January 10, 2012 | Volume 6 | No. 1

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Zoning Bulletin

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Doctrine of Exhaustion of Administrative Remedies—Lower Court Says Medical Marijuana Dispensaries Failed to Exhaust Administrative Remedies Before Seeking Judicial Review of Nuisance Abatement Order

Dispensaries maintain an exception to the doctrine applies

Citation: *SJCBC, LLC v. Horwedel, 201 Cal. App. 4th 339, 2011 WL 5966277 (6th Dist. 2011)*

CALIFORNIA (11/30/11)—This case addresses the issue of whether the doctrine of exhaustion of administrative remedies applies and precludes judicial relief in a case where medical marijuana dispensary operators challenged nuisance abatement orders issued by the county.

The Background/Facts: San Jose Cannabis Buyer's Collective, LLC ("SJCBC") and Pharmer's Health Center Cooperative, Inc. ("Pharmer's") (collectively, the "Dispensaries") leased buildings in the city of San Jose from which they operated medical marijuana dispensaries. In January 2010, the San Jose Department of Planning and Code Enforcement (the "Department") issued nuisance abatement compliance orders to the Dispensaries. The notices stated that under the city's municipal code (the "Code"), property could

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not be used "in a manner that created a public nuisance." A "public nuisance" was defined as use of the property in a manner that violates city, state, or federal law. The notices pointed out that sale of medicinal marijuana and the cultivation or distribution of marijuana for profit violated the California Uniform Controlled Substances Act (Health & Saf. Code §§ 11000 et seq.) and the Federal Controlled Substances Act (21 U.S.C.A. §§ 812 et seq.). The notices advised the Dispensaries' landlords and the Dispensaries that the distribution at the two leased premises constituted public nuisance because such distribution violated state and federal law and was not an allowed or conditional use in any industrial zoning district in the city. The notices required distribution of marijuana at the two locations be ceased.

Subsequently, the Dispensaries' landlords complied with the nuisance abatement orders by initiating proceedings to evict the Dispensaries from the leased premises.

In April 2010, the Dispensaries filed with the superior court a petition for a writ of mandamus or prohibition. The court denied the petition based on the Dispensaries' failure to exhaust their administrative remedies under the Code.

The Code provided that a person who receives a nuisance abatement order can: correct the alleged violation; or if they do not correct the violation, the director of the Department must set a hearing before the administrative appeals board. After such hearing and an administrative order from the board, an aggrieved person may obtain judicial review.

The Dispensaries appealed the court's decision. They argued that the doctrine of exhaustion of administrative remedies (the "Doctrine") did not apply here; they argued that their circumstances fit within an exception to the Doctrine.

DECISION: Reversed.

The Court of Appeal, Sixth District, California, held that, pursuant to the Code, here, an administrative review was an "illusory remedy" and thus not required for exhaustion. These circumstances fit within an exception to the doctrine of exhaustion of administrative remedies. Thus, the lower court's ruling that the Doctrine applied and the Dispensaries failed to exhaust their administrative remedies was in error. The Dispensaries' action was ripe for judicial review.

In so holding, the court explained that the Doctrine "refers to the requirement that administrative remedies be pursued as a jurisdictional prerequisite to seeking judicial relief from an administrative action." Generally, a party must exhaust administrative remedies before he or she can seek judicial review; it is a jurisdictional prerequisite. However, the court acknowledged that there were exceptions to the Doctrine such as when the administrative remedy is: unavailable; inadequate; or would be futile to pursue. Exceptions also apply in situations where: the agency "indulges in unreasonable delay"; when the subject matter lies outside the administrative agency's jurisdiction; or when pursuit of an administrative remedy would result in irreparable harm.

Thus, the court noted that "[t]he exhaustion requirement is not applicable where an effective administrative remedy is wholly lacking." The court

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agreed with the Dispensaries that was the case here. The Dispensaries could not have initiated the administrative review that they allegedly were required to exhaust, and the party authorized to do so—the director—did not do so before the Dispensaries sought judicial review.

Specifically, here, the court found that under the Code, the Dispensaries could not challenge the nuisance abatement compliance order immediately. Only the director could initiate a hearing. The director would only initiate a hearing if there was failure to comply with the order. In this case, the landlords, who received their own orders regarding the properties on which the Dispensaries operated, in effect, complied with the orders and abated the nuisance by proceeding to evict the Dispensaries. Thus, even though the Dispensaries disagreed with the order, they could not comply under protest and then initiate an administrative review, nor could they have taken a risk of noncompliance and waited for the director to initiate a hearing; this option was negated because their landlords complied with the order. Here, the director presumably did not initiate a hearing because the landlords had complied. Accordingly, in the end, administrative review before the board was not a remedy that the Dispensaries could have pursued for relief; administrative review was an "illusory remedy" here and therefore the Doctrine did not apply.

See also: *Eye Dog Foundation v. State Bd. of Guide Dogs for Blind, 67 Cal. 2d 536, 63 Cal. Rptr. 21, 432 P.2d 717 (1967).*

See also: *Ogo Associates v. City of Torrance, 37 Cal. App. 3d 830, 112 Cal. Rptr. 761 (2d Dist. 1974); accord, Campbell v. Regents of University of California, 35 Cal. 4th 311, 25 Cal. Rptr. 3d 320, 106 P.3d 976, 195 Ed. Law Rep. 989, 22 I.E.R. Cas. (BNA) 905 (2005).*

Case Note: The superior court had also denied the Dispensaries' petition on the grounds of lack of ripeness and failure to show irreparable harm. The appellate court noted that those grounds were related to the Doctrine, but did not provide alternative bases to uphold the denial.

Preemption—Mining Company Denied Variance from Setback Requirements for Mining Activities

Mining company contends local ordinance setback requirement is preempted by state Surface Mining Conservation and Reclamation Act

Citation: *Hoffman Min. Co., Inc. v. Zoning Hearing Bd. of Adams Tp., 2011 WL 5865672 (Pa. 2011)*

PENNSYLVANIA (11/23/11)—This case addressed the issue of whether the Surface Mining Conservation and Reclamation Act (52 P.S. §§ 1396.1 to 1396.19a) (the "Surface Mining Act") preempts a provision in a local

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zoning ordinance that establishes a setback for mining activities from residential structures.

The Background/Facts: Hoffman Mining Company, Inc. ("Hoffman Mining") sought to engage in surface coal mining on a 182.1-acre tract of land within the Adams Township Conservancy (S) District in Adams Township in Cambria County, Pennsylvania. Adams Township Zoning Ordinance § 1413 (the "Ordinance") permitted mining activities in that zoning district, but only by special exception. In addition, § 1413.5(a) of the Ordinance required "[a] ll mining, excavating, and blasting activities" in the district to maintain a setback of at least 1,000 feet from all residential structures.

In pursuit of its mining plan, Hoffman Mining filed an application with the Adams Township Zoning Hearing Board (the "Zoning Board"), requesting a special exception to conduct surface mining. In addition, it requested a variance from the Ordinance's 1,000-foot setback provision. In the alternative, Hoffman Mining asserted that the setback provision of the Ordinance was preempted by the Surface Mining Act. More specifically, Hoffman Mining argued that there was a conflict between the Ordinance's setback provision and the Surface Mining Act's setback clause, under which no "surface mining operations" were permitted within 300 feet of any "occupied dwelling." (52 P.S. §§ 1396.4b(c) and 1396.4e(h)(5).) Hoffman Mining also cited the Surface Mining Act's preemption clause, which provides that: "all local ordinances and enactments purporting to regulate surface mining are hereby superseded"; and that in enacting the Surface Mining Act, the Commonwealth of Pennsylvania "hereby preempts the regulation of surface mining as herein defined." (52 P.S. § 1396.17a.) (The Surface Mining Act does not define "surface mining" but does define "surface mining activities" as including mining operations for coal.)

The Zoning Board granted Hoffman Mining's request for a special exception to permit mining on the tract of land, with conditions. However, the Zoning Board denied Hoffman Mining's request for a variance from the Ordinance's 1,000-foot residential setback provision. The Zoning Board also concluded that the Ordinance's setback provision was not preempted by the Surface Mining Act—based on a distinction between regulation of mining activities and traditional zoning prerogatives.

Hoffman Mining appealed. The trial court affirmed.

Hoffman Mining again appealed. The Commonwealth Court also affirmed.

Hoffman Mining again sought review, which the Supreme Court of Pennsylvania granted.

DECISION: Affirmed.

The Supreme Court of Pennsylvania held that the Ordinance requiring surface mining activities to be set back from residential structures was not expressly or impliedly preempted by the Surface Mining Act.

In so holding, the court recognized a distinction between the regulation of the technical activities of mining/drilling and the traditional regulation of land use through zoning ordinances.

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The court explained that there are three generally recognized types of preemption: "(1) express or explicit preemption, where the statute includes a preemption clause, the language of which specifically bars local authorities from acting on a particular subject matter; (2) conflict preemption, where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute; and (3) field preemption, where analysis of the entire statute reveals the General Assembly's implicit intent to occupy the field completely and to permit no local enactments." "Both field and conflict preemption require an analysis of whether preemption is implied in or implicit from the text of the whole statute, which may or may not include an express preemption clause," said the court.

To determine whether there was preemption here, the court analyzed the statutory language in the Surface Mining Act's preemption provision. It found the first sentence of the preemption clause applied to local enactments already in existence at the time the Surface Mining Act took effect. Since the Ordinance was enacted after the effective date of the Surface Mining Act, the first sentence of the preemption clause did not apply here.

The court found the second sentence of the preemption clause did intend to bar local authorities from enacting regulations of "surface mining" after the effective date of the Act, as that term was defined under "surface mining activities." The court noted that missing from the Surface Mining Act's definition of "surface mining activities" was any mention whatsoever of either the location of surface mining or traditional land use regulation.

The court ultimately concluded: "The Surface Mining Act's preemption clause expressly preempts the regulation of surface mining; however, the clause does not preempt local regulation of land use via zoning ordinances, which may affect where surface mining is located or sited." Thus, concluded the court, the Township Ordinance's residential setback provision for mining activities fell clearly within the purview of traditional zoning regulations, merely regulating where surface mining can be sited, and therefore was not expressly preempted by the preemption clause of the Surface Mining Act.

Hoffman Mining had also argued that, if not expressly, the General Assembly had, in the Surface Mining Act's preemption clause, implicitly intended to preempt local enactments, such as the zoning ordinance's setback provision. The court disagreed. Such implicit preemption would require both conflict preemption and field preemption, and the court found neither here.

The court found that there was no conflict preemption between the Ordinance setback provision and the Surface Mining Act setback provision of 300 feet; it was possible to comply with both setback provisions. Moreover, the Ordinance's residential setback provision did not "stand as an obstacle to the execution of the full purposes and objectives of the Surface Mining Act"—which were: "to provid[e] for the conservation and improvement of areas of land affected in [ ] surface mining"; and "the protection and maintenance of the water supply." Moreover, the court did not interpret the Surface Mining Act "to have removed all force from general zoning consid-

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erations as they apply to local siting or surface mining." Rather, the court found the Act's policies could "rest alongside zoning ordinances that ... require surface mining operations to observe a residential setback."

The court also found there was no field preemption, as it could not conclude that the General Assembly implicitly intended the Surface Mining Act to be exclusive with respect to the location or siting of surface mining within a municipality. Indeed, the Act had an explicit objective of "enhance[ing] land use management and planning."

See also: *Miller & Son Paving, Inc. v. Wrightstown Tp., 499 Pa. 80, 451 A.2d 1002 (1982).*

See also: *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont, 600 Pa. 207, 964 A.2d 855, 168 O.G.R. 524 (2009).*

Preemption—Town Ordinance Limits Check-Cashing Businesses to Certain Zoning Districts

Operators of check-cashing business say ordinance is invalid because it is preempted by state banking laws

Citation: *Sunrise Check Cashing and Payroll Services, Inc. v. Town of Hempstead, 933 N.Y.S.2d 388 (App. Div. 2d Dep't 2011)*

NEW YORK (11/29/11)—This case addressed the issue of whether a town ordinance limiting the location of check-cashing establishments to certain zoning districts in the town was preempted by New York State Banking Law and therefore invalid.

The Background/Facts: In January 2006, the Town of Hempstead (the "Town") adopted § 302(K) of article XXXI of the Towns' Building Zone Ordinance ("Section 302(K)"). Section 302(K) prohibited check-cashing establishments within the Town in any districts other than industrial and light manufacturing districts. Further, under an amortization provision in Section 302(K), preexisting check-cashing establishments located in districts where such establishments would be prohibited under Section 302(K) were required to terminate by amortization no later than five years after the effective date of Section 302(K).

Operators of check-cashing establishments in the Town's business district (the "Operators") challenged the validity of Section 302(K). Among other things, they maintained that Section 302(K) was preempted by New York State Banking Law.

The Operators contended that the Banking Law preempted Section 302(K) "since the Banking Law sets forth a detailed and comprehensive regulatory scheme that evinced the State's intent to reserve the field of banking for State oversight and control."

The Town maintained that its ordinance was valid and not preempted by state Banking Law.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the Supreme Court granted summary judgment in favor of the Town. The court found that the state legislature had not intended to occupy the field of regulating check-cashing establishments.

The Operators appealed.

DECISION: Reversed, and matter remitted.

The Supreme Court, Appellate Division, Second Department, New York, held that Section 302(K) conflicted with, and thus was preempted by, state Banking Law.

In so holding, the court explained that although local governments have broad police powers relating to the welfare of their citizens, local governments cannot adopt laws that are inconsistent with the Constitution or with any general law of the state. Thus, the power of local governments to enact laws is subject to the fundamental limitation of the preemption doctrine. Generally, state preemption occurs either: (1) under conflict preemption, where a local law prohibits what a state law explicitly allows, or when a state law prohibits what a local law explicitly allows; or (2) under field preemption, where "a local law regulating the same subject matter [as a state law] is deemed inconsistent with the State's transcendent interest, whether or not the terms of the local law actually conflict with a Statewide statute." Field preemption, further explained the court, can apply under any of three different scenarios: (1) when an "express statement in the state statute explicitly avers that it preempts all local laws on the same subject matter"; (2) where a "declaration of state policy evinces the intent of the Legislature to preempt local laws on the same subject matter"; or (3) where the "Legislature's enactment of a comprehensive and detailed regulatory scheme in an area in controversy is deemed to demonstrate an intent to preempt local laws."

To determine whether Section 302(K) was preempted by state law, the court examined certain provisions of the Banking Law. Article 9-A of the Banking Law pertaining to "Licensed Cashers of Checks" explicitly granted the superintendent of banks (the "Superintendent") the authority to "provide for the regulation of the business of cashing checks. Section 369 of the Banking Law addressed conditions precedent to the issuance of a license. Under Section 369(l), those seeking to obtain a license to cash checks had to submit a "business plan," which had to include: a description of the primary market area; a description of the customer base; proposed days and hours of operation; types of services to be offered; a detailed description of demographics of the area; a description of any proposed economic development area; and specific marketing targets. The court found that, under the clear language of Banking Law § 369(1), the Superintendent was vested with the duty to determine: whether each applicant for a check-cashing license proposes to perform that function in an appropriate location; whether there was is a community need for a new licensee in that location; and whether the granting of such an application will be advantageous to the public.

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Thus, the court concluded that the legislature had specifically delegated to the Superintendent the task of determining whether particular locations were appropriate for check-cashing establishments.

Meanwhile, here, the court found that in adopting Section 302(K), the Town had "necessarily determined that, in its estimation, the Town's business district [was] not an appropriate location for check-cashing establishments, and that such establishments [were] only appropriate in the Town's industrial and light manufacturing districts."

The court concluded that the Town's attempt to control the determination of the appropriate locations of these establishments by enactment of Section 302(K) was in conflict with Banking Law § 369(1); Section 302(K) had more than a tangential impact on the relevant Banking Law provisions. Section 302(K) purported to accomplish the same function delegated by the legislature to the Superintendent in making a determination as to the appropriate location for check-cashing establishments. Section 302(K) thus purported to divest the Superintendent of that authority.

The court concluded that Section 302(K) was therefore invalid based on the doctrine of conflict preemption.

See also: *Chwick v. Mulvey, 81 A.D.3d 161, 915 N.Y.S.2d 578 (2d Dep't 2010).*

See also: *Lansdown Entertainment Corp. v. New York City Dept. of Consumer Affairs, 74 N.Y.2d 761, 545 N.Y.S.2d 82, 543 N.E.2d 725 (1989).*

Insurance—Insurer Refuses to Defend County in Lawsuit Alleging Fair Housing Act Violations by County

Insurer points to planning and zoning related exclusions in public entity insurance policy

Citation: *County of Boise v. Idaho Counties Risk Management Program, Underwriters, 2011 WL 5966878 (Idaho 2011)*

IDAHO (11/30/11)—Although this case did not specifically deal with a zoning issue, it dealt with an issue that any municipality may face when making zoning and planning decisions. This case involved an insurance coverage dispute. It addressed whether Fair Housing Act claims brought against a county, arising from zoning and planning decisions it had made, were excluded from the county's public entity insurance policy coverage.

The Background/Facts: In January 2008, Alamar Ranch, LLC ("Alamar") sued the County of Boise (the "County") in federal court. Alamar alleged that the County violated the federal Fair Housing Act ("FHA"). Alamar alleged that these FHA violations arose out of decisions made by the County's Planning and Zoning Commission and the County Board of Commissioners.

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The County had a Public Entity Multi-Lines Insurance Policy (the "Policy") with Idaho Counties Risk Management Program ("ICRMP"). The County asked ICRMP to defend it in this FHA litigation. ICRMP refused because ICRMP determined that Alamar's claims were beyond the scope of the Policy's coverage. Under the "errors and omissions section" of the Policy, excluded from coverage were any claims of liability arising out of or in any way connected to "land use regulation or planning and zoning activities or proceedings, however characterized."

The County filed a legal action against ICRMP. It asked the court to declare that ICRMP had a duty to defend and indemnify the County against Alamar's claims. The County contended that the coverage exclusion did not apply to civil rights claims, and that because the FHA claims against it were civil rights claims, they should be covered.

The district court concluded that Alamar's claims arose from or were connected with planning and zoning or land use decisions. It also found that Alamar had alleged intentional misconduct. The court determined that the Policy expressly excluded coverage from both of those types of claims. Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the court issued summary judgment in favor of ICRMP.

The County appealed.

DECISION: Affirmed.

The Supreme Court of Idaho found that Alamar's claims did indeed arise out of, or were connected with, the County land use regulations. Alamar had alleged that decisions made by the County's Planning and Zoning Commission and the County Board of Commissioners on its land use application constituted violations of the FHA. While those claims could be categorized as civil rights claims, they obviously arose out of "land use or planning and zoning," and thus were explicitly excluded from coverage under the Policy.

The court concluded, holding that ICRMP had no duty to defend the County in the FHA action brought by Alamar against the County.

See also: *Hoyle v. Utica Mut. Ins. Co., 137 Idaho 367, 48 P.3d 1256 (2002).*

Zoning News from Around the Nation

CALIFORNIA

Sacramento County supervisors recently voted "to clarify" their existing ordinance because it "didn't address marijuana dispensaries." The new zoning amendment denies business permits to establishments that conflict with "either state or federal law, or both." Reportedly, the new amendment "effectively bans both marijuana stores and cultivation in the county."

Source: *The Sacramento Bee; via http://www.kansascity.com*

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INDIANA

The Greene County Commissioners plan to formally request District 62 State Rep. Matt Ubelhor (Republican-Bloomfield) introduce legislation when the General Assembly convenes in early January, allowing a zoning question to be placed on the November 2012 General Election ballot. The zoning referendum bill would be specific only to Greene County. Currently, Greene County is one of eight counties in the state that does not have some kind of land-use planning ordinance currently in place.

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

MASSACHUSETTS

The commonwealth's new casino legislation requires a local ballot referendum before any developer can win a casino license.

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

NEW JERSEY

Bills pending in the state legislature (S-2950) and (A-4128) allow for "modifications to municipal land use approvals because of changed economics." The bills would allow certain property owners that have preexisting land use approvals the ability to submit applications for "adaptive approvals" to the boards that issued the preexisting approvals in order to modify the terms and conditions of the preexisting approvals and current zoning. Among other things, the application would be required to specify the changes being requested and to demonstrate that: the current zoning or existing approval does not provide the property with an economically viable use; no feasible market exists for development of the property based upon the property's current zoning or existing approval; or financing for the development of the property under current zoning or the existing approval is not readily available. The bill would require the approving board to grant an adaptive approval if it determines that the applicant has complied with the requirements set forth in the bill and that the application can be granted without substantial detriment to the public good, to the extent it is not incompatible with the use of adjoining properties.

Source: *S-2950; http://www.njleg.state.nj.us*

WISCONSIN

Assembly Republicans recently introduced "a sweeping bill to streamline Wisconsin's mining regulations." The 183-page bill creates a new set of laws specifically for iron mining. Among its major provisions: the state's DNR "would have to approve or deny an iron mine application within 360 days of deeming the application complete" (Current state law does not lay out a deadline.); "contested case hearings on DNR permitting decisions would be eliminated"; only those directly injured by a mining operation could bring a lawsuit challenging DNR

permit enforcement or alleging violations of mining laws; "the DNR would have to issue a mining water withdrawal permit even if the applicant can't show the withdrawals won't hurt the public welfare or the quantity or quality of state waters if the agency decides the mine's public benefits exceed the harm"; "half of the revenue from a state tax on ore sales would go back to the state's general fund" (Currently all the money from the tax is distributed to local governments where the ore is mined.); "the bill acknowledges mining will probably result in 'adverse impacts' to wetlands but presumes it's necessary."

Source: *Bloomberg Business Week*; http://www.businessweek.com

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January 25, 2012 | Volume 6 | No. 2

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Proceedings—Zoning Board Goes into Private Session During Public Hearing to Discuss Absent Attorney's Advice

Property owner argues private session violates state's Right-to-Know Law

Citation: *Ettinger v. Town of Madison Planning Bd., 2011 WL 6188621 (N.H. 2011)*

NEW HAMPSHIRE (12/08/11)—This case addressed the issue of whether a public body's closed session to discuss the written advice of counsel who is absent fits within the "consultation with legal counsel" exclusion of New Hampshire's Right-to-Know Law, RSA 91-A:2, I(b).

The Background/Facts: The Pomeroy Limited Partnership ("Pomeroy") owned property in the town of Madison, New Hampshire. Pomeroy sought to covert buildings on the property to a condominium ownership form. It received conditional approval to do so from the town's Planning Board (the "Board").

Abutting property owners (the "Ettingers") requested a public hearing to allow them to challenge the approval of the condominium plan.

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At the scheduled time of the hearing, the Board went into a private session for 30 minutes. During the private session, they read and discussed: e-mails from the Board's attorney; a memorandum summarizing legal advice relayed over the phone from the Board's attorney to the Board's administrative assistance; and letters from the Ettingers' attorney.

After this private session, the Board reopened the public hearing. At the conclusion of the public hearing, the Board granted final approval to the Pomeroy application.

The Ettingers subsequently filed a petition in superior court. They argued that the private session violated New Hampshire's Right-to-Know Law (the "Law"), RSA 91-A:2, I(b).

The Board argued that its members were permitted to read a letter from counsel and discuss its contents in a private session under the "consultation with legal counsel" exclusion from the definition of "meeting" in the Law.

The Law provides that "all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public." (RSA 91-A:2, II.) "Meetings" are defined as "the convening of a quorum of the membership of a public body 'for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power.'" (RSA 91-A:2, I.) "Consultation with legal counsel" is excluded from that definition and therefore not subject to the various requirements for open meetings contained under the Law. (RSA 91-A:2, I(b).)

The Superior Court agreed with the Ettingers that the private session violated New Hampshire's Right-to-Know Law.

The Board appealed.

DECISION: Affirmed.

As a matter of first impression (i.e., first time the issue was addressed by this appellate court), the Supreme Court of New Hampshire (the "Court") held that a public body's closed session to discuss the written advice of counsel who is absent does not fit within the "consultation with legal counsel" exclusion of New Hampshire's Right-to-Know Law, RSA 91-A:2, I(b).

In so concluding, the Court looked at the plain language of the statute. It found that a "consultation with legal counsel" did "not encompass a situation in which the public body convenes a quorum of its membership only to discuss a legal memorandum prepared by, or at the direction of, the public body's attorney where that attorney is unavailable at the time of the discussion." The court found that, "[a]t the very least," the "consultation with legal counsel" exception required "the ability to have a contemporaneous exchange of words and ideas between the public body and its attorney."

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The Board had argued that a "consultation with legal counsel" was "co-extensive with the common-law attorney-client privilege." The Board contended that legislators intended that the "consultation with legal counsel" exception from the Right-to-Know Law's public meeting requirements was meant to allow public bodies to enter nonpublic sessions to discuss the written advice of counsel. The court disagreed, and instead noted that the Right-to-Know Law operated as a statutory public waiver of any possible evidentiary privilege of the public client except in the narrow circumstances stated in the statute.

See also: *District Atty. for Plymouth Dist. v. Board of Selectmen of Middleborough, 395 Mass. 629, 481 N.E.2d 1128, 12 Media L. Rep. (BNA) 1064 (1985).*

Case Note: The Court noted that the public records disclosure law provided an exception, in RSA 91-A:5, IV, for any "confidential" information. The Court found this was further evidence that the legislature did not intend the consultation with legal counsel exclusion of RSA 910A:2 to allow a public body to close a meeting whenever its discussion turned to advice received from its attorney who is neither physically present nor present telephonically and is therefore unable to participate in the discussion.

Case Note: The Ettingers had sought attorney's fees. The Court found they were not warranted here because the Board—prior to this decision—lacked guidance from the Court on this "narrow issue." The Court did not award attorney's fees because it could not say that the Board should have known that its nonpublic session violated the Right-to-Know Law.

Proceedings—After ZBA Approves Use Variance, Opponents Appeal

Opponents say approval is invalid because composition of the ZBA was impermissible under state statute

Citation: *Friends of H. Fletcher Brown Mansion v. City of Wilmington, 2011 WL 6148717 (Del. 2011)*

DELAWARE (12/12/11)—This case addressed the issue of whether a State statute governing the composition of zoning boards of adjustments ("ZBAs") in cities or incorporated towns without a home rule charter allowed city officers to delegate agents to sit on the ZBA in their place.

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The Background/Facts: Ingleside Homes, Inc. ("Ingleside") owned the H. Fletcher Brown Mansion (the "Mansion") in the city of Wilmington, Delaware (the "City"). Ingleside sought to partially demolish and renovate the Mansion for use as a 32-unit multifamily apartment building for senior citizens. It applied to the City's ZBA for three use variances. The ZBA granted the variances.

Thereafter, Friends of the H. Fletcher Brown Mansion ("Friends") filed a Verified Petition in Certiorari in the Superior Court. Among other things, Friends argued that the ZBA's composition was impermissible because the statutorily mandated City Solicitor and City Engineer members did not participate in the decision. As such, Friends contended that the ZBA's decision must be invalidated.

Friends' argument was based in title 22, § 322(a) of the Delaware Code. Under § 322(a), in cities or incorporated towns that have not adopted a home rule charter, the ZBA must: "consist of the chief engineer of the street and sewer department, the city solicitor and the mayor or an authorized agent of the mayor … ."

Here, neither the City Solicitor not the City Engineer served on the City's ZBA. The ZBA instead consisted of: the City's Director of Transportation in place of the city engineer; the City's First Assistant City Solicitor in place of the city solicitor; and the mayor's authorized agent.

The City argued that: (1) the statute allowed the Chief Engineer and City Solicitor to appoint agents to serve in their place on the ZBA; and (2) in any case, § 322(a) should be construed in light of the City's Charter, which provided for the performance of department duties by designees.

The Superior Court concluded that the composition of the ZBA was permissible, and that the ZBA had properly granted the use variance to Ingleside.

Friends appealed.

DECISION: Reversed, and matter remanded.

The Supreme Court of Delaware (the "Court") held that the ZBA was improperly composed. Because the ZBA was not properly constituted, the Court held that the ZBA's decision granting Ingleside the variances must be set aside.

The Court explained its holding: Under the required strict construction of § 322(a), its plain language allowed the Mayor to appoint an authorized agent to serve on the ZBA. The absence of similar language for the Chief Engineer and City Solicitor indicated that the General Assembly did not intend for an analogous delegation option to exist for those two members. Accordingly, found the court, "section 322(a)'s plain language preclude[d] a conclusion that the Chief Engineer and City Solicitor may appoint agents to serve in their place on the ZBA."

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The Court rejected the City's contention that the delegation power for performance of department duties allowed under the City Charter should be "import[ed]" into § 322(a). Section 322(a) enumerated specific officers for the ZBA's composition; it did not require a general departmental participation. Since the Charter permitted the delegation of duties imposed upon *the department*—rather than specific officers of the department—delegation was precluded.

Case Note: The Court offered that if, as the City had argued, service on the ZBA was a burden on the City Solicitor and City Engineer, § 322(b) allowed cities with a home rule charter to establish a board of adjustment consisting of five members who are city residents. Section 322(a) applied by default only if a home rule charter city eschewed the option of establishing a board of adjustment—which it had here. Thus, the City had the option of composing a board of adjustment under § 322(b) or remaining with the default composition provided in § 322(a).

Spot Zoning—City Downsizes Zoning of 2.85-Acre Parcel, Allowing Only One Dwelling Per 20 Acres

Owners contend rezoning is impermissible spot zoning and a compensatory taking

Citation: *Avenida San Juan Partnership v. City of San Clemente, 2011 WL 6188451 (Cal. App. 4th Dist. 2011)*

CALIFORNIA (12/14/11)—This case addressed the issue of whether the rezoning of a parcel constituted impermissible spot zoning. It also addressed whether the rezoning amounted to a compensable regulatory taking.

The Background/Facts: In 1980, the Avenida San Juan Partnership (the "Partnership") purchased a 2.85-acre lot (the "Property") on a slope in the city of San Clemente, California (the "City"). At the time of that purchase, the zoning allowed six dwellings per acre.

In 1996, the City rezoned the Property to "RVL"—"residential, very low," allowing one dwelling per 20 acres. All parcels surrounding the Property were zoned "RL"—"residential low density zone," which allowed four dwellings per one acre.

The Partnership did not learn about the rezoning until 2006 when it applied for a development application to build four dwellings on the 2.85-acre Property. At the recommendation of the planning commission, the city council denied the Partnership's application.

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Thereafter, the Partnership appealed. Among other things, it argued that the 1996 rezoning constituted spot zoning, and that the spot zoning constituted a compensatory regulatory taking.

The trial court agreed that the restrictions on the Property constituted spot zoning. It issued a writ of mandate declaring null and void the resolution denying the Partnership's application to develop four houses on the Property. The Court also found that the spot zoning constituted a compensable taking.

The City appealed.

DECISION: Affirmed in part, reversed in part, and remanded.

The Court of Appeal, Fourth District, Division 3, California (the "Court"), held that the City's downzoning of the Property, to permit one dwelling per 20 acres in the middle of a residential tract whose zoning allowed at least four dwellings per acre constituted improperly discriminatory spot zoning. The Court also held that the City's actions constituted a compensable, partial taking.

In so holding, the court explained that the "essence of spot zoning is irrational discrimination." Impermissible spot zoning occurs, further explained the Court, "where a small parcel is restricted and given lesser rights than the surrounding property ... thereby creating an 'island' in the middle of a larger area devoted to other uses ... ."

Here, the Court found there was "no question that the [Partnership's] parcel [was] a one-house-per-20-acre island in a two-to-six house-per-acre sea." Clearly, concluded the Court, this was discriminatory downsizing.

The Court also found that the City's downsizing of the Property's zoning was a partial taking, which was compensable. The Court explained that "[t]here are compensable takings that do not involve the deprivation of all economically viable use of land." A compensable regulatory taking can occur when a regulation "goes 'too far,' but stops short of denying all economically viable use." Whether a regulation goes too far and is compensable depends on three core factors present: (1) the economic effect on the landowner; (2) the extent of the regulation's interference with investment-backed regulations; and (3) the character of the governmental action. (These are known as the "*Penn Central* factors.")

Here, the court found these three core factors readily applied: First the economic effect was "dramatic." The Property value was $1.3 million if four houses could be built, or $0 under the RVL zoning. Second, "the regulation wholly undermined the investment-backed expectations of the Partnership," which had even obtained approval for a four-house development in 1983. Third, "the character of the governmental action appears to have been largely motivated to keep the subject parcel open space" (as petitioned by opponents to the 1983 approval).

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The Court concluded by recognizing the "conditional nature" of the inverse condemnation judgment: If the City complies with the writ of mandate requiring the City to vacate the resolution denying the Partnership's development application, it need not pay the judgment (which was to be recalculated on remand per order of the Court).

See also: *Hamer v. Town of Ross, 59 Cal. 2d 776, 31 Cal. Rptr. 335, 382 P.2d 375 (1963).*

See also: *Ross v. City of Yorba Linda, 1 Cal. App. 4th 954, 2 Cal. Rptr. 2d 638 (4th Dist. 1991).*

See also: *Palazzolo v. Rhode Island, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592, 52 Env't. Rep. Cas. (BNA) 1609, 32 Envtl. L. Rep. 20516 (2001).*

See also: *Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631, 11 Env't. Rep. Cas. (BNA) 1801, 8 Envtl. L. Rep. 20528 (1978).*

Case Note: The City had argued that any discriminatory downsizing was justified because the property was on a slope—requiring high retaining walls and a "tunnel-like" access road. The Court rejected this argument for several reasons: First the topography rationale did not support discriminatory treatment where much of the City reflected the same topography. Second, because there could have been measures to "cure" the impact of grading or retaining walls, topography by itself was not a reason to deny Partnership's application. Most fundamental was that the purpose of the RVL was to "preserve canyons," and this Property was a slope, not a canyon.

Validity of Ordinance—Landlord Challenges Ordinance Limiting Occupancy of Single Dwelling Units to Three Unrelated Individuals

Landlord contends ordinance violates the state Constitution's Due Process Clause

Citation: *McMaster v. Columbia Bd. of Zoning Appeals, 2011 WL 6156995 (S.C. 2011)*

SOUTH CAROLINA (12/12/11)—This case addressed the issue of whether a city's ordinance, which limited to three the number of unrelated

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persons who may reside together as a single housekeeping unit, violated the Due Process Clause of the South Carolina Constitution.

The Background/Facts: Peggy McMaster ("McMaster") owned property (the "Property") in the city of Columbia, South Carolina (the "City"). The Property constituted a "single dwelling unit" and was located within a residential zoning district in the immediate vicinity of the University of South Carolina. Pursuant to the City's Zoning Ordinance (the "Ordinance"), only one "family" could occupy a single dwelling unit. The Ordinance defined "family" as: "an individual; or two or more persons related by blood or marriage living together; or a group of individuals, of not more than three persons, not related by blood or marriage but living together as a single housekeeping unit."

Four unrelated individuals occupied McMaster's Property. The individuals were undergraduate students at the University of South Carolina. They were "friends, shared meals and expenses, and operated as a single household."

After receiving neighborhood complaints, the City's Zoning Administrator conducted an investigation of McMaster's Property and determined that McMaster was violating the Ordinance. McMaster was sent a notice of zoning violation and directed to reduce the occupancy of her Property to no more than three unrelated persons within 30 days.

McMaster appealed the violation notice to the City's Board of Zoning Appeals (the "ZBA"). She argued that the Ordinance was not violated. In the alternative, she argued that the Ordinance was unconstitutional. She argued that the Ordinance's definition of "family," which limited to three the number of unrelated persons who could reside together as a single housekeeping unit, arbitrarily and capriciously deprived her of a cognizable property interest in violation of the Due Process Clause of the South Carolina Constitution.

The ZBA affirmed the zoning violation.

McMaster then appealed the ZBA's decision to the circuit court.

The circuit court found the Ordinance's definition of family did not violate the Due Process Clause of the South Carolina Constitution. Specifically, the court found that McMaster failed to prove the limitation on occupancy was not reasonably related to any legitimate governmental interest.

McMaster appealed.

DECISION: Affirmed.

The Supreme Court of South Carolina (the "Court") held that the Ordinance, which limited to three the number of unrelated persons who may reside together as a single housekeeping unit in a single dwelling unit, did not violate the Due Process Clause of the state Constitution.

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The Court explained that, in reviewing substantive due process challenges to municipal ordinances, it must consider whether the ordinance bears a reasonable relationship to any legitimate interest of government. The burden of proving the invalidity of an ordinance is on the party attacking it, said the Court. Thus, here, it was McMaster's burden to show the arbitrary and capricious character of the Ordinance. The Court found McMaster failed to meet that burden.

In explaining its holding, the Court noted that a United States Supreme Court case had found that the federal constitution does not afford substantive due process protection in relation to such occupancy limitations. In that case, the United States Supreme Court held that "zoning ordinances which limit the number of unrelated people who may live together in one household do not implicate a fundamental right of association or privacy and are a valid exercise of a state's police power." The Court here found that rationale persuasive. The Court here also found "a rational relationship between the City's decision to limit to three the number of unrelated individuals who may live together as a single housekeeping unit and the legitimate governmental interests of controlling the undesirable qualities associated with 'mass student congestion.'" Having found the Ordinance bore a reasonable relationship to a legitimate interest of government, the Court concluded that it did not violate the Due Process Clause of the State Constitution.

See also: *Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797, 6 Env't. Rep. Cas. (BNA) 1417, 4 Envtl. L. Rep. 20302 (1974).*

See also: *Harbit v. City of Charleston, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009), as amended, (May 4, 2009).*

Zoning News from Around the Nation

CALIFORNIA

A Napa Superior Court judge recently ruled that Napa County's so-called "density bonus" ordinance was legal. "The ordinance grants incentives to developers who build more affordable housing than the zoning code's required minimum, according to the release." Those challenging the validity of the ordinance had reportedly alleged that the county's density bonus ordinance actually discouraged building affordable housing and its long-term housing plans were discriminatory and illegal. Specifically, they contended that affordable housing requirements made it difficult for developers to recover their costs from building low- and very-low-income units.

Source: *Napa Valley Register*; http://napavalleyregister.com

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MASSACHUSETTS

Danvers' Board of Selectmen have voted to propose a home-rule petition this spring that would ask the commonwealth to count the town's mobile homes as affordable housing. If passed at the Danvers' Town Meeting in May, the home-rule petition would be sent to the legislature for consideration. Under the Massachusetts law, known as Chapter 40B, residential developers can bypass local zoning if less than 10% of the community's overall housing is affordable as defined by the statute, and the developer meets other requirements. Currently, "mobile homes don't meet the law's definition of affordable housing." Reportedly, Salisbury passed as similar home-rule petition that was sent last year to the state legislature. That resulting bill has reportedly been sitting in the Joint Committee on Housing since July.

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

NEW JERSEY

Egg Harbor Township recently passed an ordinance that "brings its residential housing codes into compliance with state affordable housing rules." Under the new ordinance, the township now requires developers meet certain criteria to set aside 20% of their units for low- and moderate-income housing to be spread throughout developments built in Pinelands Regional Growth Zones. The ordinance also calls for developers to purchase Pinelands development credits. Reportedly, the ordinance is "a direct result of a pending lawsuit between the township and a developer who wants to build affordable housing units in the township."

Source: *Shore News Today; www.shorenewstoday.com*

PENNSYLVANIA

The state senate recently passed an amended version of House Bill 1950, which would impose an impact fee on oil and gas companies and would require towns to allow drilling in every zoning district. The bill now awaits a House vote on the amended version.

Source: *The Intelligencer; www.phillyburbs.com*

SOUTH CAROLINA

The City of Columbia has a new law that sets restrictions on sexually oriented businesses. Among other things, the law requires a 700-foot buffer between any establishment that sells sex items and the nearest protected structure.

Source: *The State; www.thestate.com*

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VERMONT

The state recently announced $409,532 in municipal planning grants to 42 communities across the state. The grants are meant to help municipalities "plan for a variety of forward thinking objectives including economic development, village revitalization and future housing needs." The Municipal and Regional Planning Fund program offers grants of up to $15,000 through a competitive process. "Municipalities were funded to support updating town plans, zoning bylaws and planning for necessary public infrastructure related to downtown and village revitalization."

Source: *Real Estate Rama; http://vermont.realestaterama.com*

WISCONSIN

State Senator Kathleen Vinehout reportedly intends to introduce two bills in 2012 that would regulate frac sand mining. One bill would "require a 30 day public notice to neighboring property owners when a frac sand mining company forges a developer's agreement or applies for any local or state permit." The other bill would universally define frac sand mines as "conditional uses," requiring frac sand mines obtain a permit no matter how the mine site is zoned.

Source: *Ashland Current; www.ashlandcurrent.com*

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ZONING PRACTICE JANUARY 2012

AMERICAN PLANNING ASSOCIATION

ISSUE NUMBER 1

PRACTICE COOPERATIVE PLANNING

Zoning Across Boundaries: Annexation, Joint Planning Boards, and the Challenges of Cooperative Planning

By Suzanne Sutro Rhees, AICP

Jurisdictional boundaries, whether they separate cities and townships, villages and towns, or cities and counties, can present seemingly intractable problems for planners and planning officials.

Creating plans and ordinances that serve the interests of both the urban and rural sides of the boundary can be a daunting task when their goals seem to be at cross purposes. Typically, cities seek room to expand, as well as efficient extension of municipal utilities in the future. Therefore, they prefer that the land surrounding them be reserved for agricultural or very low-density development. Rural jurisdictions such as townships or counties, on the other hand, may seek to increase their tax bases by promoting commercial or industrial development adjacent to the city. The prospect of residential development on the city's outskirts may also attract developers and buyers, combining easy access to the city's amenities and services with the lower taxes of the rural jurisdiction. Such conflicts seem ubiquitous and permanent in many regions, regardless of the pace of urban development.

Of course, it makes a big difference where the boundaries are located. In some states, primarily in the Sun Belt, cities are, to use author David Rusk's term, elastic—able to expand into rural areas as the need dictates. More often, however, city boundaries are highly constrained by adjacent jurisdictions, whether these are other cities, villages, townships, or counties with planning and zoning authority.

In most cases, annexation is the means by which cities expand their boundaries. Annexation is inherently controversial—one jurisdiction ends up taking land from another—making it particularly difficult to approach in a cooperative manner. According to the League of Minnesota Cities' *Handbook for Minnesota Cities*, "Annexation questions pose some of the most difficult technical and policy problems facing municipal officials. Annexations present such difficulties because sound, realistic facts and estimates regarding the financial and service implications of a proposed annexation are necessary. Annexation involves important policy questions relating to the welfare of the entire urban community, including both the city and surrounding land."

This article explores various methods used by neighboring jurisdictions to work cooperatively across boundaries, including orderly annexation agreements and joint planning boards, extraterritorial subdivision controls, and shadow or "ghost" platting.

MINNESOTA: ORDERLY ANNEXATION AGREEMENTS AND JOINT PLANNING BOARDS

One technique that has achieved some success in Minnesota is orderly annexation: an agreement between a city and township or a city and a county as to the timing and extent of annexation. The former Minnesota Planning Agency (now defunct) described the advantages of the process in a 1995 paper:

> Orderly annexation lets the city and township address annexation more cooperatively and give more thought to the needs of the broader area. It encourages joint planning for the area where annexations are expected and helps in timing annexations to coincide with new development and the need for city services. The process is intended to avoid piecemeal annexations while giving local governments more time to prepare for future annexations and to direct growth in a more orderly fashion.

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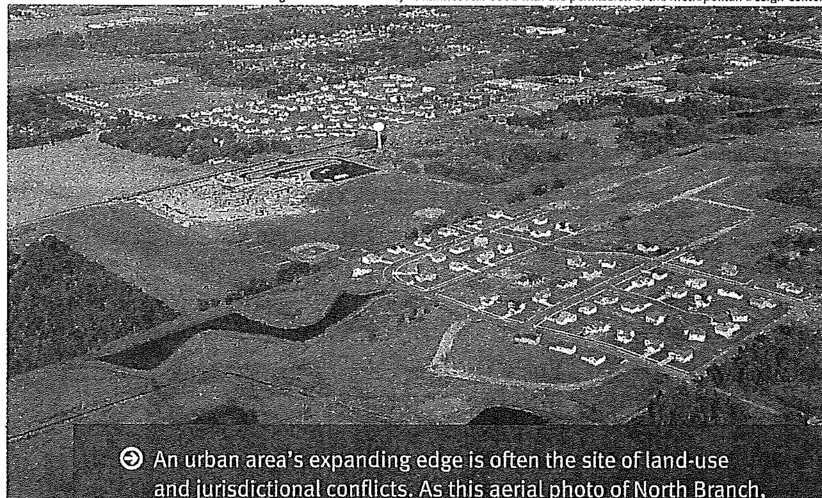


An urban area's expanding edge is often the site of land-use and jurisdictional conflicts. As this aerial photo of North Branch, Minnesota, illustrates, low-density residential development rubs elbows with farms, forests, and recreational land, while direct street connections to the nearby city are as yet undefined.

ASK THE AUTHOR JOIN US ONLINE!

Go online during the month of January to participate in our "Ask the Author" forum, an interactive feature of Zoning Practice. Suzanne Sutro Rhees, 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

Suzanne Sutro Rhees, AICP, is a parks and trails planner for the Minnesota Department of Natural Resources and a frequent contributor to APA publications. Through her previous work as a consultant, she has extensive experience with zoning and boundary issues in Minnesota, Iowa, and Wisconsin. (She assisted Mason City, Iowa, in developing the subdivision ordinance discussed in this article.) As an active member of the APA Minnesota's Legislative Committee, she is involved in a long-term effort to streamline and update the state's planning enabling laws.

Orderly annexation agreements often include other provisions that address the loss of taxes that townships will experience—for example, a city may reimburse a township the amount of tax revenue yielded by an annexed parcel, with the reimbursement generally phased out over a period of 10 or more years.

Sauk Rapids

Annexation agreements can include zoning standards that establish a logical transition from rural to urban land use as utilities are extended. One such arrangement is between of the city of Sauk Rapids, a small city bordering the Mississippi River in the St. Cloud metropolitan area, and its two adjoining townships, Sauk Rapids and Minden. The agreements establish joint planning boards and zoning ordinances for each township. Both ordinances include clear statements of purpose: "to maintain orderly and controlled development which does not conflict with the existing development plans of the City of Sauk Rapids nor the desire within the Township to preserve an agricultural and rural character." Essentially, the areas will remain in agricultural zoning, at a density of one unit per 40 acres, until the city is ready to annex them. The agreements stipulate that the joint planning boards will not support rezonings to nonagricultural uses prior to annexation, and those parcels already zoned for nonagricultural use will require annexation prior to any further development.

Sauk Rapids Community Development Director Todd Schultz explains that agreements with Sauk Rapids Township go back to the late 1980s and have remained highly effective. "The city has never forcibly annexed anyone, except for some township 'islands' within the city that were absorbed about 25 years ago," says Schultz.

In Sauk Rapids annexations require a petition by the property owner or developer and approval of either the city or the township. This approach tends to result in numerous small annexations rather than a smaller number of city-initiated annexations of larger tracts of land. One might expect that this would create a patchwork or leapfrog pattern of annexations. Not when municipal sewer and water services are involved. Schultz explains that "economics plays a huge role—if city sewer and water aren't available, the developer must pay for the extension of services, including to any properties in between the parcel to be annexed and the city boundary. This adds an element of risk, which most developers aren't willing to take. Therefore, annexations tend to be contiguous."

Relations with Minden Township have been more contentious, perhaps because the annexation area includes a narrow band of preexisting large-lot residential and commercial development bordering State Highway 23. These areas are zoned consistently with existing land uses, with design standards for commercial building materials and screening. Because the joint planning board that manages the annexation area requires a unanimous vote for any zoning change, it has been hard to reach agreement on the level of new development in this area. As is common with this kind of fringe development, it is increasingly difficult for the city to extend utilities to this area in a cost-effective way.

Sartell

The neighboring city of Sartell is surrounded by (and surrounds, in some locations) LeSauk Township. Under an orderly annexation agreement dating from the 1980s, both areas are under the jurisdiction of a joint planning board—which also serves as the city planning commission—with equal representation from both jurisdictions. However, according to Planning Director Anita Rasmussen, AICP, this arrangement didn't serve the city especially well—the township board members had little interest in city issues, and overlapping county jurisdictions (the city straddles a county line) created greater confusion. The agreement is planned to change in 2012, reverting back to a city-only planning commission.

Sartell's primary challenge, however, is the fragmented nature of city/township boundaries. Substantial portions of the township bordering the Mississippi River are developed at urban densities with inadequate wells and septic systems, but the cost of extending city utilities to these areas is more than what could be recouped by property assessments. The Coalition of Greater Minnesota Cities, an advocacy organization, has identified an $11 million shortfall, far beyond what the city can subsidize. The lesson may be that orderly annexation agreements do not necessarily guarantee an orderly annexation process.

Mankato

A similar approach is used by the city of Mankato, a regional center on the Minnesota River, and three adjacent townships, as well as Blue Earth County. The city uses different approaches with each township, based on development patterns and township preferences.

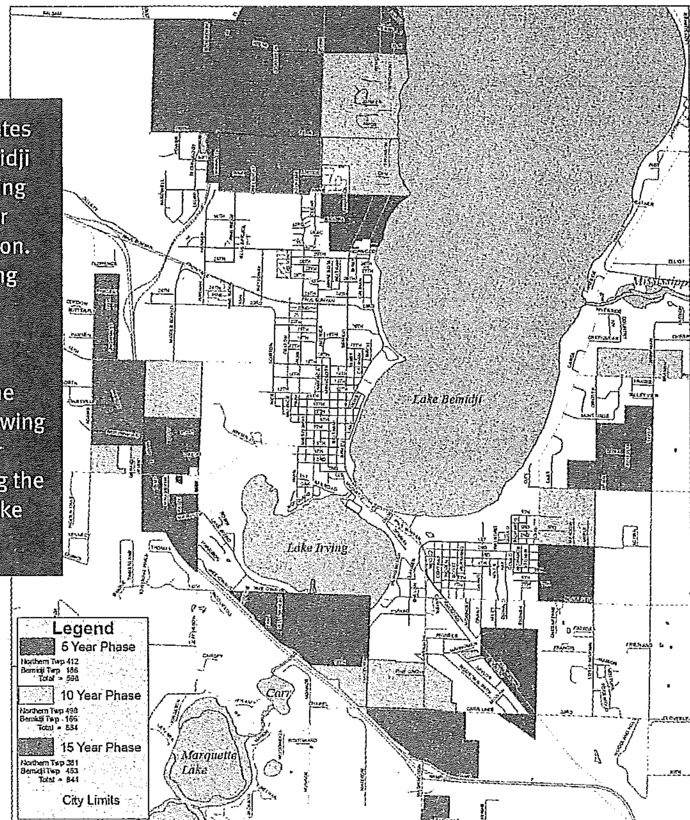
- The city's agreement with Mankato Township, negotiated in 1998, applies to an area within two miles of the city boundary where the city has subdivision review authority. The agree-

ment prohibits nonfarm development in the area, except on preexisting lots, and prohibits new animal feedlots. Annexation cannot occur until a property is proposed for development, and unless both the township and the city agree to it. Either the city or township can stop an annexation they consider premature.

- Mankato's agreement with Lime Township establishes three subareas for phased annexation. Areas I and II are largely urbanized, within the regional sewer service area, and scheduled for annexation in 2013 and 2018, respectively. Area III encompasses the largely agricultural remainder of the township. Interestingly, the township has delegated its planning and zoning authority to the city—the city planning commission also serves as the township planning board—although the township board retains approval authority over all zoning actions.
- In South Bend Township, which includes an old platted and partially developed town site and considerable industrial development along the Blue Earth River, county zoning continues to apply. As with Lime Township, three phased subareas are defined. No new industrial development is allowed without city and township concurrence. However, the township may extend limited sewer service to properties in the industrial zone.

Blue Earth County in turn stipulates that in orderly annexation areas written authorization by both the township and the city is required as a condition for county approval of a subdivision, zoning change, or other land-use approvals. Property owners must petition the city to annex their property, and the city cannot force annexation of property without township consent.

According to Paul Vogel, the city's community development director, relationships with all three townships and the county remain collaborative. "We look at these agreements as vehicles for cooperative planning."



This map illustrates the Greater Bemidji Area Joint Planning Board's plans for orderly annexation. The joint planning board and local governments are currently implementing the first phase, following sewer and water extensions along the west shore of Lake Bemidji.

Greater Bemidji Area Joint Planning Board

Bemidji's Regional Joint Planning Board

Most joint planning boards only have jurisdiction over a designated annexation area, not the entire city or township. One more far-reaching approach is that of the Greater Bemidji Area Joint Planning Board (JPB), which represents a merger of planning and zoning services for three units of government, the City of Bemidji, Bemidji Township, and Northern Townships, together covering a 72-square-mile area. Bemidji is a regional center for north central Minnesota, with a state university, a regional hospital, a traditional downtown, and substantial resort and recreation development in the lake country that surrounds it.

Andrew Mack, AICP, planner with the JPB, explains that the merger grew out of a typical contentious annexation process, with the state's administrative law judge mediating between townships and city. Local decision makers raised the question "Why can't we solve these problems by sitting in the same room?" The parties in the dispute formed a task force, and their efforts led in 2005 to an orderly annexation agreement with three phases. In 2007 a single zoning and subdivision ordinance was adopted for all three jurisdictions, along with a joint powers agreement for planning and zoning services. The agreement established the eight-member JPB, composed of four members appointed by the city and two from each township. A joint planning commission with 12 members was also established, with the same proportional split. The board acts as the decision-making organization, similar to a city council or town board, while the planning commission is advisory. In 2008, planning and zoning functions were centralized in the JPB, consolidating the separate city and township planning and zoning departments.

This effort gave rise to a land-use policy plan, a transportation plan, zoning and subdivision ordinances, and an orderly annexation agreement, intended to establish boundaries that could be sustained over the next twenty years. While unique in Minnesota and not specifically enabled by state planning statutes, the arrangement has proved durable and legally defensible.

The JPB and local governmental units are now implementing the first phase of a planned 15-year annexation process. The first phase was delayed for two years due to a series of landowner appeals of the assessments needed to extend sewer and water services along the west shore of Lake Bemidji. All the assessments were eventually upheld. The board is also beginning the preparation of a comprehensive plan for the entire planning area, revising the initial land-use and transportation plans adopted in 2005 with the orderly annexation agreement. The zoning ordinance is reviewed and updated annually. The JPB also administers airport zoning within a larger area, including two other townships that are not part of the joint powers agreement and have not adopted zoning ordinances.

IOWA: EXTRATERRITORIAL SUBDIVISION CONTROL AND 28E AGREEMENTS

Cross-boundary planning in Iowa is somewhat simpler than in Minnesota, since counties and cities are the only entities with planning authority. Under state law, cities have subdivision authority over a two-mile extraterritorial jurisdiction outside their boundaries.

Mason City

Mason City recently adopted a new zoning code based on the form-based SmartCode. The city's zoning districts follow a transect arrangement, from the Z1 Agricultural to the Z5 Central Business District. Much of the outlying land within city boundaries remains in agricultural use and zoning. The zoning code and subdivision ordinance, both adopted in 2010, are coordinated so that subdivisions of more than two lots within both the Z1 Agricultural District and the city's two-mile extraterritorial area are only allowed if they meet certain requirements:

- The site must be contiguous to an existing neighborhood or can be readily connected to an existing neighborhood or corridor by a collector street.
- The site must be able to be served by public utilities within a reasonable distance as determined by the city engineer and development review committee.
- A concept plan must be developed as part of the application and show how the proposed subdivision will fit into a complete planned neighborhood of at least 40 acres in size.

Road, block, and lot standards within the subdivision ordinance are consistent with new urbanist concepts, emphasizing interconnected streets, limited block length, sidewalks, and trails.

According to Planning Director Pam Myhre, the new ordinances are working well and reducing the need for variances and rezoning. There has been little subdivision activity within the extraterritorial area, but one recently proposed business park within the city will be developing a concept plan with the required street connections.

Linn County

Intergovernmental cooperation in Iowa is strongly encouraged under state law: Chapter 28E of the Iowa Code permits any governmental agency to undertake any activity jointly with any other agency so long as each agency has the power to undertake that particular activity on its own. These joint and cooperative arrangements have proved to be an efficient and popular way of providing services at a reasonable cost.

Linn County (surrounding the city of Cedar Rapids), has used "28E agreements" to develop a series of City-County Strategic Growth (CCSG) plans, enabling cities and the county to establish stable cooperative zoning arrangements for growth areas outside city boundaries. As the recent CCSG plan for the small city of Ely states, "coordinated land use planning between a city and county promotes compact growth patterns in appropriate locations, reduces public infrastructure costs, and encourages the retention of viable agricultural operations and open space."

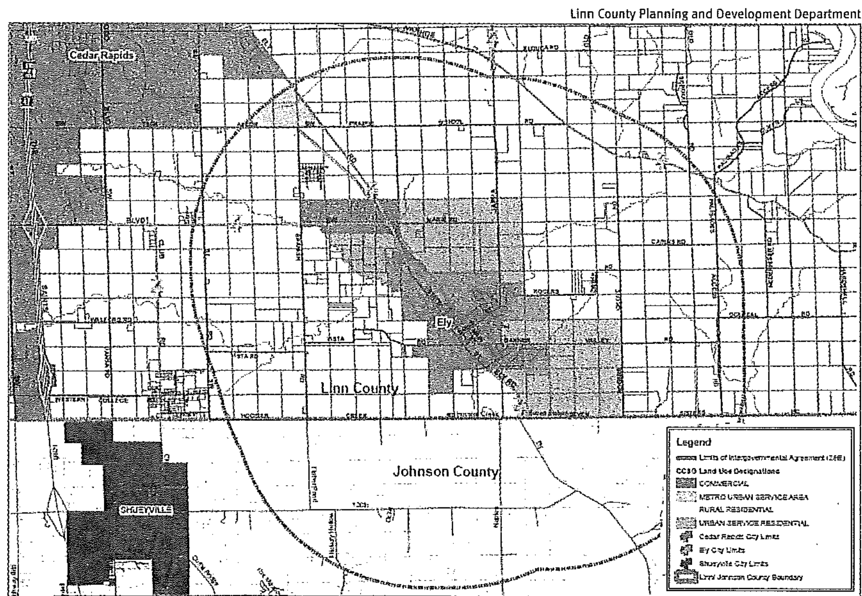
The planning process begins with a Fringe-Area Policy Agreement, established under Chapter 28E, that establishes a two-mile study area based on the city's extraterritorial jurisdiction. Within that area, the city and county agree to establish policies for orderly growth. The Ely plan, for example, designates most of the fringe area for continued agricultural use and defines three other areas surrounding the city:

- A rural residential area designated for low-density development (i.e., rural roads, wells, and septic systems) and not intended for annexation
- An urban service area designated for residential development (i.e., developed with densities compatible with city standards and served by city utilities or its own centralized system) and intended for eventual annexation
- A small rural commercial area, intended to allow limited highway-oriented commercial and office uses and not intended for annexation

County zoning applies within each area, with city approval required for all zoning and subdivision applications. If annexation takes place, the county waives its approval authority. The plan also establishes minimum levels of service required for each land-use category at the time of development, consistent with the county's sophisticated Rural Land Use Plan. Services include not only water and wastewater but transportation (county road classifications) and fire protection.

According to County Planning Director Les Beck, Ely is currently growing rapidly and expanding its boundaries through annexation, which effectively takes the county out of the picture. Beck points out that while strategic growth planning can work well, the lack of regional population targets can hinder agreement. For example, one city currently working with the county on a fringe area plan has identified a 1,000-acre growth area based on its own population projections, while county planners believe that a 150-acre area would be sufficient.

The 28E agreement process may be most effective in establishing protocols for development review in order to implement an urban fringe area plan. The city of Ames, home of Iowa State University, recently executed a 28E cooperative agreement with Story County and the neighboring city of



This map illustrates the area targeted for growth around the city of Ely, Iowa.

Gilbert, governing development review in the urban fringe area. For example, the cities agree to waive their extraterritorial review of subdivisions in rural and agriculturally zoned areas, while the county agrees to waive its review of subdivisions in the urban services area. The result should be a streamlined, less redundant approval process.

WASHINGTON: GROWTH MANAGEMENT AREAS

The agreements discussed above have a somewhat improvised quality, since they exist without an overarching state policy framework. Such a framework can be found within those states that have actively promoted growth management. Under Washington's Growth Management Act (GMA), high-growth counties work with cities to define their population distributions and the cities' Urban Growth Areas (UGAs).

Under the GMA, counties are responsible for choosing a reasonable 20-year population growth allocation within the range of high and low projections prepared by the state's Office of Financial Management. Within each county, the affected local jurisdictions must work out their own population as part of the regional planning process. Cities define their UGAs and must be prepared to ultimately serve these areas with utilities. However, the GMA states that while cities must propose urban growth areas, counties are ultimately responsible for designating those areas. This process, not surprisingly, can be challenging.

Poulsbo

One example of collaborative city-county planning is that between the city of Poulsbo and Kitsap County, located on the Olympic Peninsula on the west side of Puget Sound. Poulsbo is a small city, 18 miles by road and ferry from Seattle, with a charming small-scale downtown that reflects its strong Norwegian heritage. Beginning in 1998, Poulsbo and Kitsap County began developing a subarea plan for the city's UGA with the goal of defining a 20-year framework for annexations and urban services extensions. The plan, controversial at the time, was adopted in 2001 and has functioned effectively in conjunction with phased annexations to manage growth within the UGA.

As the city's comprehensive plan explains:

> The Growth Management Act (GMA) makes annexations a part of the overall planning process and essentially eliminates much of the annexation decision-making process in cities because planning for growth occurs earlier, during the formation of the Urban Growth Area boundaries and the development of the City's Comprehensive Plan. The decision about annexation is not whether to annex, but rather when. Important factors that may influence the timing of annexation include population growth, the city's ability to provide urban services in a proposed area, and the current housing and economic market.

The city defined a series of 18 annexation areas, all of which were annexed sequentially during the 1996–2011 period. The remaining land within the UGA is governed by a combination of county and city standards; the city's zoning districts and the county's administrative and development review procedures apply. Much of this area is zoned as the city's "Residential Low" district, at four to five units per acre, and although the majority of it is currently split into larger semirural lots, a majority of these lots remain in rural land uses or undeveloped.

How can these areas be serviced with utilities while remaining outside the city boundary? The answer, according to Barry Berezowsky, Poulsbo's planning director, is that essentially they can't—the city requires annexation prior to extension of water, sewer, and solid waste services. In other words, the UGA primarily functions as an urban reserve prior to annexation—a process that is generally initiated by landowner petition. Land can be developed without annexation into the city, but only at rural densities or on existing legal lots of record. So, for all intents and purposes, an efficient development pattern requires annexation.

Perhaps the most salient feature of the UGA is its relatively small size. Prior to the city's recent annexations the unincorporated portion was about 1,200 acres, and in 2011 it was 376 gross acres. Therefore, approximately 824 acres have been annexed into the City of Poulsbo. The capacity analysis conducted by the city in its 2009 Comprehensive Plan update concluded that only 119 of the remaining 376 acres are developable.

Poulsbo uses a variety of smart growth techniques or, as the city calls them, "reasonable measures" to prevent unnecessary expansion of the UGA. These include maximum lot sizes, accessory dwelling units, cottage housing, and mixed housing types to achieve urban densities while preserving the city's small-town character. In fact, as of 2009, the average net residential density for new development within the city was about seven units per acre. The city's 2009 Comprehensive Plan was awarded a VISION 2040 award from the Puget Sound Regional Council and the 2011 Governor's Smart Communities Award for Comprehensive Planning.

Berezowsky reports that while the economic downturn has reduced the pressure for annexations, the city continues to see considerable development activity within its current boundaries, including infill and redevelopment. The next review of the UGA is scheduled for 2013, through a coordinated process with Kitsap County.

REFERENCES

City of Ames, Iowa. 2006. *Ames Urban Fringe Plan.* Available at http://www.cityofames.org/modules/showdocument.aspx?documentid=2404.

City of Poulsbo, Washington. 2009. *Comprehensive Plan.* Available at http://www.cityofpoulsbo.com/planning/planning_comp_plan.htm. See Chapter 2, Land Use.

Kitsap County, Washington. 2001. *Poulsbo Sub-Area Plan.* Available at http://www.kitsapgov.com/dcd/community_plan/subareas/poulsbo/pb-plan-web.pdf.

League of Minnesota Cities. 2011. *Handbook for Minnesota Cities.* Available at http://www.lmc.org/page/1/resource-library-search-results.jsp.

Spokane County (Washington) et al. 2009. *Collaborative Planning: Implementation in Spokane County's Metro Urban Growth Area.* Available at http://www.spokanecounty.org/boundary/content.aspx?c=1434.

Examples of Orderly Annexation, Joint Planning Boards, and Interlocal Agreements

City of Ames, Iowa. *28E Agreement—Ames, Gilbert, and Story County.* http://www.cityofames.org/index.aspx?page=1323.

City of Mankato, Minnesota. *Annexation Agreements.* See http://www.mankato-mn.gov/PlanningAndZoning/Annexation.aspx.

City of Mason City, Iowa. *Zoning and Subdivision Ordinances.* See http://www.masoncity.net/pView.aspx?id=1356&catid=58.

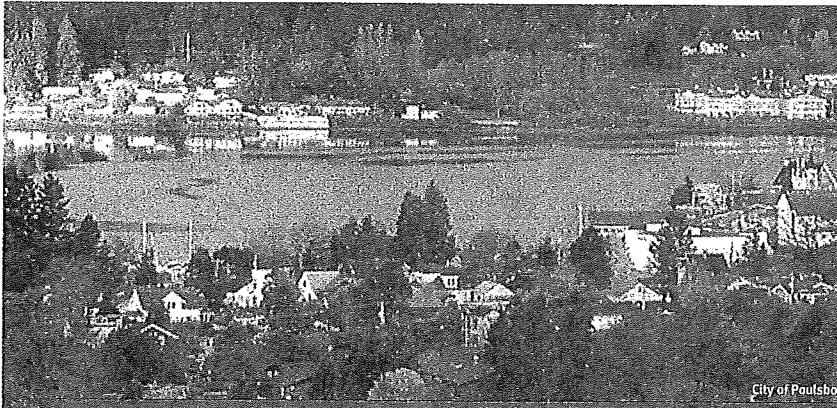
City of Poulsbo, Washington. *Annexation Information.* See http://www.cityofpoulsbo.com/planning/planning_annexations.htm.

City of Sauk Rapids, Minnesota. *Orderly Annexation Areas / Joint Planning Boards.* See http://www.ci.sauk-rapids.mn.us/ under "Orderly Annexation Areas."

Greater Bemidji (Minnesota) Area Joint Planning Board. See www.jpbgba.org, "Zoning Ordinance, Maps and Agreements."

Linn County, Iowa. *City/County Strategic Plans and Village Plans.* www.linncounty.org/content.asp?Page_Id=1085&Dept_Id=25.

Snohomish County, Washington. *Snohomish County Tomorrow: A Growth Management Advisory Council.* www1.co.snohomish.wa.us/County_Services/SCT.



The City of Poulsbo, Washington, abuts its heavily forested urban growth area. City of Poulsbo

Snohomish County

Other regions in Washington have formulated their own approaches to cross-boundary coordination. Snohomish County, on the east side of Puget Sound north of Seattle, established an interjurisdictional forum, Snohomish County Tomorrow (SCT) in 1989 to respond to growth pressures and establish a regional growth management framework. SCT, which includes cities, towns, and the Tulalip Tribes, gradually assumed responsibility for developing the countywide planning policies required by the GMA and continues to serve as an indispensable venue for discussing regional issues. SCT is currently engaged in an update of the countywide policies within the larger framework of the Puget Sound Regional Council's Vision 2040 plan.

The county has established a series of interlocal annexation agreements with many of the cities that establish policies in areas such as development review, transportation improvements, and mitigation of impacts to either or both jurisdictions.

Spokane County

Spokane County, which includes the city of Spokane and a cluster of smaller satellite cities, undertook an intensive effort in 2006 to encourage collaborative planning. A lack of interlocal agreements in the region had resulted in annexation disputes and pending lawsuits. A state grant led to a pilot project to examine the degree of consistency and conflict found in the land-use regulations and development practices of the adjacent jurisdictions. The study found that while the neighboring jurisdictions used generally consistent densities and zoning categories, inconsistent subdivision regulations and street standards resulted in differing street patterns, from more urban grids to more suburban cul-de-sacs and private roads. It also found that the process for reviewing applications rarely considered the standards and requirements of neighboring jurisdictions.

Spokane County and the participating cities agreed in 2008 to collaborate on a second phase of the study. As part of that effort, participants examined the fiscal impacts of annexations on the county's revenues and delivery of services. Implementation of the study's recommendations is now underway. The county has revised its subdivision standards to foster consistent road design and street connectivity. Several interlocal agreements have been negotiated, including an agreement on a set of principles for collaborative planning. The most significant issue for the county has been the pending annexation of Spokane International Airport by the cities of Spokane and Airway Heights. Through an interlocal agreement, the annexation was postponed until 2012 to mitigate the impacts to county revenues. The participants are also considering options for maintaining the county's fiscal health by eliminating overlaps with city services and possibly through revenue sharing.

CONCLUSIONS

This brief survey has traced a path from Minnesota, a state that manages the annexation process without much encouragement of cross-boundary planning, to Iowa, which encourages a broad range of intergovernmental agreements without a regional planning structure, to Washington, which actively manages growth, giving counties the final say on the urban growth boundaries. While none of these processes are free from controversy, it appears that the stronger the regional framework, the better the chances of an outcome that is based on verifiable data and sound planning principles.

While few states have gone as far as Washington in establishing a framework for growth management, or in assigning decision-making powers to counties, improved cross-boundary planning could be achieved in any region through a number of steps:

- Enabling and encouraging interlocal agreements between neighboring jurisdictions
- Providing models for such agreements and assistance in developing them
- Providing incentives for coordination, such as priorities for funding or technical assistance
- Establishing criteria for urban growth areas that are based on reasonable regional population and employment projections, rather than optimistic expectations
- Striving for consistency with urban development standards, particularly in street and block standards, for areas slated for eventual annexation

Residential development on a rural area's outskirts can attract developers and buyers, combining easy access to the city's amenities and services with lower taxes. © iStockphoto.com/Volker Kreinacke

VOL. 29, NO. 1

Zoning Practice is a monthly publication of the American Planning Association. Subscriptions are available for $95 (U.S.) and $120 (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.

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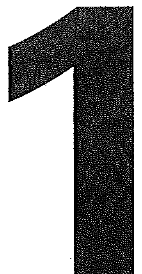


ZONING PRACTICE

FEBRUARY 2012

AMERICAN PLANNING ASSOCIATION

ISSUE NUMBER 2

PRACTICE CONSOLIDATION

2

Consolidating Zoning Districts

By Donald L. Elliott, FAICP

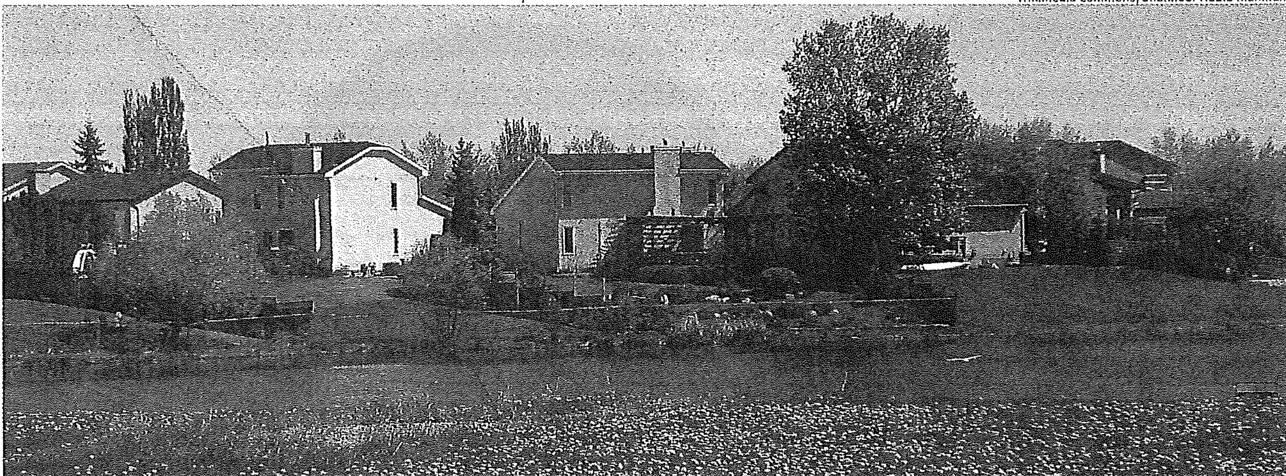
"Council wants *another* new zone district?" sighed Peter Planalot. "I can't even keep track of the ones we already have, and I'm the planning director! We need to get rid of some of the existing districts before we add new ones."

I never actually heard Peter make the above statement, because he doesn't exist. But I suspect that many planning directors and zoning administrators would sympathize with Peter's frustration. As cities grow and counties mature, they need to accommodate new kinds of development, and that often leads to the creation of new zoning districts. They don't exactly breed like rabbits, but they do tend to proliferate over time. In *A Better Way to Zone*, I quoted statistics from Denver as an example. Its 1923 zoning ordinance had 13 districts, the 1957 code had 19, by 1994 it was up to 42, and its 2010 code has 107 districts.

Proliferation of zone districts creates several problems, none of them fatal but most of them annoying. *First*, the creation of a new district needs to be reflected in all of the non-district based-controls in the zoning code. If the new district has special sign or parking regulations, how do they relate to the general parking and sign standards? Are they consistent? Can they be integrated? If the new code is silent on those issues (because they weren't the issues driving the creation of the new zone, which is common) what sign and parking standards should staff apply? And each time a new development standard is added or revised, its impact on each existing zone district needs to be considered. Did you check how the new landscaping requirements are going to fit with the dimensional or form requirements in each district? The more districts you have, the more checking you have to do. And the more chance there is for inconsistencies to enter the code. Why is it that this district has stronger landscaping requirements but weaker tree preservation requirements than all the other similar districts in the code? Was that intentional or just an oversight by drafters who didn't know what else was in the code?

A *second* problem (alluded to above) is that proliferation of zone districts make it hard for staff, citizens, and investors to understand and remember how the code works. Staff are paid to learn it, so they will, but the training time required each time staff turns can be long. Investors can hire consultants to learn it, but that increases development costs and puts the city at a possible competitive disadvantage when most cities want to do just the opposite. Citizens bear the brunt of the burden of complexity, because it is harder for non-planners to understand a complex code and no one is being paid to do it for them.

Wikimedia Commons/Shahnoor Habib Munmun



Outside of the city's high-density city center, most residents of Winnipeg, Manitoba, live in low-density residential areas such as the bucolic Richmond West neighborhood pictured here.

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About the Author

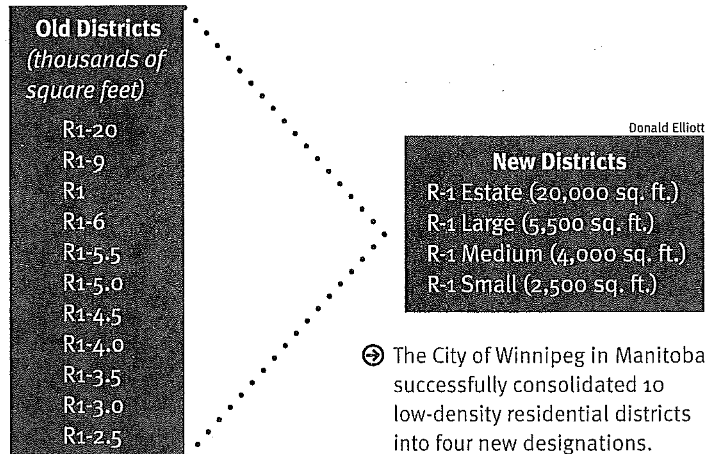
Donald L. Elliott, FAICP, is a senior consultant with the Denver office of Clarion Associates, a former chapter president of APA Colorado, and a former chair of the APA Planning and Law Division. As a planner and lawyer he has assisted more than 40 North American cities and counties to reform and update their zoning, subdivision, housing, and land-use regulations. He has also consulted in Russia, India, Lebanon, and Indonesia, and served as USAID Democracy and Governance Advisor in Uganda for two years.

For all of these reasons, cities that reform their development codes often try to consolidate their current menu of zoning districts back into fewer, more flexible districts. In my code writing practice that request comes much more often than not—but the trend is not universal. As noted above, Denver recently adopted a new zoning ordinance with separate menus of form-based districts for each of its seven context areas—a total of 107 districts. The number of zone districts was driven by Denver's desire for a more finely calibrated set of tools that would better tailor future development and redevelopment to the context of the surrounding area. It fits in with comments I have heard from both city staff and consultants that "We don't care how many zone districts there are as long as they're the right ones." As a second example, both Chicago and San Diego operate "modular" zoning systems in which one portion of the zoning designation regulates permitted uses and a second module addresses permitted heights and densities. By allowing combinations of use and dimensional zoning modules, the pressure to proliferate districts can be reduced and the need to consolidate districts may not arise. A third example is that many form-based codes also result in more zone districts than the codes they replace.

Still, consolidation of existing zone districts is an effective tool to simplify development codes, and one that many cities want to try. It can be done, and it has been done.

WINNIPEG, MANITOBA

Between 2005 and 2007, Winnipeg revised all of its zoning bylaw provisions for areas outside the city center. When it started, the city had 10 different R1 districts that differed based on the minimum lot sizes and widths. When it finished, there were just four variations. The consolidation is shown below.



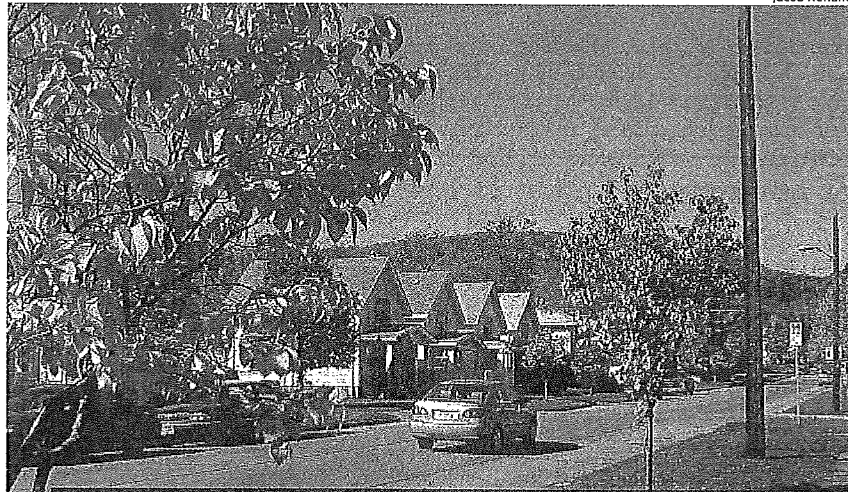
The City of Winnipeg in Manitoba successfully consolidated 10 low-density residential districts into four new designations.

As the table shows, no residential property owner was made nonconforming because the minimum lot sizes were lowered or held constant. In fact the opposite was true. Smaller minimum lot sizes could allow subdivision and densification of the R1 neighborhoods over time, and that could be a problem. In many residential neighborhoods potential zoning controversy arises not because zoning changes allow individual property owners to do less with their property, but because the change allows their neighbors to do more. Few suburban property owners want their neighbors to subdivide and create more units.

To prevent that possibility, the Winnipeg Zoning Bylaw provided that when an R1 or R2 property is subdivided, all lots within 100 feet (ignoring rights-of-way) of existing R1 or R2 neighborhoods must match or exceed the minimum lot width of the existing neighborhood. A new subdivision in the new R1-Small district across the street from developed parcels 50 feet wide would need to plat lots at least 50 feet wide, even if that meant that the minimum lot size for those lots exceeds 2,500 square feet. This helps promote similar development character adjacent to existing development. Further away from existing development, the property owner could plat narrower lots as long as they met the 2,500 square foot minimum lot size. The Winnipeg solution simplifies the structure of the zoning bylaw while avoiding claims of regulatory takings and relieving existing residents' fears about the character of new development nearby. Incidentally, it also helps defuse "the numbers game" in which property owners insist that neighbor-

ing development be a particular minimum lot size in order to preserve neighborhood property values, when in fact well-designed, denser development could enhance those values even more.

Jacob Norlund



Many older neighborhoods in Duluth, Minnesota, have a well-preserved fabric of single-family homes on small lots. In the city's new zoning code, contextual development standards encourage compatible redevelopment without requiring neighborhood-specific overlays or districts.

DULUTH, MINNESOTA

In 2006, Duluth adopted a visionary comprehensive plan to guide the future of the city and the redevelopment of its waterfront. Two years later it began integrating and updating its 1950s-era zoning code and seven other ordinances to help make that plan a reality. The new code adopted in 2010 is a hybrid code that includes eight new form-based districts targeted to key walkable mixed use areas of the city, including the waterfront and downtown. Since the development code was gaining a more complex district structure in some areas, the city looked for ways to simplify the code in others and eventually decided to consolidate the existing R1-a, R1-b, R1-c, and R-2 zone districts. The three R-1 districts differed only in minimum lot area, lot width, and setbacks, while the little used R-2 district also allowed construction of two-family structures.

Contextual standards that require consistency with existing development patterns can be an effective tool for facilitating district consolidations.

As in Winnipeg, the question was how to ensure that future development would be consistent with the established character of surrounding areas. To do that, Duluth decided to use "contextual" standards for minimum lot size, minimum lot width, and setbacks in the consolidated R-1 district. Those solutions are shown in the table below.

As the table illustrates, two different types of contextual standards were used. Minimum lot sizes begin at the lowest size permitted for single-family homes in the earlier code (4,000 square feet in area, 30 feet in width) but are modified upward to reflect the average size of lots developed with that use on the same block face (i.e., all of the lots on the same side of the street between the nearest two intervening cross-streets). The city originally intended to use the same contextual measure for front and side setbacks but later decided to simplify it by only referring to the immediately adjacent lots developed with the same type of structure. While lot size and width is based on the block face, setbacks are based only on adjacent lots.

The old Duluth zoning ordinance contained a 300-foot spacing requirement for two-family structures in single-family districts, as well as an 1,800-square -oot minimum size for two-family structures in order to protect the predominant character of those districts. Those provisions carried over into in early drafts of the new code and would have applied in the consolidated R-1 district. However, after discussion only the minimum unit size was retained and the spacing restriction was dropped as unnecessary.

R-1 DISTRICT DIMENSIONAL STANDARDS

City of Duluth, Minnesota

Lot Standards		
Minimum lot area per family (One-family)		The larger of 4,000-sq. ft. or average of developed 1-family lots on the block face
Minimum lot area per family (Two-family)		The larger of 3,000 sq. ft. or average of developed 2-family lots on the block face
Minimum lot area per family (Townhouse)		2,500 sq. ft.
Minimum lot frontage (one-family, two-family, and townhouses)		The larger of 30 ft. or average of developed lots with similar uses on the block face
Setbacks, Minimum		
Minimum depth of front yard		The smaller of 25 ft. or average of adjacent developed lots facing the same street
Minimum width of side yard (one- and two-family)	General	The larger of 6 ft. or average of adjacent developed lots facing the same street
Minimum width of side yard (one- and two-family)	Lots with less than 50 ft. frontage and garage	Combined width of side yards must be at least 12 ft.

PHILADELPHIA

On December 15, 2011, the Philadelphia City Council unanimously voted to replace its 1962 zoning ordinance with an entirely new document covering all of the city's 146 square miles of land. In the process the number of base zoning districts was reduced from 55 to 36 and the number of overlay districts from 33 to 17. In some cases the remaining overlay districts include unique standards for different areas of the city (i.e., each area subject to special controls does not have a separate overlay), but the result is still much simpler than the structure it replaced. The most significant district consolidation occurred for small-scale, walkable commercial strips. Over the years 16 different Philadelphia neighborhoods had decided to reinforce the character of their local "main street" shopping area by crafting overlay districts for these areas. Most of the resulting overlays only included restrictions on uses and permitted signs, while others went further to address parking amounts, parking location, and other issues. A sample overlay district map is shown below.

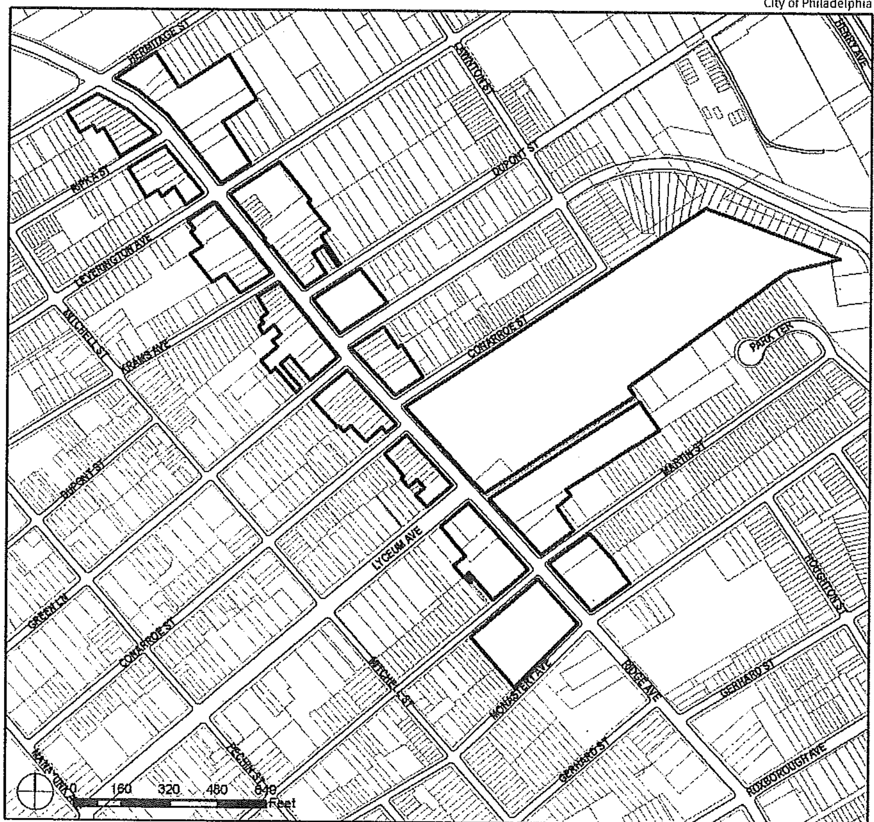
Ed Yakovich

Philadelphia is one of the latest major U.S. cities to complete a comprehensive zoning reform effort. Through consolidation the city reduced the total number of zoning districts by more than a third.

Because many of the local neighborhood controls were very similar, Philadelphia decided to create a new base (not overlay) zoning district called Commercial Mixed Use 2.5 (CMX-2.5). The new use contained a limited list of permitted uses similar to the city's existing CMX-2 district and the larger dimensional standards used in its existing CMX-3 district. After mapping the commercial corridors into the new CMX-2.5 district, most of the old overlay zones could be deleted.

Of course, the fit was not perfect—it never is in consolidation efforts. Those neighborhoods whose existing commercial mixed use overlays addressed other issues wanted those controls continued, so some of the overlay controls stayed in place. So, for example, the city's East Falls overlay remains in place to carry over specialized setback controls for Kelly Drive as well as specialized building width and curb cut controls. But use restrictions no longer appear in the overlay—they now appear in the underlying CMX-2.5 district. Similarly, the Ridge Avenue overlay remains in the code to carry over limits on use of space for commer-

City of Philadelphia



Ridge Avenue (Only applies to lots zoned CMX-2)

Before Philadelphia overhauled its zoning code, it had multiple different overlay districts with similar development standards intended to protect the character of neighborhood shopping districts. The city's new code remaps most of these overlays with a single new base zoning district.

cial purposes and specialized sign controls for that area. In addition to reducing the number of overlay districts, Philadelphia's approach also grouped the remaining overlays in one section of the code. Not only do all of the overlay districts now appear in one chapter of the new code, but all neighborhood commercial area overlays now appear in the NCA subchapter of the overlay district chapter.

PITFALLS TO AVOID

As these examples show, it is possible to simplify development codes by consolidating similar zone districts, but there are several practices that can make the job easier and increase your chances of success.

Some cities have explored consolidating their higher density multifamily zones with lower intensity commercial zones as part of a mixed use strategy.

First, be careful consolidating residential zones. Commercial property owners use their property for business and can often support any consolidation that preserves or improves their business options and property values. But neighborhood residents often own their property because they like the "feel" of the neighborhood and don't want that to change. Allowing more uses and more density are often unpopular regardless of whether they increase flexibility and property values. The key in residential district consolidation is to find ways to reinforce the established character without needing a separate district for each platting pattern.

This caveat about residential zones is particularly applicable when a new building type will become available—for example, when the consolidation will allow two-family structures in some previously single-family districts or town houses in a previously one- and two-family district. Generally, new types of residential structures need different dimensional or form standards (often a minimum lot area per unit or a waiver of side setbacks in the case of town houses), so be sure to address those in the dimensional standards for the new district. Although Duluth did not need to carry over a spacing requirement to assuage concerns about the new availability of two-family residences in a single-family district, that is one option that could be used to protect the current character of the area. Similarly, some consolidated districts that introduce town houses into lower density districts cap the number of adjacent town houses that can be constructed in a block (i.e., no more than six attached units permitted in a single structure).

Second, consolidate through "upzonings" rather than "downzonings" whenever possible. As long as the consolidated district allows the same or more opportunities for development and redevelopment as before, there is little chance of losing a lawsuit over regulatory takings. That doesn't mean the threat won't be bandied about—it usually is—but it will be bandied about less. Using the smallest minimum lot sizes and widths applicable in the included zones (as Winnipeg and Duluth did) also reduces the creation of nonconformities (i.e., lots, structures, or uses that met the requirements of the old code but don't comply with the new code). Upzonings can also increase opportunities for reinvestment and enhance the range of housing options available in the neighborhood. If some of the higher intensity commercial uses that will become available through consolidation create concern, make them conditional uses subject to a hearing (but clarify that existing uses of that type will be deemed to have already received a permit).

Third, commercial and industrial districts often offer significant opportunities for consolidation. The menu of those districts in older codes often reflects the idiosyncratic order in which shopping mall, business park, lifestyle center, and main street developers appeared on the scene rather than how many districts the city needs in order to regulate commercial and industrial development. In recent years many cities have recognized that they only need three or four industrial districts—usually (1) a light industry/mixed use/business park/research park district, (2) a general manufacturing/processing/assembly district, (3) a district for heavier operations using hazardous materials or procedures or unavoidable environmental and neighborhood impacts, and (4) sometimes a planned industrial development district. Milwaukee, Minneapolis, and Seattle now use menus of industrial districts following this pattern.

In older codes commercial districts have often proliferated even more than industrial districts (as the Philadelphia case study shows). Increasingly, commercial districts are being consolidated to focus more on the scale of development (both the size of individual buildings and the maximum size of uses within buildings) rather than the list of permitted uses. There is a big difference between a 10,000-square-foot neighborhood hardware store and a Home Depot superstore, so saying that "hardware stores" are only allowed in more intense commercial districts may not make sense. You can allow small stores in lower density districts and bigger stores and more intense commercial areas. In addition, some cities have explored consolidating their higher density multifamily zones with lower intensity commercial zones as part of a mixed use strategy. Duluth did just that when it combined its R-4 (dense apartments) and C-1 (neighborhood scale commercial retail) zones.

Increasingly, commercial districts are being consolidated to focus more on the scale of development rather than the list of permitted uses.

Fourth, it may not be worth trying to consolidate "one-off" special purpose districts like those specifically designed for casinos, stadiums, waterfronts, airports, or ports. While it may seem a waste to keep a lengthy chapter of the code devoted to

one or two sites in the city, special purpose districts often have few similarities with the heavy industrial or commercial districts that you may be tempted to group them with. Casino and stadium districts are notoriously idiosyncratic. At a minimum they often require unusual amounts of parking and unique types and sizes of signs. The controversies surrounding the location of these economically desirable but locally unpopular facilities often forces cities to balance very detailed development standards designed to control their impacts with very specific building program needs of the developer. The result is often a hash representing the personalities (or loudest voices) involved rather than a thoughtful blend of controls that could be safely applied in other contexts. It is often best to leave these types of districts out of the consolidation discussion.

KEYS TO SUCCESS

After the list of districts to be consolidated has been identified, you still need to proceed with caution. As with all planning and zoning activities, it is wise to keep in close communication with the neighborhoods that will be affected by the consolidation. Zoning changes make most property owners nervous, and often the only cure is repeated explanation of what is being done and why. Property owners want to know, and the city should be able to clearly communicate

- what zoning designations will be affected (i.e., what districts are being eliminated and what will the new districts be called);
- who will gain uses or development options and what they are;
- who will lose uses or development options and what they are;
- who (if anyone) will be subject to new development or design controls; and
- how the city will handle any nonconformities.

Regarding that last point, lawyers and planners know that nonconforming uses and structures can almost always be continued and can be bought and sold to new owners and operators, but citizens often need reassurances. A city program to clarify that those situations are deemed "not nonconforming" and a provision indicating that the city will issue letters to that effect upon request can go a long way to reducing anxiety.

Testing is also important. Some cities have their staff go over the past six or 12 months of applications to see how they would have been treated under the proposed consolidated district. If glitches are found—for example, the mix of large and small parcels in the new district would allow some buildings to be far taller or bigger than their neighbors—those can be fixed through revisions to the development standards before the new district is adopted.

If testing reveals that the consolidation will not work in part of the intended area, be prepared to map those areas into a different district. If a proposed consolidation doesn't work for 10 percent of the properties, that doesn't mean that the consolidation fails. It means that you need to either exclude those areas (i.e., remap them into another existing zone district) or develop a new use standard or a design or development standard to address the anomalies. As a last resort, you can include a qualification that "this standard shall not apply to structures with X characteristic constructed before the effective date of this amendment." While not elegant, this is a common solution. The "carve-out" only affects one or a handful of properties, so few planners and investors will ever have to deal with it. But failure to consolidate the districts just because of that anomaly would will keep life more complex for all of the other planners and investors operating in the area. The benefits of a simpler, more flexible district structure may be worth a few exceptions, however inelegant.

So when codes evolve into a confusing plethora of districts, it is possible to get the cat back in the bag—or at least to get some cats back in some bags. It is possible to corral some of those "just slightly different from each other" zone districts into broader and more flexible consolidated districts. Using the techniques described above, district consolidations can help simplify life for planners, create new investment opportunities, increase housing diversity, and still preserve the established character of developed neighborhoods. The creation of new zone districts does not have to be a one-way ratchet towards a code complexity. And Peter Planalot can simplify the rest of the code to make room for the new districts that council wants.

Philadelphia's new zoning code fixes many of the regulatory "cracks" that had emerged since the previous code's original adoption in 1962. © iStockphoto.com/

VOL. 29, NO. 2

Zoning Practice is a monthly publication of the American Planning Association. Subscriptions are available for $95 (U.S.) and $120 (foreign).
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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.

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Printed on recycled paper, including 50-70% recycled fiber and 10% postconsumer waste.

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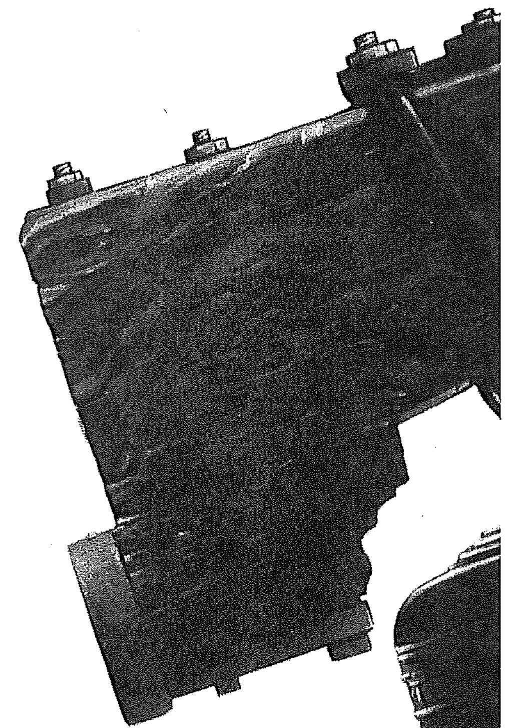

DOES YOUR COMMUNITY HAVE TOO MANY ZONING DISTRICTS?

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