QUINLAN™

August 25, 2011 | Volume 5 | No. 16

Zoning Bulletin

in this issue:

WEST®

41059279

Freedom of Speech—Zoning Code's "Sign" Definition Has Exclusions

Sign permit applicant argues definition is impermissibly content-based in violation of Free Speech rights

Citation: *Neighborhood Enterprises, Inc. v. City of St. Louis, 2011 WL 2694571 (8th Cir. 2011)*

The Eight Circuit has jurisdiction over Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

EIGHTH CIRCUIT (MISSOURI) (07/13/11)—This case addresses the issue of whether a sign ordinance's definition of "sign" violated freedom of speech rights provided by the First Amendment to the United States Constitution.

The Background/Facts: Jim Roos was the founder of a nonprofit organization, Sanctuary In The Ordinary ("SITO") (collectively, Roos and SITO are hereinafter referred to as "Sanctuary"). Roos described himself as a critic of the use of eminent domain for private development by the City of St. Louis (the "City"). He was also the coordinator and

Contributors
Corey E. Burnham-Howard

Zoning Bulletin is published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526 St. Paul, MN 55164-0526. For subscription information: call (800) 229-2084, or write West, Credit Order Processing, 620 Opperman Drive, PO Box 64833, St. Paul, MN 55164-9753.

POSTMASTER: Send address changes to, Zoning Bulletin, 610 Opperman Drive, P.O. Box 64526 St. Paul, MN 55164-0526.

WEST®

610 Opperman Drive • P.O. Box 64526 • St. Paul, MN 55164-0526
1-800-229-2084 • email: west.customerservice@thomsonreuters.com • west.thomson.com/quinlan
ISSN 0514-7905 • © 2011 Thomson Reuters. All Rights Reserved.
Quinlan™ is a Thomson Reuters brand.

spokesperson for the Missouri Eminent Domain Abuse Coalition ("MEDAC"). In early 2007, Roos and MEDAC commissioned a sign/mural for the south side of a SITO-owned building. The sign/mural was approximately 363 or 369 square feet in area. It was visible from nearby interstates. The sign/mural consisted of the words "End Eminent Domain Abuse" inside a red circle and slash.

In April 2007, the City issued a citation to SITO. It declared the sign "illegal" because no sign permit had been obtained.

SITO applied for a sign permit. The City denied the permit application, saying: the sign was larger than that allowed by the City's Zoning Code; and the sign was located on the side of a building in contravention of Zoning Code requirements.

SITO appealed. The City's Board of Adjustment (the "Board") upheld the denial of SITO's sign permit application.

Sanctuary filed suit in court. Among other things, Sanctuary argued that the City Zoning Code's definition of "sign" impermissibly burdened its free speech rights under the First Amendment to the United States Constitution.

"Sign" was defined under the Zoning Code as: "any object or device ... situated outdoors which is used to advertise, identify, display, direct or attract attention to an object, person, institution, organization, business project, service, event, or location ... ." The definition for "sign" specifically excluded certain things, including: "[n]ational, state, religious, fraternal, professional and civic symbols"; and "works of art."

Sanctuary argued that the Zoning Code's sign restrictions were unconstitutionally content-based because they were not supported by "compelling" public interests.

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

Sanctuary appealed.

DECISION: Reversed and matter remanded.

The United States Court of Appeals, Eighth Circuit, agreed with Sanctuary and reversed the district court's holding. The court of appeals held that the Zoning Code's definition of "sign" was impermissibly content-based, subjecting it to strict scrutiny under the First Amendment free speech analysis. The court further held that the City's asserted interests for the "sign" restrictions were not narrowly drawn to accomplish those ends.

The court explained that the Free Speech Clause of the First Amendment provides that: "Congress shall make no law ... abridging the freedom of speech ... ." This clause is applicable to municipalities. The Free

Speech Clause protects signs, as they are "a form of expression." Signs may be regulated to protect public interests, but the constitutionality of the sign regulations depends on whether the sign restrictions are content-based or content-neutral. If content-neutral, the restrictions are subject to intermediary scrutiny. If content-based, the restrictions are constitutionally permissible only if they withstand strict scrutiny.

Here, the Court of Appeals found the Zoning Code's definition of "sign" was "impermissibly content-based because 'the message conveyed determines whether the speech is subject to the restriction.'" Here, under the City's Zoning Code, whether an object is a "sign" or is exempt from the sign regulations, depended on its content. An object of the same dimensions of Sanctuary's "End Eminent Domain Abuse" sign/mural would not have been subject to the City Zoning Code sign regulations if it were a "[n]ational, state, religious, fraternal, professional and civic symbol ... ." Thus, the regulations were content-based because they made impermissible distinctions based solely on the content or message conveyed in the sign.

Because the definition of "sign" was found to be a content-based restriction, strict scrutiny applied. The regulations would only be constitutional and enforceable if the City could show they were necessary to serve a compelling state interest that was narrowly drawn to achieve that end.

Here, the City asserted interests of traffic safety and aesthetics as reasons for the sign restrictions. The court noted these interests "have never been held to be compelling." Moreover, the court said that even assuming they were adequate justification for the content-based sign-regulations, "the sign code [could] not withstand strict scrutiny because it [was] not narrowly drawn to accomplish those ends." The Zoning Code did not explain how the interests of traffic safety and aesthetics were served by the sign regulations, nor did it offer reasons for applying its sign regulations to some types of signs but not others. In other words, the City "fail[ed] to demonstrate how th[ose] interests [were] served by the distinction it [drew] in the treatment of exempt and nonexempt categories of signs."

See also: *Whitton v. City of Gladstone, Mo., 54 F.3d 1400, 23 Media L. Rep. (BNA) 1910 (8th Cir. 1995).*

See also: *Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794, 9 Ed. Law Rep. 23, 112 L.R.R.M. (BNA) 2766 (1983).*

Case Note: The Court of Appeals remanded to the district court the issue of whether the unconstitutional portion of the sign or-

dinance could be severed from that chapter of the Zoning Code or whether the entire chapter with those provisions had to be "[struck] down."

Public and Low-Income Housing—Town Ordinances Allow Developers to Pay Fee-In-Lieu of Affordable Housing Construction

Developer argues fee-in-lieu is illegal because it is not authorized by the State General Assembly

Citation: *North End Realty, LLC v. Mattos, 2011 WL 2670227 (R.I. 2011)*

RHODE ISLAND (07/08/11)—This case addresses the issue of whether Rhode Island municipalities can charge developers a fee-in-lieu of undertaking the construction of affordable housing.

The Background/Facts: North End Realty, LLC ("North End") was a developer. It owned real property in the Rhode Island town of East Greenwich (the "Town"). In February 2007, North End filed with the Town's planning board both "master" and "preliminary" plans for the development of a proposed five-lot subdivision.

Town ordinances required that developers either designate 15% of the units in any subdivision or major residential land development as affordable housing or pay the sum of $200,000 (per affordable unit) as a fee-in-lieu of constructing the required number of affordable housing units.

Because North End indicated that it did not intend to include any affordable housing units as part of the subdivision, the Town, citing its related ordinance, mandated that North End pay a $200,000 fee-in-lieu before North End would be allowed to record subdivision approval or begin property development.

Subsequently, North End filed a complaint in superior court. Among other things, North End argued that the Town did not have the requisite authority to impose the $200,000 fee-in-lieu, required by the Town's ordinances. North End maintained that before the Town could impose "a fee of such a substantial and burdensome nature," the State General Assembly must enact legislation that explicitly grants the Town that authority. In other words, North End argued that the fees-in-lieu were illegal because the Town had no authority to impose them. North End asserted that only the General Assembly had the power to enact laws that had a statewide impact.

The Town responded that it had such authority: The Town had adopted a comprehensive plan in order to attain its General Assembly-mandated affordable housing goal, pursuant to the Rhode Island Low and Moderate Income Housing Act ("LMIHA"). That comprehensive plan specifically stated the option to pay a fee-in-lieu of the required number of affordable housing units. The state director of administration approved that comprehensive plan. The Town then had adopted the subject ordinances to implement the state-approved plan.

A hearing justice entered final judgment in favor of the Town.

North End appealed.

DECISION: Vacated and matter remanded.

The Supreme Court of Rhode Island held that the Town "may not legally impose a fee-in-lieu in the absence of enabling authority from the General Assembly." Although the General Assembly had authorized analogous development impact fees and open space fees, it had not authorized a fee-in-lieu of undertaking the construction of affordable housing. The court found that the LMIHA was "completely silent with respect to the subject of fees-in-lieu." Accordingly, the court directed the superior court to issue an order enjoining the Town from imposing, assessing, or collecting the fee-in-lieu of construction of affordable housing.

In reaching its conclusion, the court explained that a municipality that had adopted a home rule charter could exercise its own authority over purely local concerns. In this case, fees-in-lieu of affordable housing construction affected state concerns, not just local concerns. This was because "[t]he development of affordable housing is a critical statewide need." Therefore, as with the analogous development impact fees and open space fees, specific enabling legislation first had to be enacted by the General Assembly before municipalities in Rhode Island could impose such fees-in-lieu, said the court. This, explained the court, allows for the "desirability and possible effects of the imposition of such fees-in-lieu [to be] evaluated in the context of statewide affordable housing policy."

In short, the court concluded that: Rhode Island municipalities cannot impose fees-in-lieu of affordable housing construction because the State General Assembly must first authorize them to do so and it has not.

See also: *Town of East Greenwich v. O'Neil, 617 A.2d 104 (R.I. 1992).*

Case Note: The court acknowledged "the need for municipalities to have some degree of flexibility in enacting local legislation

that will help municipalities to design and implement the most effective strategies to bring them into compliance with LMIHA." However, the court further noted the necessity for there to be "a statutory framework that provides specific guidance with respect to the calculation, imposition, and use of such fees-in-lieu in order to ensure that the fees-in-lieu are reasonable and rationally related to local needs, as is the case with development impact fees and open space fees."

Public and Low-Income Housing—Town Denies Affordable Housing Site Plan Application

Town cites safety concerns, but applicant says those concerns do not outweigh affordable housing need

Citation: *AvalonBay Communities, Inc. v. Zoning Com'n of Town of Stratford, 130 Conn. App. 36, 2011 WL 2622396 (2011)*

CONNECTICUT (07/12/11)—This case addressed the issue of whether a town zoning commission's safety concerns were sufficient so as to outweigh the need for affordable housing in town and deny a developer's application to construct affordable housing units.

The Background/Facts: AvalonBay Communities, Inc. ("AvalonBay") sought to construct an affordable housing development in the town of Stratford, Connecticut (the "Town"). AvalonBay submitted to the Town's zoning commission (the "Commission") applications seeking approval to construct the affordable housing development. Ultimately, the Commission voted to deny AvalonBay's site plan application based on the following public health and safety concerns: "(1) failure to provide adequate, safe and timely emergency access; (2) probable destruction of wetland and watercourse resources; and (3) reasonable likelihood of unreasonable pollution of the waters of the state."

AvalonBay appealed to superior court. It argued that the reasons for the denial were not supported by sufficient evidence in the record and did not constitute substantial public interests that clearly outweighed the Town's need for affordable housing.

The superior court agreed with the Commission that its denial of the affordable housing application was proper on the emergency access ground. It disagreed with the Commission's reasons for denial on the other two grounds.

AvalonBay appealed. The Commission and the Town also cross appealed.

DECISION: Reversed and matter remanded.

The Appellate Court of Connecticut held that evidence was insufficient to support the Commissions' denial of AvalonBay's applications based on safety concerns over emergency vehicle access. The court also held that the Commission's concerns about emergency access and regarding environmental issues were insufficient to outweigh the need for affordable housing in the Town so as to preclude granting AvalonBay's applications.

In reaching its conclusion, the court explained that in order for a municipality to deny an affordable housing site plan application, "[t]he record must establish more than a mere possibility of harm to a substantial public interest"; rather, "[t]he record must contain evidence as to a quantifiable probability that a specific harm will result if the application is granted ... ." In other words, "[m]ere concerns alone" are insufficient to support the denial of an affordable housing application in Connecticut (pursuant to Conn. Gen. Stat. § 8-30g(g)).

Here, the court found evidence was insufficient to support the Commissions' denial of AvalonBay's affordable housing application on the basis of safety concerns. The Commission's concerns focused on whether aerial fire trucks could fit under a parkway underpass. The court found all evidence showed that all aerial fire trucks could fit under the underpass without delay.

The Commission had also expressed concern about the width of an adjacent public street as an adequate secondary emergency route. The court found this was an insufficient basis for denial of AvalonBay's affordable housing application because the street would be used only if the primary route could not be accessed; and for the concerns to have merit, three chance occurrences would have to manifest simultaneously.

Finally, the court also concluded that perceived concerns regarding environmental issues (the court found the record insufficient to support the concerns), including negative impact to natural resources and wetlands, did not outweigh the need for affordable housing in the Town.

In conclusion, the court found that: the Commission "rested on speculation to support its safety concerns," and "the record [did] not contain 'evidence as to a quantifiable probability that a specific harm [would] result if the application [was] granted.'"

The court remanded the matter to the trial court. The appellate court directed the trial court to render judgment sustaining AvalonBay's appeal and directing the Commission to approve AvalonBay's affordable housing site plan application.

See also: *River Bend Associates, Inc. v. Zoning Com'n of Town of Simsbury, 271 Conn. 1, 856 A.2d 973 (2004).*

See also: *Avalonbay Communities, Inc. v. Planning and Zoning Com'n of Town of Wilton, 103 Conn. App. 842, 930 A.2d 793 (2007).*

Case Note: The Connecticut statute governing affordable housing land use appeals—Conn. Gen. Stat. § 8-30g—explicitly provides that the burden is "on the commission to prove, based upon the evidence in the record ..." that the commission's decision is: "(1) supported by evidence in the record; and (2)(a) is necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider; (b) such public interests clearly outweigh the need for affordable housing; and (c) such public interests cannot be protected by reasonable changes to the affordable housing development."

Short-Term Rentals—Owners of Home in Town's Residential District Rent Home Out for Short-Term Rentals

Town says homeowners' commercial use of the property is in violation of ordinance

Citation: *Siwinski v. Town of Ogden Dunes, 949 N.E.2d 825 (Ind. 2011)*

INDIANA (06/29/11)—This case addresses the issue of whether a zoning code restriction of a dwelling's use to a "single-family dwelling" in a Residential District prohibits the use of homes in the district for short-term rentals.

The Background/Facts: Steven and Lauren Siwinski (the "Siwinskis") owned a home in the town of Ogden Dunes, Indiana (the "Town"). The Town is "a small, quiet, lakeshore town on Lake Michigan." Their home was located in an "R-Residential District."

Pursuant to the Town's Zoning Code, in an R-District, buildings and premises could only be used for: (1) single-family dwellings; (2) accessory buildings or uses; (3) public utility buildings; (4) semi-public uses; (5) essential services; and (6) special exception uses permitted under the Zoning Code. The Zoning Code defined a "single-family dwelling" as: "[a] separate detached building designed for and occupied exclusively as a residence by one family."

The Siwinskis advertised their home for rent on the Internet Web site "Vacation Rentals by Owner," utilizing the domain name VRBO.com. In April 2007, the Town sent the Siwinskis a cease and desist letter. The letter advised the Siwinskis that renting their property was prohibited by the Zoning Code. Nevertheless, on five different occasions in 2007, the Siwinskis rented their home to people for stays of between two and 11 days.

In August 2007, the Town filed suit against the Siwinskis for violating the Zoning Code. The Town noted that the Zoning Code permitted the Siwinskis to only use their home "exclusively as a residence by one family." The Town argued that the Siwinskis rental of their home for profit violated this restriction.

The Siwinskis disagreed that the phrase "exclusively as a residence" prohibited them from renting their home to multiple families. They argued that the home was still used for "eating and sleeping and other things typically associated with a family residence." Furthermore, they interpreted the phrase "by one family" to mean one family at a time, as opposed to multiple families living in a home at the same time.

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

The Siwinskis appealed.

DECISION: Affirmed; matter remanded as to damages.

The Supreme Court of Indiana held that "the Siwinskis impermissibly rented their dwelling in violation of the Town's ordinances."

In so holding, the court interpreted the language of the Zoning Code. The court found it clear that, by designating a Residential District and a Commercial District, the Town intended to have certain classes of uses in designated areas. Of the applicable uses in the Residential District where the Siwinskis' home was located, the court found the only relevant use of the Siwinskis' home was as a single-family dwelling. The court interpreted the Zoning Code's definition of single-family dwelling. The court found the ordinance was clear: it facially stated that the Residential District shall have single-family dwellings, which were dwellings occupied exclusively as a residence by one family. On this alone the court found the ordinance clearly forbid the renting of a home in the Residential District. The court concluded that the Siwinskis' rental of their dwelling was not a single-family use as allowed in the Residential District because the dwelling was not occupied exclusively by one family.

Still, the court also looked to the Zoning Code as a whole in order to assist its analysis. The Town had a Commercial District, which allowed "commercial activity." "Commercial activity" was defined as "[a]ny ac-

tivity conducted for profit or gain." The court found that the rental activity undertaken by the Siwinskis was conducted for profit or gain. Their rental activity was "commercial activity," which was allowed only in the Commercial District, not in the Residential District.

See also: *Ragucci v. Metropolitan Development Com'n of Marion County, 702 N.E.2d 677 (Ind. 1998).*

Case Note: The court also concluded that, under Ind. Code § 36-1-3-8, the Siwinskis were liable for a maximum fine of $32,500 for their five violations of the ordinance. (A fine of not more than $2,500 for the first offense, plus fines of not more than $7,500 for the second and each subsequent offense.)

Zoning News from Around the Nation

DISTRICT OF COLUMBIA

The D.C. Council recently amended its zoning laws to "help re-establish a federal firearm licensee (FFL) dealer in the district." Under D.C.'s zoning laws, gun-related businesses must be at least 300 feet away from schools, libraries, playgrounds, and other locations. The new amendment allows for a licensed gun dealer to register and process gun sales at Metropolitan Police headquarters.

Source: *Fox News*; www.foxnews.com

ILLINOIS

A proposed ordinance that is "intended to force banks and other financial institutions to better maintain their vacation properties" is now under the consideration of Chicago's full council. Among other things, the ordinance "includes language that expands the definition of a property owner in the city code to include 'any person who alone, jointly or severally with others is a mortgagee who holds a mortgage on the property, or is an assignee or agent of the mortgagee.'" This expanded class of owners would be required to follow existing vacant building rules. The proposed ordinance essentially "ratchet[s] up banks' requirements under the law by effectively establishing mortgage holders as owners of vacant property."

Source: *ChicagoNow*; www.chicagonow.com

WASHINGTON

Seattle's City Council recently passed a new ordinance that "establishes a regulatory framework for the growing number of medical marijuana dispensaries in Seattle." The new ordinance requires medical marijuana dispensaries to: obtain a business license; pay taxes and fees; and meet city land use codes. It also subjects dispensaries to the requirements of the city's "Chronic Nuisance Property Law" and prohibits the "open use and display of cannabis" at the dispensaries. Reportedly, questions exist as to whether the new ordinance would stand up in court since the sale and use of marijuana violates federal law.

Source: *Seattle Post Intelligencer*; www.seattlepi.com

October 10, 2011 | Volume 5 | No. 19

QUINLAN™

Zoning Bulletin

in this issue:

WEST®

41059282

Enforcement of Regulations—Property Owner Appeals Four Zoning Citations

At hearing, city requires property owner to prove citations were incorrectly issued

Citation: *Daily v. City of Sioux Falls, 2011 SD 48, 2011 WL 3759925 (S.D. 2011)*

SOUTH DAKOTA (08/24/11)—This case addresses the issue of whether a municipal administrative appeals process which requires an individual who appeals a zoning citation to bear the burden of proving it was incorrectly issued—violates the individual's constitutional due process rights.

The Background/Facts: In the summer of 2004, Daniel Daily ("Daily") hired a contractor to construct a concrete extension to the east side of his driveway. The contractor had laid concrete extension to the driveways of various homes in Daily's neighborhood, and informed Daily that a permit was not required. Daily's completed extension spanned approximately seven feet from the edge of the existing driveway and ran the length of the driveway. The extension also

Contributors
Corey E. Burnham-Howard

Zoning Bulletin is published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526 St. Paul, MN 55164-0526. For subscription information: call (800) 229-2084, or write West, Credit Order Processing, 620 Opperman Drive, PO Box 64833, St. Paul, MN 55164-9753.

POSTMASTER: Send address changes to, Zoning Bulletin, 610 Opperman Drive, P.O. Box 64526 St. Paul, MN 55164-0526.

WEST®

610 Opperman Drive • P.O. Box 64526 • St. Paul, MN 55164-0526
1-800-229-2084 • email: west.customerservice@thomsonreuters.com • west.thomson.com/quinlan
ISSN 0514-7905 • © 2011 Thomson Reuters. All Rights Reserved.
Quinlan™ is a Thomson Reuters brand.

ran up to a fire hydrant in the right of way, allowing Daily to use a snow-blower to clear snow from the hydrant.

In April 2006, the City of Sioux Falls' (the "City") code enforcement officer told Daily he would need a variance for the concrete driveway extension. The City's Board of Adjustment denied Daily's application for a variance.

Over the next two years, the City issued Daily four citations for the concrete driveway extension. Daily appealed each of the citations. He alleged selective enforcement of the City's municipal code. A hearing was held only on the final two citations he received. At that hearing, Daily was informed that he bore the burden of proving that the City incorrectly issued the citations. A hearing examiner ultimately upheld the final two citations.

Daily then brought an action in court. He maintained that the City's administrative appeals process, including the enforcement of its zoning ordinances, violated his constitutional rights to procedural due process. Specifically, Daily argued that the City's administrative appeals process violated the 14th Amendment to the United States Constitution and article VI, § 2 of the South Dakota Constitution—both of which provide that no person shall be deprived of "life, liberty, or property without due process of law."

The circuit court agreed with Daily. The City appealed.

DECISION: Judgment of circuit court affirmed.

The Supreme Court of South Dakota held that the City's administrative appeals process deprived Daily of a protected property interests without due process of law because Daily was required to bear the burden of proving that the City incorrectly issued the citations (instead of the City bearing the burden of proving the alleged violations).

The court explained that "the requirements of due process apply to adversarial administrative proceedings of local units of government." Daily could show a due process violation here if he could demonstrate that he had a protected property or liberty interest at stake and that he was deprived of that interest without due process of law, said the court.

Each of the citations issued to Daily assessed a civil fine. Assessment of a civil fine "deprives an individual of a protected interest," said the court. As such, the court found that Daily had a protected interest.

The court then analyzed whether the City's administrative appeals process deprived Daily of that interest without due process of law. Here, the City took the position that the issuance of a citation by a

City code enforcement officer established noncompliance and that an individual who appealed a citation bore the burden of proving that the City incorrectly issued it.

The court said that determining what process is due in a particular case requires consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest though the procedures used, and the probable value, if any, of additional or substitute safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Weighing these three factors here, the court found: "demonstrates that holding the City to its burden of proof [of proving Daily violated the City code] was constitutionally required in this case." Here, "Daily ha[d] a significant private interest in avoiding the assessment of a fine," said the court. "On the other hand, the City ha[d] an interest in ensuring that its residents compl[ied] with its zoning ordinances and municipal code." In this case, the court found it clear that "properly allocating the burden of proof [to the City] would reduce the risk of erroneously depriving individuals of protected property interests without placing substantial fiscal or administrative burdens on the City." Because the hearing examiner did not hold the City to its burden of proof (having to prove Daily violated City zoning ordinances), the court concluded that the City's administrative appeals process deprived Daily of a protected property interest without due process of law.

See also: *Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).*

See also: *City of Pierre v. Blackwell, 2001 SD 127, 635 N.W.2d 581 (S.D. 2001).*

Case Note: Daily had also argued that the City violated his procedural due process rights by issuing multiple citations for a single violation of its zoning ordinances and municipal code. As a matter of policy, the City repeatedly cited individuals for violations until they finally complied with its zoning ordinances. The court found that while this practice was not a "technical violation of Daily's procedural due process rights," it was a "relevant consideration in evaluating the fairness of the City's administrative appeals process."

Variance—BZA Approves 241 Variances for a Proposed Development on a Single Property

Opponent argues BZA exceeded its authority by essentially rezoning the property

Citation: *Fleischman v. District of Columbia Bd. of Zoning Adjustment, 2011 WL 3715032 (D.C. 2011)*

DISTRICT OF COLUMBIA (08/25/11)—This case addresses the issue of whether a board of zoning appeals exceeds its authority when it grants such a number of variances for a single property that it impacts nearly every applicable zoning requirement of the property.

The Background/Facts: In June 2008, Hillcrest Homes Association LP ("HHALP") filed an application with the District of Columbia Board of Zoning Adjustment (the "BZA") to construct a residential development containing 54 one-family detached dwellings in a residential zoning district on a 12.59-acre triangle-shaped property. HHALP sought to cluster the development, leaving 4.69 acres of the property undeveloped. HHALP's application sought necessary variances to cluster the development. The principal variance requested was to reduce the minimum lot area. Variances related to the reduced lot size were also sought for the minimum required front, rear, and side yards. HHALP also sought variances to build 23 of the houses to four stories, instead of the allowed three, but without an increase in the allowed overall height. In all, given the number of individual lots, a total of 241 variances were approved by the BZA.

Julius Fleischman, another local builder, filed a motion asking the BZA to reconsider. That motion was denied. Fleischman then appealed to court. Fleischman contended that the BZA exceeded the scope of its authority under the D.C. Code (§ 6-641.07(e)). Section 6-641.07(e) of the D.C. Code provides that the BZA "shall not have the power to amend any regulation or map." Fleischman noted that the BZA's approval impacted almost every applicable zoning requirement of the property. Fleischman maintained that the net effect of approving all of HHALP's requested variances was a de facto rezoning of the property, and such a rezoning could only be done by the Zoning Commission, not the BZA.

DECISION: Judgment of Board of Zoning Adjustment affirmed.

The District of Columbia Court of Appeals disagreed with Fleischman's argument and upheld the BZA's granting of the variances.

In so concluding, the court analyzed whether the BZA exceeded its powers in granting the variances. The court found that the BZA was authorized, under the D.C. Code, to "make special exceptions to the provisions of the zoning regulations in harmony with their general purpose and intent." According to those terms, the court found no reason why the variances requested by HHALP were not properly before the BZA. The court found that "the size of the property [and] the number of the variances requested" did not—by themselves—impact the analysis of whether the BZA had authority to preside over HHALP's application.

In other words, as long as the BZA properly applied the "three-part test" for determining whether a variance should issue, each variance was properly granted—no matter the total number of them granted for the single property. The court explained that three-part test. In order for HHALP to obtain area variance relief, it had to show: (1) there was an "extraordinary or exceptional condition affecting the property"; (2) "practical difficulties" would occur if the zoning regulations were strictly enforced; and (3) the requested relief could be granted "without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan." For a variance to issue, "the difficulties or hardships [must be] due to unique circumstances peculiar to the applicant's property and not to the general conditions in the neighborhood," further explained the court.

The court concluded that, here, the three-part test was met. First, the court found that the BZA "properly applied the uniqueness test when it concluded that 'the difficulties or hardships' cited by HHALP were 'unique circumstances peculiar to the applicant's property.'" The property: was irregularly shaped and wooded; had extreme topography; had significant grade differential; had minimal street frontage in comparison to its perimeter; had no public street infrastructure; and was encumbered on its southern boundary by a private parking lot which reduced the property's buildable area.

The court also found that the record contained "sufficient factual findings supporting the BZA's conclusion that HHALP was presented with practical difficulties warranting the area variance[s]." HHALP had demonstrated the two necessary elements to show "practical difficulty": (1) compliance with the area restrictions would be unnecessarily burdensome; and (2) the practical difficulties were unique

to this particular property. This was because, found the court, here, several extraordinary and exceptional conditions were inherent to the property: its extreme topography and challenging slope; the acreage devoted to the extension of an avenue and the infeasibility of extending streets; the lack of public street infrastructure; the parking lot, which reduced the property's buildable area; the remaining wooded open space, which would serve as a buffer; and the fact that denying variances would have prompted a need for other variances.

In summary, the court found that the BZA "reasonably concluded that the 'clustering of the development' ... [was] a reasonable response to the property's topographical constraints as well as to the community's desire to open space along the northern boundary of the property."

See also: *Washington Canoe Club v. District of Columbia Zoning Com'n, 889 A.2d 995 (D.C. 2005).*

See also: *Gilmartin v. District of Columbia Bd. of Zoning Adjustment, 579 A.2d 1164 (D.C. 1990).*

Rezoning—Members of Public Ask to Receive Copies of Documents at Public Hearing

After PZC denies those requests, those who made document requests file complaint with Freedom of Information Commission

Citation: *Planning and Zoning Com'n of Town of Pomfret v. Freedom of Information Com'n, 130 Conn. App. 448, 23 A.3d 786 (2011)*

CONNECTICUT (08/02/11)—This case does not address a "zoning" issue, but does address an issue that affects planning and zoning commissions. This case addresses the issue of whether, under Connecticut statutory law, public meeting attendees' requests to receive copies of documents must be in writing, rather than be made orally. It also addresses the issue of whether, under Connecticut statutory law, a planning and zoning commission has a duty to reduce to writing its denial of a request for copies of documents—even when the request for copies is not properly made.

The Background/Facts: On January 9 and 15, 2008, the Planning and Zoning Commission of the Town of Pomfret (the "PZC") con-

ducted meetings to review and debate draft proposed amendments to the Town's zoning regulations concerning home occupation uses. At the January 9 meeting, the PZC had copies of, planned to discuss, and in fact did discuss two documents: (1) a four-page draft memorandum from the town planner entitled "Home Occupations Retail Sales," dated January 8, 2008; and (2) a letter from the town counsel to the town planner regarding the proposed zoning amendments. At the January 15 meeting, the PZC had copies of, planned to discuss, and in fact did discuss an updated version of the "Home Occupations Retail Sales" draft memorandum, dated January 15, 2008.

At the January 9 meeting, Ford Fay, a member of the public, orally requested a copy of both documents. The PZC denied his request. At the January 15 meeting, Charles A. Boster, a member of the public, orally requested a copy of both documents. The PZC also denied his request.

Two or three days later, Fay and Boster requested and received the two documents from the town hall. Nevertheless, in February 2008, Fay and Boster filed a complaint with Connecticut's Freedom of Information Commission (the "Commission"). They alleged that the PZC's denial of their oral requests for the documents at issue violated the Connecticut Freedom of Information Act (Conn. Gen. Stats. § 1-210(a)). Section 1-210(a) of the Act provides, in relevant part: "[E]very person shall have the right to (1) inspect such [public] records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212 ... ." Here, Fay and Poster had not requested to inspect or copy the documents, but had asked to receive a copy of the documents. Section 1-212(a) provides that: "Any person applying in writing shall receive, promptly upon request, a plain or certified copy of any public record...."

The Commission concluded that the PZC violated the "promptness requirement" of § 1-212(a) by failing to provide to Fay a copy of the documents at issue at the time he requested them. The Commission made a similar finding with respect to Boster's request.

The PZC appealed to court. The superior court overturned the decisions of the Commission. The court found that the PZC did not violate the "promptness requirement" of § 1-212(a). The court noted that the Freedom of Information Act "only requires agencies to respond to requests for copies promptly during regular office or business hours, not during evening meetings in progress." Because

Fay and Boster's requests were made after regular office or business hours, the court concluded that the PZC's denial of the requests did not violate the promptness requirement of § 1-212(a).

The Commission appealed.

DECISION: Judgment of superior court affirmed (on other grounds).

The Appellate Court of Connecticut concluded that the PZC properly denied Fay and Boster's requests because their requests were not reduced to writing as required by § 1-212(a). The court analyzed the statutory language of §§ 1-210(a) and 1-212(a). Again, § 1-212(a) provides that: "Any person applying *in writing* shall receive, promptly upon request, a plain or certified copy of any public record ... ." (Emphasis added.) The court found that Fay and Boster, by making oral requests for the documents at issue, failed to satisfy the express requirement of § 1-212(a). Because those requests did not comport with the legal requirements, the court concluded that the PZC did not violate the promptness requirement of §1-212(a).

The court acknowledged that the PZC had not reduced to writing its denial of Fay and Boster's requests. Section 1-206(a) of the Act provides: "Any denial of the right to inspect or copy records provided for under section 1-210 shall be made to the person requesting such right by the public agency official who has custody or control of the public record, in writing ... ." The court concluded that because Fay and Boster did not properly make a request to receive a copy of the documents pursuant to § 1-210 (i.e., because their requests were not in writing, as required by § 1-210), the PZC's "obligation to reduce to writing its denial of the requests was never triggered."

See also: *State v. DeFrancesco, 235 Conn. 426, 668 A.2d 348 (1995).*

Case Note: Another member of the public, Paul Hennen, also joined Fay and Boster in bringing the complaint to the Commission.

Case Note: Because the appellate court affirmed the superior court's decision on an alternate ground, the appellate court did not address the Commission's argument as to whether the Freedom of Information Act requires agencies to promptly respond to requests for copies only during regular office of business hours.

Nonconforming Use—Motocross Operator Fails to Apply for Grandfathered, Prior Nonconforming Use Status under Zoning Law

Operator later asks court to declare it with such status

Citation: *Town of Plattekill v. Ace Motocross, Inc., 87 A.D.3d 788, 928 N.Y.S.2d 151 (3d Dep't 2011)*

NEW YORK—This case addressed the issue of whether an operator of a nonconforming use, who had failed to apply to the zoning commission for nonconforming use authorization following an amendment to the municipal code that eliminated the nonconforming use but allowed for an "amortization period" of operation, could subsequently seek nonconforming use status in court.

The Background/Facts: Ace Motocross, Inc. ("Ace") operated a commercial motocross racetrack in the Town of Plattekill (the "Town"). In 2005, the Town enacted Chapter 110 of its Municipal Code. Part of that chapter prohibited the use of land for the operation of off-road motorized vehicles. The new law did include a "grandfather" provision, which allowed property owners who permitted such operations on their land to apply to the Town's Zoning Board of Appeals (the "ZBA") within 90 days of the law's enactment for a determination that such use was a preexisting nonconforming use prior to February 18, 1987. If so, the owner could receive authorization to continue the nonconforming operations for up to 10 years.

Ace, who claimed that its racetrack had been in operation since before 1987, did not apply to the ZBA for "grandfathered" prior nonconforming use status.

In early 2006, the Town's Code Enforcement Officer issued citations to Ace for its use of the property for commercial motocross racing in violation of the zoning law. When Ace did not cease its activities, the Town filed an action in court. The Town asked the court to permanently enjoin Ace from operating the racetrack. The Town asked the court to find that there were no material issues of fact in dispute and to decide the matter in its favor on the law alone.

The court granted the town's motion for summary judgment. The court permanently enjoined Ace from operating a commercial motocross track in violation of the zoning law.

Ace appealed. It asked the court to declare its racetrack a grandfathered, prior nonconforming use.

DECISION: Judgment of Supreme Court affirmed.

The Supreme Court, Appellate Division, Third Department, New York, held that Ace's failure to first apply to the ZBA for nonconforming use authorization precluded their counterclaim (i.e., their request that the court declare that the racetrack was a nonconforming use and could continue operating for at least ten years from enactment of the municipal code provision).

In so holding, the court noted that a municipality "may enact a zoning law that eliminates prior nonconforming uses in a 'reasonable fashion,' such as by providing for an 'amortization period' to allow a party to recoup expenditures by continuing the nonconforming use for a designated period of time." The Town's zoning law included such a provision. That provision allowed Ace an opportunity to apply for prior nonconforming use status. Nevertheless, Ace failed to do so. As such, they cannot seek such relief through the courts, concluded the court.

See also: *550 Halstead Corp. v. Zoning Bd. of Appeals of Town/Village of Harrison, 1 N.Y.3d 561, 772 N.Y.S.2d 249, 804 N.E.2d 413 (2003).*

See also: *Village of Valatie v. Smith, 83 N.Y.2d 396, 610 N.Y.S.2d 941, 632 N.E.2d 1264 (1994).*

See also: *Suffolk Outdoor Advertising Co., Inc. v. Hulse, 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263, 8 Envtl. L. Rep. 20185 (1977).*

Zoning News from Around the Nation

CALIFORNIA

Governor Jerry Brown recently signed into law legislation "that will allow local governments to count foreclosed property toward meeting their requirement for creating affordable housing."

Source: *Marin Independent Journal; www.marinij.com*

Approved by the state assembly and now being considered by Governor Jerry Brown is legislation "that would require [big box stores of more than 90,000 square feet that dedicate 10 percent of that space to nontaxable items such as food] ... to include an economic analysis as part of the routine local permitting process." Reportedly, the analysis required would be "similar to an environmental review but focused on fiscal impacts, [and] would account for a number of collateral costs in contrast to direct benefits created by the stores." Opponents, including Wal-Mart, ar-

gue the legislation would "stifle economic development" and "create another layer of bureaucracy." Proponents of the bill dispute these claims, noting that local officials could approve a store's application, even if the analysis proves economic costs outweigh benefits.

Source: *Sign On San Diego; www.signonsandiego.com*

Effective January 1, 2012, is a new law that allows local governments to regulate medical marijuana collectives and cooperatives. More specifically, Assembly Bill 1300 "establishes that local governments can enact and enforce local ordinances regulating the location, establishment, and operations of medical marijuana collectives or cooperatives."

Source: *The Van Nuys News Press; http://www.vannuysnewspress.com*

ILLINOIS

Governor Pat Quinn recently signed into law legislation "which allows municipalities with less than 500,000 people to adopt their own public hearing rules for zoning cases." The new law is meant to make the public hearing process more efficient. Opponents of the new law say it could allow municipalities "to institute undemocratic and unfair rules."

Source: *Chicago Daily Herald; www.dailyherald.com*

MICHIGAN

Among the several bills related to medical marijuana that are pending in the state legislature is a bill that would subject dispensaries to zoning guidelines

Source: *Port Huron Times Herald; www.thetimesherald.com*

PENNSYLVANIA

On July 1, 2011, Allentown created a Neighborhood Improvement Zone. Reportedly, "[t]he 130-acre Neighborhood Improvement Zone was primarily created to help pay for [a] hockey arena." Businesses in this new zone will not have to pay "additional state or local taxes, but the taxes they do pay will be deposited in a special fund overseen by the state treasurer [who will then] ... transfer those funds to the Allentown Commercial and Industrial Development Authority."

Source: *The Morning Call; www.mcall.com*

October 25, 2011 | Volume 5 | No. 20

QUINLAN™

Zoning Bulletin

in this issue:

WEST®

41059283

Validity of Ordinance (RLUIPA)—Zoning Ordinance Prohibits Religious Institutions but Allows Parks, Playgrounds, Recreation Centers

Church argues ordinance violates equal terms provision of RLUIPA

Citation: *Covenant Christian Ministries, Inc. v. City of Marietta, Georgia, 2011 WL 3903432 (11th Cir. 2011)*

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

ELEVENTH CIRCUIT (GEORGIA) (09/07/11)—This case addressed the issue of whether a zoning ordinance that prohibited all religious institutions in a number of residential districts, but permitted private parks, playgrounds, and neighborhood recreation centers in those districts, violated the equal terms provision of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). In addressing that issue, the case addresses whether private parks, playgrounds, and neighborhood recreation centers are "assemblies" within the meaning of RLUIPA.

The Background/Facts: Covenant Christian Ministries, Inc. ("Covenant") is a nondenominational church that conducts worship services and oper-

Contributors
Corey E. Burnham-Howard

Zoning Bulletin is published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526 St. Paul, MN 55164-0526. For subscription information: call (800) 229-2084, or write West, Credit Order Processing, 620 Opperman Drive, PO Box 64833, St. Paul, MN 55164-9753.

POSTMASTER: Send address changes to, Zoning Bulletin, 610 Opperman Drive, P.O. Box 64526 St. Paul, MN 55164-0526.

WEST®

610 Opperman Drive • P.O. Box 64526 • St. Paul, MN 55164-0526
1-800-229-2084 • email: west.customerservice@thomsonreuters.com • west.thomson.com/quinlan
ISSN 0514-7905 • © 2011 Thomson Reuters. All Rights Reserved.
Quinlan™ is a Thomson Reuters brand.

ates a private school. Covenant planned to build a larger church, a school, a gymnasium, and an activity field. In furtherance of those plans, in October 2004, Covenant entered into a contract to purchase approximately eight acres of property in an R-2 residential zone in the City of Marietta, Georgia (the "City"). Covenant closed on the purchase of that land in November 2005. It then sought a development permit from the City. At that time, the City informed Covenant that under a November 2004 zoning ordinance (the "2004 Ordinance"), religious institutions were prohibited in R-2 zones. Covenant then applied for rezoning, which the City denied.

Eventually, Covenant filed a lawsuit against the City. Among other things, Covenant alleged that the 2004 Ordinance, on its face, violated the equal terms provision of RLUIPA (42 U.S.C.A. § 2000cc(b)(1)).

RLUIPA's equal terms provisions states that: "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." (42 U.S.C.A. § 2000cc(b)(1).) A finding of a violation of this provision requires: (1) the party challenging the ordinance must be a religious assembly or institution that is (2) subject to a land use regulation that (3) treats the religious assembly on less than equal terms with (4) a nonreligious assembly or institution.

Covenant argued that since the 2004 Ordinance prohibited religious institutions in the R-2 zone but allowed private parks, playgrounds, and neighborhood recreation centers, the 2004 Ordinance facially differentiated between religious and nonreligious assemblies or institutions.

The district court agreed with Covenant.

The City later appealed.

DECISION: Affirmed.

The United States Court of Appeals, Eleventh Circuit, held that the 2004 Ordinance violated the equal terms provision of RLUIPA.

In so holding, the court rejected the City's contrary arguments.

The City had first argued that the 2004 Ordinance did not violation RLUIPA's equal terms provision because private parks, playgrounds, and neighborhood recreation centers did not qualify as "assemblies" under RLUIPA. The City argued they were not "assemblies" because those who attended such places were not assembling for a common purpose, but were there for differing reasons: some sought exercise, others sought relaxation or solitude. Thus, the City maintained it could treat those entities differently than religious assemblies without violating RLUIPA.

The court disagreed. It said: "That some individuals have different purposes for meeting in a particular place does not mean the place fails to qualify as an 'assembly' under RLUIPA." Rather, the court found that private parks, playgrounds, and neighborhood recreation centers were "assemblies" within the meaning of RLUIPA. The court said this was because they were "places where 'groups or individuals dedicated to similar purposes—whether

social, education, recreational, or otherwise—can meet together to pursue their interests.'"

The City also argued that, in any case, the 2004 Ordinance passed a strict scrutiny analysis since the prohibition on religious assemblies in residential areas was a narrowly tailored means of achieving the City's compelling interest in preserving residential neighborhoods and protecting those areas from traffic, crowds, and disruption.

Again, the court disagreed. The court concluded that the 2004 Ordinance did not pass strict scrutiny. The court said that "a complete prohibition of religious assemblies in residential zones [was not] a narrowly tailored means of achieving the City's interests ... ." The court found that recreation centers, parks, and playgrounds had a similar potential for community disruption, increased traffic, and encroachment into residential neighborhoods. Yet, the 2004 Ordinance permitted those such uses. The City was not protecting those interests from nonreligious conduct. Moreover, said the court, those interests "could be achieved by narrower ordinances that do not improperly distinguish between similar secular and religious assemblies."

See also: *Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004).*

See also: *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295 (11th Cir. 2006).*

Case Note: The district court had remedied the 2004 Ordinance's facial violation of RLUIPA by striking private parks, playgrounds, and neighborhood recreation centers from the list of permitted uses in residential zones. On appeal, Covenant had argued that the court erred and that the remedy should have been to add language allowing churches in residential zones. The court of appeals found the district court's remedy was "consistent with the purposes of the zoning restrictions in the R-2 zone." "By striking private parks, playgrounds, and neighborhood recreation centers, the district court remedied the unequal treatment problem while maintaining the residential character of the R-2 zone," said the court.

Case Note: Covenant had also argued that it had a vested right to a building permit because the 2004 Ordinance had been ruled to be partially invalid. The court of appeals rejected this vested rights argument. Covenant could not invoke a vested rights "equitable" argument since Covenant "did not reasonably rely on any act or omission by the City ... and did not investigate the zoning status of its property until after closing."

Enforcement—Landowner, ZBA Enter into Stipulated Judgment over Alleged Zoning Violations

After court finds landowner in contempt of judgment, he appeals arguing activities on his property were permitted

Citation: *Przekopski v. Zoning Bd. of Appeals of Town of Colchester, 131 Conn. App. 178, 26 A.3d 657 (2011)*

CONNECTICUT (09/06/11)—This case addresses the issue of whether after entering into a stipulated judgment in response to an allegation of a zoning violation, a landowner can later raise arguments that his activities were not in violation of zoning laws.

The Background/Facts: Leonard Przekopski, Jr. ("Przekopski") and his wife Karen Przekopski owned real property in the Town of Colchester, Connecticut (the "Town"). Przekopski used the property for a variety of industrial activities, including: the excavation and processing of sand and gravel; soil manufacturing; recycling of earth materials; and the bulk storage of manure.

In May 2006, the Town's zoning enforcement officer ordered Przekopski to cease and desist "any and all excavation, recycling activities, and build storage of manure" on the property until a zoning permit for such activities had been obtained. Przekopski appealed to the Town's Zoning Board of Appeals (the "ZBA"). The ZBA upheld the enforcement order.

Przekopski then appealed to the superior court. Eventually, Przekopski and the ZBA entered into a stipulation regarding the property. They agreed that judgment would be rendered in favor of the ZBA. They also agreed that Przekopski was required to file an application for a special exception from the zoning regulations for the excavation activities, and an application for a variance from the zoning regulations for the processing and recycling of earth materials. Under the stipulation, Przekopski was permitted to continue his activities "until the earlier of August 21, 2007, or April 23, 2007 [if Przekopski did not submit the applications, as stipulated]."

The Przekopskis submitted a special exception application to the Town's Planning and Zoning Commission (the "PZC"). On November 28, 2007, the PZC denied the application. However, Przekopski thereafter continued to conduct excavation and recycling activities on the property.

On February 25, 2008, the ZBA filed a motion for contempt. The court ordered the excavation and recycling activities on the Przekopskis' property to cease. The court also provided that if such operations did not cease by March 17, 2008, a fine of $1,000 per day would be ordered. Under a March 19, 2008, order, the court extended the deadline to cease operations to March 26, 2008, with the fine retroactive to March 19, 2008, if operations did not cease.

In April 2008, the court issued an order of judgment of $28,000 against Przekopski for 28 days of their violation of its order.

Przekopski appealed. Among other things, Przekopski argued that he could not be found in contempt of the stipulation because: (1) his activities constituted preexisting, nonconforming uses of the property protected by the laws of Connecticut; and (2) his activities constituted uses permitted as of right under the zoning regulations.

DECISION: Affirmed in relevant part.

The Appellate Court of Connecticut held that Przekopski, by entering into the stipulated judgment, waived his right to claim that his operations were permitted.

The court explained that a stipulated judgment is defined "as a contract of the parties acknowledged in open court." The court said that, "in the absence of language evidencing an intent to preserve specific issues or claims for further litigation, it is presumed that the parties intended for the stipulated judgment to resolve all contested issues and claims raised in the record." In other words, in a stipulated judgment, the parties "waive their right to litigate issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation." In exchange for the saving of cost and elimination of risk, the parties "each give up something they might have won had they proceeded with the litigation."

Both the arguments raised by Przekopski on appeal—that his activities constituted preexisting, nonconforming uses of the property and/or uses permitted as of right—were contested issues prior to the stipulated judgment. Rather than pursue these claims that the activities qualified as such uses, Przekopski entered into the stipulation and elected to have the court render the stipulated judgment. After reviewing the stipulation and the stipulated judgment, the appellate court found neither contained any language evidencing the parties intended to preserve the issues as to whether the activities qualified as preexisting, nonconforming uses or uses permitted as of right.

The court concluded by upholding the trial court's conclusion that Przekopski performed nonpermitted activities on his property in violation of the court's order.

See also: *Bank of Boston Connecticut v. DeGroff, 31 Conn. App. 253, 624 A.2d 904 (1993).*

See also: *Albert Mendel and Son, Inc. v. Krogh, 4 Conn. App. 117, 492 A.2d 536 (1985).*

Variance—Court Says Issuance of Special Permit under State Statute is All That is Needed for Project to Proceed

City and neighbor maintain local zoning ordinance requirements also apply

Citation: *Gale v. Zoning Bd. of Appeals of Gloucester, 80 Mass. App. Ct. 331, 952 N.E.2d 977 (2011)*

MASSACHUSETTS (09/02/11)—This case addresses the issue of whether the application of a local ordinance (such as a requirement to obtain a variance) is precluded by an affirmative finding under Mass. Gen. L. c. 40A, § 6, by a local zoning board, that changes to an existing, nonconforming structure would not be "substantially more detrimental" to the neighborhood and a special permit should issue. In other words, is such an affirmative finding alone sufficient to proceed with the proposed project?

The Background/Facts: The Footes owned land on Squam Rock Road in Gloucester, Massachusetts (the "City"). It was located in an R-2 residential zoning district, and situated on the coastal peninsula of Annisquam, on Cape Ann, with ocean views of Ipswich Bay. The Foote property contained a 1,000-square-foot seasonal cottage. The property did not conform to the requirements of the City's zoning ordinance (the "ordinance") regarding: lot area; side yard setback; front yard setback; and rear yard setback. Those nonconformities predated the enactment of the ordinance, rendering the Foote cottage a preexisting nonconforming structure.

In 2008, the Footes sought to replace the cottage with a larger year-round residence. They planned a new 2,700-square-foot, two-bedroom structure, which would exceed the bounds of the existing footprint.

In furtherance of the planned new construction, the Footes petitioned the City's Zoning Board of Appeals (the "ZBA") for: (1) a special permit pursuant to Mass. Gen. L. c. 40A, § 6; and (2) a variance pursuant to § 2.4.5(d) of the ordinance.

Under G.L. c. 40A, § 6: a preexisting nonconforming structure or use may be changed, extended, or altered if it is not "substantially more detrimental" to the character of the neighborhood than the original structure or use, as determined by the local permit granting authority.

Under § 2.4.5(d) of the ordinance, portions of a replacement structure must meet the dimensional requirements of the ordinance, unless a variance is granted by the ZBA.

The ZBA eventually granted the Footes a special permit, finding that: "even if there is an intensification of any nonconformities, the house as reconstructed ... will not be substantially more detrimental to the neighborhood than the existing nonconforming structure ... ." The ZBA also granted the variance, finding that because of the shape and grade of the lot, the Foo-

tes would face a unique personal and financial hardship if the dimensional requirements of the zoning ordinance were enforced.

Abutting property owners of the Footes, the Gales, appealed the ZBA's decision to Land Court. They argued that the variance was granted in error. They contended that the topography and shape of the Footes' lot were not extraordinary. They also argued that lot shape was not a proper legal consideration in determining whether a variance should be granted.

The Land Court affirmed the ZBA's decision. The judge held that a finding under G.L. c. 40A, § 6 would have been sufficient to allow reconstruction of the structure; a variance was not legally required.

The Gales appealed. They argued that "the local requirement of seeking a variance pursuant to § 2.4.5(d) of the ordinance, in addition to the G.L. c. 40A, § 6, finding, [was] not precluded by the language of the statue." In other words, the Gales argued that the language of G.L. c. 40A, § 6 did not allow for reconstruction of a structure based only on the findings that the structure would not be "substantially more detrimental" to the character of the neighborhood than the original structure or use; rather, argued the Gales, if a local ordinance additionally required a variance—as here—then that too must be obtained. Here, the variance was improperly granted, argued the Gales.

The ZBA also filed a brief, maintaining that the City had the authority to require certain variances under § 2.4.5(d). The ZBA also argued that the variance here was properly granted.

DECISION: Affirmed.

After analyzing the statutory language, the Appeals Court of Massachusetts held that if there is a finding of "no substantial detriment" under G.L. c. 40A, § 6, that finding alone is "sufficient to proceed with the proposed project"—and the applicant is entitled to issuance of a special permit; when there is such an affirmative finding, the statute precludes the application of a local by-law or ordinance as an additional step.

The court concluded that, here, the ZBA's finding of "no substantial detriment" was all that was required; no variance under the ordinance was needed to proceed with the Footes' proposed reconstruction.

See also: *Bransford v. Zoning Bd. of Appeals of Edgartown, 444 Mass. 852, 832 N.E.2d 639 (2005).*

See also: *Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 514 N.E.2d 369 (1987).*

Case Note: The court noted that its interpretation of the statutory language was "in keeping with special treatment explicitly afforded to single or two-family residential structures under the statute."

Rezoning—Permit Recipient Says Opponent's Appeal is Untimely under LUPA

Parties dispute whether LUPA's time limit for appeal is tolled by the filing of a motion for reconsideration

Citation: *Mellish v. Frog Mountain Pet Care, 172 Wash. 2d 208, 257 P.3d 641 (2011)*

WASHINGTON (07/28/11)—This case addresses the issue of whether a motion for reconsideration filed by a landowner with a county hearing examiner tolls the running of the 21-day time limit under Washington's Land Use Petition Act ("LUPA") for the landowner to file a land use petition in superior court until such time as the motion for reconsideration is decided.

The Background/Facts: Harold and Jane Elyea owned Frog Mountain Pet Care ("Frog Mountain") in Jefferson County, Washington (the "County"). Frog Mountain applied to the county for a conditional use permit and a variance to expand their dog and cat boarding facility. On June 18, 2007, a County hearing examiner granted Frog Mountain's application. A land use permit issued to Frog Mountain on June 20, 2007.

Frog Mountain's neighbor, Martin Mellish ("Mellish"), opposed the expansion of the animal boarding facility. He asserted that the proposed expansion would increase noise from the facility. On June 28, 2007, Mellish filed a motion for reconsideration with the hearing examiner.

On July 20, 2007, the hearing examiner denied Mellish's motion for reconsideration.

On August 10, 2007, Mellish filed a land use petition in superior court pursuant to LUPA. This filing occurred 20 days after the County mailed notice of the hearing examiner's decision denying Mellish's motion for reconsideration, and 50 days after entry of the hearing examiner's decision granting Frog Mountain's application.

Frog Mountain moved to dismiss Mellish's land use petition as untimely.

Under LUPA (RCW 36.70C.040(3)), the applicant or any aggrieved party may appeal the final decision to superior court "within twenty-one days of the issuance of the land use decision." A "land use decision" is defined as "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination." (RCW 36.70C.020(2)).

Frog Mountain asserted that the 21-day time-limit on filing the petition ran from the date of the hearing examiner's original decision.

Mellish and the County (though on opposite sides of the underlying lawsuit) contended that the time limit for filing the lawsuit ran from the date Mellish's motion for reconsideration was denied. As such, they argued that Mellish's land use petition was timely.

The superior court agreed with Mellish and the County. It denied Frog Mountain's motion to dismiss. It then reached the merits of Mellish's land use petition and reversed the County's decision to grant the permit.

Frog Mountain appealed, arguing the superior court erred in denying its motion to dismiss. The Court of Appeals reversed the trial court. Agreeing with Frog Mountain, it held that the hearing examiner's original decision was the "final determination" that triggered the time limit for filing a land use petition. Accordingly, it held that Mellish's motion for reconsideration did not toll the filing deadline, and Mellish's land use petition was untimely.

Mellish appealed.

DECISION: Reversed.

The Supreme Court of Washington held that the motion for reconsideration Mellish filed with the county hearing examiner tolled the finality of the examiner's initial decision for the purposes of filing a land use petition in superior court. Accordingly, Mellish's land use petition was timely.

The court so held based on its determination that the hearing examiner's decision on the reconsideration motion was a "final determination" from which the 21-day period of time to file an appeal is triggered. The court noted that a decision is "final" if it "leaves nothing open to further dispute and which sets at rest cause of action between parties."

The court found that, here, after Mellish filed his motion for reconsideration, Frog Mountain's "entitlement" to the permit was once again "open to ... dispute." Thus, the court found "the action was only 'conclude[d]' when the hearing examiner issued a decision on the reconsideration motion on July 20."

Moreover, the court noted the "practical problems" with interpreting LUPA differently. If Mellish filed a land use petition without waiting for the hearing examiner's decision on the reconsideration motion, Mellish would lack standing because he would not have exhausted administrative remedies yet—as required by LUPA (RCW 36.70C.060(2)(d)). On the other hand, if Mellish were to wait, and the original hearing examiner's decision was considered the "final determination" that triggered the filing period, then the 21-day deadline could expire before the hearing examiner issued a decision. Given this practical problem under such an interpretation, the court found it clear that the "final determination" from which the 21-day period of time to file an appeal was triggered was the hearing examiner's decision on the reconsideration motion.

See also: *Samuel's Furniture, Inc. v. State, Dept. of Ecology, 147 Wash. 2d 440, 54 P.3d 1194 (2002).*

See also: *Skinner v. Civil Service Com'n of City of Medina, 146 Wash. App. 171, 188 P.3d 550 (Div. 1 2008), review granted, 165 Wash. 2d 1040, 204 P.3d 215 (2009).*

Case Note: The State of Washington legislature has since amended LUPA (under House Bill 2740 in 2010) to clarify that, when a timely motion for reconsideration of a local land use decision is filed, the date of the land use decision triggering the 21-day time limit for filing a land use petition in superior court is the date the local jurisdiction's decision on a motion for reconsideration is entered. RCW 36.70C.020(2)(c) now includes this provision:

> Where a local jurisdiction allows or require a motion for reconsideration to the highest level of authority making the determination, and a timely motion for reconsideration has been filed, the land use decision occurs on the date a decision is entered on the motion for reconsideration, and not the date of the original decision for which the motion for reconsideration was filed.

Case Note: Because the Supreme Court held that a motion for reconsideration filed with a county hearing examiner tolled the finality of the hearing examiner's initial decision, the court found it "unnecessary" for it to consider whether House Bill 2740 applied retroactively.

Zoning News from Around the Nation

MARYLAND

The Baltimore County Council recently adopted regulations for "accessory apartments" in single-family homes. "Accessory apartments" are now limited to such apartments for relatives of homeowners and to size standards. Opponents reportedly fear the "bill could potentially allow neighborhoods to become much more densely populated than zoning rules now allow."

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

MICHIGAN

The Huron County Board of Commissioners was recently expected "to vote on a resolution that would impose a moratorium on any new wind overlay districts until the State of Michigan makes a determination regarding the various proposals to eliminate the personal property tax." Under county ordinance, any wind development requires the creation and approval of a wind overlay district. Personal property taxes are "the only tax local units of government receive from wind developments."

Source: *Huron Daily News; www.michigansthumb.com*

NEW YORK

The town of Dryden has been sued by a natural-gas company, Anschutz Exploration, "in an effort to strike down a recent zoning law prohibiting gas drilling [in Dryden]." "More than a dozen municipalities in New York have enacted gas-drilling bans or restrictions amid controversy over hydraulic fracturing, or 'fracking.'" In the lawsuit against Dryden, Anschutz reportedly contends that the state of New York has the power to regulate the oil-and-gas industry, and local governments only have the power to regulate the industry's use of roads.

Source: *Bloomberg Businessweek; www.businessweek.com*

NORTH CAROLINA

A new state law has broadened the definition of "farm." The new law "increases the number of ways landowners can prove they operate a farm. One new way is by having a farm number, which is issued by the Farm Service Agency of the U.S. Department of Agriculture." Reportedly, local officials fear that "in a rapidly urbanizing area, the new state law could cause a problem because of the zoning exemption"—particularly when nontraditional farming may now meet the "farm" definition and thus be exempted from certain zoning laws.

Source: *StarNews Online; www.starnewsonline.com*

WASHINGTON

The Western Washington Growtsh Management Hearings Board recently upheld Whatcom County's "one house per two acres" zoning regulation. An "anti-sprawl group," Futurewise had challenged the zoning regulations, arguing that it allowed for "too dense of development, precluding rural land uses." The Board found that because the zoning areas were "limited," then "[c]ontained in [that] manner," the zoning did "not pose a threat to the County's rural character." Had the regulation covered "an extensive area," the Board reportedly agreed with Futurewise that it would have violated state law.

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

WISCONSIN

The Wisconsin Supreme Court recently heard oral arguments "regarding a much-anticipated challenge to the state's livestock siting law." "[T]he Court's decision is expected to establish a precedent as to how the state's livestock facility permitting process interacts with local zoning authority. The law was designed to create uniform rules for siting livestock operations in the state and was enacted with bipartisan support." It is expected that the court's decision will issue in a few months.

Source: *Dairy Herd Network; www.dairyherd.com*

QUINLAN™

November 10, 2011 | Volume 5 | No. 21

Zoning Bulletin

in this issue:

WEST®

41059284

Validity of Regulation—Ordinance Prohibits "Formula Fast-Food Restaurants" in Business District

Property owner says ordinance unconstitutionally regulates land-use based on the owner

Citation: *Mead Square Commons, LLC v. Village of Victor, 2011 WL 4537068 (N.Y. Sup 2011)*

NEW YORK (09/30/11)—This case addresses the issue of whether an ordinance prohibiting "Formula Fast-Food Restaurants" is unconstitutional.

The Background/Facts: Mead Square Commons, LLC ("Mead") owned real property in the Central Business District in the Village of Victor (the "Village"). Mead proposed a new mixed use building for its property. One of the potential tenants for that proposed building was a Subway restaurant.

The Village Code § 170-13 prohibited "Formula Fast-Food Restaurants" in the Village's Central Business District. "Formula Fast-Food Restaurants" ("FFFRs") were defined as any establishment that is re-

Contributors
Corey E. Burnham-Howard

Zoning Bulletin is published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526 St. Paul, MN 55164-0526. For subscription information: call (800) 229-2084, or write West, Credit Order Processing, 620 Opperman Drive, PO Box 64833, St. Paul, MN 55164-9753.

POSTMASTER: Send address changes to, Zoning Bulletin, 610 Opperman Drive, P.O. Box 64526 St. Paul, MN 55164-0526.

WEST®

610 Opperman Drive • P.O. Box 64526 • St. Paul, MN 55164-0526
1-800-229-2084 • email: west.customerservice@thomsonreuters.com • west.thomson.com/quinlan
ISSN 0514-7905 • © 2011 Thomson Reuters. All Rights Reserved.
Quinlan™ is a Thomson Reuters brand.

quired by "contract, franchise or other arrangements" to offer two or more of the following: standardized menus, food preparation and/or uniforms; prepared food in ready to consume states; food sold over the counter in disposable containers and wrappers; food selected from a limited menu; food sold for immediate consumption on or off premises; and customer payment before eating.

Because its potential tenant, Subway, was an FFFR prohibited from the Village's Central Business District, Mead challenged the validity of § 170-13. Mead alleged that the ordinance was "unconstitutional and illegal under New York State law and the United States Constitution." Mead argued that the ordinance was illegal because its prohibition on FFFR was "based, not upon the characteristics of the restaurant, but upon whether or not the owner or operator is under some contractual or franchise arrangement to utilize FFFR criteria." Zoning regulations can only deal with land use, not with the people who own or occupy the land, argued Mead.

The Village asserted that § 170-13 had a legitimate purpose "to maintain the unique village character and vitality of the commercial district." The Village maintained the ordinance was not based on who owned or operated the restaurant; rather it applied to all types of owners equally and it merely prohibited everyone from operating an FFFR within that district, said the Village.

Both parties filed motions for summary judgment, asking the court to find that there were no material issues of fact in dispute and to decide the matter in their favor on the law alone.

DECISION: Village's motion granted.

The Supreme Court, Ontario County, New York, held that § 170-13 was not an improper regulation of a specific entity. The ordinance was not unconstitutional. The FFFR ordinance, found the court, was not based simply upon who owned or operated the restaurant. All land-use laws relate to the owner to some extent, noted the court. The court found that this ordinance was not unconstitutional in that it was not "plainly personal" and did not seek to regulate a specific entity. The court found that the ordinance treated all similarly situated owners identically and was based on "neutral planning and zoning principles." Section 170-13, found the court, "applie[d] to the entire business district and addresse[d] conduct that affect[ed] the character of the community."

See also: *Dexter v. Town Bd. of Town of Gates, 36 N.Y.2d 102, 365 N.Y.S.2d 506, 324 N.E.2d 870 (1975).*

Preemption—City Ordinance Regulates the Location of Video Lottery Machines

Business operator challenges ordinance, saying it is preempted by state's video lottery scheme

Citation: *Law v. City of Sioux Falls, 2011 SD 63, 2011 WL 4395979 (S.D. 2011)*

SOUTH DAKOTA (09/21/11)—This case addresses the issue of whether the State of South Dakota intended to fully occupy the field of video lottery, to the exclusion of municipal regulation—including zoning regulation of the placement of video lottery machines.

The Background/Facts: Rick Law ("Law") sought to operate on-sale alcoholic beverage establishments with video lottery machines in the City of Sioux Falls (the "City"). The City's Ordinance 60-80 required that an on-sale alcoholic beverage business seeking to place video lottery machines in the establishment must meet certain location requirements and apply for a conditional use permit with the City Planning Commission. Law did not apply for a conditional use permit because he believed each of this proposed locations would fail under the requirements of Ordinance 60-80. Instead, Law brought a declaratory action against the City. He asked the court to determine the constitutionality of Ordinance 60-80. He alleged that the Ordinance was unconstitutional because the City had exceeded its authority in enacting the ordinance. He said this was because the State of South Dakota (the "State") had fully occupied the field of video lottery regulation, preempting any municipal regulation.

The City countered that Ordinance 60-80 did not regulate video lottery, but was a zoning ordinance, enacted through a valid exercise of the City's police powers.

The South Dakota Lottery intervened in the action, agreeing with Law's position.

The circuit court also agreed with Law.

The City appealed. The City argued that Ordinance 60-80 was valid because South Dakota law authorized the adoption of zoning ordinances that restrict the location and use of buildings for the "purpose of promoting health, safety, or the general welfare of the community." The City maintained that, among other things, Ordinance 60-80 did not regulate video lottery, but controlled, through zoning, the location and use of buildings housing video lottery machines in order to protect the health, safety, and general welfare of City residents.

DECISION: Affirmed.

The Supreme Court of South Dakota rejected the City's argument and held that Ordinance 60-80 was preempted by South Dakota's legislative

lottery scheme. In so holding, the court found that the state intended to fully occupy the field of video lottery, to the exclusion of municipal regulation.

The court explained that "[a] municipality may exercise any power or perform any function not prohibited by [state or federal] constitution or laws." While municipalities clearly have the power to enact zoning ordinances, "no municipality may enact a law regulating a subject where the State has wholly occupied the field of that subject, to the exclusion of any local regulation."

Here the court found no express legislative directive controlling video lottery to the exclusion of local regulation. However, the court found that "the scope and power exerted by the Legislature and the character of the obligations imposed by its statutes reflect[ed] legislative intent to be exclusive in the field [of video lottery regulation]."

Having found that the state intended to fully occupy the field of video lottery, to the exclusion of municipal regulation, the court found it "immaterial that the City is governed by a home-rule charter or empowered to enact zoning regulations. ... Once the City enacted Ordinance 60-80, regulating the placement of video lottery machines, the City exceeded its authority."

See also: *Minnesota Agr. Aircraft Ass'n v. Township of Mantrap, 498 N.W.2d 40 (Minn. Ct. App. 1993).*

See also: *Sarasota Alliance For Fair Elections, Inc. v. Browning, 28 So. 3d 880 (Fla. 2010).*

Case Note: The South Dakota Lottery had noted that although control of video lottery was delegated to the Lottery, municipalities maintained their zoning authority to control the location of alcoholic beverage establishments.

Conditions—Board Approves Site Plan Application with Condition that Size of Proposed Structure be Reduced

Applicant argues Board exceed its authority since structure met code's dimensional requirements

Citation: *Greencove Associates, LLC v. Town Bd. of Town of North Hempstead, 929 N.Y.S.2d 325 (App. Div. 2d Dep't 2011)*

NEW YORK (09/20/11)—This case addressed the issue of whether a town's board of approval had the power to impose a condition that re-

duced the size of a proposed structure, even when that structure met dimensional code requirements.

The Background/Facts: Greencove Associates, LLC ("Greencove") owned a 5.26 acre parcel of property (the "Property") in the Town of North Hempstead, New York (the "Town"). The Property was improved by a commercial shopping center. When the shopping center had first been constructed in 1959, a restriction was imposed requiring the maintenance of a landscaped buffer (the "Buffer") along a portion of the property. Following a 1999 expansion of the shopping center, the Buffer measured, on average, 22 feet in width.

In 2010, Greencove sought to expand the shopping center. It submitted to the Nassau County Planning Commission ("NCPC") an application for approval to construct a new 10,000-square-foot structure in the southwest corner of the property. As proposed, the structure would encroach on the Buffer, reducing it to a width of four or five feet.

The NCPC recommended approval of the site plan application with a modification reducing the size of the new structure to approximately 6,800 square feet. The NCPC said this would "enable the structure to better fit into the irregular-shaped site ... while maintaining the existing [B]uffer."

Eventually the Town Board of the Town of North Hempstead (the "Board") approved Greencove's site plan application, with the condition that the size of the proposed structure be reduced to 6,800 square feet.

Greencove appealed. Greencove noted that the proposed 10,000-square-foot building was dimensionally code compliant. Greencove argued that the condition requiring a reduction in the size of the building exceed the Board's powers.

DECISION: Greencove's petition denied.

The Supreme Court, Appellate Division, Second Department, New York, held that the challenged condition was within the Board's power to impose.

The court pointed to Town Law § 274-a(2)(a), which authorized the Board to review site plans based on certain land use elements, including "screening," "landscaping," and "dimension of buildings." The Town Code provided that in making its considerations as to whether or not to approve a site plan, the Board must consider, among other things, "[o]verall impact on the neighborhood, including compatibility of design considerations and adequacy of screening from residential properties." The court also noted that the Board could impose a condition upon property so long as there was a "reasonable relationship between the problem sought to be alleviated and the application concerning the property."

Citing the Town Law and Town Code, the court found that the Board had authority to impose the contested condition. The court also found

that the contested condition "was a reasonable means of assuring that the existing landscaped buffer, which was designed to screen the adjacent residential neighborhood from the effects of the shopping center, would be preserved." Thus, although the 10,000-square-foot proposed structure was dimensionally code compliant, it could not be placed on the Property without encroaching on the existing Buffer. The Board's condition of reduction in the size of the proposed structure had a reasonable relationship to ensuring the shopping center remained screened from the residential neighborhood.

See also: *International Innovative Technology Group Corp. v. Planning Bd. of Town of Woodbury, 20 A.D.3d 531, 799 N.Y.S.2d 544 (2d Dep't 2005).*

Uses—Village Orders Property Owners to Cease and Desist Commercial Horse Boarding Use

Owners argue commercial horse boarding is agricultural use permitted in their zoning district

Citation: *LeCompte v. Zoning Bd. of Appeals for Village of Barrington Hills, 2011 IL App (1st) 100423, 2011 WL 4436247 (Ill. App. Ct. 1st Dist. 2011)*

ILLINOIS (09/21/11)—This case addresses the issue of whether property owners' commercial boarding of horses was an "agricultural" use, and thus permitted in their zoning district. The case involved statutory analysis.

The Background/Facts: Dr. Benjamin LeCompte and Cathleen LeCompte (the "LeComptes") owned approximately 130 acres of property in an R-1 (residential) district in the Village of Barrington Hills, Illinois (the "Village"). The LeComptes' property consisted of a single-family residence, as well as a stable and a riding arena which was approximately 30,000 square feet. Of the 45 horses boarded at the LeComptes' "Oakwood Farm," 35 were owned by third parties. In addition to commercially boarding horses, the LeComptes raised, trained, and sold horses.

In January 2008, the Village's attorney delivered a cease and desist letter to the LeComptes. The letter stated that the LeComptes' property, Oakwood Farm, was being used as a commercial horse boarding facility in violation of the Village's Zoning Code. The letter ordered the LeComptes to cease and desist using the property for the nonpermitted use.

Under § 5-5-2 of the Village's Zoning Code, "agriculture" was a permitted use in an R-1 zoned district. Section 5-2-1 of the Code defined "agriculture" as: "[t]he use of land for agricultural purposes, including

farming, dairying, pasturage ... and animal ... husbandry (including the breeding and raising of horses as an occupation."

The LeComptes appealed. They argued that commercial horse boarding was a permitted agricultural use under the Code. They argued that the terms "breeding and raising of horses" encompassed the boarding of horses. The LeComptes also focused on the term "including" that was used in § 5-5-1's definition of "agriculture." They argued that the use of the term "including" meant that the list of agriculture uses was illustrative not exhaustive. They contended that since the Village referred to the "breeding and raising of horses," the Village intended for the commercial boarding of horses to be a use included in that list of permitted "agriculture" uses. The LeComptes further argued that their operation of a commercial boarding facility was permissible because § 5-3-4(A) of the Code restricted the Village from "impos[ing] regulations or requir[ing] permits with respect to land used ... for agricultural purposes."

The Village disagreed. It maintained that the commercial boarding of horses was not a permitted use in an R-1 zoned district. It further maintained that the LeComptes' commercial boarding facility was not compatible with the other single-family residences in the R-1 zoned district.

The Village's Zoning Board of Appeals (the "ZBA") found: (1) that the LeComptes were operating a commercial boarding facility in an R-1 zoned district; (2) that the commercial boarding of horses was not a permitted agricultural use in an R-1 zoned district; and (3) that because the commercial boarding of horses was not a permitted agricultural use, § 5-3-4(A) did not apply.

The LeComptes appealed.

The circuit court affirmed the ZBA's decision.

The LeComptes again appealed.

DECISION: Affirmed.

The Appellate Court of Illinois held that the LeComptes' commercial boarding of horses was not "agriculture" and thus was not permitted in their R-1 district.

The court agreed with the LeComptes' argument that the use of the term "including" in the Code's definition of "agriculture" meant the list was only partial and not exhaustive. However, the court said that unless the boarding of horses was "similar to other uses in the definition," the boarding of horses could not be said to be a use meant to be included in that list. Analyzing dictionary definitions of "breeding and raising" (uses specifically listed as "agriculture" under the Code) and "boarding," the court found that "a person who boards horses engages in different acts from a person who breeds and raises horses." The court also found that the Code's definition of "animal husbandry"—a use permitted as an agriculture use under the Code—did not include the commercial boarding of horses as part of its definition. The court thus concluded that the

drafters of the Code did not intend for the commercial boarding of horses to be included in the definition of agriculture as a use for agricultural purposes.

The court also rejected the LeComptes argument that § 5-3-4(A) of the Code applied. Again, § 5-3-4(A) of the Code restricted the Village from "impos[ing] regulations or require[ing] permits with respect to land used ... for agricultural purposes." The court concluded that because the LeCompt-es' property was used primarily for the commercial boarding of horses, which was not a use for agricultural purposes, § 5-3-4(A) did not apply.

See also: *People v. Perry, 224 Ill. 2d 312, 309 Ill. Dec. 330, 864 N.E.2d 196 (2007).*

See also: *Cosmopolitan Nat. Bank v. Cook County, 103 Ill. 2d 302, 82 Ill. Dec. 649, 469 N.E.2d 183 (1984).*

Determination—Planning Board's Written Denial of Application Fails to Enumerate Reasons for Denial

Applicant says denial is inadequate, but Board says meeting minutes detailed reasons

Citation: *Limited Editions Properties, Inc. v. Town of Hebron, 2011 WL 4398544 (N.H. 2011)*

NEW HAMPSHIRE (09/22/11)—This case addresses the issue of what is required for a local planning board's statement of the grounds of disapproval of an application to be "adequate" under New Hampshire statutory law.

The Background/Facts: Limited Editions Properties, Inc. ("LEP") owned 112.5 acres of property in Hebron, New Hampshire (the "Town"). LEP applied to the Town's Planning Board (the "Board") for approval to develop a 20-lot subdivision on the property. The Board voted to deny the application. LEP appealed to superior court.

On appeal, LEP argued, among other things, that the Board, in disapproving LEP's application, failed to provide an adequate record "capable of meaningful review."

New Hampshire statutory law, RSA 676:4, I(h) requires: "In case of disapproval of any application submitted to the planning board, the ground for such disapproval shall be adequately stated upon the records of the planning board."

The superior court found the Board's record was sufficient and upheld the Board's decision.

LEP appealed.

DECISION: Affirmed.

The Supreme Court of New Hampshire held that the Board adequately stated on the record the grounds for disapproval of LEP's application.

The court explained that the adequate record requirement of RSA 676:4, I(h) "anticipates an express written record that sufficiently apprises an applicant of the reasons for disapproval and provides an adequate record of the board's reasoning for review on appeal." The court said the statutory requirement could be satisfied by "[a] written denial letter combined with the minutes of a planning board meeting."

Here, the Board's written letter of denial did not enumerate the reasons for denying LEP's application. Accordingly, the court looked to see whether the Board's meeting minutes adequately stated the reasons for disapproval.

Minutes from a January 6, 2010, meeting showed that: one Board member voted against approval for aesthetic reasons; another member voted against approval for safety and aesthetic reasons; and a third member voted against approval for environmental concerns.

LEP argued that because the votes cast to deny the application reflected "individual sentiments rather than collective consensus," the Board's "general denial" of the application was not adequate. The court disagreed, finding the record "adequately reflect[ed] the Board's reasons for denying the application." The record showed that the Board had discussed many aspects of the proposed plan during the deliberative session. The record also showed that the Board" identified concerns and unresolved issues regarding the proposed subdivision's impact on aesthetics, the environment, and the safety of persons and property." Moreover, the Board discussed the need to provide reasons for the denial. The meeting transcript detailed three Board members' positions, and it revealed that the Board's further discussion indicated that it agreed that the recitation of those positions described its reasons for denial. The court concluded that the Board's denied of LEP's application based on "aesthetics ... , safety concerns, and environmental concerns" was sufficient.

See also: *Motorsports Holdings, LLC v. Town of Tamworth, 160 N.H. 95, 993 A.2d 189 (2010).*

Case Note: LEP had made other arguments in appealing the denial of its application. The court also rejected those arguments.

Zoning News from Around the Nation

ALABAMA

The City of Birmingham is considering zoning restrictions for methadone clinics. A proposed zoning law would prohibit methadone clinics within 1,000 feet of a home, school, or church.

Source: *WBRC; http://www.myfoxal.com*

The City of Northport is considering proposed zoning rules related to group homes. Among other things, the proposed amendments would: "[m]andate that no more than three unrelated people can live in the home, while allowing caretakers who don't live there"; and "[r]equire that group homes be at least one mile away from one another." Reportedly, the Alabama Disabilities Advocacy Program has lodged a complaint of housing discrimination with the federal Department of Housing and Urban Development over the proposed rules.

Source: *Tuscaloosa News; www.tuscaloosanews.com*

CALIFORNIA

Santa Barbara County recently approved a permanent ban on storefront medical marijuana dispensaries in the county's unincorporated areas.

Source: *The Santa Ynez Valley Journal; www.santaynezvalleyjournal.com*

ILLINOIS

DuPage County was expected to vote recently on a proposed set of zoning amendments that were "geared toward reducing the impact of new religious facilities on unincorporated residential neighborhoods." Proposed amendments would "address infrastructure, traffic and building size issues related to churches, mosques and other places of assembly in residential areas."

Source: *Chicago Daily Herald; www.dailyherald.com*

MARYLAND

Seven community associations, along with nine residents, recently filed a lawsuit against Anne Arundel County. The lawsuit contends that the County violated state laws when, in adopting 11 zoning amendments, it allegedly ignored the County's General Development Plan that called for "limited residential and commercial development."

Source: *The Capital; http://www.hometownannapolis.com*

NEW YORK

Four Tompkins County towns at the south end of Cayuga Lake have recently passed zoning amendments "affirming the inappropriateness of natural-gas drilling and support activities as land uses within their borders" (i.e., "anti-fracking" laws).

Source: *The Ithaca Journal; www.ithacajournal.com*

NORTH CAROLINA

New Hanover County's industrial zoning ordinance has been amended to now "require heavy industry to acquire a special-use permit before locating in the region." The new 60-day special use permitting process requires: (1) a $400 application fee; (2) planning board review; and (3) planning board recommendation to the county commissioners.

Source: *Lumina News; www.luminanews.com*

November 25, 2011 | Volume 5 | No. 22

QUINLAN™

Zoning Bulletin

in this issue:

WEST®

41059285

Time for Proceedings—Neighbor Appeals Issuance of Building Permit to Abutting Landowner

He argues his appeal is timely under "alternative" path offered by state statutory law

Citation: *Connors v. Annino, 460 Mass. 790, 2011 WL 5042220 (2011)*

MASSACHUSETTS (10/26/11)—This case addressed the remedies and timeframe for seeking remedies that are available under Massachusetts statutory law—the Zoning Act, G.L. c. 40A—to one who is aggrieved by the issuance of a building permit to another person.

The Background/Facts: Anthony Annino, II, trustee of 89-91 Overland Road Realty Trust ("Annino"), planned to demolish and replace an existing two-family structure on his property in Waltham, Massachusetts. Annino filed applications for two building permits with the city's building department. Two days later, on July 30, 2008, Annino's neighbor, Robert E. Connors, Jr. ("Connors"), learned about them.

On August 20, Connors sent a letter to the building commissioner. In that letter, he laid out a legal argument opposing Annino's requested building permits. Connors asked the building commissioner to deny the applications or alternatively forward them to the city's zoning board of appeals

Contributors
Corey E. Burnham-Howard

Zoning Bulletin is published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526 St. Paul, MN 55164-0526. For subscription information: call (800) 229-2084, or write West, Credit Order Processing, 620 Opperman Drive, PO Box 64833, St. Paul, MN 55164-9753.

POSTMASTER: Send address changes to, Zoning Bulletin, 610 Opperman Drive, P.O. Box 64526 St. Paul, MN 55164-0526.

WEST®

610 Opperman Drive • P.O. Box 64526 • St. Paul, MN 55164-0526
1-800-229-2084 • email: west.customerservice@thomsonreuters.com • west.thomson.com/quinlan
ISSN 0514-7905 • © 2011 Thomson Reuters. All Rights Reserved.
Quinlan™ is a Thomson Reuters brand.

(the "board"). The building commissioner did not respond immediately to the letter.

On September 15, 2008, the building inspector issued two building permits to Annino. Connors learned that the permits were issued on September 25. On September 29, at Connors requests, the building inspector responded to his letter, saying the building permits were properly issued under the city's zoning code.

On October 20, 2008, 35 days after the building permits had issued, Connors filed a petition of appeal with the board. The board dismissed Connors' petition, concluding that he had "failed to bring the appeal within the time frame required by statute."

Connors appealed to Land Court. The Land Court judge agreed that Connors had failed to timely appeal.

Connors again appealed. On appeal, he argued that the statutory scheme set out under Massachusetts' Zoning Act, G.L. c. 40A, §§ 7, 8, and 15, provided him with two independent ways to appeal from the building department's issuance of the permits to Annino. Section 7 requires the appropriate municipal building official (here, the building commissioner) to enforce zoning ordinances or bylaws by withholding a "permit for the construction, alternation or moving of any building or structure" if the proposed building or structure violates any relevant municipal zoning ordinance or bylaw. Section 8 provides in relevant part that "[a]n appeal to the permit granting authority as the zoning ordinance or by-law may provide, may be taken by any person aggrieved by reason of his inability to obtain ... [an] enforcement action [under § 7] ... or by any person ... aggrieved by an order or decision of the inspector of buildings, or other administrative official, in violation of any provision" of G.L. c. 40A or the pertinent zoning ordinance or bylaw. Finally, § 15 prescribes the time in which the administrative appeals in § 8 must be taken: "within thirty days from the date of the order or decision which is being appealed." With respect to an appeal from an "inability to obtain [a § 7] enforcement action" the date from which the 30-day period of appeal is measured is the date of the written response of the municipal building official to the aggrieved person's request for enforcement."

Connors argued that: (1) under §§ 8 and 15, he could have filed a petition of appeal with the board from the decision to issue the building permits within 30 days of the permits' issuance; and (2) under §§ 7, 8, and 15, he was entitled to submit—at any time within six years—a written request to the building commissioner to "enforce" the zoning ordinance by refusing to issue the building permits Annino was seeking. Connors contended that he had taken the second approach. He maintained that under § 7, he had until October 29, 2008 (30 days from the commissioner's September 29, 2008, letter) to file his petition of appeal with the board.

DECISION: Judgment of land court affirmed.

The Supreme Judicial Court of Massachusetts held that the "alternative" remedy offered in § 7 of requesting the enforcement of the zoning

ordinance was only available where the aggrieved party does not have adequate notice of the building permit's issuance in time to challenge it within 30 days. Otherwise, if the aggrieved party does have adequate notice, the party must challenge it within 30 days of the issuance of the permit, in accordance with §§ 8 and 15.

The court said that to read the statute otherwise—allowing an appeal under § 7 after the time for an appeal from the issuance of the building permit under §§ 8 and 15 has run—would essentially render § 8's 30-day limitation period superfluous.

The court found that, in this case, Connors had notice of the issuance of the building permits 20 days before the 30-day period for bringing an appeal under §§ 8 and 15 expired. Since he had such notice, Connors could not pursue an enforcement action under § 7 (absent a zoning or permit violation by Annino).

See also: *Gallivan v. Zoning Bd. of Appeals of Wellesley, 71 Mass. App. Ct. 850, 887 N.E.2d 1087 (2008).*

See also: *Fitch v. Board of Appeals of Concord, 55 Mass. App. Ct. 748, 774 N.E.2d 1107 (2002).*

Case Note: Francis W. Connors also joined Connors in bringing the legal action.

Case Note: In its decision, the court emphasized that an enforcement request under § 7, and a subsequent appeal from a denial of said request under §§ 8 and 15, remained a valid procedural path for aggrieved parties to follow in appropriate circumstances. Such circumstances, explained the court, included: (1) when an aggrieved party can establish that he or she was without adequate notice of the order or decision being challenged; or (2) where an aggrieved party alleges that an abutter failed to obtain proper building permits, and therefore seeks an enforcement request to stop the abutter from proceeding with their unauthorized activity.

Validity of Zoning Regulations—Zoning Law Prohibits Commercial Wind Farms in County

Wind farm proponents argue law is an unconstitutional taking and violates the dormant Commerce Clause

Citation: *Zimmerman v. Hudson, 2011 WL 5008547 (Kan. 2011)*

KANSAS (10/21/11)—This case addressed the issue of whether a zoning law that prohibited the placement of commercial wind farms in a

county: (1) was an unconstitutional taking under the Fifth Amendment to the United States Constitution; or (2) violated the "dormant" Commerce Clause of the United States Constitution.

The Background/Facts: Wabaunsee County is located in the Flint Hills of Kansas, "which contain the vast majority of the remaining Tallgrass Prairie that once covered much of the central United States." In the fall of 2002, the Board of County Commissioners of Wabaunsee County (the "Board") heard that a company was looking to build a wind farm in the county. At that time, the county had no zoning regulations specifically related to wind farms. However, under Agricultural District Regulations, the establishment of a wind farm would have required the granting of conditional use permits ("CUP"s) under Board discretion to allow for the height of wind turbine structures.

In November 2002, the Board adopted a resolution placing a temporary moratorium on the acceptance of applications for CUPs for wind farm projects. Eventually, on July 12, 2004, the Board adopted a resolution amending its zoning regulations to: (1) permit Small Wind Energy Conversion Systems ("SWECS"); and (2) prohibit Commercial Wind Energy Conversion Systems ("CWECS," i.e., commercial wind farms) in the county. SWECSs were defined as those consisting of a wind turbine: with a capacity of not more than 100 kilowatts; less than 120 feet in height; and intended solely to reduce on-site consumption of purchased utility power. CWECSs were defined as wind turbine systems: exceeding 100 kilowatts capacity; exceeding 120 feet in height; or consisting of more than one turbine apparatus and related infrastructure of any size proposed and/or constructed by the same person or group of persons on the same or adjoining parcels or as a unified or single generating system.

Owners of land in the county (the "Landowners") sued the Board in district court, challenging this zoning amendment. Owners of purported wind rights concerning other properties in the county intervened in the action. (Collectively, the "Landowners" and the owners of wind rights are hereinafter referred to as the "Landowners.")

Among other things, the Landowners argued that the Board's decision to amend the zoning regulations: (1) constituted a compensable taking under the Fifth Amendment to the United States Constitution; and (2) violated the "dormant" aspect of the Commerce Clause of the United States Constitution.

The Fifth Amendment provides that no person's property should be taken without just compensation.

The Commerce Clause empowers Congress to "regulate Commerce ... among the several states." Within that grant of power is a negative command called the "dormant Commerce Clause." In essence, the dormant Commerce Clause prohibits "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."

The district court judge held: (1) that no taking occurred; and (2) that there was no dormant Commerce Clause violation.

The Landowners appealed.

DECISION: Judgment of district court affirmed in part, reversed in part, and remanded.

The Supreme Court of Kansas held that the Board's decision to amend the zoning regulations did not constitute a compensable taking under the Fifth Amendment to the United States Constitution because interests in developing wind farms were not vested rights, necessary to support a takings claim. The court also held that, although the zoning amendment was not facially discriminatory, remand was required for determination as to whether the amendment violated the dormant Commerce Clause.

The court explained that to prevail on a takings claim, the Landowners would have to first establish that the "property" in question (i.e., the interest in developing wind farms) was one in which a vested interest existed. The Board had argued that whatever interests the Landowners purportedly possessed before the moratorium, those interests were conditioned upon the Board's discretionary issuance of a CUP. Accordingly, argued the Board, interests such as developing, constructing, or operating CWECSs were not vested rights. The court agreed, reiterating that an applicant would have no vested rights in a CUP when its issuance depended upon the discretionary approval of the Board. The court noted that in this case, at all material times, the county zoning regulations granted absolute discretion to the Board for issuing CUPs. Accordingly, the court concluded that no vested property right of any type had been taken from the Landowners by the Board.

As to the dormant Commerce Clause claim, the court explained that it asks two questions to determine if a zoning regulation violates the dormant Commerce Clause. First, it asks whether the challenged law discriminates (i.e., treats in-state and out-of-state economic interests differently by benefiting the former and burdening the latter) on its face against interstate commerce. If so, it is invalid unless it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." If not, then the court engages in a balancing test (known as the *Pike* test) to determine if the burden imposed on interstate commerce is "clearly excessive in relation to the putative local benefits."

Here, the court found that there was no facial discrimination—as there was no "differential treatment of in-state and out-of-state economic interests that benefited the former and burdened the latter." The court found that the county's amended zoning regulations prohibited all CWECSs in the county, regardless of whether the producer wished to sell the wind-generated electricity in other states, in other Kansas counties, or within Wabaunsee County itself.

The court said that absent discrimination, the balancing test need be applied next—to see whether the burden imposed on interstate commerce would be clearly excessive in relation to the putative local benefits (if so the amendments would be invalid; if not they would be upheld). The court remanded the matter to the district court to conduct this balancing test.

See also: *Kansas Racing Management, Inc. v. Kansas Racing Com'n, 244 Kan. 343, 770 P.2d 423 (1989).*

See also: *Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970).*

Case Note: In its opinion, the court also made note that: the Federal Power Act did not permit states to regulate the generation of electric energy free from Commerce Clause restraint; and the Energy Policy Act did not affirmatively permit states to regulate the generation of electric energy free from Commerce Clause restraint.

Validity of Zoning Regulations—Zoning Ordinance Prohibits Construction over a Certain Height above the Side of a Specific Road

Building permit applicant contends ordinance is unconstitutionally void-for-vagueness

Citation: *Cunney v. Board of Trustees of Village of Grand View, N.Y., 2011 WL 4953061 (2d Cir. 2011)*

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

SECOND CIRCUIT (NEW YORK) (10/19/11)—This case addressed the issue of whether a provision of a village zoning law was unconstitutionally vague as applied.

The Background/Facts: Brendan Cunney ("Cunney") owned a half acre of property adjacent to the Tappan Zee Bridge within the Village of Grand View-on-Hudson (the "Village") in Rockland County, New York. The property was bounded by the Hudson River to the east and River Road to the west.

In 2006, Cunney sought to improve his property. He applied to the Village for the requisite permits to construct a single-family residence. Because of the location of Cunney's property, his proposed development triggered section E of the Village zoning law. Section E provided that to preserve the remaining views of the Hudson River from River Road, "no building shall be erected ... which shall rise more than two stories in height nor more than four and one-half (4 ½) feet above the easterly side of River Road."

Cunney sought clarity from the Village's Zoning Board of Appeals (the "ZBA") as to where measurements should be taken to ensure section E compliance. However, the ZBA declined to interpret section E.

Eventually, in September 2006, the Village Planning Board approved Cunney's revised site plan. The site plan included road elevation levels and house height measurements from five different stations on Cunney's lot—to show compliance with section E.

In October 2006, the Village building inspector issued Cunney a building permit.

Following completion of the construction of his house, in August 2007, Cunney applied to the Village for a certificate of occupancy ("CO"). In December 2007, Cunney's CO application was denied. The denial was based on a compliance determination by the Village engineer, which found that from one station on Cunney's lot, Cunney's roof height was "greater than allowed."

Cunney appealed to the ZBA, arguing among other things that section E was ambiguous. The ZBA concluded that section E was not ambiguous and that Cunney's house exceed section E's restrictions. The ZBA did grant Cunney a conditional variance.

Cunney then filed a complaint in court. He asserted that section E was "void for vagueness both as applied to his property and on its face." He also contended that the Board of Trustees of the Village of Grand-View-on-Hudson, the ZBA and the building inspector (collectively, the "Village Defendants") violated his substantive due process rights by denying his application for a CO.

Finding there were no material issues of fact in dispute and deciding the matter on the law alone, the district court issued summary judgment in favor of the Village on the void-for-vagueness and substantive due process claims.

Cunney appealed. On appeal, Cunney again argued that section E was void-for-vagueness as applied because it did not provide adequate guidance as to the elevation point on River Road adjacent to his property from which he should measure the height of his house. He also argued that section E was unconstitutionally vague because it authorized arbitrary and discriminatory enforcement by the Village. Cunney further argued that his substantive due process rights were violated by the Village's "post hoc interpretation of section E to justify the denial of his CO."

DECISION: Judgment of district court reversed in part, vacated in part, and remanded.

The United States Court of Appeals, Second Circuit, agreed with Cunney. The court held that section E was unconstitutionally vague as applied to Cunney's property because: (1) it provided inadequate notice of the elevation point on River Road from which Cunney should measure the height of his house to determine compliance; and (2) it authorized arbitrary and discriminatory enforcement. Since the district court had denied Cunney's substantive due process claim based on its denial of his void-for-vagueness claim (which was now overturned by the Second Circuit court), the court also remanded the substantive due process claim to the district court to decide.

In so concluding, the court explained that the 14th Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property without due process of law." For the protection of such due process, "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of ... statutes." A statute's language may be so vague as to deny due process if: (1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; and (2) it authorizes or even encourages arbitrary and discriminatory enforcement.

The court found section E afforded a reasonable person adequate notice of what it generally prohibited (e.g., three-story buildings). However, the court also found it "remarkably unclear" with respect to how the four and one-half limitation was defined. More specifically, the court found that the ordinance failed to describe from what adjacent elevation point on River Road the height of a building must be measured to determine the building's compliance with section E's height restriction. The court found this left the permit applicant with no notice of how he or she should design his or her site plan. It also left the Village without objective standards it could apply in determining a project's compliance.

Still, noted the court, even in the absence of clear standards, if the conduct at issue fell within the core of the ordinance's prohibition, it would not be unconstitutionally vague. This is because if the conduct at issue falls so squarely in the core of what is prohibited by the ordinance, there is no substantial concern about arbitrary enforcement "because no reasonable enforcing officer could doubt the [ordinance's] application in the circumstances."

Here, the court found that the ordinance as applied to the design and construction of Cunney's house was "not saved by resort to a clear core"; the height of Cunney's house did not fall so squarely within the core of section E's prohibition as to allay concerns regarding the risk of arbitrary enforcement. This, said the court was because, under a reasonable interpretation of the statute, Cunney's house, as built, did comply with section E.

See also: *Hill v. Colorado, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000).*

See also: *Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).*

Successive Variance Applications—Property Owner Applies for a Variance in 1994, Which is Denied

When property owner applies for same variance in 2009, the zoning board refuses to consider the application on the merits

Citation: *Brandt Development Co. of New Hampshire, LLC v. City of Somersworth, 2011 WL 4844422 (N.H. 2011)*

NEW HAMPSHIRE (10/12/11)—This case addressed the issue of whether the facts and circumstances surround an identical variance application 15 years later constituted material changes in circumstances requiring the zoning board of appeals to conduct a full review of the variance request on the merits.

The Background/Facts: Brandt Development Company of New Hampshire, LLC ("Brandt") owned a house and attached barn in a residential multifamily district in the city of Somersworth, New Hampshire (the "City"). In

November 1994, Brant applied for a variance form size and frontage requirements to convert the property from a duplex into four dwelling units.

Under New Hampshire statutory law, RSA 674:33, I(b), in order to obtain a variance, Brandt was required to satisfy a five-part test, showing: (1) the variance would not be contrary to the public interest; (2) special conditions existed such that literal enforcement of the ordinance would result in unnecessary hardship; (3) the variance was consistent with the spirit of the ordinance; (4) substantial justice was done; and (5) the variance did not diminish the value of the surrounding properties.

The City's zoning board of adjustment (the "ZBA") denied Brandt's application. It found that Brandt's property failed to satisfy all five of the criteria for a variance set out under RSA 674:33, I(b).

Brandt did not appeal the ZBA's 1994 denial of its variance application. However, 15 years later, in December 2009, Brandt again applied to the ZBA for a variance from the City's area, frontage, and setback requirements. Brant again proposed to convert the dwelling into four units.

The ZBA declined to consider Brandt's application on the merits. The ZBA based this decision on the basis that "circumstances [had] not changed sufficiently [since the 1994 variance application] to warrant acceptance of the [2009] application."

Brandt appealed to the superior court. The superior court affirmed the ZBA's decision.

Brandt again appealed.

DECISION: Judgment of superior court reversed, and matter remanded.

The Supreme Court of New Hampshire held that material changes in circumstances occurred during the 15 years between Brandt's filing of the successive variance applications such that the ZBA was required to consider Brandt's second application on the merits.

The court explained that it was "well settled that a zoning board having rejected one variance application, may not review subsequent applications absent a 'material change of circumstances affecting the merits of the application.'" In New Hampshire, said the court, successive variance proposals must demonstrate either: (1) material changes in the proposed use of the land; or (2) material changes in the circumstances affecting the merits of the application.

On appeal, Brandt argued the latter. It maintained that the ZBA was required to review its 2009 variance application on the merits even though it asked for essentially the same relief as the 1994 application. Brandt contended that material changes in circumstances occurred during the 15 intervening years. Although the governing statute, RSA 674:33, I(b), had not changed, Brandt noted that case law interpreting the five criteria for granting a variance had changed. Brandt maintained that the standards it needed to meet to obtain a variance were therefore now different.

The court agreed. In 1994, the unnecessary hardship prong of the five-part test for obtaining a variance required applicants to show: "a deprivation 'so great as to effectively prevent the owner from making any reasonable use of the land.'" By 2009, that standard had changed. In 2009,

an applicant seeking a use variance could show unnecessary hardship by demonstrating: (1) a zoning restriction as applied to its property interfered with its reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship existed between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others. An applicant seeking an area variance could show unnecessary hardship by demonstrating that: (1) an area variance was needed to enable the applicant's proposed use of the property given the special conditions of the property; and (2) the benefit sought by the applicant could not be achieved by some other method reasonably feasible for the applicant to purse, other than an area variance.

The City had countered that the ZBA had acted reasonably in denying the application, for even with a material change in circumstances under the unnecessary hardship prong of the five-part test, the other four prongs were unchanged and the ZBA had denied the 1994 application on those other four grounds as well.

The court said that although only that one criterion was "uprooted," that major shift in the doctrine of unnecessary hardship constituted a material change in circumstances with respect to Brandt's 2009 application. Although it is only one of the five factors, unnecessary hardship is "central to the very concept of a variance," said the court. The five criteria are interrelated concepts. Although the changes taking place in the 15-year period between Brandt's application did not create an "absolute certainty of a different outcome from that obtained in 1994," they did "create a reasonable possibility" of a different outcome—and that was sufficient for the ZBA to have to review Brandt's 2009 application on the merits.

See also: *Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727, 766 A.2d 713 (2001).*

See also: *Boccia v. City of Portsmouth, 151 N.H. 85, 855 A.2d 516 (2004).*

Case Note: In its decision, the court had also noted that although the other four criteria of the variance test under RSA 674:33 have not changed (from 1994 to 2009) as much as the unnecessary hardship criterion, they have still been "refined and clarified" by case law.

Zoning News from Around the Nation

CALIFORNIA

In an attempt to qualify for a referendum aimed at repealing San Jose's "new pot club rules," medical marijuana advocates have submitted 48,598 petition signatures. The "pot club rules" would "limit the number of medical marijuana collectives to 10—less than a tenth of the number

now believed to operate throughout the city." Once the county Registrar of Voters verifies the number of signatures, if there are "enough to qualify a referendum, the city would have 30 days to either repeal the ordinance, put the referendum on the ballot for the next regularly scheduled municipal election or call a special election."

Source: *Mercury News; www.mercurynews.com*

MICHIGAN

Union Township recently adopted an ordinance regulating garage and yard sales. Residents must now obtain a permit before hosting a yard or garage sale and are limited to three such sales per year.

Source: *The Morning Sun; www.themorningsun.com*

MINNESOTA

Four homeowners have sued the city of Winona over a rental cap law. Under the law, homeowners are prohibited from converting their houses to rental units if there is already a concentration of 30% rentals on that city block. The suing homeowners argue the rental cap law is a violation of the Minnesota Constitution's equal protection clause because "one person's property rights should not be limited by the previous actions of his or her neighbors."

Source: *KARE 11; www.kare11.com*

NEW YORK

The Anschutz Exploration Corporation has filed a lawsuit against the town of Dryden (Tompkins County). The lawsuit is in response to the Town's enactment of zoning laws aimed at preventing hydrofracking because of concerns about its negative effect on drinking water and air quality. Reportedly, Anschutz argues in the suit that the subject zoning law is inconsistent with New York's Oil, Gas and Solution Mining Law—which, Anschutz argues, overrides local ordinances involving natural-gas drilling except those involving local roads and property taxes.

Source: *Legislative Gazette; www.legislativegazette.com*

PENNSYLVANIA

Reportedly, five environmental advocacy groups—Clean Water Action, Delaware Riverkeeper Network, the Sierra Club's Pennsylvania branch, Earthworks, and PennEnvironment—have sent a letter to state senators voicing opposition to language in SB 1100, which would tie receipt of revenue from a natural gas impact fee to municipality adoption of a "model" zoning ordinance. The groups also support a greater setback for private and public drinking water supplies.

Source: *NPR; http://stateimpact.npr.org*

December 10, 2011 | Volume 5 | No. 23

QUINLAN™

Zoning Bulletin

in this issue:

WEST®

41059286

Procedure—Town Fails to Timely Act on Application for Special Permit

Applicant argues permit must be approved by default

Citation: *Troy Sand & Gravel Co., Inc. v. Town of Nassau, 2011 WL 5221262 (N.Y. App. Div. 3d Dep't 2011)*

NEW YORK (11/03/11)—This case addressed the issue of whether a town's alleged failure to act on a special permit application within a reasonable period of time resulted in the application being approved by default.

The Background/Facts: In 2004, Troy Sand & Gravel Company, Inc. ("Troy") planned to establish a quarry in the Town of Nassau (the "Town"). In furtherance of those plans, Troy submitted to the Town applications for a special permit and site plan approval for the quarry.

After the town passed successive moratoria on new mining applications, in 2008, the Town passed a zoning law that permanently banned commercial excavation.

Troy subsequently sued the Town. It asserted that the Town's actions were taken in bad faith to prevent the operation of the proposed quarry. It argued the Town's failure to act in a reasonable period of time on its special use permit application rendered the application approved by default. It

Contributors
Corey E. Burnham-Howard

Zoning Bulletin is published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526 St. Paul, MN 55164-0526. For subscription information: call (800) 229-2084, or write West, Credit Order Processing, 620 Opperman Drive, PO Box 64833, St. Paul, MN 55164-9753.

POSTMASTER: Send address changes to, Zoning Bulletin, 610 Opperman Drive, P.O. Box 64526 St. Paul, MN 55164-0526.

WEST®

610 Opperman Drive • P.O. Box 64526 • St. Paul, MN 55164-0526
1-800-229-2084 • email: west.customerservice@thomsonreuters.com • west.thomson.com/quinlan
ISSN 0514-7905 • © 2011 Thomson Reuters. All Rights Reserved.
Quinlan™ is a Thomson Reuters brand.

also argued that under the state's Mined Land Reclamation Law, the Town's delay in reviewing its permit application necessarily resulted in the Town's relinquishment of its right to review the application. Troy moved for partial summary judgment. It asked the court to find that there were no material issues of fact in dispute and to decide the matter in its favor on the law alone.

The Supreme Court denied Troy's motion. Troy appealed.

DECISION: Affirmed.

The Supreme Court, Appellate Division, Third Department, New York, held that the Town's failure to act on the application in a reasonable period of time did not render the application approved by default.

Town laws did provide specific time periods in which the Town was required to hold a hearing and decide on Troy's application for a special use permit. However, the court found that the laws did not provide for a default approval of a special use permit application in the event that the Town did not comply with those time periods. Rather, the court said that the proper remedy for the Town's alleged failure to act was for there to be a special proceeding to compel the Town to issue a decision on Troy's application.

The court also concluded that the Mined Land Reclamation Law did not require that the Town relinquish its right to review Troy's application because of the Town's delay in reviewing the application. While the Mined Land Reclamation Law supersedes all local laws and ordinances regulating mining and reclamation activities in New York, the law, found the court, "does not prevent local government from enacting local laws having the effect of banning mining, nor does it govern the manner in which decisions on special use permits must be made or the time within which those decisions must be made."

See also: *Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 N.Y.2d 668, 642 N.Y.S.2d 164, 664 N.E.2d 1226 (1996).*

See also: *Tinker Street Cinema v. Town of Woodstock Planning Bd., 256 A.D.2d 970, 681 N.Y.S.2d 907 (3d Dep't 1998).*

Variance—Board Approves Mining Company's Use Variance Request to Mine in a Single-Family Residential Zone

Neighboring property owners argue mining company failed to show "unnecessary hardship," as required for a variance

Citation: *Harrison v. Mayor and Board of Alderman of City of Batesville, 2011 WL 5222895 (Miss. 2011)*

MISSISSIPPI (11/03/11)—This case addressed the issue of whether a city erred in granting a variance to allow mining in an area zoned single-family residential and community business. In a matter of first impression

(i.e., the first time the court ruled on the issue), the case clarifies the standards that should apply when a zoning ordinance uses the language "practical difficulties or unnecessary hardships" for granting a variance.

The Background/Facts: Memphis Stone & Gravel Company ("Memphis Stone") sought to mine sand and gravel from 18 acres of land that it leased from various property owners in the city of Batesville, Mississippi (the "City"). That land was contiguous to Memphis Stone's existing plant operation, and was zoned single-family residential and community business. Under the City's Code, mining was only allowed as a conditional use in areas zoned agricultural and industrial. Therefore, Memphis Stone applied to the City's Planning Commission for a use variance.

The Planning Commission approved the use variance. The City's mayor and Board of Aldermen (collectively, the "Board") upheld the variance with conditions.

Neighboring property owners of Memphis Stone's leased land, the Harrisons, appealed the variance to the circuit court. Among other things, they argued that in order to obtain a variance, Memphis Stone needed to show "hardship" by submitting evidence that a unique condition of the property prevented Memphis Stone from making full use of the land. The Harrisons maintained that Memphis Stone had failed to show any hardship and that therefore the Board should not have granted Memphis Stone's variance request.

Memphis Stone and the Board argued that "unnecessary hardship" took into account "public need." Memphis Stone had stated that 10 tons of aggregate was needed locally for construction and infrastructure and that those minerals would be lost if the land was developed as it was zoned.

The Harrisons countered that increased profitability and convenience of location do not establish hardship.

The circuit court affirmed the Board's decision to grant the variance. In so holding, the court found that Memphis Stone had provided "ample evidence" to justify the variance: Memphis Stone had presented "evidence of a public need for a good source of local aggregate and the project would be a good asset for the local community's economy that [would] likely be lost to future residential development based on the location of the property."

The Harrisons appealed. The Court of Appeal reversed.

The Board appealed. The Supreme Court of Mississippi granted certiorari "to clarify the standards that should apply when a zoning ordinance uses the language 'practical difficulties or unnecessary hardships' for granting a variance."

DECISION: Vacated, and decision of circuit court reversed (on different grounds than Court of Appeals had reversed), and matter remanded.

The Supreme Court of Mississippi held that the Board erred in granting Memphis Stone's variance request because there was no evidence of the required "unnecessary hardship."

In so holding, the court explained that there were two types of variances: A "nonuse" or "area" variance allows a landowner to build or maintain

physical improvements that deviate from the nonuse/area limitations of a zoning ordinance. A "use" variance allows a landowner to engage in a use of the land prohibited by the zoning ordinance. The variance at issue in this case was a "use" variance.

Under the City's Code, the Board could grant a variance "where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of th[e] ordinance." However, the Code did not define "practical difficulties" or "unnecessary hardship."

As a matter of first impression (i.e., the first time the Mississippi Supreme Court ruled on the issue), the court held that the phrases "practical difficulties" and "unnecessary hardship" apply to nonuse and use variance respectively. Since this case involved a use variance, Memphis Stone was required to show "unnecessary hardship" in order to obtain the variance it sought.

As a matter of first impression, the court adopted a definition of "unnecessary hardship." It said that a landowner seeking a use variance must show "unnecessary hardship" by showing that:

> (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances [of the land for which the variance is sought] and not to the general conditions of the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.

The court also said that in determining whether to grant a use variance, a board must: determine whether the hardship is self-created (e.g., such as determining whether the applicant had actual or constructive knowledge of the land's zoning when entering into the lease or purchase of the land); and ensure that the variance complies with "the spirit of [the] ordinance" and that "public wellness and safety [be] secured and substantial justice done."

Because the court's decision was a matter of first impression, the court remanded the case to the Board so the parties could have an opportunity to present it with evidence in compliance with the court's opinion.

See also: *Matthew v. Smith, 707 S.W.2d 411 (Mo. 1986).*

See also: *Otto v. Steinhilber, 282 N.Y. 71, 24 N.E.2d 851 (1939).*

Case Note: The Harrisons had argued that the variance granted to Memphis Stone constituted spot zoning. The Court of Appeals had agreed. It found the variance was not a minor departure from the applicable zoning ordinance, but was a dramatic departure which could be obtained only though rezoning and not a variance request. The Supreme Court of Mississippi said that: "[t]he grant of a variance ... that has the same effect as a small parcel rezoning cannot be attacked

as spot zoning" because the granting of a variance does not involve a zone change but is permitted when certain conditions exist. Therefore, said the court, the proper question was not whether the variance was "spot zoning," but whether the Board acted within its scope and power under the applicable zoning ordinances. Connected to that was whether substantial evidence supported the Board's decision to grant the variance.

Case Note: In its decision, the court rejected (without much explanation) Memphis Stone's argument that "unnecessary hardship" takes into account the public need. Instead, said the court, the focus should be on whether there is a "public detriment" to the granting of the requested variance.

Case Note: In its decision, the court noted that some other jurisdictions view the terms "practical difficulty" and "unnecessary hardship" as interchangeable.

Standing—Landowner, Seeking Denial of Neighbor's Permit Application, Appeals Decision Denying Permit

Permit applicant contends landowner lacked standing to bring such appeal because it had no particularized injury

Citation: *Witham Family Ltd. Partnership v. Town of Bar Harbor, 2011 ME 104, 2011 WL 5187954 (Me. 2011)*

MAINE (11/01/11)—This case addressed the issues of whether: (1) a neighboring landowner—who appeared before a municipal zoning board of appeals through its attorney—sufficiently appeared before the board so as to provide it with standing to challenge the board's decision to issue a permit; and (2) whether a neighboring landowner's claimed injury from findings that an applicant complied with some, but not all, criteria necessary for a permit had a particularized injury sufficient to provide standing to appeal from the decision denying the application for a permit—which was the relief the neighboring landowner was seeking.

The Background/Facts: In 2009, North South Corporation ("North South") applied to the Planning Board of the town of Bar Harbor (the "Town") for a permit to construct a hotel. The Planning Board denied North South's application on the single ground that it exceeded the applicable ordinance height limitations; the Planning Board found that the proposed hotel complied with ordinance requirements in all other respects.

North South appealed the Planning Board's denial to the Town's Board of Appeals (the "BOA").

The BOA concluded that the Planning Board had misinterpreted the ordinance provision relating to height requirements. It reversed the Planning Board's denial, and remanded the matter to the Planning Board with instructions to issue North South's requested permit. The Planning Board issued the permit on May 19, 2010.

The Witham Family Limited Partnership (the "Partnership") owned land abutting the location of North South's proposed hotel. The Partnership's attorney had appeared at public hearings on North South's permit application. While North South's appeal to the BOA was pending, the Partnership filed its own appeal to the BOA. The Partnership challenged that portion of the Planning Board's decision that found that North South's proposed hotel did conform to other criteria for obtaining a permit—namely parking and street width requirements.

The BOA affirmed the Planning Board's decision with regard to the Partnership's appeal.

The Partnership then appealed the BOA's decisions—in both North South's appeal and in the Partnership's appeal—to superior court.

North South argued that the Partnership lacked standing to bring the appeals. North South contended that the Partnership had not "appeared" before the Planning Board in relation to North South's permit application because the Partnership's attorney failed to specifically announce that he was speaking on behalf of the Partnership when he spoke at public hearings on the permit application. North South also argued that since the Partnership's own appeal was based on BOA findings that North South complied with certain permit criteria—rather than an appeal of the denial itself—the Partnership did not have a particularized injury necessary for standing to seek review of the BOA's decision to issue the permit.

The superior court agreed with North South and dismissed the Partnership's complaint. The court found that the Partnership lacked standing to seek review of either of the BOA's decisions.

DECISION: Vacated, and matter remanded.

The Supreme Judicial Court of Maine held that: (1) the Partnership had sufficiently opposed North South's appeal as a party through representation by its attorney at related public hearings, such that it had standing to seek court review of the BOA's decision to issue the permit; and (2) the Partnership had a particularized injury from the findings that North South complied with other criteria for the permit sufficient to provide standing to the Partnership to appeal the Planning Board's denial of North South's permit application.

The court explained that for the Partnership to have standing to appeal the BOA's decision to court, it had to be a "party," meaning: (1) one who had "appeared" before the BOA; and (2) one who was "able to demonstrate a particularized injury as a result of the [BOA]'s action." "Appearance," further explained the court, meant: "'participation'—formal

or informal, whether personally or through an attorney—in the municipal proceedings by, for example, 'voic[ing] ... concerns for traffic, noise and aesthetics,' or 'express[ing] opposition' at a municipal hearing." "Particularized injury" occurs when a judgment or order adversely and directly affects a party's property, pecuniary, or personal rights. When the appealing party is an abutting landowner, it need only assert a "reasonable allegation of a potential for particularized injury ... ."

The court found that the Partnership "appeared" before the Board through its attorney, even though its attorney failed to specify that he was representing the Partnership. The court found that it could be "inferred that [the attorney] appeared on behalf" of the Partnership. Thus, as to the Partnership's appeal of the BOA's decision to issue the permit in response to North South's appeal, the court held that the Partnership had standing because: it both appeared (through its attorney) before the BOA and would suffer a particularized injury by the BOA's decision.

As to the Partnership's appeal of the Planning Board's denial of North South's permit application, the court found that the Partnership did have a particularized injury—despite the fact that the permit was denied. The court acknowledged that a party is usually not aggrieved by a judgment granting the relief requested in his pleadings (such as here, where the Partnership was appealing a decision to deny North South grant of the permit—which is the relief the Partnership was seeking). However, the court said that an exception to that general rule is: when "an essential finding on which the judgment is based might otherwise prejudice the party through the use of collateral estoppel in the future proceeding." Here, the court found, "continuing adverse collateral consequences to the Partnership would result from its failure to challenge the basis of the Planning Board's denial of North South's permit." This was because "[a]lthough the Planning Board did initially deny North South's application, had North South's subsequent appeal to the [BOA] been successful and had the Planning Board been ordered to issue the requested permit [—which is what consequently happened—], collateral estoppel would have barred the Partnership from challenging the bases on which the permit was granted." Thus, North South's pending—and ultimately successful—appeal created a continuing opportunity for injury to the Partnership, which is all that was necessary to confer standing on the Partnership.

See also: *Sahl v. Town of York, 2000 ME 180, 760 A.2d 266 (Me. 2000).*

See also: *Friends of Lincoln Lakes v. Town of Lincoln, 2010 ME 78, 2 A.3d 284 (Me. 2010).*

See also: *Norris Family Associates, LLC v. Town of Phippsburg, 2005 ME 102, 879 A.2d 1007 (Me. 2005).*

See also: *Great Cove Boat Club v. Bureau of Public Lands, 672 A.2d 91 (Me. 1996).*

Validity of Zoning Regulations—After Billboard Company Modernizes Billboard, Township Claims Billboard is a Nuisance

Billboard company challenges portion of zoning ordinance limiting modernization of nonconforming billboards

Citation: *Township of Blair v. Grand Lamar OCI North Corp., 2011 WL 5108510 (Mich. Ct. App. 2011)*

MICHIGAN (10/27/11)—This case addresses the issue of whether a Michigan township could restrict the modernization of a nonconforming use that reduces nonconformities. It also analyzed whether a zoning requirement that billboards have a specified distance between them violated the First Amendment to the United States Constitution.

The Background/Facts: Grand Lamar OCI North Corporation ("Lamar") leased property in the township of Blair, Michigan (the "Township") on which it maintained commercial billboards. One of Lamar's billboards was a "double decker" billboard (i.e., a two-level sign). It had been installed prior to the Township's Zoning Ordinance (the "ZO"). The billboard was a nonconforming use under the ZO because it exceeded: (1) display area requirements; (2) height requirements; and (3) requirements related to the distance between the signs.

In December 2008, Lamar removed the upper portion of the sign and installed an LED display face on the remaining board. These changes eliminated the nonconformities in display area. However, the nonconformities related to height requirements and requirements for space between signs did not change.

The Township sued Lamar. It claimed that the billboard, which was a preexisting nonconforming use, constituted a nuisance per se because it violated § 20.08.3 of the ZO. Section 20.08.3 restricted the modification of a nonconforming uses—including those that reduced nonconformities. Modifications to nonconforming signs and billboards were restricted to those that "do not exceed an aggregate cost of thirty (30) percent of the appraised replacement cost of the sign or billboard, as determined by the Zoning Administrator," unless the modifications change the sign or billboard to a conforming structure.

Lamar counter-complained. It argued that Michigan law prohibited the Township from restricting the modification of a nonconforming use that reduces nonconformities. It also alleged that the requirement in § 20.07.3 that billboards be located 2,640 feet apart violated the First Amendment to the United States Constitution.

The circuit court found in favor of the Township.

Lamar appealed.

DECISION: Affirmed.

The Court of Appeals of Michigan found that Lamar's argument that case law prohibited a township from barring modernization of a nonconforming use if it reduces the nonconformity was without merit. Modernization of a nonconforming use may be allowed dependent on the facts of the case, said the court. Modernizations of nonconforming uses are not to be allowed carte blanche just because they may reduce nonconformities.

Here, the court found that the ZO's restrictions on modernization of nonconforming signs and billboards to 30% of replacement value still allowed a property owner to maintain, modernize, and use the billboard. The ZO did not prevent Lamar's billboard from being used, nor did it destroy Lamar's investment. It merely limited changes that could be made to it. Accordingly, the Township had the authority to abate the nuisance (in Lamar's changed billboard). Consequently, Lamar was not entitled to relief from the ZO under which its modernized billboard was declared a nuisance per se.

The court also rejected Lamar's argument that the ZO's required space between billboards violated the First Amendment. The court noted that the First Amendment protects commercial speech only if that speech concerns lawful activities and is not misleading. A restriction on protected commercial speech is constitutional so long as it: (1) seeks to implement a substantial government interest; (2) directly advances that interest; and (3) reaches no further than necessary to accomplish the given objective.

Applying that test here, the court found that the ZO's 2,640-foot spacing between signs requirement passed constitutional muster. Lawful commercial speech was involved, found the court. As to the ZO's restrictions on that speech (in the form of the spacing requirements), the court found: (1) that the ZO's goals of promoting aesthetic desirability of the environment and reducing hazards to life and property in the Township were of substantial government interest; (2) the restrictions directly advanced those interests; and (3) went no further than necessary to accomplish those objectives.

Lamar had argued that the spacing requirements served no aesthetic or public safety purpose. The court disagreed. It concluded that the ZO's spacing requirements were valid.

See also: *Austin v. Older, 283 Mich. 667, 278 N.W. 727 (1938).*

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

Case Note: The circuit court had found another portion of the ZO was an unconstitutional restraint on free speech because it granted unbridled discretion to the Zoning Administrator to grant or deny permits for modifications to nonconforming billboards which did not bring those billboards into full compliance. The trial court had severed that portion of the ZO from the ZO. Lamar had challenged that remedy. The appellate court found that section of the ZO was severable, as no other section relied upon it and its removal did not

defeat the ZO's goal of eventually eliminating nonconforming uses; standards remained in place for allowing modernization and repair of billboards. The court held that the valid portion of the ZO could therefore be read and enforced independently of the invalid portion.

Zoning News from Around the Nation

CALIFORNIA

A state appeals court recently held "that California law allows cities and counties to ban [medical marijuana dispensaries]," "In the case, a three-judge panel in the 4th District Court of Appeal in Riverside ... concluded that the state's medical marijuana laws do not prevent cities and counties from passing regulations on dispensaries, including bans."

Source: *Los Angeles Times; www.latimes.com*

INDIANA

State Representative Matt Ubelhor (Republican-Bloomfield) recently announced plans to introduce a zoning referendum bill that will be specific only to Greene County. If successful in the general assembly, voters in Greene County will have a chance to voice their opinion on a county-wide zoning/land use management ordinance in a referendum vote on the November 2012 election ballot.

Source: *Greene County Daily World; http://gcdailyworld.com/*

MARYLAND

The Howard County Council has voted to "table a controversial bill that would have streamlined the county zoning appeals process." The bill "would have allowed the Board of Appeals to hear zoning cases appealed from the hearing examiner 'on the record,' meaning neither side would be allowed to present new evidence." The council reportedly tabled the bill to "allow more time to study the process and come up with efficiencies that satisfy everyone."

Source: *Baltimore Sun; http://www.baltimoresun.com*

PENNSYLVANIA

The state legislature is considering House Bill 1950 and Senate Bill 1100, which would "eliminate or severely restrict the ability of local governments to enact zoning ordinances applicable to Marcellus Shale gas drilling operations and establish a standard 'model' ordinance that all townships would have to follow."

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

VIRGINIA

The York County Planning Commission recently removed agriculture and aquaculture from two of the county's residential zoning districts. Reportedly, the changes were made as a way to "preempt possible state legislation that could include aquaculture in the Right to Farm Act, which would restrict local governments from regulating commercial aquaculture operations."

Source: *Daily Press; http://articles.dailypress.com*

December 25, 2011 | Volume 5 | No. 24

QUINLAN™

Zoning Bulletin

in this issue:

WEST®

41059287

Use Variance—Landowner Applies for Variance for Residential Use in Industrial Zone

Board denies variance, finding no unnecessary hardship

Citation: *Oxford Corp. v. Zoning Hearing Bd. of Borough of Oxford, 2011 WL 5599663 (Pa. Commw. Ct. 2011)*

PENNSYLVANIA (11/18/11)—This case addressed the issue of whether a landowner had proven unnecessary hardship so as to obtain a use variance.

The Background/Facts: Oxford Corporation ("Landowner") owned a 10.5-acre parcel of property in the borough of Oxford (the "Borough"). The parcel was zoned industrial. Landowner sought to develop the property as a residential use, which was not a permitted use in the industrial zone. Landowner filed an application with the Borough's Zoning Hearing Board (the "Board") to obtain a use variance for a residential use. In seeking the variance, Landowner alleged that the property could not be used "in any reasonable or economically viable manner as currently zoned."

The Board denied Landowner's request. The Board concluded that Landowner failed to demonstrate by substantial evidence that it was entitled to any variance relief. Specifically, the Board found, among other

Contributors
Corey E. Burnham-Howard

Zoning Bulletin is published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526 St. Paul, MN 55164-0526. For subscription information: call (800) 229-2084, or write West, Credit Order Processing, 620 Opperman Drive, PO Box 64833, St. Paul, MN 55164-9753.

POSTMASTER: Send address changes to, Zoning Bulletin, 610 Opperman Drive, P.O. Box 64526 St. Paul, MN 55164-0526.

WEST®

610 Opperman Drive • P.O. Box 64526 • St. Paul, MN 55164-0526
1-800-229-2084 • email: west.customerservice@thomsonreuters.com • west.thomson.com/quinlan
ISSN 0514-7905 • © 2011 Thomson Reuters. All Rights Reserved.
Quinlan™ is a Thomson Reuters brand.

things, that there was no hardship peculiar to Landowner's parcel that prevented it from being developed as it was zoned.

Landowner appealed to the trial court. The court affirmed the Board's denial of the use variance.

Landowner again appealed.

DECISION: Affirmed.

The Commonwealth Court of Pennsylvania held that the industrial zoning of landowner's property did not create an unnecessary hardship, as required for Landowner to obtain a use variance.

The court explained that in order to qualify for a variance, an applicant must establish: "(1) an unnecessary hardship stemming from unique physical circumstances or conditions of the property will result if the variance is denied; (2) because of such physical characteristics or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the ordinance; (3) the hardship has not been created by the applicant; (4) granting the variance will not alter the essential character of the neighborhood nor be detrimental to the public welfare; and (5) the variance sought is the minimum variance that will afford relief." As for the requisite "unnecessary hardship" element, an applicant must prove either: "(1) the physical characteristics of the property are such that it could not in any case be used for any permitted purpose, or that it could only be used for such purpose at prohibitive expense; or (2) the characteristics of the property are such that the lot has either no value or only distress value for any purpose permitted by the ordinance."

Thus, here, in order for Landowner to obtain a use variance, it had to show that compliance with the zoning ordinance (i.e., using the property for a use allowed in an industrial zone) could render the property practically useless. Landowner was required to show that either: (1) the physical characteristics of the property precluded its use for a permitted purpose in the industrial zone or that such use would be prohibitively expensive; or (2) that the characteristics of the property are such that it either has no value or only distress value for any permitted purpose in the industrial zone.

The court found that Landowner failed to meet that burden. A number of witnesses had "credibly testified that the property could be put to [uses permitted in the industrial zone—such as professional and business office use, or a warehouse or similar use]." Landowner could not obtain a variance simply because the zoning of its property deprived it of the most lucrative or profitable uses of the property.

See also: *Com. By and Through Dept. of General Services v. Zoning Hearing Bd. of Susquehanna Tp., 677 A.2d 853 (Pa. Commw. Ct. 1996).*

Case Note: Landowner had actually applied for "a use variance, as well as a substantive validity variance." The court explained that a validity variance is based on the theory that an otherwise valid zoning ordinance is confiscatory when applied to a particular property and

that a variance is necessary to permit a reasonable use of the land. A party seeking either a use variance or a validity variance must comply with the same variance requirements, said the court.

Conflict of Interest—Despite Recusing Himself, City Council's Attorney Gives Generic Advice on Resolution of Variance Request

Variance applicant says attorney's participation tainted resolution and required it be vacated

Citation: *Kane Properties, L.L.C. v. City of Hoboken, 2011 WL 5554361 (N.J. Super. Ct. App. Div. 2011)*

NEW JERSEY (11/10/11)—This case addressed the issue of whether the participation of the city council's attorney in regard to the council's resolution on variance requests, despite the attorney's conflict of interest, required vacation of the city's decision and a remand for reconsideration.

The Background/Facts: Anthony Rey ("Rey") owned property located in an industrial zone in the city of Hoboken (the "City"). Kane Properties, L.L.C. ("Kane") sought to construct a 12-story, 72-unit residential building with a parking garage and on-premises day care center on Rey's property. Kane applied to the City's Board of Adjustment (the "Board") for use and area variances.

While considering the application, the Board heard testimony from members of the public, including Skyline Condominium Association ("Skyline"). Skyline operated a 15-story residential building near Rey's property. Skyline, which was represented before the Board by its attorney, Michael Kates ("Kates"), objected to Kane's variance requests.

The Board granted the variances.

Two weeks after the Board granted the variances, Kates was appointed Corporation Counsel for the city, thus becoming the City Council's legal advisor. Kates remained employed as a partner in the law firm that had represented Skyline.

Skyline, represented by a new attorney—Edward J. Buzak ("Buzak")—from another law firm, challenged to the City Council (the "Council") the Board's grant of the variances to Kane. Kates recused himself in regard to the appeal.

Thereafter, Kates sent the Council a memorandum containing generic advice about how to handle zoning appeals in general. Buzak, Skyline's new attorney, also sent Kates' advice memo to the Council as part of his own advice on handling appeals. Later, the Council voted to deny Kane's requested variances at a meeting where Buzak was not present to advise them, but Kates was present. At that meeting, Kates provided the Coun-

cil some procedural advice concerning their vote on the resolution denying the variances. Kates signed the resolution.

Kane filed an action in lieu of prerogative writs challenging the Council's decision. Among other things, Kane contended that the decision was tainted by Kates' participation.

The Law Division disagreed with Kane and affirmed the Council's decision.

DECISION: Reversed, and matter remanded.

The Superior Court of New Jersey, Appellate Division, held that the participation of Kates despite his conflict of interest required that the city's decision on Kane's variance requests be vacated and remanded for reconsideration.

The court said that "[t]he essential question" it had to answer was "whether, in the mind of a reasonable citizen fairly acquainted with the facts, this scenario would create an appearance of improper influence." In other words, the question was "whether, in this situation, a municipal decision-maker that receives advice, directly or indirectly, from an attorney with a conflict of interest, and that allows the attorney to participate in a Council meeting at which he should not even have been present, taints its resulting decision."

The court answered that question in the affirmative. Here, Skyline was the objector, and Skyline's former attorney was the Council's attorney. The court found "[t]hat scenario would give any reasonable citizen cause for concern."

The court noted that an attorney having such a conflict must "withdraw completely from representing both the municipality ... and the private client with respect to such matter." Here, "Kates should have been absolutely and completely screened from this application," said the court. "No advice with his name on it should have gone to the Council ... . Kates should not have been in the room when the Council was voting on the resolution, and he certainly should not have given any advice about it, procedural or otherwise. ... Finally, Kates should not have signed the resolution."

Taking all of Kates' participation together, the court concluded that the Council's resolution on Kane's' variance requests must be vacated and the matter remanded to the Council for reconsideration ab initio (i.e., from the beginning).

See also: *In re A. and B., 44 N.J. 331, 209 A.2d 101, 17 A.L.R.3d 827 (1965).*

See also: *Randolph v. City of Brigantine Planning Bd., 405 N.J. Super. 215, 963 A.2d 1224 (App. Div. 2009).*

Notice—Landowner Challenges City's Published Notice of Public Hearings on Adoptions of Ordinances

Landowner says notices should have identified new zones being created

Citation: *Rockaway Shoprite Associates, Inc. v. City of Linden, 2011 WL 5515222 (N.J. Super. Ct. App. Div. 2011)*

NEW JERSEY (11/14/11)—This case addresses the issue of the sufficiency of a published notice for a public hearing on the adoption of an ordinance and an amendatory ordinance that rezoned 47.5 acres in a city.

The Background/Facts: Linden Development, LLC purchased a 105-acre parcel of property in the city of Linden (the "City"). The parcel was the site of a former General Motors ("GM") assembly plant. The parcel was zoned heavy industrial and light industrial. Linden sought to create a combination of retail and commercial uses, multifamily residential use, and industrial and warehouse uses. Accordingly, Linden sought a change in zoning for 45 acres to allow retail and commercial uses. Linden applied to the City for the zone changes.

Eventually, the city drafted an ordinance, Ordinance 52-71, to implement the proposed zoning changes. The City published in the local newspaper notice of Ordinance 52-71 for public hearing and possible adoption. The notice read in pertinent part: "AN ORDINANCE TO AMEND AND SUPPLEMENT CHAPTER XXXI, ZONING, OF AN ORDINANCE ENTITLED "AN ORDINANCE ADOPTING AND ENACTING THE REVISED GENERAL ORDINANCES OF THE CITY OF LINDEN, 1999 ... ." The notice further stated the block and lot numbers of the site of the proposed zoning. It also noted that the ordinance would amend regulation for the use of the site of the former GM facility.

Ordinance 52-71 was eventually adopted.

After its adoption, the City determined that certain limited revisions were necessary as to the newly created Planned Commercial Development ("PCD") zoning district. The City introduced a new Ordinance 53-10 to enact those revisions. The notice for the public hearing for Ordinance 53-10 did not identify the property affected by the proposed ordinance, but simply read: "AN ORDINANCE TO AMEND ORDINANCE NO. 52-71, ENTITLED 'AN ORDINANCE TO AMEND AND SUPPLEMENT CHAPTER XXXI, ZONING', OF AN ORDINANCE ENTITELD 'AN ORDINANCE ADOPTING AND ENACTING REVISED GENERAL OFDINANCE FO THE CITY OF LINDEN, 1999' ... ."

Ordinance 53-10 was eventually adopted.

Rockaway Shoprite Associates, Inc. ("RSA") operated a supermarket near Linden's property. After adoption of Ordinance 53-10, RSA filed a lawsuit against the City and the City Council, seeking reversal of the adop-

tion of the ordinances. Among other things, RSA challenged the ordinances on procedural grounds. RSA maintained that, in accordance with New Jersey statutory law—N.J.S.A. 40:49-2.1—, the notices should have identified more information, including the new zones being created.

Section 40:49-2.1 requires the publication of a notice citing a municipal land use ordinance to contain a "brief summary of the main objectives or provisions of the ordinance." The statute also requires that amendments to ordinances include "a summary of the objectives or provisions of the amendment or amendments."

The City, City Council, and Linden as intervenor, maintained that is was sufficient if the notice, as here, identified the property by common name and by block and lot number, and informed the public that the permitted use of the property would change.

The Law Division judge concurred with the latter view. The judge concluded that the public notices for Ordinances 52-71 and 53-10 conformed to statutory requirements.

RSA appealed.

DECISION: Judgment of Law Division reversed.

The Superior Court of New Jersey, Appellate Division, held that the public notices for the ordinances were legally deficient in apprising the public of the substantive changes to the municipality's zoning effected by the proposed ordinances.

The court stated that the "summary" required by N.J.S.A. 40:49-2.1 must apprise interested readers throughout the municipality of the zoning changes contemplated as well as their nature and import. In other words, notice of proposed changes in the zoning laws "must be reasonably sufficient and adequate to inform the public of the essence and scope of the proposed change." A mere reference to the objective of the ordinance does not satisfy the statute, said the court. Rather, the notice must alert property owners of the possibility that the proposed amendment may affect the zoning of their properties or nearby properties. The notice must identify the subject property and inform the reader that the ordinance would result in substantive changes to the municipality's zoning. Thus, at a minimum, New Jersey law requires that published notice of a zoning ordinance creating new zones and uses applicable to an area identify and briefly describe those new zones and uses. It must provide sufficient detail of what is projected to inform the interested public whether to participate or object. It must provide "an accurate description of what the property will be used for ... ." It should "focus on the substantive effect of the amendment ... ."

Here, the court found that the public notice of Ordinance 52-71 "merely advised that the zoning [was] being amended as to the properties identified... ." This general, standardized language "provide[d] no real notice apprising the public of what exactly [was] being proposed." Indeed, the changes to be effectuated by Ordinance 52-71—including the changing of previous zone boundary lines, changes in allowable uses and densities in the area rezoned, and the creation of new zones that previously did not ex-

ist—were totally absent from the public notice in this case. While the published notice alerted the public that some type of zoning amendment was being considered regarding the GM site, the court found that "nothing therein informed interested persons of the nature or extent of the change or whether it was consequential enough to warrant their attendance at, and participation in, the ensuing public hearing."

The court found that the notice of amendatory zoning ordinance, Ordinance 53-10, fared no better. It did not alert the public that the amendment involved the former GM site, much less the nature of the zoning changes it was proposing.

The court noted that the notices did not need to be exhaustive or detailed; they only need to reasonably inform of the substance of the proposed changes. At a minimum, the published notices should have identified and summarized the new zones and new uses, concluded the court.

Because the notices were insufficient, the court concluded that the ordinances were invalid.

See also: *Pond Run Watershed Ass'n v. Township of Hamilton Zoning Bd. of Adjustment, 397 N.J. Super. 335, 937 A.2d 334 (App. Div. 2008).*

See also: *Perlmart of Lacey, Inc. v. Lacey Tp. Planning Bd., 295 N.J. Super. 234, 684 A.2d 1005 (App. Div. 1996).*

See also: *Cotler v. Township of Pilesgrove, 393 N.J. Super. 377, 923 A.2d 338 (App. Div. 2007).*

See also: *Wolf v. Mayor and Borough Council of Borough of Shrewsbury, 182 N.J. Super. 289, 440 A.2d 1150 (App. Div. 1981).*

Case Note: The City, City Council, and Linden had argued that RSA waived its right to challenge the ordinances because it had attended the public hearing on Ordinance 52-71 and did not then object to the lack of proper notice. The court rejected that argument. The court said that the entire public was entitled to notice in full compliance with N.J.S.A. 40:49-2.1. Further, said the court, the public's entitlement to such notice could not be waived by those individual members of the public who actually attend the improperly noticed public hearing. Failure to provide proper notice deprived the City of jurisdiction and rendered null any subsequent action.

Preemption—Medical Marijuana Dispensary Operator Challenges Municipal Ban on MMDs

Operator argues state statutes preempt municipalities from enacting such bans

Citation: *City of Riverside v. Inland Empire Patient's Health and Wellness Center, Inc., 200 Cal. App. 4th 885, 2011 WL 5386590 (4th Dist. 2011)*

CALIFORNIA (11/09/11)—This case addressed the issue of whether state medical marijuana statutes preempt municipal zoning ordinances banning medical marijuana dispensaries.

The Background/Facts: Larry Swerdlow ("Swerdlow") leased property in the city of Riverside ("Riverside") on which he operated Inland Empire Patient's Health and Wellness Center Inc. (the "Center"). The Center was a nonprofit medical marijuana dispensary ("MMD").

Riverside's zoning code specifically prohibits MMDs. It also prohibits any use which is prohibited by state and/or federal law. Any violation of Riverside's municipal code is deemed a public nuisance under the code.

In January 2009, Riverside advised Swerdlow that Riverside's zoning code prohibited MMDs. Nevertheless, Swerdlow continued to operate the Center.

Riverside then brought a legal action against Swerdlow and others (including the owners of the property and a board member and manager of the Center). Riverside alleged public nuisance, and asked the court to enjoin the Center from operating its MMD in the city.

The trial court found that Riverside could use zoning regulations to prohibit MMDs. It entered an order enjoining the Center from operating its MMD in the city.

The Center appealed. Among other things, the Center argued that, while cities and counties could zone where MMDs may be located, Riverside could not lawfully ban all MMDs from the city. The Center argued that Riverside's ordinance banning MMDs throughout the city was preempted by state law—specifically, the Compassionate Use Act of 1996 ("CUA") (Health & Saf. Code § 11362.5) and the Medical Marijuana Program ("MMP") (§§ 11362.7-11362.83).

DECISION: Affirmed.

The Court of Appeal, Fourth District, Division 2, California, held that local governments, such as Riverside, are not preempted by the CUA and MMP from enacting zoning ordinances banning MMDs. Because Riverside's ordinance banning MMDs was not preempted by state law, it was valid and enforceable.

The court explained that Riverside's zoning ordinance banning MMDs would be preempted by state law if it: (1) duplicated state law; (2) contradicted state law; or (3) entered into an area fully occupied by state law, either expressly or by legislative implication.

Here, the court found that Riverside's zoning ordinance regulating MMDs did not "mimic" or duplicate state law; rather, it could be reconciled with the CUA and MMP. This was because Riverside's zoning ordinance differed in scope and substance from the CUA and MMP.

The court explained that the CUA provides limited criminal immunity to medical marijuana users and caregivers for use, cultivation, and possession of medical marijuana. The MMP merely implements the CUA and also provides immunity for those involved in lawful MMDs. Neither the CUA nor the MMP provide individuals with inalienable rights to establish, operate, or use MMDs, nor do they preclude locate governments from regulating MMDs through zoning ordinances. The CUA and MMP do not expressly mandate that MMDs shall be permitted within every city and county, nor do they prohibit cities and counties from banning MMDs, said the court.

The Center had argued that Riverside's ordinance banning MMDs was invalid because it was inconsistent with the MMP. The MMP, noted the Center, provides immunity for a nuisance claim arising from a violation of a section of the MMP that encompasses operating an MMD. Because § 11362.775 of the MMP exempts an operator of an MMD from liability for nuisance, the Center argued that Riverside's zoning ordinance, banning MMDs and declaring them a nuisance, was preempted by state law. The court disagreed. It said that although § 11362.775 allowed lawful MMDs, a municipality could limit or prohibit MMDs through zoning regulations and prosecute such violations by bringing a nuisance action and seeking injunctive relief. The MMP provides immunity only as to lawful MMDs. An MMD operating in violation of a zoning ordinance prohibiting MMDs is not lawful. Because the legislature did not expressly prohibit cities from enacting zoning regulations banning MMDs or from bringing a nuisance action enforcing such ordinances, Riverside's zoning ordinance banning MMDs did not duplicate or contradict the CUA and MMP statutes.

The court also found that the CUA and MMP do not fully occupy—either expressly or impliedly—the area of regulating, licensing, and zoning MMDs, to the exclusion of all local law. Neither the CUA nor the MMP address the areas of land use, zoning, and business licensing. Moreover, found the court, the CUA and MMP express "an intent to permit local regulation of MMD's." The CUA expressly provides that it does not "supersede legislation prohibiting a person from engaging in conduct that endangers others." The MMP expressly states that it does not "prevent a city or other local governing body from adopting and enforcing laws consistent with [the MMP]."

The court concluded that because Riverside's ban of MMDs was not preempted by the CUA or MMP, Riverside's prohibition of MMDs in the city through enacting a zoning ordinance banning MMDs, was a lawful method of limiting the use of property by regulating and restricting the location and establishment of MMDs in the city.

See also: *City of Claremont v. Kruse, 177 Cal. App. 4th 1153, 100 Cal. Rptr. 3d 1 (2d Dist. 2009), review denied, (Dec. 2, 2009).*

See also: *Qualified Patients Ass'n v. City of Anaheim, 187 Cal. App. 4th 734, 115 Cal. Rptr. 3d 89 (4th Dist. 2010), review denied, (Dec. 1, 2010).*

Case Note: The Center had also argued that local municipalities cannot enact a total ban on MMDs based solely on federal law preemption. The court agreed, holding that federal preemption of state medical marijuana law is not a valid basis for upholding a city's ordinance banning MMDs.

Zoning News from Around the Nation

IDAHO

The Washington County Planning and Zoning commission has passed a proposed ordinance that would restrict gas and oil company activity. Among other things, the ordinance would require a written agreement that the company will repair any damage, excluding ordinary wear and tear, to the county roadways including bridges, road alignments, culverts, and surfaces. The ordinance also would require general liability insurance of $10 million for bodily injury; $20 million for blowouts or explosions; coverage for underground reservoirs, including resources; environmental impairment; and workers' compensation. The ordinance further would require "that the company repair any and all damage to the property caused by the operation within 30 days after the project for that operation is complete. This includes leaks or spills and must be approved by the fire chief."

Source: *The Argus Observer; www.argusobserver.com*

MICHIGAN

Fruitport Township has proposed an ordinance that would restrict medical marijuana growing. Under the ordinance, "marijuana can be grown and dispensed by a registered primary caregiver to up to five patients for medicinal purposes." The ordinance restricts medical marijuana home occupation to single-family dwellings only. It also "calls for only one primary caregiver per household, and the operation must register with the police and fire departments and be more than 1,000 feet from any school or day-care facility, to ensure compliance with federal Drug-Free School Zone requirements."

Source: *Muskegon Chronicle; www.mlive.com*

State Senator Virgil Smith has introduced legislation that would exempt Detroit from a provision in the state's Right to Farm Act, which restricts municipalities from exercising regulatory authority over agriculture. Reportedly, "[t]he Michigan Farm Bureau is fighting any changes to the Right to Farm Act, not because they are opposed to urban farming, but because the law was designed to protect farmers engaged in accepted practices

from the whims—or sensitive noses—of local residents and their elected representatives." Smith counters that Detroit "needs the ability to zone farms and fine-tune regulations because urban areas are not an appropriate venue for all types of agriculture."

Source: *MLive.com*

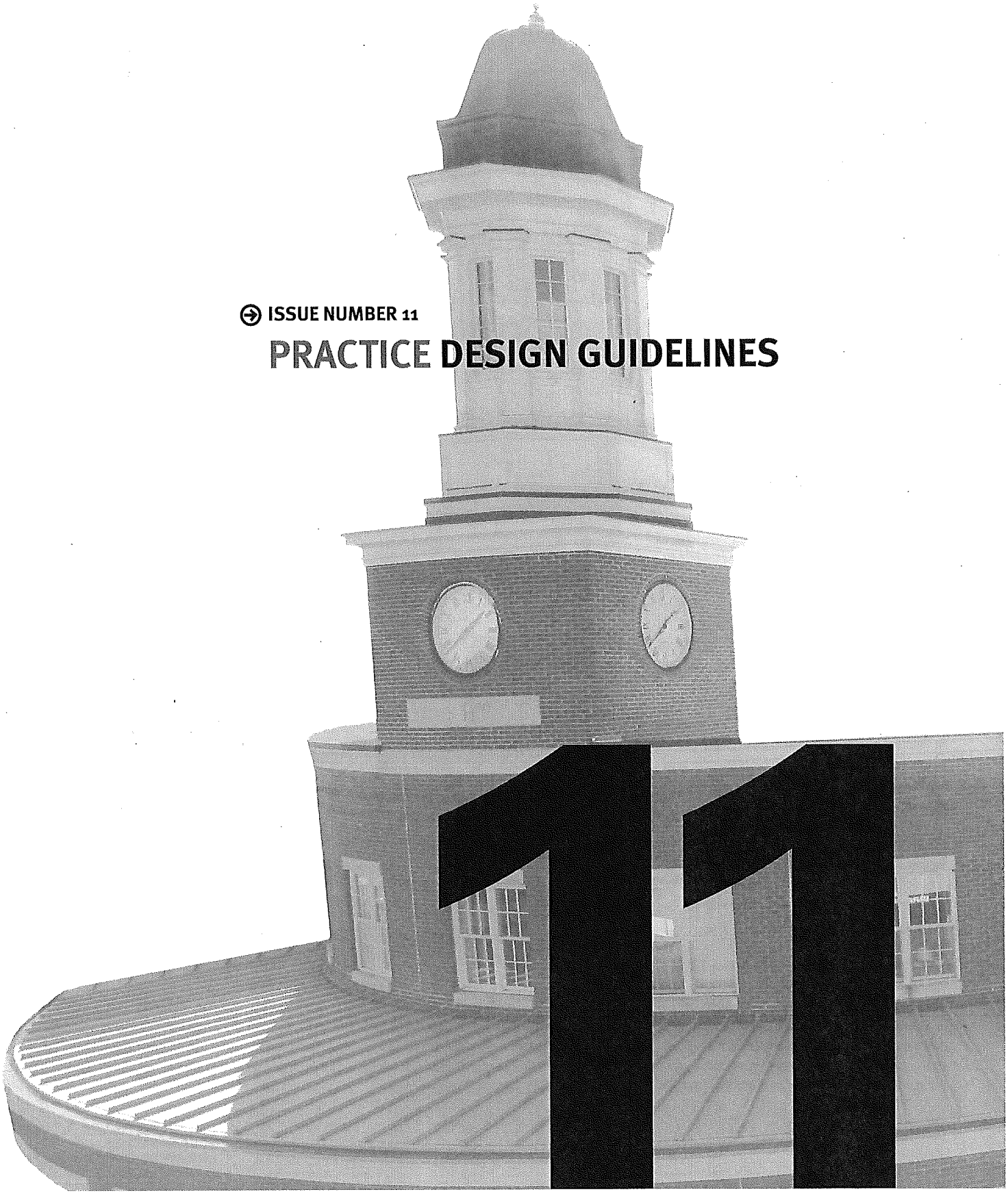
PENNSYLVANIA

On November 17, the State House of Representatives approved a bill to enact an impact fee on drillers in the Marcellus Shale. "House Bill 1950 permits counties impacted by drilling in the Marcellus Shale to enact an impact fee with a sliding scale structure. The fee would be split with 75 percent going to the county enacting the fee and 25 percent to the state for infrastructure improvements, environmental protection and public health and safety initiatives. A bill passed in the Senate Nov. 15 imposing an impact fee on natural gas drillers would split revenues 55 percent to impacted municipalities and 45 percent to statewide infrastructure and environmental programs."

Source: *The Times Herald; www.timesherald.com*

ZONING PRACTICE NOVEMBER 2011

AMERICAN PLANNING ASSOCIATION



ISSUE NUMBER 11

PRACTICE DESIGN GUIDELINES

Controlling Strip Development with Design Guidelines

By Ross A. Moldoff, AICP

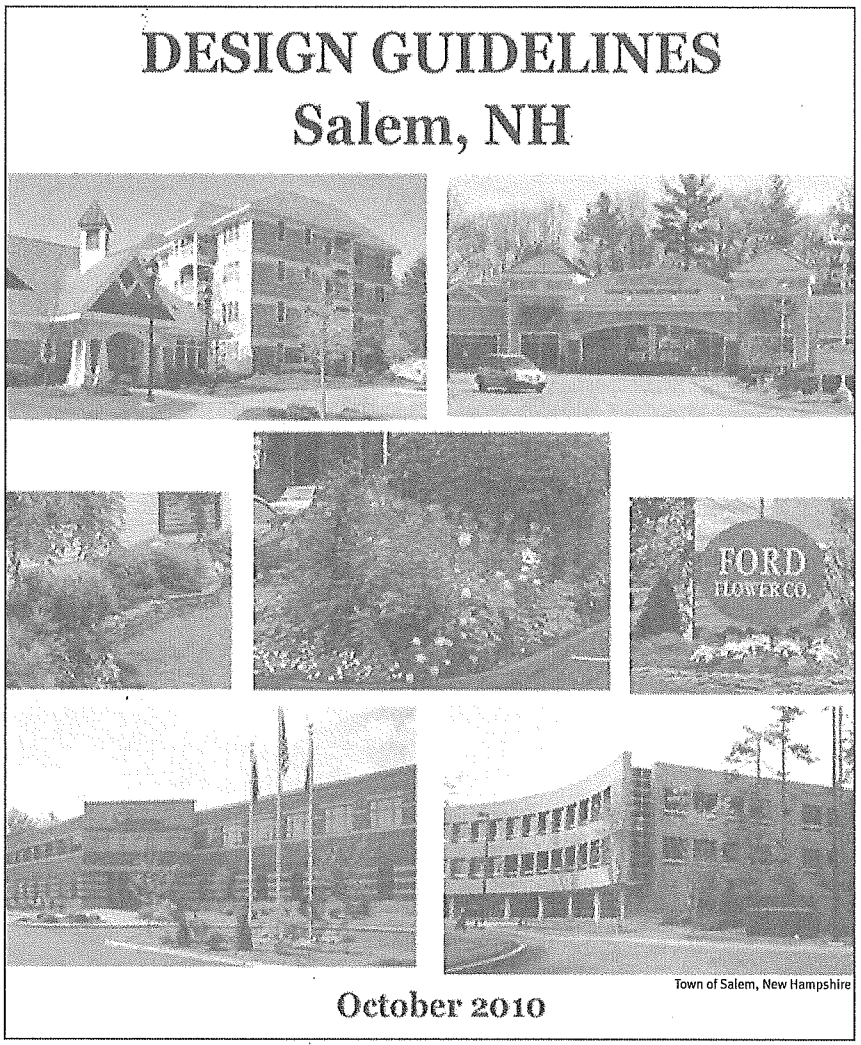
Design guidelines are a relatively new tool for controlling the appearance of development.

Many communities have regulations for the architectural design of retail or big box buildings, along with requirements for landscaping, signage, lighting, and other similar topics. Design guidelines take these regulations a step further by focusing on illustrations and photographs to clarify what the desired type of development looks like. Pictures eliminate much of the guesswork about what a regulation means. A visual depiction of a regulation is much easier for staff, planning board members, and applicants to understand. The great benefit of design guidelines is to allow all parties involved in the preparation or review of a development proposal to see what is required or preferred with photographs and illustrations, thereby reducing wrong interpretations that can lead to costly delays in the approval process.

The following article is based on a presentation at the American Planning Association's National Planning Conference in Boston in April 2011. It highlights the experiences of Salem, New Hampshire, and Cape Cod, Massachusetts, using design guidelines to control strip development.

SALEM, NEW HAMPSHIRE'S ROUTE 28 STRIP

Salem, New Hampshire, is a bedroom community of 30,000 people located 32 miles north of Boston. Salem is home to Rockingham Racetrack (horse racing), Canobie Lake Park (amusement park), and a six-mile-long commercial strip along NH Route 28 known as South and North Broadway. Strip development as used here is defined as a linear pattern of retail businesses and other uses along a road corridor characterized by one-story commercial buildings surrounded by parking lots, with a



The purpose of Salem's new design guidelines is to guide the appearance of new projects, to illustrate and expand current design regulations, and to help applicants understand what the town wants. The document includes chapters on site planning, architecture, landscaping, lighting, and signage.

ASK THE AUTHOR JOIN US ONLINE!

Go online during the month of November to participate in our "Ask the Author" forum, an interactive feature of Zoning Practice. *Ross Moldoff, AICP, and Sarah Korjeff 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

Ross Moldoff, AICP, has been the planning director for Salem, New Hampshire, for 28 years and provides staff support for the Planning Board and Conservation Commission. Moldoff has extensive experience in subdivision and site plan permitting as well as writing and enforcing regulations and zoning ordinances. He has taught courses on Controlling Strip Development, Managing Residential Growth, and Evaluating Development Proposals for the University of New Hampshire Continuing Education Program. He holds a bachelor's degree in Economics and Environmental Studies from Colby College and a master's degree in Regional Planning from the University of Massachusetts.

Sarah Korjeff is a planner and historic preservation specialist at the Cape Cod Commission, a regional planning and regulatory agency serving the 15 towns in Barnstable County, Massachusetts. She works with communities to develop bylaws and design guidelines that protect the region's distinctive character, referencing historic architectural forms and past development patterns. Korjeff coordinated production of the Cape Cod Commission's *Designing the Future to Honor the Past*, and was a principal author of the commission's latest design guidelines publication, *Contextual Design on Cape Cod: Design Guidelines for Large-Scale Development*. She holds a bachelor's degree in History from Middlebury College and a master's degree in Historic Preservation from the University of Pennsylvania.

significant amount of pavement visible from the roadway, multiple driveway openings, large signs, and a dependency on automobiles for access and circulation.

Salem's Route 28 strip contains more than 300 retail businesses, including big box retailers, several large shopping centers, and dozens of smaller strip malls and individual stores. Just off the strip sits the 1.1-million-square-foot Mall at Rockingham Park, the largest enclosed mall in New Hampshire. Since 1984 more than 3.6 million square feet of retail space has been approved in Salem.

The strip in Salem was originally developed in the 1950s and 1960s with little regard for design. Retailers wanted to be in Salem because of its location and the lack of a sales tax in New Hampshire. The town wanted tax revenue to support the services needed for a growing residential population. Property owners wanted to develop sites at the lowest possible cost. The dominant development style along the strip was cement-block and sheet-metal buildings with flat roofs, massive parking lots, little if any landscaping, giant signs, and multiple curb cuts.

PREVIOUS ATTEMPTS TO IMPROVE THE STRIP

Over the years we tried many different techniques to control strip development and improve the aesthetic character along Route 28, including rezoning commercial lots to noncommercial districts, limiting the size of retail stores, reducing the allowable size and height of signs, requiring more landscaping and buffers, imposing impact fees, and regulating traffic management and architectural design. Although all these regulations improved the quality of new development, many applicants and planning board members did not understand what the town actually wanted. The design regulations were simply words in a long document filled with many other requirements. Various people interpreted the text in different ways. It was not unusual to have applicants negotiate specific design features with the planning board at public meetings, which usually took lots of time and left both sides uncomfortable with the result. I began to realize that the text-based regulations were not good enough to deal with complex design issues.

GOOD EXAMPLES OF DESIGN GUIDELINES

For many years, I felt design guidelines were the missing link in our quest to improve the aesthetic character of Route 28. Guidelines use photographs and drawings to illustrate the desired form of development. One of the early design guideline documents that influenced my thinking was *Designing the Future to Honor the Past: Design Guidelines for Cape Cod*, prepared by the Cape Cod Commission in 1994. It uses photographs, drawings, and text to present detailed guidelines for open spaces, roadways, architecture, adaptive reuse, infill construction, landscaping, accessibility, parking, outdoor lighting, and signage. A unique feature of these guidelines is a model case study for commercial strip development with sequenced illustrations of existing conditions and phased redevelopment.

Another document I consulted was *Design Guidelines for the Route One Corridor in Falmouth, Maine*, produced by Terrence DeWan and Associates in 1997. This booklet is about 50 pages long and contains large (4-inch by 4.5-inch) photographs with brief explanations. Guidelines for architectural design and signage are presented as brief bullet-points. The format of the document and the simplicity of the messages make it very easy to understand.

INTRODUCING DESIGN GUIDELINES TO SALEM

In 2010 the Town of Salem received a grant from the New Hampshire Department of Transportation to prepare design guidelines as part of the Community Technical Assistance Program for the Interstate Route 93 expansion project.

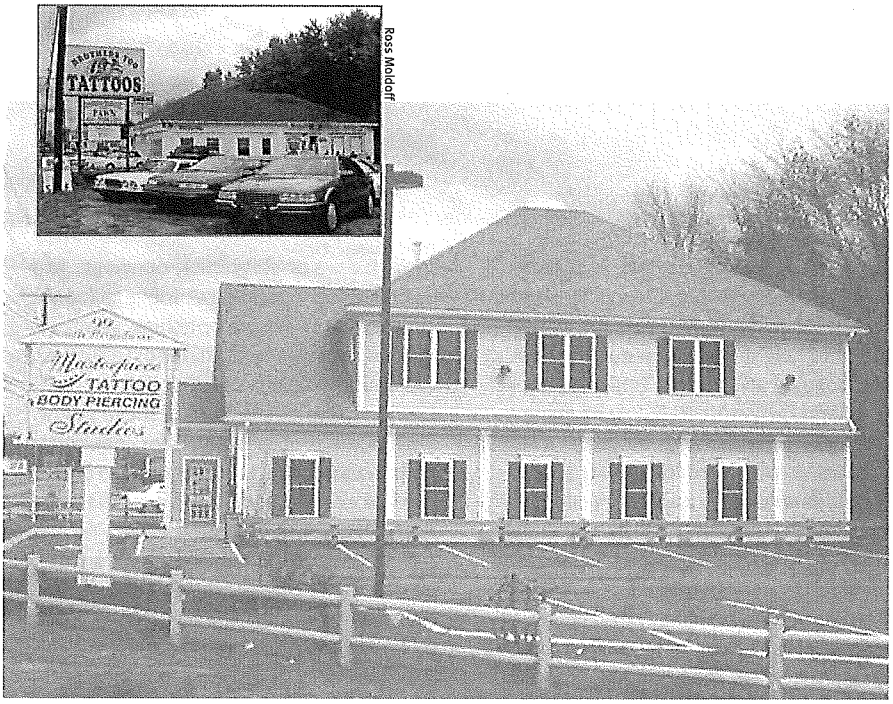
We started this project with a meeting to get input from the businesses and property owners who would be affected by

design guidelines, such as engineers and architects. We purposely held the meeting before putting any guidelines together. Our consultant made a general presentation with questions for the audience about design concepts that might be acceptable for Salem. We found that improving the character of the Route 28 strip was a shared goal of most of the participants, but there were concerns about adding costs to comply with new design guidelines and overregulating signs in particular.

Armed with feedback from this meeting, our consultant prepared a document using many photographs of local sites and buildings. We posted everything on the town website and, after several revisions and review by the planning board and myself, a final document was produced.

This document, *Design Guidelines for Salem, New Hampshire*, includes chapters on site planning, architecture, landscaping, lighting, and signage. It covers all new commercial (retail, office, and industrial) and multifamily residential development projects. Each chapter contains goals, objectives, and guidelines, which take the form of brief sentences with accompanying photographs. There are about 250 separate guidelines in 90 pages. The design guidelines were adopted by the planning board in March 2011 as part of the town's site plan review regulations. The guidelines apply to new development as well as expansions or redevelopment of existing buildings and sites. They are applied to each development that requires site plan approval from the planning board, but can be waived if the board finds they are not applicable due to project size.

One critical decision was to adopt the guidelines as voluntary recommendations, not mandatory regulations. The planning board felt that the level of detail in the guidelines would take some time for everyone to get used to, and they wanted to gauge the community's experience with them for a few years before making them mandatory.



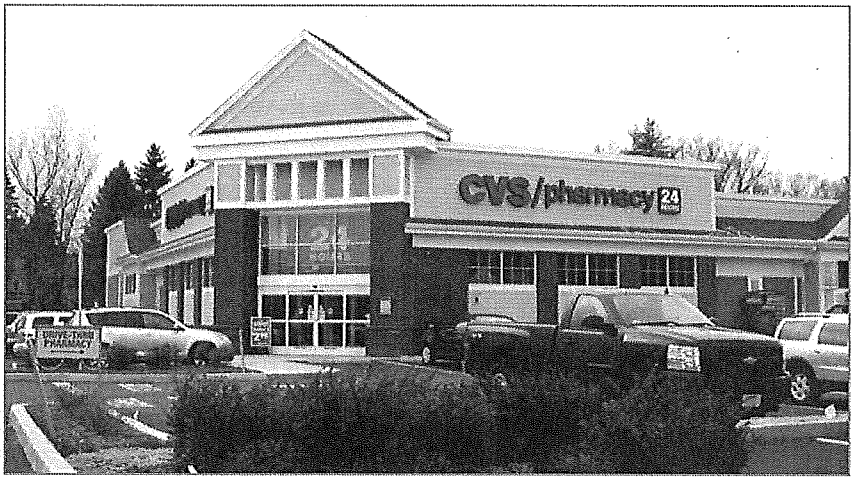
Ross Moldoff

These before-and-after photos demonstrate the power of aesthetic improvements to change a retail strip.

LESSONS

Adopting design guidelines in a pro-development community with an existing commercial corridor is no easy task. In Salem, it helped to invite the development community to participate in the process at an early stage, not just to comment on a finished document. Keeping the public informed by posting draft versions of the guidelines on the town website and televising all discussions on them created a climate of openness. We were fortunate to hire an experienced consultant who was able to smoothly deal with concerns after having done so many times before in other communities. We were able to overcome any remaining objections by adopting the guidelines as voluntary. I also prepared a checklist to summarize the 90-page document in just a few pages, which made it easier to convey to property owners.

Several new projects have been reviewed under the design guidelines so far, and the experience has been positive. The planning board requested architectural upgrades and increased size of plantings in accordance with the guidelines. I expect that, as they are used more often, both the development community and the planning board will find the photographs in the guidelines to be beneficial and easy to use. Ultimately, I have no doubt this tool will help us better control the appearance of new development in Salem.



Ross Moldoff

Newer projects demonstrate what the town was trying to accomplish with design guidelines, including more attractive buildings and improved signage and landscaping.

Design Guidelines in Barnstable County, Massachusetts

By Sarah Korjeff

The Cape Cod Commission has used design guidelines since the early 1990s.

As a regional planning and regulatory agency—one of only two in Massachusetts—we identified the need for design guidelines both to direct development in the local communities and also to guide the design of projects undergoing review by our own agency.

DESIGNING THE FUTURE TO HONOR THE PAST

Designing the Future to Honor the Past: Design Guidelines for Cape Cod was our first effort. Because the Cape Cod Commission is a regional agency, we first developed design guidelines to apply to the region as a whole. That could be challenging given the variation in neighborhood character throughout the Cape's 15 towns, so we focused on the distinctive, traditional characteristics that were most common across those communities—the things that make the Cape unique and draw people there. Our initial publication included guidelines ranging from big-picture issues like site design down to more specific details like signage. We incorporated graphics as much as possible to help interpret the guidelines for the reader. The underlying principle of the publication was always to guide development to be consistent with the Cape's traditional character.

We developed *Designing the Future to Honor the Past* with help of a consultant and with numerous public meetings and opportunities for comment. The design guidelines were adopted as a technical bulletin by the Cape Cod Commission and are used to illustrate how to comply with minimum performance standards in the commission's review of large-scale developments. In addition, the guidelines are used informally by several town planning boards, town planners, and architectural review boards in their site plan review and other local development reviews.

In one town, Yarmouth, the planning board formally adopted the design manual for guidance during project reviews in their commercial business district.

The manual, which won an Outstanding Planning Award from the Massachusetts Chapter of APA in 1995, has two key sections that make it more likely to be implemented. The first is a section titled "Case Studies," where we explored four typical development scenarios from the region: commercial strip redevelopment, compact residential development, historic village centers, and large-scale commercial development. We then applied the guidelines to each development scenario and illustrated how they could affect design there.

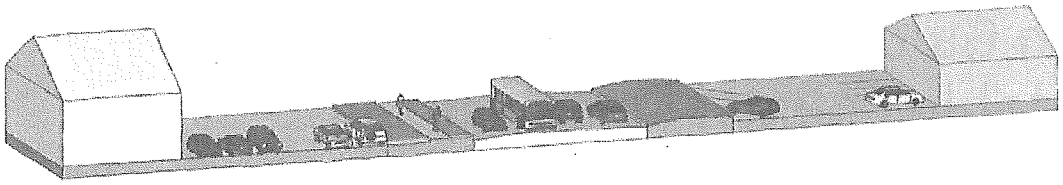
The strip redevelopment scenario was perhaps the most complicated, and it begins by acknowledging key problems with existing conditions: curb-cut conflicts, lack of consistent architecture, residential isolation, and visual clutter. The manual then attempts to address these issues in phases: first, laying the groundwork by creating a plan for the area and amending zoning, then focusing on "Green Intervention" by consolidating curb cuts, installing sidewalks and street trees, and providing open space. The third phase introduces housing to the area through back-lot development and makes connections to surrounding residential neighborhoods. Finally, the fourth phase looks at infill construction along the street edge, as well as introducing public transportation and improving signage.

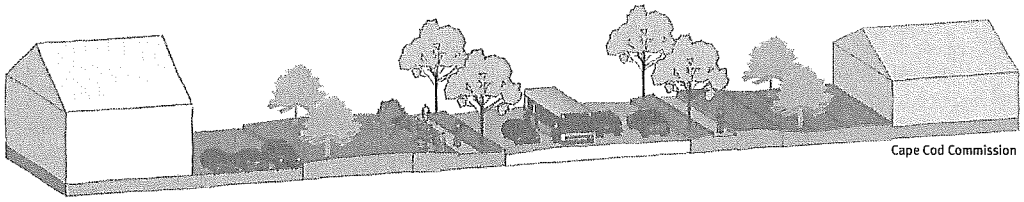
The second key section of the manual is titled "Making it Happen," which helps facilitate the changes discussed in the case studies. It acknowledges that zoning changes are not always easy to accomplish but recognizes they are a critical piece in guiding commercial zones to follow a more traditional surrounding context.

In strip commercial areas we have worked with towns individually and discussed those zoning changes that are needed to support the design guidelines—things like adjusting building setbacks, requiring building transparency, adopting mixed use zoning, and amending parking location requirements. But "Making it Happen" goes beyond zoning. It addresses the need to work with property owners to identify incentives that will guide development to desired locations and in the desired forms. It covers options like streamlined review processes, transfer of development rights, and density

Cape Cod Commission

As shown in this sketch, lower roof heights on attached masses reduce the apparent scale of the building.





Cape Cod Commission

This cross section shows existing development setbacks along Route 132 (above) and proposed changes following the design guidelines (below). In the future cross section, the taller building on the left remains where it is and parking is shielded by a 30-foot landscape buffer on the property. The shorter building on the right is moved closer to the street, and landscaping fills the front setback area.

bonuses. It also acknowledges the need for local investment in infrastructure improvements, whether they are public transit, pedestrian and bicycle facilities, or design assistance for facade improvements.

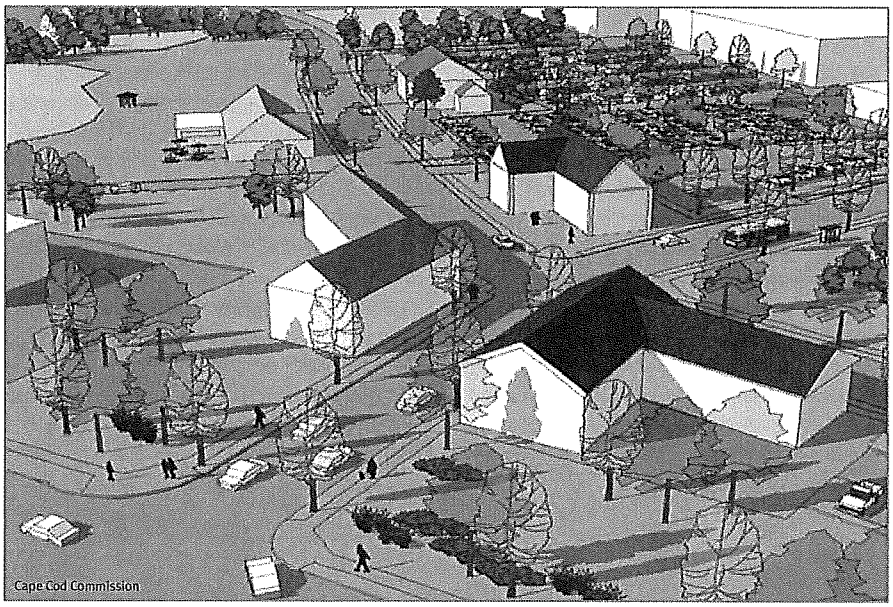
CONTEXTUAL DESIGN ON CAPE COD

After using *Designing the Future to Honor the Past* for 10 years, we found that historic districts and village centers were often subject to design review or design standards, but outlying areas in the region were not. Larger commercial zones, mostly located outside village centers, were seeing development of chain stores and other large commercial buildings. Towns were requesting assistance in how to review these structures, and it became apparent that further guidance was needed in the design of large-scale buildings. That led to development of the commission's second design manual, *Contextual Design on Cape Cod: Design Guidelines for Large Scale Development*, which won an Outstanding Planning Award from the Massachusetts Chapter of APA in 2009.

Contextual Design on Cape Cod focuses on large buildings, which the commission sees most in its development reviews and which arguably have the greatest visual impact on region. As with the first design manual, this was developed on a regional scale in an effort to provide a starting point for all towns and for the commission. Unlike the first manual, we developed it in-house with a group of architects that served as an advisory panel. In usage, it is very similar to the first manual. The commission has adopted it as another technical bulletin that provides guidance in how to comply with our regulations, and we are encouraging communities to adopt it too. The Yarmouth Planning Board has formally adopted a slightly modified version as a minimum requirement in certain commercial districts, but other towns are using it informally to guide their review.

The importance of contextual design—guiding development to be consistent with the Cape's traditional character—is explained in this manual. It focuses on two main concerns: ways to site large buildings and ways to break down large building masses into smaller elements that are more consistent with the region's traditional scale. In looking at siting strategies, the guidelines address two different scenarios—siting buildings in centers and siting buildings in outlying areas—acknowledging that different techniques are appropriate for each situation.

In strip development areas, it is necessary to determine whether an area should be treated as center or as an outlying area. If a strip area is adjacent to a village center



Cape Cod Commission

This rendering of proposed development, looking north from the intersection of Route 28 and the Cape Cod Mall rear entrance, illustrates how the area could look with enhanced landscape buffers along Route 28 and a series of pedestrian-scale buildings fronting on a revised internal road/sidewalk network. The buildings are set close to the street and oriented to take advantage of visual access to the nearby ponds and green space.

or established neighborhood, it may be best to follow the historic patterns. Defining the street edge is perhaps one of the most important strategies, illustrated by moving buildings closer to the street, using landscape features to continue the building line, and using street trees to further define the street edge. Relocating buildings or entire parking lots may not be possible, so the guidelines offer alternative means of meeting the design goals through buffers and landscaping, always in an effort to maintain the traditional character of the region.

In the "Building Strategies" section, the manual explores various ways to break down large building masses, whether it is several smaller buildings grouped around a small courtyard or green or a series of smaller, attached massings. Articulating buildings by incorporating changes in building setback, height, roofline, and facades is a key element of this section. It also discusses the concept of bringing down the building edges with smaller attached masses that are more pedestrian oriented and scaled.

Both siting strategies and building strategies are illustrated with a combination of photographs and simple figures. Using graphics is critical to helping people understand the intent of the guidelines, and also to making the document user friendly.

APPLYING DESIGN GUIDELINES ALONG ROUTE 132

After producing the two regional design manuals, it has been a welcome challenge to apply these guidelines to specific areas in the region. The Route 132 commercial corridor in Hyannis, developed originally in the 1970s, is a good illustration of the challenges surrounding a commercial strip. The town and property owners want to change the character of the corridor to make it safer for pedestrians and other users and also to make it more attractive for businesses and their users.

We began our work by looking at the length of the corridor; cataloging its users; and studying building footprints, development patterns, and roadway characteristics. In doing that we were able to define discreet segments that could be recognized for their unique character. We defined the distinct areas on a map and created different goals and separate design guidelines for each area so the corridor would seem less like a long, consistent strip. Breaking it down into smaller parts also seemed to make unique development patterns more visible and potential solutions more manageable to implement.

A main feature of the Route 132 report was establishing a scale of building at the street frontage—essentially changing the relationship between the building and the street—either by moving parking to the rear of buildings or by establishing a wide, landscaped buffer. We found that offering two possible solutions is a useful tool that recognizes that it's not always possible to relocate a building in the short term. Those options—moving the building forward or improving landscaping—are then illustrated with simple graphics.

Another main feature of the report was the focus on streetscape design. For each segment of the corridor we identified ways to define the road edge with consistent landscape treatments and pedestrian amenities, and presented them in illustrated design guidelines. Street trees and landscape buffers were proposed in some areas; consistent building setbacks in others. Hard-edge buffers such as fences or low walls were proposed in places where parking is visible or buildings are set too far back to create a sense of enclosure.

We also identified areas where development could be added—either to provide a pedestrian focus that connects existing activity areas to residential areas, to act as a shield for large parking lots, or to draw attention to underappreciated resources. As one example, we suggested additional pedestrian-scale buildings at the main access to one of the malls to provide linkage to a nearby residential neighborhood, to take advantage of hidden ponds, and to screen mall buildings and parking. We developed illustrations and graphics using SketchUp to help people understand how the area could look with these changes and to help sell the idea to various property owners and community officials.

FINAL THOUGHTS

In developing guidelines for specific areas, it's important to recognize the potential shrinking retail market and also competition from other areas of the community that are involved in revitalization efforts—village centers, main streets, etc. Guidelines should make an effort to differentiate these areas, both in design and in activities or uses, in an effort to help them all succeed. But perhaps most important is to get guidelines out there. It is hard to influence change without them. To see the full design guidelines and reports discussed in this article, visit the Cape Cod Commission website at www.capecodcommission.org.

REFERENCES

- Cape Cod Commission. 1994. *Designing the Future to Honor the Past: Design Guidelines for Cape Cod.* Available at www.capecodcommission.org/resources/regulatory/DesignManual.pdf.
- Cape Cod Commission. 2009. *Contextual Design on Cape Cod: Design Guidelines for Large-Scale Development.* Available at www.capecodcommission.org/resources/regulatory/ContextualDesignFinalWeb.pdf.
- Salem (New Hampshire), Town of. 2011. *Design Guidelines for Salem, New Hampshire.* Available at www.salemnhprojects.org/uploads/planning/Design_Guidelines/DESIGN%20GUIDELINES%20-5-4-11-adopted.pdf.

Cover image: Mashpee Commons, on Cape Cod, is built in the style of traditional New England town centers. It includes a mix of businesses and housing. Paul Blackmore/*Cape Cod Times*; design concept by Lisa Barton.

VOL. 28, NO. 11

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

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

Missing and damaged print issues: Contact Customer Service, American Planning Association, 205 N. Michigan Ave., Suite 1200, Chicago, IL 60601 (312-431-9100 or customerservice@planning.org) within 90 days of the publication date. Include the name of the publication, year, volume and issue number or month, and your name, mailing address, and membership number if applicable.

ZONING PRACTICE
AMERICAN PLANNING ASSOCIATION

205 N. Michigan Ave.
Suite 1200
Chicago, IL 60601–5927

1030 15th Street, NW
Suite 750 West
Washington, DC 20005–1503

HOW DOES YOUR COMMUNITY GUIDE THE DESIGN OF COMMERCIAL CORRIDORS?

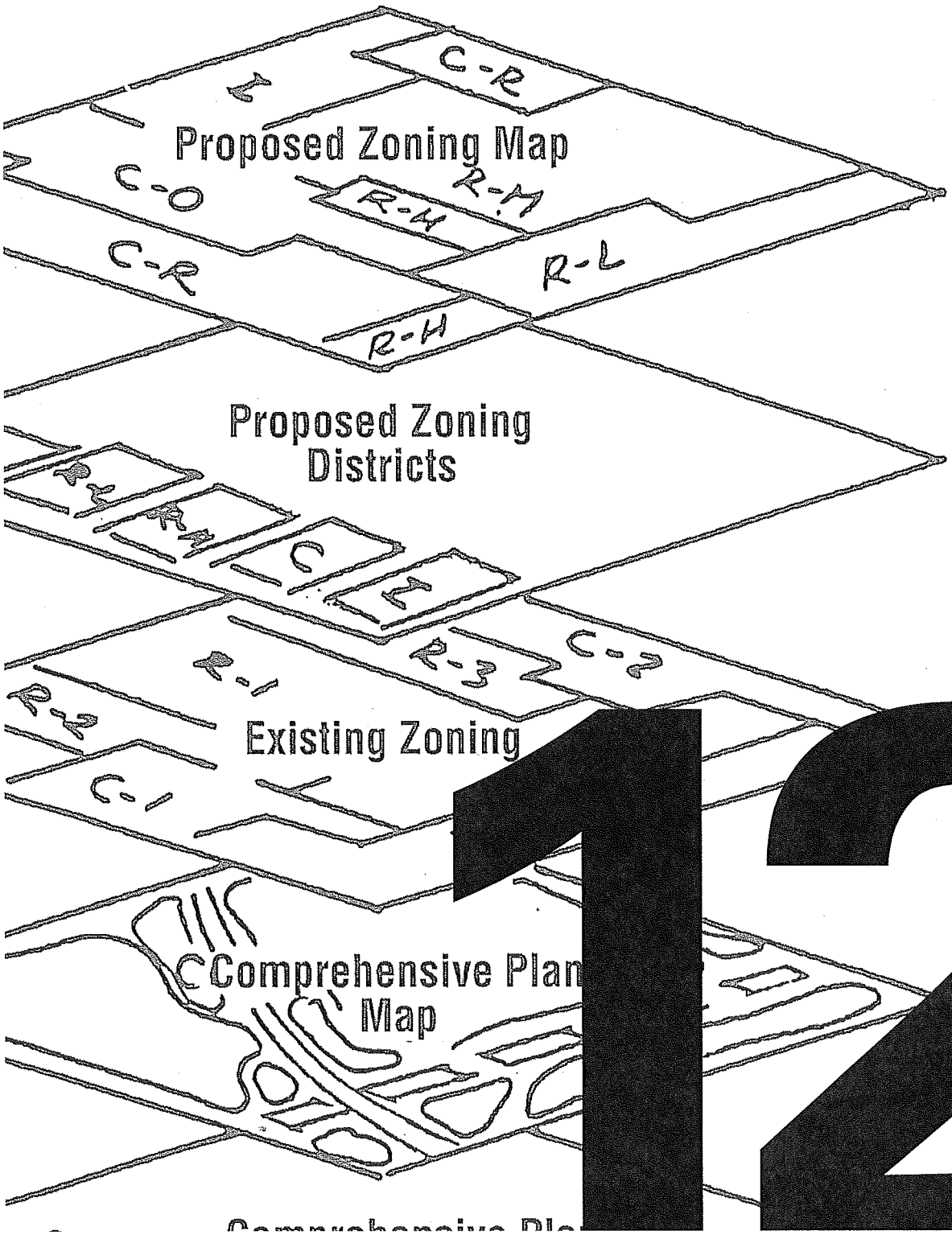
11

ZONING PRACTICE DECEMBER 2011

AMERICAN PLANNING ASSOCIATION

ISSUE NUMBER 12

PRACTICE REMAPPING



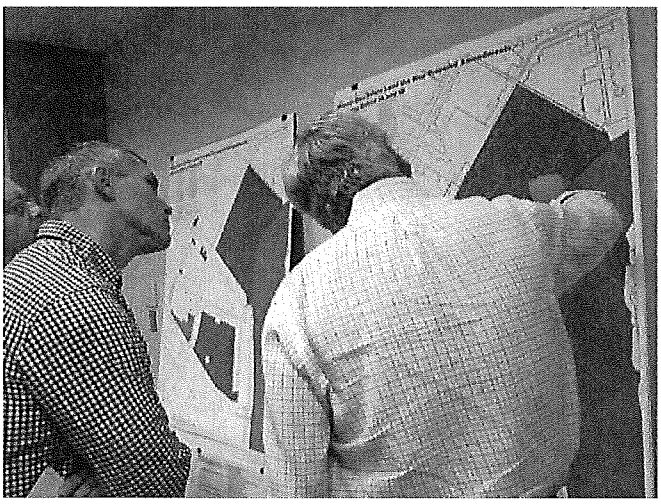
12

Mapping Principles for Rezonings

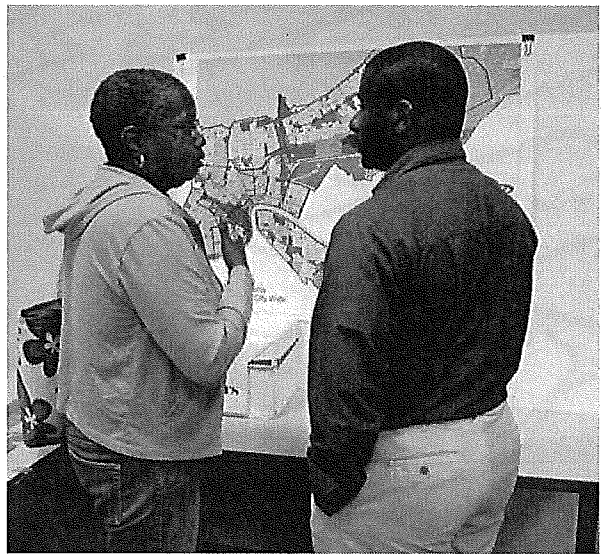
By Arista Strungys, AICP

When a municipality takes on comprehensive zoning reform, rewriting the text is only half the story.

In order to implement redevelopment goals—particularly those identified in a comprehensive plan—and ensure that the new zoning matches the reality of the existing physical environment, a revision of the zoning map is also needed. This task can be daunting, as zoning map revisions typically pique the interest of various property owners, including those that may not have been involved with the text revision process. To make this process more manageable, the following mapping principles can serve as both a guide for planners to make the process less intimidating and as a way to explain the rationale behind map changes to the larger constituency.



Jeanne Nathan



Public forums provide an opportunity for citizens to review proposed zoning maps and ask questions to gain a better understanding of the changes.

WHY DOES THE ZONING TEXT COME FIRST?

It is typical in a zoning ordinance update to make revisions to the text before undertaking any remapping. The purpose of this is to make necessary changes to the procedures and content of regulations so that it reflects current policy, especially as articulated in recently adopted plans. Key changes include adjustments to existing or drafting of new zoning districts. Once district regulations are drafted, tested, and approved—and principles for mapping are in place—the remapping process can begin.

MAPPING PRINCIPLES

In order to identify where to map the districts proposed by the new zoning ordinance, the municipality must first agree on principles for mapping decisions. These principles need to reflect existing development realities, applicable land-use policies, and tenets of good urban planning. When evaluation of the zoning map begins,

ASK THE AUTHOR JOIN US ONLINE!

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

About the Author
Arista Strungys, AICP, is a principal consultant at Camiros, Ltd. Her area of expertise is zoning and development regulations, and she has worked with communities across the country in drafting development regulations. She is experienced in all types of regulatory techniques, including traditional controls, hybrid and form-based coding, design guidelines, and sustainable development.

the following suggested principles are intended help decision makers evaluate potential zoning changes. Typically, much of the current zoning map will not change drastically during remapping. Many of the current zoning districts will be retained, with only minor modifications to bulk, setback, and design standards, to better address existing development patterns and conditions.

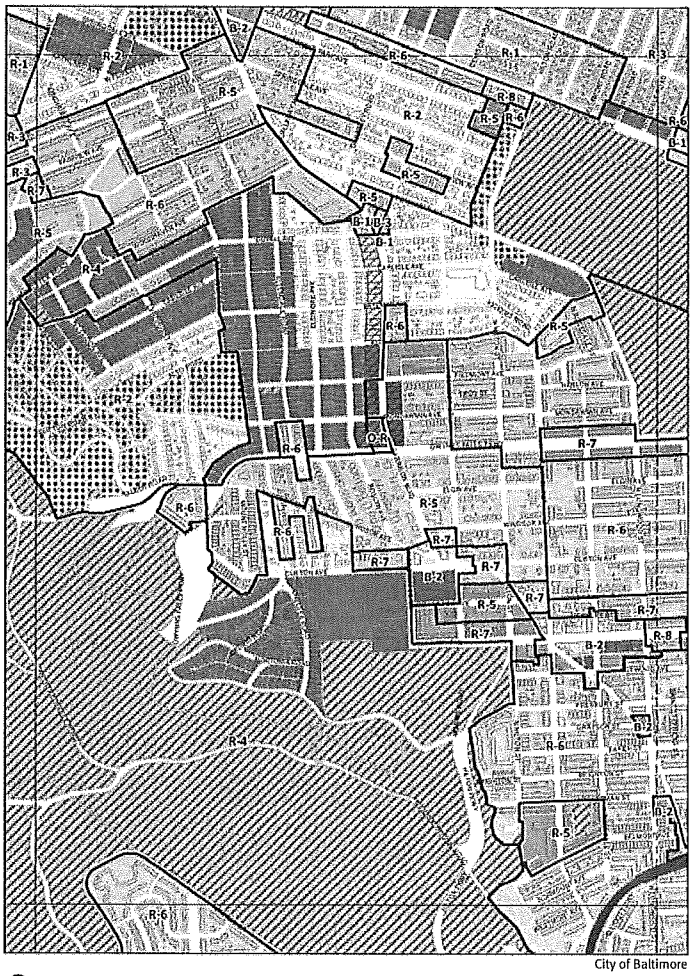
Maintain current zoning districts in their present locations where controls are appropriate for current development patterns and there is no desire for change. Many of the current zoning districts likely provide the desired level of control regarding the type of development, form, and design character of the area, as well as the uses desired. While there may be some text adjustments to fine-tune the district, the current mapped location of these districts serves the development goals of the long-term future and, therefore, should not be adjusted.

Often, as part of the fine-tuning process, district names are changed to reflect modern zoning conventions. For example, older ordinances may have named districts sequentially by letter (A, B, C, etc.). An ordinance revision will usually rename these new districts by major land-use category, such as R1 for residential districts, C1 for commercial districts, and so forth. In this case, the remapping should present these renamed districts as "equivalenced" districts to ease concerns over changes. In equivalencing, the new zoning districts are equated to the old districts (e.g., A District = R1 District). The map should be redrawn to illustrate the equivalenced districts, including a legend that shows these equivalences. This will illustrate the areas where zoning will not change in content, only name, and will put many community members' minds at ease.

> Newer mapping and data-gathering techniques such as GIS make it possible to remap areas to bring them into conformity, either by amending criteria to make them more responsive to existing conditions, mapping to a different district, or by creating a new district.

Remap areas of the municipality to reduce nonconformities.
Certain areas of a municipality may have been inappropriately mapped or developed differently over time than currently zoned, creating nonconformities. One of the goals of a comprehensive zoning revision, for both text and map, is to reduce nonconformities, which confirms the integrity of the zoning ordinance and map, creates predictability and consistency in the application of the ordinance, and reduces the need for variances.

Certain areas may have been mapped so that they do not actually reflect the details of development in that area. In some communities, an older land-use policy may have tried to reduce the density of residential areas, but development proceeded in accordance with the density established by the lots of record. Thus, many properties in these areas are nonconforming in regard to lot area, lot width, or some other factor affecting density. Newer mapping and data-gathering techniques such as GIS have allowed for a more rigorous and cost-effective assessment of these types of conditions. This makes it possible to remap areas to bring them into conformity, either by amending the criteria within existing zoning districts to make them more responsive to existing conditions, mapping to a different district, or by creating a new district that reflects such conditions. This can also be the case with nonconforming uses. An established commercial area may be zoned residential, making the commercial uses nonconforming. A rezoning to the appropriate commercial district would allow these areas to continue as a business district.



City of Baltimore

Highlighting the areas of change and graying out areas where no rezonings are proposed (as shown here) can clearly communicate where district changes are planned.

Remap applicable portions of the municipality to implement development policies.

A comprehensive plan often contains numerous land-use policies that describe how areas should redevelop. In areas where policies describe a plan for redevelopment that differs from what is permitted now, new districts may be appropriate. The following mapping principles will assist in identifying how these zoning map changes should occur.

1. The process should begin by identifying key areas where change is desired, noting the relationship of current zoning to the proposed land-use or redevelopment policy. If the current zoning is able to accommodate such redevelopment, then there is no need for the zoning map to change. If the plan does not contain specific land-use recommendations, or if the recommendations are too vague to be mapped, additional area-based planning may be necessary. It is essential to understand the type of use and form desired in order to identify appropriate zoning.

2. Where current zoning districts do not achieve or accommodate the desired change, the most appropriate new districts for such land-use or redevelopment policy should be identified. In some cases, remapping may be a mix of zoning districts.

3. To start the mapping process, the general location of new districts should be placed on the zoning map. While a plan may provide some general guidance regarding location, eventually the zoning map will need to be refined to specifically identify the parcels to which these districts will be applied. Comparison of the existing land-use pattern with the land-use directions provided or implied by the plan will help to define and refine the boundaries of the re-map area. Studies of aerial photography or site inspection should also be conducted.

4. Finally, two key implications of remapping should be considered. The first is the creation of nonconformities. The second is the timing related to achieving the redevelopment potential. Not all zoning map changes should occur immediately upon the adoption of new zoning text. In some cases, where there is a policy or desire to have an area redevelop differently over time, it may not be appropriate to change the zoning immediately because the market and other development conditions may not be in place to bring about that change. Remapping is based on redevelopment potential, including factors outside of the zoning ordinance. If current or anticipated market conditions are not yet in place, remapping could lead to extensive nonconformities and discourage reinvestment and maintenance, thus creating more, rather than less, blight conditions. In this case a zoning change is better reserved for a later time when that redevelopment potential begins to be demonstrated by requests for rezoning.

Apply policy-specific districts when remapping to resolve specific conditions or achieve specific purposes.

There may be a need to draft new districts to achieve specific purposes; consequently, these require special considerations in their mapping. Examples of some of these types of districts include transit-oriented development, mixed use, campus districts, and overlay districts.

Transit-Oriented Development Districts: Transit-oriented development is a specific type of mixed use development that increases density and allows for a mix of pedestrian-oriented commercial and residential uses around transit stops in order to encourage the use of transit and reduce reliance on the automobile. Generally, the accepted planning principle for TOD is to consider the area within a quarter-mile radius around the transit stop as the geography for a TOD district. However, when applied to the zoning map, a TOD district cannot be applied as that circle. Instead, mapping should use the quarter-mile rule as a reference point to assess the character of existing development in that area.

A TOD district should be mapped in those areas that can accommodate higher density and a mix of uses. In more urban areas, where a natural mix of commercial

and residential uses may exist, it is generally easier to apply the TOD district within a general quarter-mile radius. In more suburban areas, mapping of the district will need to take into account the existing conditions. For example, where stable residential neighborhoods abut the transit stop, the district should "jog" along the boundaries of these existing neighborhoods. In these cases, it may be mapped only along corridors adjacent to the transit station.

Mixed Use Districts: Many land-use plans acknowledge the benefits of mixed use development and contain numerous policies that encourage such redevelopment. These can also range from districts that mix residential and commercial uses to an industrial and commercial mix. In response, a zoning ordinance will need the proper districts to foster this type of development. Because mixed use development allows for a variety of uses, the creation of nonconformities is less of an issue during remapping.

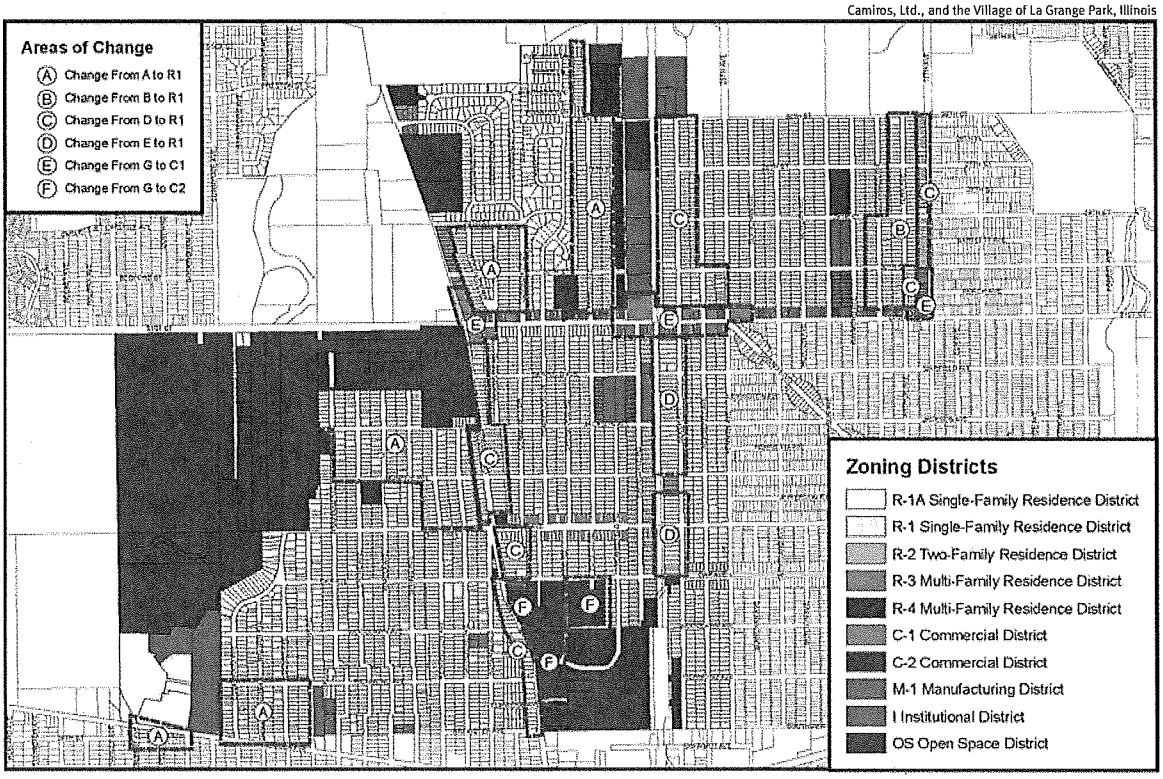
First, existing mixed use areas should be identified. Remapping these areas to a mixed use district will encourage continued investment by allowing such development by-right. Areas where abutting districts have begun to blend together should also be considered for mixed use zoning. This frequently occurs, for example, when a commercial district abuts a light industrial district and the two types of uses coexist peacefully. In these cases, mixed use development often serves as a good transition between districts.

Also, mixed use development does not have to be encouraged only by remapping to one specific district. In some cases, a mixed use environment is created by careful mapping of different residential and nonresidential districts. For example, in certain areas there may be neighborhoods of residential development that directly abut a small-scale, local commercial corridor, creating a mixed use environment where residents walk to the local grocery store. In these instances, the mixed use environment is created by mapping the commercial corridor as a local commercial district and the residential area as residential.

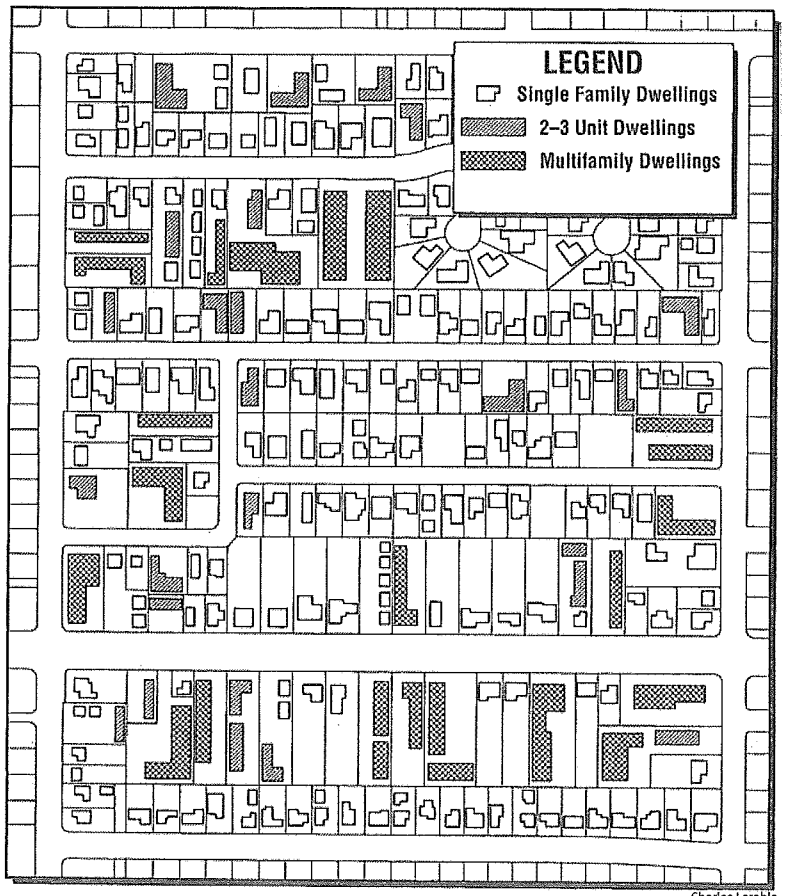
Campus Districts: When a community has significant institutional uses, such as a university or major medical center, a common zoning technique is to create a campus district for the use. Because of the numerous activities and uses that take place within such a large institution, a special zoning district can make regulation easier for both the institution and the municipality. This approach gives the institution more flexibility in development and frees the municipality from having to process special uses or variances for simple changes to the campus. Rezoning to these districts should be coterminous with the boundaries of the campus and only permitted for properties owned by the institution. If additional property is purchased after the district is mapped, the map will need to be amended to incorporate that area.

Overlay Districts: In older ordinances overlay districts have frequently functioned as a way to address immediate concerns in specific geographic areas. In many ways, they are a fast-and-dirty solution to a hot-button issue. However, as part of a comprehensive zoning update, overlay districts should be carefully evaluated for their usefulness. While the intent of an overlay district is important to a neighborhood this can get lost in the myriad regulations that now apply to a zoning lot once overlay districts are in place. This makes the ordinance difficult to use and interpret. The first step is to see if the regulations within the overlay district can be consolidated into one or more base districts or perhaps made into a new base district. Then the area should be rezoned to the appropriate base district, whether a revised district or a newly drafted one.

Camiros, Ltd., and the Village of La Grange Park, Illinois



Showing the equivalences on zoning maps helps the public understand that district renamings do not necessarily affect district regulations.



Charles Lerable

Mapping new district boundaries can be especially challenging in areas with existing development of different use types or densities.

On the other hand, a true overlay district is one that regulates certain specific elements common to a geographic area and responds to the uniqueness of that area, which is appropriately zoned with a number of different districts. Environmental issues are one type of condition that are often best addressed through an overlay district, as the overlay districts impose restrictions that promote environmental sensitivity but allow the area to develop as the appropriate mix of districts and intensities. While overlay districts are a useful zoning tool, their application should be limited so that they specifically address a particular issue that applies over a larger geography. From a mapping perspective, the specific elements that the overlay district is trying to regulate should guide the location of the district's boundaries.

Remap existing planned unit developments and other large-scale developments.
Many municipalities have used planned unit developments as a way to accommodate new development within the framework of an outdated ordinance. The goal of a comprehensive zoning update is to create a development environment where modern development types can take place by-right, without having to go through a series of approvals. Once a new ordinance is adopted, older adopted planned unit developments will remain in place, so it is good policy to try to integrate the requirements of planned unit developments into the zoning ordinance. This will allow each PUD to be evaluated against the underlying zoning, and remapping can occur where new districts better align with the intent of the land-use and design requirements contained within the planned unit development ordinance. This can encourage the repeal of PUDs, where appropriate, as the approved conditions contained within these regulations can be continued under zoning.

As a general rule, if the owner of a planned unit development is in compliance with all requirements and conditions, the PUD cannot be repealed by the municipality because it is a special approval granted to the property owner. Therefore, these approvals will remain in place unless a change is requested by the owner. For planned unit developments, typically three options are available to the owner:

1. If the new districts and regulations match the PUD regulations, making the PUD unnecessary, that planned unit development can be repealed at the owner's request. This offers a benefit to the property owner, because any changes to the development that comply with the zoning ordinance can occur without special approvals.

2. If the owner would like to retain the PUD but link to the new zoning ordinance, the planned unit development can be repealed and replaced with a new PUD that links to the new zoning ordinance.

3. Finally, the PUD can be maintained as is, in which case the municipality must keep the original zoning ordinance on file as a reference point for the planned unit development regulations, since it is tied to zoning regulations in place at the time of approval.

Ensure consistency with the future land-use plan.
Some municipalities are required to maintain consistency with an future adopted land-use plan. Even when consistency is not required, general alignment with the future land-use plan is recommended so that land-use policies reinforce zoning regulations. The following principles are useful for ensuring consistency:

1. Consistency requires synchronization between land-use categories and zoning districts. It is important to understand that land-use categories are, by nature, more general than zoning districts. An apt analogy is that any land-use category is generally a basket that holds a variety of zoning districts. For example, a future land-use map will identify areas as single-family residential; however, those areas may contain a number of single-family districts of different densities. It will be important, once an area is identified as single-family, to determine exactly which single-family district is appropriate.

2. Properties should be assigned a zoning district that best fits the current use of the property unless the future land-use plan indicates an alternative land use. In this case, the municipality may choose to either rezone the lot now or wait until a rezoning is more appropriate. In some cases, because a comprehensive rezoning looks at a municipality on a parcel level, this more specific

analysis may reveal that changes to the future land-use map, rather than the zoning map, are needed to create consistency between land use and zoning.

3. If a lot is vacant, the lot should be assigned a zoning district similar to adjacent lots unless the future land-use plan states that an alternative land use is more appropriate.

4. While the chosen zoning district should be consistent with the future land-use map, it is important to catalog nonconforming uses during the zoning revision process. Documenting these uses may reveal a common development pattern not recognized in the current zoning ordinance and not accounted for in the more general land-use categories of the plan. For example, in many older cities residential neighborhoods routinely contained corner stores. However, ordinances adopted 20 or 30 years ago often made these uses nonconforming with the goal of preserving residential character. Now that a growing number of municipalities recognize the value of mixed use development at a variety of scales, corner stores are often seen as a valuable component of predominantly residential neighborhoods. If, during the mapping process, it is discovered that certain areas have a significant number of nonconforming corner stores, it is a signal that the zoning text should be reevaluated to allow them as special uses or that a special district may need to be drafted to address them.

It is important to keep in mind that zoning occurs in the realm of current development realities and property rights. While a future land-use plan typically projects a vision forward 20 years, zoning has to deal with current conditions on the ground. Therefore, unless consistency is required by city charter or state statute, most zoning maps are not carbon copies of a future land-use map, and zoning changes to align with such plan are undertaken incrementally.

WHERE DO YOU DRAW THE LINES?

As a municipality undertakes a rezoning, it is important to keep in mind where district boundaries are drawn. As a basic rule, district boundary lines should be drawn along existing streets and lot lines. This prevents split-lot zoning, where one lot is given two zoning designations.

However, even with a future land-use plan as a guide, drawing the boundaries between districts can be complicated. For example, a future land-use plan will designate a corridor as commercial but typically does not make this designation on a parcel-by-parcel basis but rather as a broad stroke of red along a commercial street. Pedestrian-oriented commercial corridors often abut lower-density residential districts. If a municipality is lucky enough to have alleys, these are natural boundary lines between districts. However, many municipalities have not developed with alleys, so drawing the boundary becomes trickier. In this example, there are two concerns that must be balanced. First, sufficient land area must be remapped to encourage commercial development. Typically, for commercial development, some zoning in depth is required, which may require rezoning residential lots located behind the commercial lots that front the corridor. Therefore, a prime consideration in mapping is determining if and where commercial zoning should intrude upon established residential zoning patterns.

This brings up the second concern: if the reduction of residential zoning may result in nonconformities when existing residential areas are placed within a commercial district. Specific site analysis will need to be undertaken to determine which replacement zone works best for areas that are currently zoned residential but need to change to accommodate the implementation of this land-use policy. The result may be a new district that allows both commercial and residential uses.

Similarly, with many municipalities becoming more comfortable with form-based code techniques, regulating plans have become a common part of ordinances. Often, these regulating plans designate various controls, such as height or use, by street frontage. These designations should cover the entire lot, especially on corner lots. Again, this is to prevent layering contradictory controls on the same lot.

I THOUGHT THE TEXT WAS DONE?

Going back and revising text once mapping has started is not uncommon. The mapping process is just another way to test the drafted districts and often you will find that the text needs further tweaking to make the districts work realistically. Other times, you may discover that some of the districts that have been retained are no longer needed. Because of this, there are often numerous iterations of both the zoning map and text. It is important to remember to continue to show the public the reasoning behind the changes between the drafts of the text and map so that they can follow the logic behind the revisions.

THE END RESULT

A comprehensive zoning map revision is no easy task. It requires balancing a number of factors that include addressing current development patterns, implementing goals for future redevelopment, and maintaining sensitivity to the concerns of property owners. However, by moving forward in a transparent fashion that lays out the reasons for changes, remains consistent in the application of guiding principles, and is flexible enough to accommodate new findings during analysis, this balance can be achieved. In the end, striking this balance will result in a new zoning ordinance and map that create a predictable development environment for property owners across the city.

Communities must consider a host of factors when remapping, including existing land uses, approved development, comprehensive plan policies, the future land-use map, existing zoning districts, and proposed new districts. Jo Evans; cover design by Lisa Barton.

VOL. 28, NO. 12

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

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

Missing and damaged print issues: Contact Customer Service, American Planning Association, 205 N. Michigan Ave., Suite 1200, Chicago, IL 60601 (312-431-9100 or customerservice@planning.org) within 90 days of the publication date. Include the name of the publication, year, volume and issue number or month, and your name, mailing address, and membership number if applicable.

ZONING PRACTICE
AMERICAN PLANNING ASSOCIATION

205 N. Michigan Ave.
Suite 1200
Chicago, IL 60601–5927

1030 15th Street, NW
Suite 750 West
Washington, DC 20005–1503

HOW DOES YOUR COMMUNITY PUT ZONING ON THE MAP?

12