility Plan (the "Airport Compatibility Plan"), which had been adopted by the County but not the City, allowed a housing density of one dwelling unit per acre on the Property. The County Commissioners determined that the Landowners' proposed subdivision's density of 2.4 dwellings per acre was incompatible with the Airport Compatibility Plan and raised safety concerns.

The Landowners appealed the County's denial of their rezoning application.

The district court held, in part, "that the City was the zoning authority and the County took a quasi-judicial review in reviewing the City's zoning decision." The district court concluded that in order to deny the Landowner's rezoning application after the City had approved it, the County had to overcome the presumption that the City's decision was reasonable. The district court determined that the County had failed to meet this burden of proof. The court "deemed the City's decision to rezone the [P]roperty lawful and ordered the publication of the City's rezoning ordinance."

The County appealed. Among other things, the County argued that: K.S.A. 3-307e authorized the County to make an independent, discretionary rezoning determination; and the County's decision to disapprove the Landowners' proposed rezoning was entitled to a presumption of reasonableness that the Landowners were required to overcome by proving that the County's action was unreasonable.

DECISION: Reversed and matter remanded.

The Supreme Court of Kansas agreed with the County. Interpreting K.S.A 3-307e, the court held that the statute did "not relegate the county to the role of reviewing the city's action." "Rather," found the court, "K.S.A. 3-307e clearly indicates that the county is a vital authority in the rezoning decision-making process and is entitled to make its own independent, discretionary determination to approve or disapprove any proposed rezoning."

In so concluding, the court said that the statutory requirement of county approval of any city rezoning within one mile of a public airport would be meaningless if it were purely ministerial. "In common usage, if one must have approval as a condition precedent, one knows that disapproval is possible," noted the court. Most importantly, found the court, K.S.A. 3-307e was not worded as a review provision. "Not only does the statute use the term 'approval' rather than 'review' or a similar term, it does not provide any criteria for a review. Rather, under the statute, the County exercises its full discretion to approve or disapprove the rezoning application," said the court.

The court further held that, under K.S.A. 3-307e, both the decision of a city and the decision of a county regarding a request to rezone property located within one mile of a public airport were entitled to a presumption of reasonableness. Both the city and the county should be recognized as a zoning authority with the discretion to independently evaluate an application for rezoning, said the court. The burden is on the landowner in challenging a rezoning decision to establish by a preponderance of the evidence that the challenged decision is not reasonable.

Here, the court remanded the matter to the district court for findings regarding the reasonableness of the County's decision.

See also: *State ex rel. Tice v. Brooks, 160 Kan. 526, 163 P.2d 414 (1945).*

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

See also: *Combined Inv. Co. v. Board of County Com'rs of Butler County, 227 Kan. 17, 605 P.2d 533 (1980).*

Case Note: The City and Landowners had suggested that the lack of guidance regarding the procedure for the County's approval process meant that the legislature could not have intended the County to be a zoning authority. The Supreme Court disagreed, finding: other statutes defined the procedures (see K.S.A. 2010 Supp. 19-2960); and the court had previously provided guidance as to nonexclusive factors to be considered (see *Golden v. City of Overland Park, 224 Kan. 591, 584 P.2d 130 (1978)*).

Case Note: The City had also argued that "giving the County the power to 'veto' the City's rezoning ordinance [was] contrary to the City's home rule authority." The Supreme Court also rejected this argument. The court found, by enacting K.S.A. 3-307e, the legislature created an exception to the city's authority.

Variance—County Grants Variance and Special Exception, Allowing Landowners to Park Paving Equipment on Their Property

Neighbors object, arguing variances may not be granted for reasons of mere convenience

Citation: *Mills v. Godlove, 2011 WL 2652481 (Md. Ct. Spec. App. 2011)*

MARYLAND (07/07/11)—This case addresses the issue of whether a zoning board had properly granted a special exception and variance. The case addresses the standards that must be met in granting special exceptions and variances.

The Background/Facts: James L. Mills and Korina Mills (the "Mills") owned property in Washington County. Their property was divided by a road. They resided on the east side of the road and maintained a garage and paving equipment on the west side. The Mills parked the paving equipment—including four dump trucks, a backhoe, and a trailer with a paver and roller—on the west side of the property for seven years. Then, a complaint was filed, challenging the legality of this parking practice. As a result, the Mills sought a special exception and variance to continue parking the paving equipment on their property. They asserted that it would be a "big hassle" to park the equipment off-site because the nearest storage area was 30 miles away. They also argued that keeping the paving equipment on their property would prevent "theft, vandalism, and other adverse acts."

Several neighbors, including Ronald Godlove and Gail McDowell (collectively, the "Neighbors"), opposed the variance and special exception. They primarily argued that parking paving equipment on the Mills' property would be detrimental to the environment and would affect property values in the area. More specifically, among other things, they argued it would: be disruptive to the Neighbors' quiet enjoyment; be detrimental to property values; and create excessive odors, dust, gas, smoke, fumes, vibrations, or glare.

Ultimately, the County Board of Zoning Appeals (the "Board") granted the requested zoning variance and special exception. The Board explained that a variance was necessary because: the Mills' property was unique due to the size and shape of the lot; and strict compliance with the special exception requirements would be impossible. The Board also noted that denying the variance would "be a substantial injustice." The Board specifically noted that the Mills' request for a variance and special exception was "primarily one of convenience," since the Mills had a snow removal contract with the state which required them to mobilize within one hour's notice.

The Neighbors appealed.

The circuit court reversed the Board's grant of a special exception and variance. The court found there was insufficient analysis of the inherent adverse effects associated with an equipment storage yard.

The Mills appealed.

DECISION: Affirmed.

The Court of Special Appeals of Maryland held that the zoning variance to permit the Mills to park paving equipment on their property was primarily one of convenience, and convenience was not sufficient to justify an exception to the zoning requirement.

In so holding, the court explained that: "[t]he general rule is that the authority to grant a variance should be exercised sparingly and only under exceptional circumstances." The court said that in order for a variance to issue: (1) the property had to be unique and unusual such that the zoning provision impacted it disproportionately; and (2) a practical difficulty and/or unreasonable hardship resulted from that disproportionate impact.

Moreover, the county zoning ordinance provided that a variance could only be granted if there is a showing of practical difficulty or undue hardship. The court said that, in regard to area variance requests—as was the request here—the less restrictive "practical difficulties" standard applied. The county zoning ordinance defined "practical difficulty" as where: strict compliance would unreasonably prevent the use of the property for a permitted purpose or render conformance unnecessarily burdensome; denying the variance would do substantial injustice to the applicant; and granting the variance would observe the spirit of the ordinance and secure public safety and welfare.

Here, all parties agreed that the Mills' property was unique due to the size and shape of the lot. However, the court found that the Mills' stated reasons for the variance (i.e., security issues, increased time to retrieve equipment, and increased costs) were valid but primarily reasons of convenience. The law was clear, said the court: "[t]he need sufficient to justify an exception must be substantial and urgent and not merely for the convenience of the applicant ... ."

The court also concluded that the Board's conclusions as to the grant of the special exception were: "insufficient because it merely presented conclusions without pointing to any evidentiary basis." The court explained that, in evaluating the Mills' special exception request, the Board's duty was to judge: whether the neighboring properties in the general neighborhood would be adversely affected; and whether the Mills' proposed use was in harmony with the general purpose and intent of the zoning plan. The Board "did not address the adverse effects of storing contractor's equipment, nor did it address how [the Mills'] storage of paving equipment would be different," found the court. The

Board merely stated, "without support," that there was no evidence to support the Neighbors' concerns. This was inadequate, concluded the court.

See also: *Carney v. City of Baltimore, 201 Md. 130, 93 A.2d 74 (1952).*

See also: *Montgomery County v. Rotwein, 169 Md. App. 716, 906 A.2d 959 (2006).*

See also: *Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981).*

See also: *Bucktail, LLC v. County Council of Talbot County, 352 Md. 530, 723 A.2d 440 (1999).*

Standing—Landowners Challenge Amendment Redefining Buildable Lot in Zoning District

Landowners maintain they can bring the challenge based on their established statutory aggrievement

Citation: *Lucas v. Zoning Com'n of Town of Harwinton, 130 Conn. App. 587, 2011 WL 3274243 (2011)*

CONNECTICUT (08/09/11)—This case addresses the types of aggrievement—classic and statutory—that must be alleged and proven in order to bring a case in trial court.

The Background/Facts: James Lucas and Leslie B. Lucas (the "Lucases") owned property in a country residential zone ("CR zone") in the town of Harwinton, Connecticut (the "Town"). In September 2008, the Town adopted an amendment to § 2.3 of its zoning regulations. The adopted amendment redefined buildable area in the CR zone.

The Lucases' appealed to court on several grounds from the Town's decision approving the amendment. The court dismissed the appeal on the ground that the Lucases failed to plead facts sufficient to establish either classical or statutory aggrievement.

The Lucases appealed.

DECISION: Reversed, and matter remanded.

The Appellate Court of Connecticut held that the Lucases had pleaded sufficient facts in their complaint to allege statutory aggrievement.

The court explained that in order for the Lucases to have standing to bring this administrative appeal, they had to be aggrieved. In other words, for the trial court to have subject matter jurisdiction over the Lucases' appeal of the amendment, the Lucases had to plead and prove aggrievement. The court further explained that there are "[t]wo broad yet distinct categories of aggrievement": classical and statutory. The

court explained that a party bringing a complaint has standing based on statutory aggrievement if they claim an injury to an interest protected by legislation. The court explained that if a person can prove statutory aggrievement, they are not required to plead and to prove the elements of classical aggrievement (i.e., a unique personal interest has been specifically and injuriously affected by the decision).

The court looked to Connecticut General Statutes § 8-8, which provides in relevant part that "Aggrieved [P]erson" means: " a person aggrieved by a decision of a board and includes ... any person owning land that abuts or is within a radius of one hundred feet of any portion of the land involved in the decision of the board."

The court found that the Lucases had plead: that they owned property located in the CR zone; that the Town redefined buildable area solely in the CR zone; and that therefore their property was specifically affected by the decision to amend § 2.3 of the regulations. The court concluded that the Lucases' pled sufficient facts in their complaint to allege statutory aggrievement.

This, however, did not end the court's analysis. Again, the court had said that in order to have standing to bring their appeal, the Lucases had to allege *and prove* statutory aggrievement. The court concluded that the matter should be remanded to the trial court with direction to consider the appeal, including the issue of whether, on the basis of the existing record, the Lucases proved aggrievement (i.e., proved that they owned property within one hundred feet of the CR zone, which the amendment affected).

See also: *Timber Trails Corp. v. Planning and Zoning Com'n of Town of Sherman, 222 Conn. 374, 610 A.2d 617 (1992).*

See also: *Cole v. Planning and Zoning Com'n of Town of Cornwall, 30 Conn. App. 511, 620 A.2d 1324 (1993).*

See also: *Lewis v. Planning and Zoning Com'n of the Town of Ridgefield, 62 Conn. App. 284, 771 A.2d 167 (2001).*

Case Note: The Town had argued that in order to allege statutory aggrievement, the Lucases also had to have alleged that they sustained an injury. The court commented: "A statutorily aggrieved person need not have sustained any injury." In any case, the court found the Lucases had alleged that the amendment redefining buildable area in a CR zone caused them injury in that it affected their property and amounted to a taking of their property.

Validity of Ordinance—Town Regulates Off-Street Parking Through General Ordinance

Landowner argues parking should have been regulated under zoning powers, requiring compliance with statutory procedure

Citation: *Spenlinhauer v. Town of Barnstable, 2011 WL 3594493 (Mass. Ct. App. 2011)*

MASSACHUSETTS (08/18/11)—This case addresses the issue of whether parking limitations contained in a town's general ordinance were invalid because they were improperly regulated by general bylaws when they were actually zoning regulations, the enactment of which required compliance with state statutory requirements.

The Background/Facts: On June 1, 2006, the Town of Barnstable, Massachusetts (the "Town"), adopted a "Comprehensive Occupancy" ordinance (the "Ordinance"). Among other things, the Ordinance limited the number of people who could occupy a single-family dwelling. The Ordinance also limited the number of motor vehicles that could be parked overnight, off-street and in the open, outside of a single-family dwelling. The Ordinance committed enforcement to "the Building Commissioner ... the Board of Health ... or the police."

Robert J. Spenlinhauer owned a single-family home in the Town. Under the formula in the Ordinance, he was permitted to park no more than three vehicles outdoors on his property overnight. Spenlinhauer, however, regularly exceeded the number of permitted vehicles.

In June 2007, after receiving complaints from neighbors, the Towns' director of public health issued an order requiring Spenlinhauer cease and desist from exceeding the vehicle parking limit. The order stated that he would be fined, as the Ordinance provided, $100 for each day of violation.

Spenlinhauer appealed the order to the Town's board of health. The board of health upheld the order and imposed a $100 fine.

Spenlinhauer then brought a legal action in superior court. He challenged the validity of the Ordinance. Essentially, he argued that the Ordinance was invalid because it amounted to an attempt to impose a zoning regulation without following the procedures required under Massachusetts statutory law, G.L. c. 40A. Under Massachusetts law, valid zoning measures can be implemented only by following the procedures spelled out in G.L. c. 40A. Here, the Town did not contend that those procedures were followed.

The Town countered with an assertion that the Ordinance was a perfectly valid health regulation.

The superior court agreed with the Town.

Spenlinhauer appealed.

DECISION: Vacated and matter remanded.

The Appeals Court of Massachusetts held that the Town Ordinance imposing limits on overnight parking was a matter for regulation through the Town's zoning power, not through its general ordinance. The court further held that the Ordinance was therefore invalid because it was not promulgated in accordance with the requirements of G.L. c. 40A.

The court explained that "[t]he distinction between zoning and other regulations is not an empty formality." Valid zoning measures can be implemented only by following the procedures spelled out in G.L. c. 40A. "Moreover, changes in zoning ordinances protect some prior existing uses ... but general ordinances typically do not." Therefore, if a town uses its general police power to adopt an ordinance that is a matter for regulation through the town's zoning powers without following the procedures contained in c. 40A, the ordinance is invalid.

Here, the court concluded that the parking component of the challenged Ordinance was a matter of regulation though the Town's zoning power, not through its use of a general ordinance because: (1) historically, prior to the adoption of the Ordinance, the Town had regulated off-street parking through its zoning bylaws; (2) the Town historically and currently regulates all other aspects of parking under its zoning bylaws; and (3) at the hearings adopting the Ordinance, there was no mention of public health issues, only concerns over character and quality of neighborhoods—"precisely the target at which the [T]own's zoning ordinance is so thoroughly and comprehensively aimed." "Against that backdrop," the court found: "the town's attempt to use its general ordinance power to regulate off-street parking undercut[] 'the assorted protections contained in' c. 40A, in the process of frustrating the purposes for which c. 40A was enacted."

The court vacated the superior court's judgment and remanded the matter for entry of judgment in accordance with its decision. The court also vacated the Town board of health orders against Spenlinhauer.

See also: *Rayco Inv. Corp. v. Board of Selectmen of Raynham, 368 Mass. 385, 331 N.E.2d 910 (1975).*

Zoning News from Around the Nation

MARYLAND

Governor Martin O'Malley has proposed new land development rules known as the "PlanMaryland" proposal. The plan, which reportedly would not require legislative approval, is being billed as "a strategy to more effectively implement 'smart growth' and prevent sprawl." The

proposed plan would not require compliance by localities, but would link local aid to compliance with the statewide goals. Localities would be offered incentives to follow the plan and "help 'fast-track' growth where dense development already exists."

Source: *The Baltimore Sun; www.baltimoresun.com*

NEW YORK

A Douglaston councilman has introduced two bills that "would enable community boards and the borough president to fight decisions made by the city's Board of Standards and Appeals [(the 'BSA')]." One bill would give local community boards and the Borough President the ability to appeal decisions made by the BSA. The appeal would then be heard by the City Council, which would vote on whether to grant the variance. Another bill proposes that the BSA be required to notify a property owner that they must apply for a new variance six months before their current one expires. Failure to do so would result in a fine.

Source: *Douglaston Patch; http://douglaston.patch.com*

PENNSYLVANIA

Scranton Mayor Chris Doherty recently vetoed city council legislation that rezoned an area of the city from neighborhood commercial to medium-density residential. The rezone essentially blocked a proposed housing project because the new zone did not permit apartments. The mayor said he vetoed the legislation because it was "flawed" in that it was illegal and violated the city's Administrative Code, as well as local, state, and federal laws, including the Pennsylvania Human Relations Act and the federal Fair Housing and Civil Rights acts.

Source: *The Times-Tribune; http://thetimes-tribune.com*

PENNSYLVANIA

A South Fayette drilling ordinance is being challenged as "illegal" by a Texas-based company, Range Resources. Range Resources reportedly alleges that the ordinance enforces buffer zones around schools, hospitals, and certain commercial areas "that force a de facto moratorium on drilling throughout the entire township." Range Resources says that violates the portion of Pennsylvania's Municipalities Planning Code that requires all municipalities to "allow for reasonable development of minerals" as part of any zoning ordinance. The company also alleges that the conditions of the ordinance violate the Fifth Amendment of the U.S. Constitution, which says private property cannot be taken for public use "without just compensation."

Source: *Pittsburgh Post-Gazette; www.post-gazette.com*

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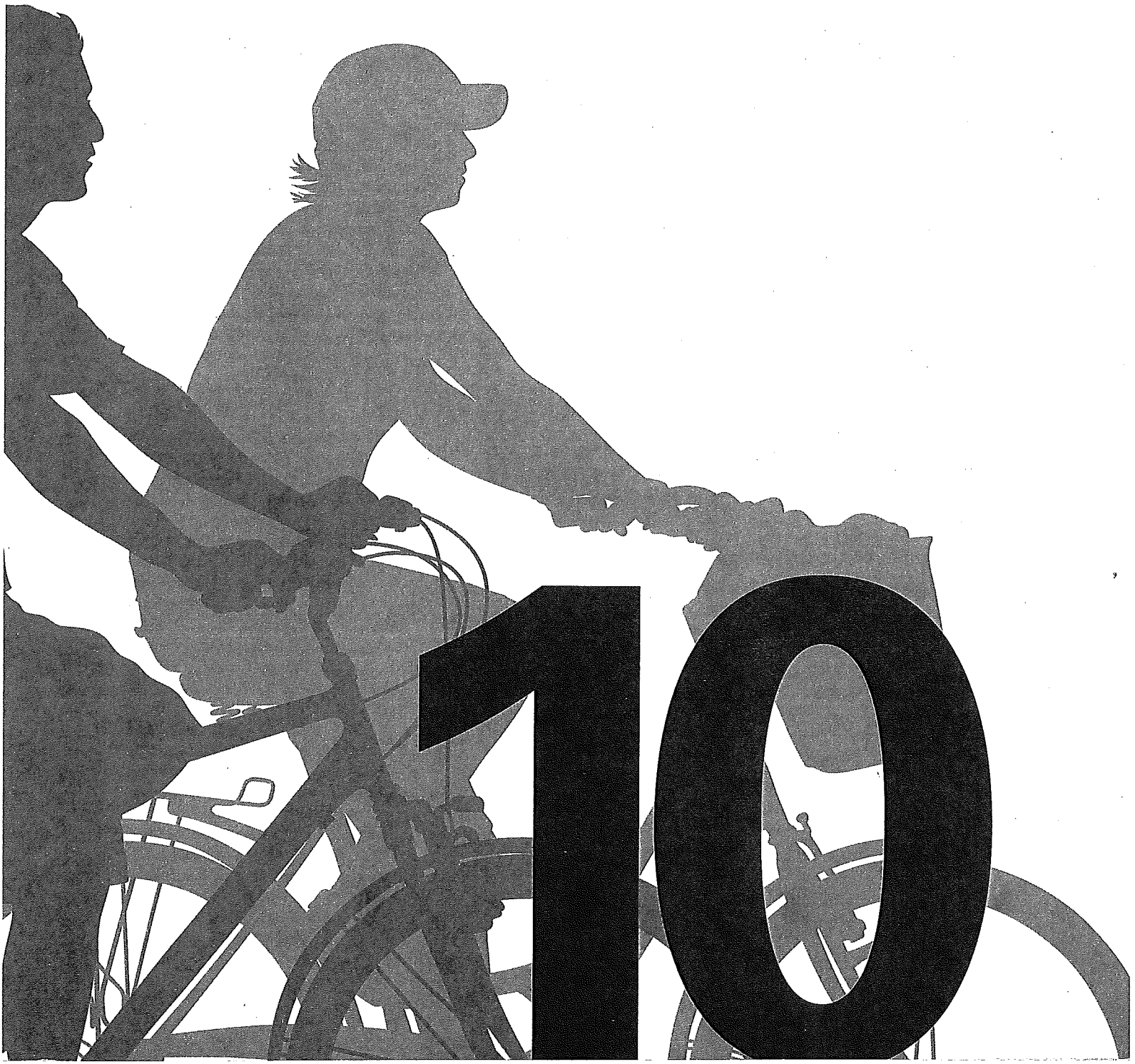
ZONING PRACTICE OCTOBER 2011

AMERICAN PLANNING ASSOCIATION

ISSUE NUMBER 10

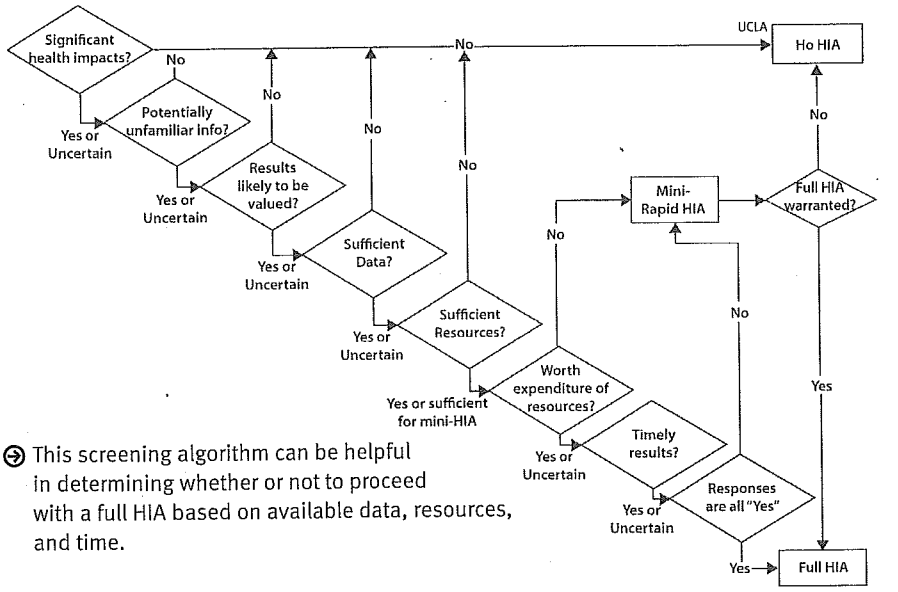
PRACTICE HEALTH IMPACT ASSESSMENT



The Effective Use of Health Impact Assessment in Land-Use Decision Making

By Patricia E. Salkin and Pamela Ko

The way land is used can impact health determinants and health outcomes, yet decisions about land-use planning and regulation are often made without specific review or discussion of the potential health consequences.



This screening algorithm can be helpful in determining whether or not to proceed with a full HIA based on available data, resources, and time.

For example, public health professionals assert that development that does not enable physical activity (no sidewalks, dangerous intersections, poorly lighted areas), access to healthy food (no grocery stores, farmers markets, or other convenient opportunities to obtain fresh food), or provide for clean air and water can reduce positive health outcomes and lead to increases in obesity, heart disease, asthma, and other preventable illnesses. One tool planners can use to inform community decisions about the health implications of development policies or proposals is Health Impact Assessment (HIA). The goal of HIA is to apply available research about health impacts to specific land-use questions to develop evidence-based recommendations to inform decision making.

HIA is a process or procedure that is used to judge the potential health effects of a policy or project on a given population with the aim of maximizing the proposal's positive health effects. Specifically, HIA can convert public health data into practical information that is useful to a decision maker in planning a new program or policy. HIA systematically evaluates the potential impact of a policy, program, or project on the health of a population as well as the distribution of those effects within the population. Information obtained from HIA regarding land-use decisions can be used to predict health outcomes based on quantitative and qualitative data and scientific findings.

HIA also promotes public health objectives and improves communication between local governments and their associated health agencies. Because HIA has its roots in assessments familiar to planners, such as environmental impact assessment (EIA), HIA tools may have a familiar look and feel for most planners and other key stakeholders involved in regional and local development. Furthermore, the participatory and evidence-based approaches and processes of an HIA framework may assist with plan making, project and proposal review, and regulatory ordinances in a manner that will inform, and is informed by, the specific health outcomes for a specific population.

ELEMENTS OF HIA

Because the field of HIA is relatively new and there is a great deal of diversity in the practices and methods used to perform HIAs in the United States, the North American HIA Practice Standards Working Group (Working Group) has attempted to establish minimum standards of good practice to guide the growth of HIA (Working Group 2010). The Working Group emphasizes that a typical HIA should involve six steps, each of which plays a specific role in gathering and evaluating all available information related to the land-use decision in question. Those steps include screening, scoping, assessment, reporting, monitoring, and evaluation of the proposed action. Screening is used to determine the value and purpose of the HIA, focusing on issues of its feasibility and the capability to add value to the discussions regarding the land-use decision. The scoping phase is designed to identify health issues and research methods and to determine how the population(s) will likely be affected by the health outcomes of the proposed action. Available evidence and existing research should also be evaluated at this point in an attempt

ASK THE AUTHOR JOIN US ONLINE!

Go online during the month of October to participate in our "Ask the Author" forum, an interactive feature of Zoning Practice. *Patricia E. Salkin and Pamela Ko 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 authors 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

Patricia E. Salkin is the Raymond and Ella Smith Distinguished Professor of Law and associate dean and director of the Government Law Center of Albany Law School. She is the chair of APA's Amicus Curiae Committee and the author of numerous books, articles, and studies on all facets of land-use law. She is also the author of the popular *Law of the Land* blog (www.lawoftheland.wordpress.com).

Pamela Ko is a visiting assistant professor of law at Albany Law School. Her research and teaching interests focus on technology transfer, clean technology and land use, and health impact assessment.

to find a wide range of necessary resources. Assessment involves establishing baseline conditions, impacts, alternatives, and mitigation for the proposed action in order to report and evaluate the likely health outcomes—such as unnecessary exposure to air pollution and particulate matter—and their effects, such as increased respiratory disease and asthma, on the targeted population(s). Assessing the available information, research, and resources will allow HIA practitioners to evaluate risks and benefits in light of the specific details of the individual HIA. The assessment should also clearly identify who may be affected and how they will be affected.

During the reporting phase, the findings from the HIA should be developed in such a way so as to facilitate health-based recommendations to aid the decision-making process with respect to the proposed action. Recommendations should also include a viable plan for implementation. Involvement and input from the various stakeholders in the process is crucial. Finally, the monitoring phase allows for continuing evaluation by engaged stakeholders and others in order to track the outcomes of a decision and its implementation.

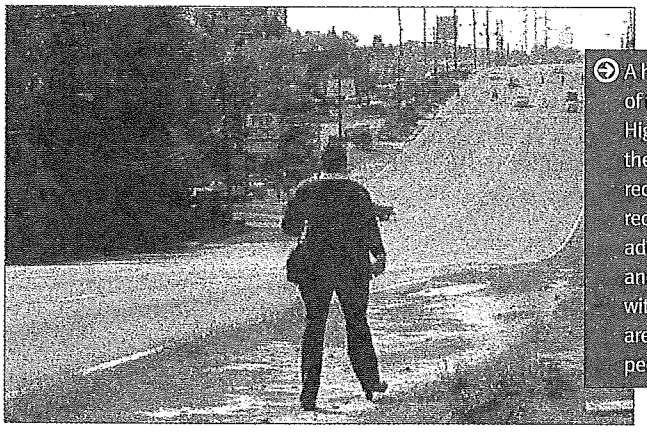
HISTORY AND GROWTH OF HIA USE

HIA in the U.S. evolved from EIAs required by the National Environmental Policy Act of 1969 (NEPA) or state-enacted "mini-NEPAs" in response to the need for a more interdisciplinary approach to health inequities. Historically, EIAs were criticized for failing to take into consideration the effects of projects on health generally, rather than evaluating only toxic exposures and sources of biophysical concerns unrelated to a "comprehensive and systematic approach to human health impacts" (Bhatia and Wernham 2008). However, by the late 1980s, the term "environment" grew to include social, cultural, and human health considerations, which in turn led to the growth of interest in the health outcomes of development projects and other land-use decisions. In 1999, the World Health Organization produced the *Gothenburg Consensus Paper*, which introduced and clearly outlined the concept of HIA and eventually led to the development and implementation of HIA as a method for evaluating the potential effects of changes to the built environment.

Today, HIAs may be linked to EIAs or they may be conducted as independent processes. While EIAs do occasionally include health risk assessments, and the U.S. Environmental Protection Agency does conduct formal health-effects forecasting as part of legally mandated cost-benefit analyses, HIAs are not routinely required or performed in any setting in the U.S. Moreover, as contrasted with EIA preparation by engineers and land-use or environmental consulting firms, HIA preparation is typically performed by public health professionals. The use of HIA, therefore, has relied on voluntary inclusion of such assessment into the development project or plan, rather than the required processes of EIA under NEPA.

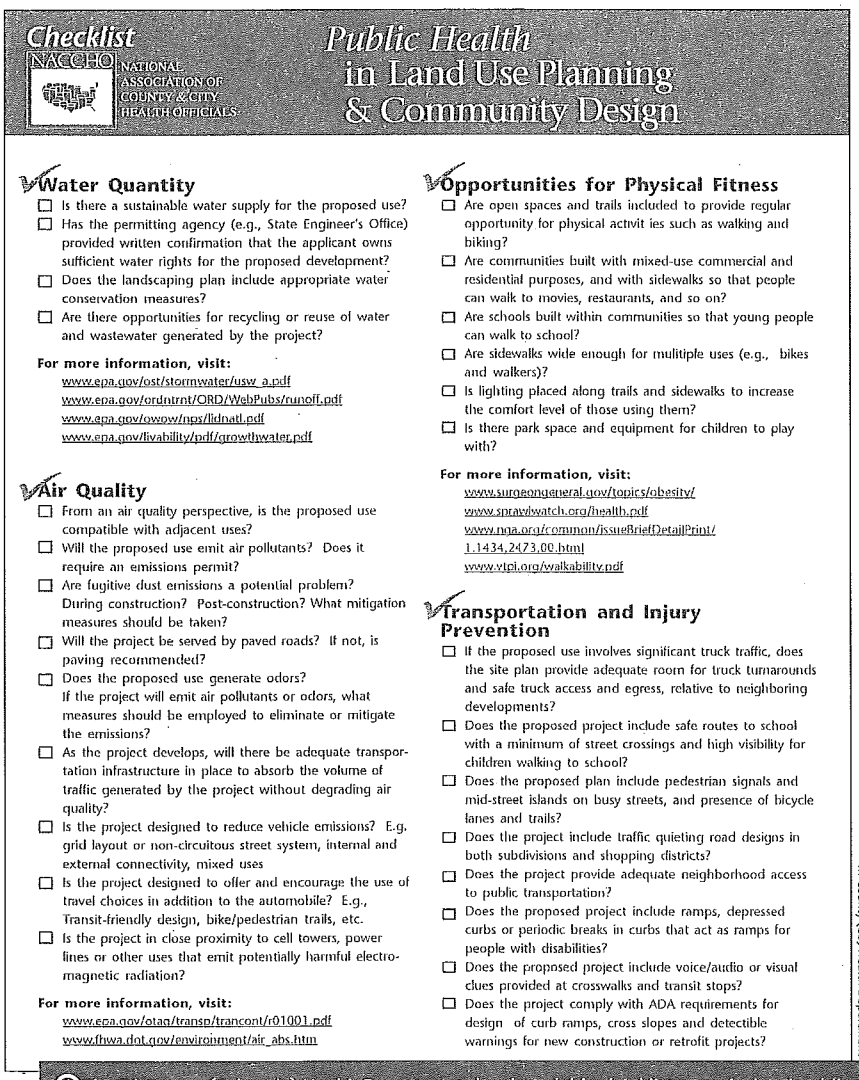
HIA vs. EIA

Discussions surrounding the potential benefits from the increased use of HIA have raised questions about whether such assessments can, and should, be mandatory and whether the means are available for incorporating HIA into existing legislative, regulatory, or administrative procedures (Ko 2011). While some proponents agree that conducting an HIA during the course of a required EIA could save time and money, others are concerned that the inclusion of an HIA into an EIA will diminish the importance and relevance of the public health issues and could lead to legal challenges. Opponents of HIA have also argued



Candace Rutt

A health impact assessment of this stretch of the Buford Highway in Atlanta evaluated the health effects of redeveloping the roadway to reduce the number of lanes, add sidewalks, crosswalks, and on-street parking, all with the goal of making the area less dangerous for people on foot or bike.



Checklist

NACCHO National Association of County & City Health Officials

Public Health in Land Use Planning & Community Design

Water Quantity

- ☐ Is there a sustainable water supply for the proposed use?
- ☐ Has the permitting agency (e.g., State Engineer's Office) provided written confirmation that the applicant owns sufficient water rights for the proposed development?
- ☐ Does the landscaping plan include appropriate water conservation measures?
- ☐ Are there opportunities for recycling or reuse of water and wastewater generated by the project?

For more information, visit:

www.epa.gov/ost/stormwater/usw_a.pdf
www.epa.gov/ordntrnt/ORD/WebPubs/runoff.pdf
www.epa.gov/owow/nps/lidnatl.pdf
www.epa.gov/livability/pdf/growthwater.pdf

Air Quality

- ☐ From an air quality perspective, is the proposed use compatible with adjacent uses?
- ☐ Will the proposed use emit air pollutants? Does it require an emissions permit?
- ☐ Are fugitive dust emissions a potential problem? During construction? Post-construction? What mitigation measures should be taken?
- ☐ Will the project be served by paved roads? If not, is paving recommended?
- ☐ Does the proposed use generate odors? If the project will emit air pollutants or odors, what measures should be employed to eliminate or mitigate the emissions?
- ☐ As the project develops, will there be adequate transportation infrastructure in place to absorb the volume of traffic generated by the project without degrading air quality?
- ☐ Is the project designed to reduce vehicle emissions? E.g. grid layout or non-circuitous street system, internal and external connectivity, mixed uses
- ☐ Is the project designed to offer and encourage the use of travel choices in addition to the automobile? E.g., Transit-friendly design, bike/pedestrian trails, etc.
- ☐ Is the project in close proximity to cell towers, power lines or other uses that emit potentially harmful electromagnetic radiation?

For more information, visit:

www.epa.gov/otaq/transp/trancont/r01001.pdf
www.fhwa.dot.gov/environment/air_abs.htm

Opportunities for Physical Fitness

- ☐ Are open spaces and trails included to provide regular opportunity for physical activit ies such as walking and biking?
- ☐ Are communities built with mixed-use commercial and residential purposes, and with sidewalks so that people can walk to movies, restaurants, and so on?
- ☐ Are schools built within communities so that young people can walk to school?
- ☐ Are sidewalks wide enough for mulitiple uses (e.g., bikes and walkers)?
- ☐ Is lighting placed along trails and sidewalks to increase the comfort level of those using them?
- ☐ Is there park space and equipment for children to play with?

For more information, visit:

www.surgeongeneral.gov/topics/obesity/
www.sprawlwatch.org/health.pdf
www.nga.org/common/issueBriefDetailPrint/1,1434,2473,00.html
www.vtpi.org/walkability.pdf

Transportation and Injury Prevention

- ☐ If the proposed use involves significant truck traffic, does the site plan provide adequate room for truck turnarounds and safe truck access and egress, relative to neighboring developments?
- ☐ Does the proposed project include safe routes to school with a minimum of street crossings and high visibility for children walking to school?
- ☐ Does the proposed plan include pedestrian signals and mid-street islands on busy streets, and presence of bicycle lanes and trails?
- ☐ Does the project include traffic quieting road designs in both subdivisions and shopping districts?
- ☐ Does the project provide adequate neighborhood access to public transportation?
- ☐ Does the proposed project include ramps, depressed curbs or periodic breaks in curbs that act as ramps for people with disabilities?
- ☐ Does the proposed project include voice/audio or visual clues provided at crosswalks and transit stops?
- ☐ Does the project comply with ADA requirements for design of curb ramps, cross slopes and detectible warnings for new construction or retrofit projects?

Tri-County (CO) Health Department

The Tri-County (Colorado) Health Department developed this checklist to assist local public health agencies in their review of applications for new development and redevelopment plans in their communities. The full checklist is available at www.tchd.org.

that unlike EIAs, which are seen as largely quantitative, HIAs are largely qualitative in nature. Because they may differ substantially in both the scope of impacts analyzed and the implementation process of the assessments themselves, combining the two assessments in a single document may prove to be difficult. Further, due to the nature of the factors assessed, the qualitative modeling of some HIA outcomes may be more difficult than modeling of EIA outcomes.

However, some level of integration of HIA into a required EIA may result in important and significant benefits. As discussed below, the San Francisco Department of Public Health found that, after sustained HIA efforts to integrate analysis of health outcomes in land-use decision making, several "complementary strategies" began to evolve. These strategies included integrating some analysis of health impacts in EIAs required by the California Environmental Quality Act, building a dialogue on the relationship between land use and public health, and promoting official health agency positions on urban policy planning questions. The Department of City Planning began to request analysis of public health concerns for specific planning questions. In fact, the efforts in San Francisco "suggest that HIA can significantly influence urban land use policy" (Bhatia 2005).

The Red Line Transit Project HIA in Baltimore was designed to evaluate the significant impacts to the geography, health, and social environment of the communities that would be affected by a proposed new light-rail line. A Draft Environmental Impact Statement (DEIS) for the project was released and detailed how construction and implementation of the project might affect the environment, including air, water, noise, and traffic volume. However, it did not identify how these factors would impact community health through changes to the built environment. Also, although the DEIS enabled informed choices to be made about the best location for the Red Line and did illustrate some of the health outcomes for each of the transit options, it did not "emphasize human-centric design options." Accordingly, the City Department of Transportation, with assistance from the City Health Department, initiated efforts to complete the HIA to "more fully explore how the Red Line will impact health and examine the potential to improve the quality of life in Baltimore." The authors of the Red Line HIA reiterated that the HIA would serve "as a comment to and supplemental analysis of the DEIS and identif[y] where the DEIS could have gone further to assess health impacts."

HOW HIAs ARE USED

While the type of policy, plan, or project evaluated under an HIA can vary, a number of the HIAs recently conducted in the U.S. have analyzed either changes to zoning ordinances or comprehensive plans, such as the TransForm Baltimore HIA, or have evaluated the specific health outcomes of redevelopment projects, such as the Jack London Gateway HIA.

Recently, an HIA was conducted to evaluate a proposed plan for development in El Cerrito and Richmond, California, to analyze the possible inclusion of affordable housing sites with other land uses. Prior to the completion of the HIA, land-use planning agencies had not determined specific sites for affordable housing nor the percentage and type of affordable housing at any site. Urban Habitat, an organization that advocates for social, economic, and environmental justice in the Bay Area, asked Human Impact Partners to assess health benefits and liabilities associated with three sites they proposed to include in their campaign for affordable housing. Following the release of the HIA, a letter from the participants to the city council and city staff discussed the health-based recommendations, and inclusion of affordable housing sites is now being considered.

In San Francisco, the Department of Public Health undertook the Eastern Neighborhoods Community Health Impact Assessment (ENCHIA) project to explicitly un-

derstand and articulate how San Francisco land-use development could promote and protect health. The goals of the ENCHIA were to identify and analyze the likely impacts of land-use plans and zoning controls on community concerns—including housing, jobs, and public infrastructure—and to provide recommendations for land-use policies and zoning controls that promoted community priorities through consensus in land-use policy making (San Francisco Department of Public Health 2007).

The Eastern Neighborhoods community planning process began in 2001 with the goal of developing new zoning controls for the industrial portions of these neighborhoods. Starting in 2005, the planning department began working with the neighborhood stakeholders to create area plans for each neighborhood to articulate a vision for the future. The resulting Eastern Neighborhoods Development Plan required that a Draft Environmental Impact Review (DEIR) be completed. The DEIR specifically referenced the 18-month-long HIA and acknowledged that the ENCHIA explicitly called attention to the "growing scientific understanding that optimal health could not be achieved by health services and individual behaviors alone." The DEIR also indicated that the planning department, in conjunction with the public health department, was committed to monitoring the progress in community health indicators (Ko 2011).

Overall, participants felt that the ENCHIA was successful in a number of significant ways. It broadened participant understanding of how development affects health, built new relationships among participants, and created a practical tool for evaluating land-use plans and projects. It also showed that a government-led public process could sustain diverse participation, employ consensus techniques, and shift participant focus from problems to solutions. The Eastern Neighborhoods area plans and rezoning were adopted by the board of supervisors, signed by the mayor, and became effective on January 19, 2009.

THE ROLE OF PLANNERS IN USING HIAs

The information obtained from an HIA can provide guidance on land-use decision making in a way that can promote or improve the health of a given population and mitigate the negative effects of changes to the built environment. Planners who understand and utilize the methods or tools provided by an HIA can make important contributions to the health and sustainability of the communities they serve. Specifically, planners can

- educate public officials about the health implications of their decisions regarding growth, development, and transportation;
- analyze local land-use decisions related to transportation, safety, environment, and health in a manner that considers the diverse needs of the population while evaluating the benefits, as appropriate, of mitigating factors such as planned unit development (PUD), mixed use development, changes to zoning laws and comprehensive plans, and crime prevention through environmental design (CPTED);
- guide or influence development and other land-use decisions in a positive manner while preserving and strengthening the communities through the creation of affordable housing opportunities, transportation options, pedestrian-safe roadways, and access to healthy foods; and
- utilize the different HIA tools available for planning and land-use decision making to determine when, and if, HIA is appropriate.

INCORPORATING HIA INTO LAND-USE DECISION MAKING

To date, most of the HIAs completed in the U.S. that deal with land use focus on one of five main objectives: pedestrian and transit-related improvements; zoning changes; neighborhood density/use restrictions; housing development projects; and various redevelopment projects for residential, commercial, or industrial sites. Notably, the majority of land-use-related HIAs were designed to evaluate factors that might impact health determinants or health outcomes that may be caused by rezoning, redevelopment, or other significant changes to the built environment, with transportation projects and redevelopment accounting for at least half of the HIAs completed. The following discussion of three specific initiatives highlights how HIAs may be used to inform land-use decisions.

TransForm Baltimore HIA

The TransForm Baltimore HIA was one of the first to evaluate comprehensive changes to a municipal zoning code. When the decision to rewrite Baltimore's zoning code was made, the Center for Child & Community Health Research at Johns Hopkins University was enlisted by the Baltimore City Health Department to conduct an analysis of the impact the changes would have on the community. The goal of the HIA was to contribute information and resources that would be used to revise the code and inform the mapping phase of the process. The Baltimore City Health Department determined that collaboration on an HIA targeted to identify areas of potential health impacts, both negative and positive, could influence policy decisions and could also help to promote the growth and development of a healthier city.

The aim of the TransForm Baltimore HIA was to research and evaluate how zoning can be used to improve overall health of the citizens in an urban environment and how to optimize the utility of the HIA in informing and influencing policy decisions. The recommendations made in the completed HIA included retaining several elements of the proposed new code that the HIA team demonstrated were "likely to contribute positively to creating healthy communities," including improving access to healthy foods, creating walkable environments, and expanding mixed use areas. Further recommendations by the HIA team included revisions that should be made to the proposed new code, including the prevention of off-premise alcohol sales outlets in transit-oriented development and industrial mixed use zones, and the use of CPTED principles in landscaping and design standards.

The Department of Planning released a draft of the new code in June 2010. Since then, the department has held several major public presentations and discussions around the city to broaden the opportunity for public input. The department also extended the comment period on the draft code and, due to strong interest and the number of comments, ideas, and suggestions to date, has decided to prepare a second draft prior to presenting legislation to the city council. This second version is expected to reflect, among other things, the input of the HIA.

HIA ON TRANSPORTATION POLICIES IN THE EUGENE CLIMATE AND ENERGY ACTION PLAN

In Oregon, the Health Impact Assessment on Transportation Policies in the Eugene Climate and Energy Action Plan was completed in August 2010 through a collaborative effort of Upstream Public Health, the City of Eugene Office of Sustainability, the Community Health Partnership (Oregon's Public Health Institute), and Lane County Public Health. The HIA was designed to evaluate the proposed action plan because it had the potential to impact not only the environment but also public health. As a result, the HIA focused on a section of the Climate and Energy Action Plan (CEAP) called "Land Use and Transportation" to assess po-

HIA RESOURCES FOR PLANNERS

The following resources are available for planners interested in obtaining more information on HIAs.

General Information on HIA Use in the United States

Bhatia, Rajiv. 2005. "Towards Equity in Land Use Development Using Health Impact Assessment." *NACCHO Exchange*, Winter. Available at www.sfphes.org/publications/CP_NEExcerpt05.pdf.

Bhatia, Rajiv and Aaron Wernham. 2008. "Integrating Human Health into Environmental Impact Assessment: An Unrealized Opportunity for Environmental Health and Justice." *Environmental Health Perspectives*, 116(8): 991–1000. Available at http://ehp03.niehs.nih.gov/article/fetchArticle.action?articleURI=info:doi/10.1289/ehp.11132.

Centers for Disease Control and Prevention—Health Impact Assessment: www.cdc.gov/healthyplaces/hia.htm.

Dannenberg, Andrew, et al. 2006. "Growing the Field of Health Impact Assessment in the United States: An Agenda for Research and Practice." *American Journal of Public Health*, 96(2): 19–27. Available at www.rwjf.org/pr/product.jsp?id=15158.

Dannenberg, Andrew, et al. 2008. "Use of Health Impact Assessment in the United States: 27 Case Studies, 1999–2007." *American Journal of Preventive Medicine*, 34(3): 243. Available at www.cdc.gov/healthyplaces/publications/AJPM_HIAcasestudies_March2008.pdf.

Forsyth, Ann, Carissa Schively Slotterback, and Kevin J. Krizek. 2010. "Health Impact Assessment in Planning: Development of the Design for Health HIA Tools." *Environmental Impact Assessment Review*, 30: 42–50. Available at http://carbon.ucdenver.edu/~kkrizek/pdfs/EIARinpress.pdf.

Forsyth, Ann, Carissa Schively Slotterback, and Kevin Krizek. 2010. "Health Impact Assessment (HIA) for Planners: What Tools Are Useful?" *Journal of Planning Literature*, 24(3): 231–245. Available at http://carbon.ucdenver.edu/~kkrizek/pdfs/hiajpl.pdf.

Health Impact Assessment Blog, the latest news and information on HIA: http://healthimpactassessment.blogspot.com/2011/03/usa-hia-update-from-human-impact.html.

Health Impact Project, a collaboration of the Robert Wood Johnson Foundation and The Pew Charitable Trusts: www.healthimpactproject.org/hia/us.

Ko, Pamela. 2011. "Incorporating Health Impact Assessment into Land Use Decision Making in the United States." *Zoning and Planning Law Report*, June 2001, Vol. 34, No. 6.

North American HIA Practice Standards Working Group, "Minimum Elements and Practice Standards for Health Impact Assessment," Version 2, November 2010. Available at www.healthimpactproject.org/resources/document/NA-HIA-Practice-Stds-Wrkng-Grp-2010_Minimum-Elements-and-Practice-Standards-v2.pdf.

Steinemann, Anne. 2000. "Rethinking Human Health Impact Assessment." *Environmental Impact Assessment Review*, 20: 627–645. Available at http://water.washington.edu/Research/Articles/2000.rethinking.pdf.

UCLA Health Impact Assessment Clearinghouse—Learning and Information Center: www.hiaguide.org; with a complete list of HIA completed in the U.S., www.hiaguide.org/hias.

Examples of HIAs

Guenin, Heidi, et al. 2010. *Health Impact Assessment on Transportation Policies in the Eugene Climate and Energy Action Plan*. Portland, Oregon: Upstream Public Health. Available at www.upstreampublichealth.org/sites/default/files/HIAEugene.pdf.

Heller, Jonathan C., Margaret Gordon, and Rajiv Bhatia. 2007. "Jack London Gateway Rapid Health Impact Assessment." Oakland, California: Human Impact Partners. Available at www.hiaguide.org/sites/default/files/JackLondonG_RHIA_casestudy.pdf.

Human Impact Partners. 2009. *Pathways to Community Health: Evaluating the Healthfulness of Affordable Housing Opportunity Sites Along the San Pablo Avenue Corridor Using Health Impact Assessment.* Oakland, California: Human Impact Partners. Available at www.hiaguide.org/sites/default/files/SanPabloAve.pdf.

Ricklin, Anna. 2008. "The Red Line Transit Project Health Impact Assessment." Baltimore, Maryland: Baltimore City Department of Transportation. Available at www.hiaguide.org/sites/default/files/Red_Line_HIA_final.pdf.

RLJ Thornton, et al. 2010. *Zoning for a Healthy Baltimore: A Health Impact Assessment of the TransForm Baltimore Comprehensive Zoning Code Rewrite*. Baltimore, Maryland: Johns Hopkins University Center for Child and Community Health Research. Available at www.hopkinsbayview.org/pediatrics/zoning/index.html.

San Francisco Department of Public Health. 2007. San Francisco Eastern Neighborhood Rezoning and Area Plans Environmental Impact Report and Eastern Neighborhoods Community Health Impact Assessment. Available at www.sf-planning.org/index.aspx?page=1678#bos_pres and www.sfphes.org/ENCHIA.htm.

Information on HIA Tools for Planners

Several tools can assist with incorporating health determinants and health outcomes into planning assessments. Three tools in particular can assist planners and other land-use decision makers: the Healthy Development Measurement Tool, the Leadership in Energy and Environment Design–Neighborhood Development, and the Design for Health suite of tools. Links to information on each are listed below.

Slide presentation on various HIA Tools: www.designforhealth.net/pdfs/hia_presentations/MNHIA_8_OtherHIA_bw.pdf.

Design for Health Tool: www.designforhealth.net/resources/hiatools.html and www.designforhealth.net/resources/planningtools.html.

Healthy Development Measurement Tool: www.thehdmt.org and www.sfphes.org/enchia/enchia_HDMT.htm.

Leadership in Energy and Environment Design—Neighborhood Development Tool: www.usgbc.org/DisplayPage.aspx?CMSPageID=148#randt; www.usgbc.org/DisplayPage.aspx?CMSPageID=2451; www.nrdc.org/cities/smartgrowth/leed.asp; www.cnu.org/leednd.

tential health impacts and recommend ways to improve those impacts while still reducing greenhouse gas emissions and fossil fuel use. The HIA included eight objectives and associated priority actions, and explored how each had the potential to impact health. For example, the first two objectives addressed the need for higher density areas and the creation of "20-minute neighborhoods," defined by the CEAP as "those in which a significant number of regular trips can be made in 20 minutes without using an automobile." According to the CEAP, 20-minute neighborhoods could increase physical activity, decrease collision fatalities, and lower air pollution by encouraging travel by walking or biking.

To create effective 20-minute neighborhoods, the CEAP cites the need for necessary retail destinations such as a grocery store, park, bank, and library so that residents can easily access goods and services by foot or bicycle. High street connectivity, safe pedestrian conditions, and access to public transit are also important factors in the success of a 20-minute neighborhood. However, the HIA noted that higher density areas may increase the urban heat island effect, which could have negative health outcomes on vulnerable populations like the elderly. Overall, it was determined that most of the objectives in CEAP have positive effects on both the environment and public health; however, the HIA did recommend that the few negative health impacts of CEAP (like increased urban density) be mitigated with improved urban design features and land-use planning.

www.pedbikeimages.org/Laura Sandt

Neighborhood parks provide space for exercise and positive social interaction. HIAs can draw attention to the effects of development proposals or policies on the availability and quality of parks and active recreation areas.

Jack London Gateway HIA

The Jack London Gateway (JLG) project was a proposal by the East Bay Asian Local Development Corporation (EBALDC) to build a 55-unit low-income housing development for seniors with additional retail space to be completed in the underutilized parking lot of the existing Jack London Gateway Shopping Plaza located in West Oakland, California. The location for the proposed project was less than 400 feet from Interstate 980 and within 1,100 feet of both Interstate 880 and the Port of Oakland.

Health Impact Partners (HIP) expressed interest in providing technical assistance to several local organizations to perform an analysis of the development project. During the assessment phase, HIP, in conjunction with other key stakeholders, isolated and prioritized four specific health determinants with recommendations for potential mitigation of negative health consequences. These four health determinants focused on air quality, noise, safety, and retail planning. For example, the community concern surrounding air quality at the JLG site—given the close proximity to the major highways and the Port of Oakland—focused on the relatively high levels of ambient particulate matter and other vehicle-related pollutants, which could cause individuals living in the senior housing to experience "relatively higher rates of chronic and acute respiratory illnesses and higher rates of morbidity due to asthma compared to people living further from these pollution centers."

This was significant since the HIA revealed that no central ventilation system was originally planned for the individual residences in the housing unit. Accordingly, the HIA participants recommended measuring and modeling wind and air patterns in order to define the extent of the potential problem objectively and to aid in planning appropriate solutions, such as the inclusion of mechanical ventilation systems with modest filtration to reduce pollution indoors. Although EBALDC would not commit to including a ventilation system with air filters for the private residences, it did undertake several steps as a result of the HIA process, including changing proposed balconies facing the freeway into bay windows, designing the ventilation system for the common spaces with air filters, modifying the plans to include a main rear entrance through the garden area for increased safety and connection with the existing community, and further engaging the community around security issues. This HIA is notable because the working group was able to engage with the developer to discuss how the proposal might affect heath determinants and outcomes and to work together to identify possible solutions.

CONCLUSION

The growing use of HIA to inform land-use decisions in the U.S. highlights the potential this tool has to promote positive health outcomes. The growing experience with HIA, through collaboration with the public health community, is yielding results that produce healthier and more sustainable communities. Today, there are many resources and opportunities for planners to incorporate some aspects of HIA into research on specific land-use issues. Planners should familiarize themselves with the HIA tools available and evaluate the potential benefits of the use of HIA in land-use decision making.

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HOW DOES YOUR COMMUNITY INTEGRATE PUBLIC HEALTH INTO DEVELOPMENT REVIEW?

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