February 10, 2012 | Volume 6 | No. 3

QUINLAN™

Zoning Bulletin

in this issue:

WEST®

41112562

Estoppel—After Finding Church Does Not Have Required Use Permit, County Orders Religious Services Stopped

Church sues, arguing equitable estoppel for lack of prior land use regulation enforcement and RLUIPA violations

Citation: *Guatay Christian Fellowship v. County of San Diego, 2011 WL 6450742 (9th Cir. 2011)*

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

NINTH CIRCUIT (CALIFORNIA) (12/23/11)—This case addressed the issue of whether a county's 20-year failure to enforce land use regulations against a church holding religious services without a required use permit equitably estops the county from enforcing the land use regulations against the church. The case also addresses what is required for a Religious Land Use and Institutionalized Persons Act ("RLUIPA") claim to be ripe.

The Background/Facts: Since 1986, the Guatay Christian Fellowship (the "Church") had been holding religious services in a recreation building located on the grounds of the Pine Valley Trailer Park (the "Park").

Contributors
Corey E. Burnham-Howard

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

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

WEST®

610 Opperman Drive • P.O. Box 64526 • St. Paul, MN 55164-0526
1-800-229-2084 • email: west.customerservice@thomsonreuters.com • west.thomson.com/quinlan
ISSN 0514-7905 • © 2012 Thomson Reuters. All Rights Reserved.
Quinlan™ is a Thomson Reuters brand.

The Park was located in Guatay, California, an unincorporated portion of San Diego County (the "County"). The parcel of land on which the Park sat was zoned "rural residential" under the County's zoning ordinance. In that zoning district, land use permits were required for religious assemblies, among other uses.

There was no evidence that the recreation building had been used for religious services prior to 1986. The Church made no attempt to complete and file a Use Permit application.

On April 16, 2008, the County issued a Notice of Violation ("NOV") to the Park. The NOV noted that the recreation building had been "illegally converted for use as a church." The NOV required the Park owner to notify the Church to cease using the building for religious assembly within 30 days of the notice.

Having found the Park owner failed to properly notify the Church of the violation, on May 30, 2008, the County sent a letter to the Church's pastor. That letter advised the Church that the property was not zoned for religious assembly and that no permit had been obtained to allow religious assembly at the property. The Church was ordered to cease and desist religious services at the recreation building.

Eventually, the Church sued the County. Among other things, the Church alleged that: the County's enforcement of the land use regulations against the Church violated RLUIPA's "substantial burden on religious exercise" prohibition. RLUIPA provides that a government land-use regulation "that imposes a substantial burden on the religious exercise of a ... religious assembly or institution" is unlawful "unless the government demonstrates that imposition of the burden ... is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest." (42 U.S.C.A. § 2000cc(a)(1).)

The Church also argued that, since the County had not enforced the land use regulations against the Church's religious assembly use in more than 20 years, principles of equitable estoppel should enjoin the County from arguing that a Use Permit was now required.

The district court found that the Church's RLUIPA claim failed because it was not ripe (i.e., not ready for judicial review) given the fact that the Church had never applied for a land use permit or zoning change. The court found that the Church's equitable estoppel claim also failed because: any reliance on the existence of a valid Use Permit (i.e., a permit that had been issued to the Park owner for music assemblies at the recreation hall had expired prior to the Church's use of the recreation hall) or on lack of prior enforcement was unreasonable.

The Church appealed.

DECISION: Affirmed.

The United States Court of Appeals, Ninth Circuit, held that: the Church's RLUIPA claim was unripe because the church failed to complete even one full use permit application. The court also held that the County could not be equitably estopped from prohibiting the Church from using its recreation hall for religious services without a required permit.

The court explained that the County's RLUIPA claim was unripe for lack of a final decision. "A claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," said the court. Here, since neither the Park owner nor the Church submitted even a single application for a Use Permit, the court "[could] not determine if the Church ha[d] suffered a 'substantial burden' under RLUIPA ... ." The Church had presented no evidence that the County would not or could not issue a Use Permit once the County had received a complete application from the Church.

The Church had also argued that the County should be equitably estopped from prohibiting its use of the recreation hall for religious services because, among other things: the Church did not know it needed a permit to use the recreation hall for religious services; and the Church had reasonably relied on the County's lack of enforcement of permit requirements when it made certain improvements to the recreation hall. The court rejected this equitable estoppel argument. The court explained that in order for it to grant equitable estoppel, the Church had to establish four elements: (1) the County was "apprised of the facts"; (2) the County intended that its conduct be acted upon, or acted such that the Church "had a right to believe it was so intended"; (3) the Church was "ignorant of the true state of the facts"; and (4) "relied upon [the] conduct to [its] injury." If one of those elements was missing, the court could not grant estoppel. Here, the court found that, among others, the third element was missing. The Church "[could] not claim that it knew neither that to use the recreation hall for religious services generally required a Use Permit, nor that the Church in particular needed to apply for one." The Church had been informed by a County employee in 1986 that a Use Permit was required. The Church could not, under California law, "rely on lack of enforcement, even in the form of previous exemption grants, to establish entitlement to equitable estoppel."

See also: *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).*

See also: *Green v. Travelers Indemnity Co., 185 Cal. App. 3d 544, 230 Cal. Rptr. 13 (1st Dist. 1986).*

See also: *Golden Gate Water Ski Club v. County of Contra Costa, 165 Cal. App. 4th 249, 80 Cal. Rptr. 3d 876 (1st Dist. 2008).*

Case Note: The court noted that "[a]ll of the circuits [as well as the Ninth Circuit's district courts] ... have applied the final decision requirement to RLUIPA claims, ... reasoning that the requirement of a final decision ... served the purposes of the ripeness doctrine ... ."

Case Note: The Church had argued that the Use Permit application (specifically the costs associated with the application) itself was a substantial burden on the church in violation of RLUIPA. The court found the record here "insufficient" to reach the merits of this "cost-as-a burden" claim. Thus, it could not "determine whether this permit application process itself constitute[d] a substantial burden on the Church, and [it determined that it] need not pass judgment on the broader question of whether costs of some magnitude alone can ever constitute a substantial burden for the purposes of RLUIPA claims."

Proceedings—Citizens Group Challenges City's Approval of Two Master Planned Development Permits

Parties dispute whether regional growth management hearings board has jurisdiction over challenge

Citation: *BD Lawson Partners, LP v. Central Puget Sound Growth Management Hearings Bd., 2011 WL 6778803 (Wash. Ct. App. Div. 1 2011)*

WASHINGTON (12/27/11)—This case addressed the issue of the jurisdiction of regional growth management boards. Specifically, it addresses whether such a board has jurisdiction over the challenge of a city's grant of master planned development permits by ordinance.

The Background/Facts: In 2009, the City of Black Diamond (the "City") adopted a new comprehensive plan. That comprehensive plan included a Future Land Use Map, which designated large areas of the City broadly for Master Planned Developments ("MPDs"). The City also enacted development regulations in the form of a 2009 MPD ordinance. The ordinance created an MPD zoning district and set the standards and the permit process for the review of future MPD permit applications. These 2009 ordinances were not appealed to the Central Puget Sound Region Growth Management Hearings Board (the "Board") under the state of Washington's Growth Management Act (the "GMA").

In 2010, BD Lawson Partners LP and BD Village Partners LP (collectively "Yarrow Bay") sought approval from the City to build two MPDs. The City granted the two MPD permits by ordinance (the "2010 Approval Ordinances").

A citizens group led by Toward Responsible Development ("TRD") filed challenges to the 2010 Approval Ordinances both in superior court under the Land Use Petition Act ("LUPA") and with the Board under the GMA. The LUPA case was stayed pending the GMA appeal.

In proceedings before the Board, the City argued that the 2010 Approval Ordinances were project permits that were consistent with the City's comprehensive plan and development regulations. As project permits, the City maintained that the Board did not have jurisdiction over the 2010 Approval Ordinances. TRD, on the other hand, argued that 2010 Approval Ordinances were not project specific permits but were development regulations, and thus the Board should have jurisdiction.

The Board agreed with TRD that it had jurisdiction. It determined that the 2010 Approval Ordinances were development regulations over which it had jurisdiction.

Yarrow Bay appealed. It argued that the Board erred by asserting jurisdiction over the 2010 Approval Ordinances. It contended that the Board's assumption of jurisdiction constituted an improper collateral attack on the City's 2009 comprehensive plan and development regulations.

DECISION: Reversed.

The Court of Appeals of Washington, Division 1, agreed with Yarrow Bay. It held that the 2010 Approval Ordinances were project permit approvals, and therefore the Board lacked jurisdiction to review them.

The court explained that the Board's jurisdiction is "limited to deciding petitions challenging comprehensive plans, development regulations, or permanent amendments to comprehensive plans or development regulations." The court said that the "Board does not have jurisdiction to decide challenges to project permit applications or site-specific land use decisions, because such decisions do not quality as comprehensive plans or development regulations."

Thus, if the 2010 Approval Ordinances amended development regulations or the City's comprehensive plan, the Board would properly have jurisdiction here. However, if the 2010 Approval Ordinances were permit approvals or site-specific land use decisions, then they would fall outside the scope of the Board's jurisdiction, and would only be properly challengeable in a LUPA petition to superior court.

Here, the court found it undisputed that the 2010 Approval Ordinances approved permits and that those permit applications were consistent with the development regulations established in 2009. Since the 2010

Approval Ordinances were permit approvals, the Board did not have jurisdiction, concluded the court. Moreover, since the 2010 Approval Ordinances were consistent with the 2009 ordinances—which were never challenged—TRD's challenge of the 2010 Approval Ordinances was an impermissible collateral attack on the 2009 ordinances, found the court.

See also: *Woods v. Kittitas County, 162 Wash. 2d 597, 174 P.3d 25 (2007).*

See also: *Feil v. Eastern Washington Growth Management Hearings Bd., 172 Wash. 2d 367, 259 P.3d 227 (2011), as corrected, (Sept. 29, 2011) and as corrected, (Jan. 10, 2012).*

Standing—Zoning Board Member Leaves After Tie Vote, Then New Vote Taken

Zoning Board member sues, alleging her vote was improperly nullified in her absence

Citation: *Brodeur v. Miami-Dade County, 2012 WL 10824 (Fla. Dist. Ct. App. 3d Dist. 2012)*

FLORIDA (01/4/12)—This case addressed the issue of whether a zoning board member had standing to challenge a vote that was taken in her absence, which she claimed improperly nullified her vote.

The Background/Facts: In June 2010, the Miami-Dade County (the "County") Community Zoning and Appeals Board for Area 12 (the "CZAB") convened for a regular meeting. Six members of the seven-member CZAB were present, including Peggy Brodeur ("Brodeur").

The agenda for that meeting included an application by developer, J. Milton Dadeland, LLC (the "Developer"), for site plan approval to increase an existing apartment building from four stories to eight stories. After hearing the application, the CZAB members voted. Three members voted for approval, and three voted against the time. Brodeur voted against the application.

At the meeting, staff, including the Assistant County Attorney, advised that a tie vote would cause the matter to carry over to the next meeting of the CZAB. The relevant county ordinance, County Code § 33-308, stated that: "Whenever a tie vote occurs, the matter shall be carried over to the next regularly scheduled meeting."

Shortly after the vote was taken, Brodeur became ill and was unable to remain for the balance of the meeting. After she left, the chair of the meeting allowed additional discussion regarding a further amendment to the Developer's application. Eventually, after additional discussion, another vote was taken on the application. This time, the application passed by a vote of three to two.

Brodeur later filed a complaint in the circuit court against the County. She alleged that the CZAB's actions on the resolution after she left the meeting violated County Code § 33-308 and that the approval of the application was therefore void.

Both the Developer (who was allowed to intervene) and the County filed motions to dismiss Brodeur's complaint. They maintained that Brodeur lacked standing to bring the action. In doing so, they relied on the "general rule that a public official lacks standing to challenge the rules and procedures applicable to his or her official acts."

Brodeur maintained that an exception existed where, such as in this case, the public official is willing to perform his or her duties, "but is prevented from doing so by others."

The circuit court agreed with the Developer and the County and dismissed the complaint.

Brodeur appealed.

DECISION: Reversed, and matter remanded.

The District Court of Appeal of Florida held that Brodeur "alleged a sufficient interest in vindicating the effectiveness of her vote to confer standing to bring the challenge."

In so holding, the court acknowledged that Brodeur lacked a property interest in the subject matter (i.e., the Developer's application). However, the court also recognized that Brodeur was "entitled to seek review of actions which nullify her duly-exercised vote."

The court looked at whether Brodeur alleged a sufficient interest on her part in vindicating "the effectiveness of her vote." The court found that she did given the facts that: (1) § 33-308 specified that a tie vote triggered a carryover to the next meeting; and (2) the carryover to the next meeting and § 33-308 were discussed by the staff and the CZAB chair before Brodeur left the meeting. The court found these facts "sufficient ... to establish Ms. Brodeur's standing to seek relief" from her claim that her vote was improperly nullified—"a distinct 'injury in fact' resulting from the CZAB's actions taken in her absence."

See also: *Graham v. Swift, 480 So. 2d 124 (Fla. Dist. Ct. App. 3d Dist. 1985).*

See also: *Coleman v. Miller, 307 U.S. 433, 59 S. Ct. 972, 83 L. Ed. 1385, 122 A.L.R. 695 (1939).*

Case Note: In August 2011, the County Commission amended Code § 33-308 so that the pertinent excerpt now provides: "Whenever a tie vote occurs and no other available motion on the application is

made and approved before the next application is called for consideration or before a recess or adjournment is called, whichever occurs first, the matter shall be carried over to the next regularly scheduled meeting."

Validity of Regulations—State Agency Issues Regulations Requiring Buffer Zones on Wetlands, Waterways

County says regulations amount to zoning and exceed agency's authority

Citation: *Delaware Dept. of Natural Resources & Environmental Control v. Sussex County, 2011 WL 6840591 (Del. 2011)*

DELAWARE (12/29/11)—This case addressed the issue of the validity of §§ 4 and 5 of the Delaware Department of Natural Resources & Environmental Control's ("DNREC") "Regulations Governing the Pollution Control Strategy for the Indian River, Indian River Bay, Rehoboth Bay and Little Assawoman Bay Watersheds" (the "PCS Regulations"), which were promulgated in 2008 to effect DNREC's Pollution Control Strategy ("PCS") for the Inland Bays watershed area.

The Background/Facts: In an effort to control pollution in the Inland Bays, in June 2008, DNREC promulgated the PCS Regulations. Sections 4.0 (Buffer Zone Establishment) and 5.0 (Sediment and Stormwater Controls) of the PCS Regulations combined to effectuate buffer zones. These buffer zones "limit landowner's uses of their property if the property is adjacent to an Inland Bay waterway." "Water quality buffers are described as natural areas between the active land uses and wetlands, or water bodies." They are "managed to promote the natural removal of pollutants and to protect wetlands against encroachment or physical alterations." The PCS Regulations required the buffer zone to be 100 feet.

In November 2008, Sussex County (the "County") filed a complaint against DNREC. The County asserted that DNREC exceeded its constitutional and statutory authority in promulgating the PCS Regulations. The County's Zoning Ordinance § 115-193 (the "County Ordinance"), enacted in 1988, regulated buffer zones. Unlike DNREC's PCS Regulations, which established a 100-foot buffer zone, the County Ordinance established only a 50-foot buffer zone. The County argued that it had sole zoning authority, pursuant to the powers delegated to it by the General Assembly. The County argued that §§ 4 and 5 of the PCS Regulations constituted "zoning" and thus directly conflicted with the County Ordinance and were void.

DNREC maintained that there was no direct conflict between the two buffer zones because "[n]othing in the PCS buffer of 100 feet prevents compliance with the [County Ordinance]'s buffer of 50 feet." Moreover, DNREC argued that §§ 4 and 5 of the PCS Regulations did not constitute zoning because they were promulgated for pollution control purposes only. As such, DNREC maintained that the PCS Regulations were lawfully promulgated pursuant to title 7, § 6010(a) of the Delaware Code to effectuate Chapter 60's express policy and purpose of pollution control.

The superior court agreed with the County. It held that §§ 4 and 5 of the PCS Regulations constituted "zoning," and thus directly conflicted with the County Ordinance. The court held those portions of the PCS Regulations were therefore void.

DNREC appealed.

DECISION: Affirmed.

The Supreme Court of Delaware agreed with the superior court. It held that DNREC exceeded its authority in enacting buffer zones under the PCS Regulations, §§ 4 and 5.

In so holding, the court explained that the General Assembly had "made clear that the authority to adopt a comprehensive land use plan in [the County] [was] vested solely with the government of [the County]." The court found this clarity in multiple relevant statutes that delegated zoning power to the County, including: title 9, section 6902(a) of the Delaware Code (which specifically delegates zoning power to the County); title 9, § 7001 (the Home Rule statute); and title 9, § 6951 (the Quality of Life Act of 1988). The court also found that, as part of the comprehensive land use plan process, the state's Land Use Planning Act (as well as the Quality of Life Act and the Delaware Land Protection Act) requires DNREC and other state agencies to bring zoning issues to the county government.

Since sole zoning authority vested in the County, the court first determined whether §§ 4 and 5 of the PCS Regulations conflicted with the County Ordinance's buffer zone regulation. The court found they did conflict. Among several other points, the court found that the "conflict [was] dramatically illustrated by § 4.7 of the PCS Regulations, which prohibits the submission to Sussex County of final site plans and final major subdivision plans unless they comply with the PCS Regulations."

The remaining issue then, was whether the PCS Regulations were valid, even if they conflicted with the County Zoning Ordinance. The court determined that § 4 and portions of § 5, which established buffer zones, were not valid because they constituted zoning. The court held that the buffer zones established in the PCS Regulations and the related

mandates constituted zoning "because they impose[d] land use restrictions on Sussex County's inland bays watersheds by multiple methods that are well-established zoning actions." "Zoning," noted the court, is defined as "the division of land into distinct districts and the regulation of certain uses and developments within those districts... ." Setbacks and buffers have been judicially recognized as part of a zoning scheme, noted the court. The court found that the PCS Regulations not only mandated a buffer, thus constituting zoning, but also went "far beyond establishing buffer zones." Among other things, again, the court pointed to § 4.7 of the PCS Regulations, which provided that no final major subdivision plats or final site plans could even be submitted to the County for consideration unless the application included the buffer zones and restrictions provided for in the PCS Regulations. The court found that, accordingly, the PCS Regulations purported "to completely prohibit [the County] from exercising its zoning authority in the absence of compliance."

The court further found that DNREC's general legislative authority to control pollution and to protect the environment was "insufficient to authorize DNREC to adopt regulations that zone Sussex County's inland bays watersheds."

The court concluded that DNREC exceeded its powers in enacting the PCS Regulations because: (1) the PCS Regulations constituted zoning; (2) the PCS Regulations directly conflicted with the County Zoning Ordinance; and (3) DNREC lacked the statutory authority to engage in zoning practices. The court held that § 4 and those portions of § 5 adopting buffer restrictions under § 4 were void and must be stricken.

See also: *Concerned Citizens of Cedar Neck, Inc. v. Sussex County Council, 1998 WL 671235 (Del. Ch. 1998).*

See also: *Coker v. Kent County Levy Court, 2008 WL 5451337 (Del. Ch. 2008).*

Zoning News from Around the Nation

DISTRICT OF COLUMBIA

Vincent Orange—currently representing Ward 5—has proposed "an emergency bill that will place limits on the number of medical marijuana facilities and strip clubs that can go in any particular ward." Under the draft bill, only five marijuana cultivation centers could be permitted in any single ward. Medical marijuana dispensaries would be limited to only two per ward.

Source: *The Washington Post; www.washingtonpost.com*

MAINE

Reportedly, members of a state task force created to reform the Land Use Regulation Commission ("LURC") recently "urged lawmakers ... to quickly pass changes to LURC's structure and rules." "[B]oth Republicans and Democrats on the committee said they don't intend to rush a decision." Task force recommendations reportedly include: retaining a statewide land use planning, zoning and permitting board for the Unorganized Territory; rewording LURC's "Purpose and Scope" to value both conservation and economic viability; and shifting major site development applications in the Unorganized Territory to the Maine Department of Environmental Protection and forest management activities to the Maine Forest Service.

Source: *Bangor Daily News; http://bangordailynews.com*

NEW JERSEY

Assemblyman Declan O'Scanlon (Republican-Monmouth) recently announced his intent to "introduce a bill that would protect the state's selected pot growers from running afoul of zoning laws." Reportedly, O'Scanlon "said many communities in New Jersey have expressed concerns about marijuana farms running afoul of federal law, and have tried to use zoning and other tools to block their entry." He contends that "most of the worries are unfounded and have needlessly kept patients from obtaining a drug that would help ease their pain." Among other things, O'Scanlon's bill would reportedly: include marijuana growers under the state's Right to Farm Act; and require the growers to provide around the clock security, spelled out in a written plan approved by the municipality.

Source: *The Star-Ledger; www.nj.com*

NEW YORK

The New York Civil Liberties Union and the National Lawyers Guild have filed a zoning complaint with New York City's buildings department. They argue that metal barricades surrounding Manhattan's Zuccotti Park (the "epicenter of the Occupy Wall Street Movement") are "a violation of city zoning law because they restrict public access to the space." Reportedly, members of the public are only able to enter the park through two "checkpoints" that are guarded by police officers or security personnel.

Source: *The Washington Post; www.washingtonpost.com*

February 25, 2012 | Volume 6 | No. 4

QUINLAN™

Zoning Bulletin

in this issue:

WEST®

41112563

Authority—Non-home-rule City's Zoning Ordinance Prohibits Oil, Gas Operations Within City Limits

Oil and gas company argues non-home-rule units of government lack authority to prohibit such operations

Citation: *Tri-Power Resources, Inc. v. City of Carlyle, 2012 IL App (5th) 110075, 2012 WL 34253 (Ill. App. Ct. 5th Dist. 2012)*

ILLINOIS (01/06/12)—This case addressed the issue of whether a non-home-rule unit of government has the authority to prohibit or bar the drilling or operation of an oil or gas well within its municipal limits.

The Background/Facts: In June 2005, Tri-Power Resources, Inc. ("Tri-Power") obtained a permit from the Illinois Department of Natural Resources (the "Department") to drill for oil on land it leased in the City of Carlyle (the "City")—an unincorporated part of Clinton County.

The City's zoning code did not allow for the drilling or operation of oil or gas wells within the City's municipal limits. Although the drilling or operation of oil or natural gas wells was not expressly prohibited by the City's zoning code, it was precluded by exclusion. It was not listed

Contributors
Corey E. Burnham-Howard

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

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

WEST®

610 Opperman Drive • P.O. Box 64526 • St. Paul, MN 55164-0526
1-800-229-2084 • email: west.customerservice@thomsonreuters.com • west.thomson.com/quinlan
ISSN 0514-7905

as a "special" or "permitted" use, and all "unlisted" uses were "deemed prohibited" under the City's zoning code.

Tri-Power brought a legal action against the City. Among other things, Tri-Power asked the court to declare that the City was not authorized to prohibit the drilling of an oil or gas well within its municipal limits. In support of its argument, Tri-Power maintained that pursuant to § 11-56-1 of the Illinois Municipal Code (the "Code") (65 ILCS 5/11-56-1) and § 13 of the Illinois Oil and Gas Act (the "Act") (225 ILCS 725/13), the City had "limited authority" to regulate the drilling or operation of an oil or gas well within its municipal limits, but was not authorized to bar or prohibit such activity.

Section 11-56-1 of the Code provides: "The corporate authorities of each municipality may grant permits to mine oil or gas, under such restrictions as will protect public and private property ... ."

Section 13 of the Act provides that an application to the State for a permit for oil or gas well operations must be accompanied by: a "certified copy of the official consent of the municipal authorities for said well to be drilled, and no permit shall be issued unless consent is secured and filed with the application."

Tri-Power contended that §§ 11-56-1 and 13 should have been "construed together as giving the City the authority to 'impose reasonable restrictions on the issuance of a permit to drill an oil or gas well inside the City limits' but not the 'authority to refuse to grant such a permit, where any or all conditions have been met or alternatively, as in the instant case, where none exist.'"

The circuit court disagreed with Tri-Power. It interpreted § 13 of the Act as granting the City the authority to prohibit the operation of an oil or gas well within its municipal limits.

Tri-Power requested certification of the issue to the appellate court. The circuit court and the appellate court both granted that request.

DECISION: Affirmed.

Agreeing with the circuit court, the Appellate Court of Illinois, Fifth District, held that a non-home-rule unit of government may prohibit the drilling or operation of an oil or gas well within its municipal limits.

In so holding, the court construed the plain language of the relevant statutes. The court found that § 13 of the Act gave the City the power to prohibit the operation of an oil or gas well within its municipal limits. The court found that § 11-56-1 of the Code further supported that determination.

Tri-Power had argued that the use of the term "consent" in § 13 should have been interpreted as referring to "the municipality's determination that all conditions or reasonable restrictions imposed [on drilling within its municipal limits] have been met." Accordingly, Tri-Power maintained that the State's authority to issue permits for oil and gas operations was preemptive.

The appellate court disagreed. It said Tri-Power's proposed interpretation would require the court to ignore the legislature's plain language and "read conditions into the statute[s] that are not there." Rather, the court found that the power to give "official consent" or permission necessarily entailed the power to deny the same. Therefore, pursuant to § 13 of the Act, a municipality could block the Department's issuance of a permit to operate an oil or gas well within its municipal limits. The court concluded that "[s]ection 13 of the Act thus precludes a finding that the legislature intended the Act to have preemptive effect, and § 11-56-1 of the Code further reflects that intent by giving local units of government the power to regulate and permit local oil and gas mining." Thus, §§ 13 and 11-56-1 collectively grant municipalities the power to both permit and prohibit local oil and gas wells.

See also: *Village of Chatham v. County of Sangamon, 216 Ill. 2d 402, 297 Ill. Dec. 249, 837 N.E.2d 29 (2005).*

See also: *People v. Wade, 326 Ill. App. 3d 396, 260 Ill. Dec. 74, 760 N.E.2d 491 (3d Dist. 2001), as modified, (Nov. 30, 2001).*

Case Note: In its holding, the court noted that, under "Dillon's Rule," "non-home-rule units possess only those powers specifically conveyed by the constitution or by statute." Thus, the City could only regulate oil or gas operations if the constitution or statute specifically conveyed such authority. Here, the court found §§ 11-56-1 and 13 collectively conveyed such authority to the City.

Constitutional Validity of Regulation—Sexually-oriented Business Says Statute Limiting its Location is Unconstitutional as Applied to it

In analyzing availability of other available areas in which business could operate, court looked outside the State's borders

Citation: *Borough of Sayreville v. 35 Club L.L.C., 2012 WL 147848 (N.J. 2012)*

NEW JERSEY (01/19/12)—This case addressed the issue of whether a court may consider the availability of alternative channels of communication that are located in another state when determining an as-applied challenge to the constitutionality of N.J.S.A. 2C:34-7—a statute that limits the locations of where sexually-oriented businesses may operate.

The Background/Facts: In November 2007, 35 Club L.L.C. ("35 Club") began operating a business called "XXXV Gentlemen's Club" in the Borough of Sayreville (the "Borough"). The business, "an all-nude gentlemen's cabaret," met the statutory definition of sexually-oriented business under New Jersey statutory law, N.J.S.A. 2C:34-6(a).

Shortly after the business opened, the Borough commenced a Chancery Division action. In part, it sought to permanently enjoin 35 Club from operating its business at the location it had chosen. The Borough maintained that the location violated N.J.S.A. 2C:34-7(a), which prohibited the operation of a sexually-oriented business within 1,000 feet of a public park or residential zone.

35 Club conceded that the Club's location violated the statutory prohibition. However, it argued that the statute was unconstitutional as applied to it because there were no "adequate alternative channels of communication [for the protected activity] within the relevant market area."

Because the statute operates to limit free speech rights being exercised by owners and patrons of sexually-oriented businesses, the New Jersey Supreme Court had previously held that the statute could only limit those rights if there were adequate alternative channels of the communication of that type of speech. Thus, the trial court in this case, in analyzing whether the statute as-applied to 35 Club was unconstitutional in violation of the free speech rights of 35 Club and its patrons, had to look at whether there were adequate alternative channels of communication for sexually-oriented businesses within the relevant market area.

The court found that the Borough had shown that there were adequate alternative channels of communication available in the relevant market area such that the statute could be constitutionally applied to prohibit 35 Club from operating in its current location—within 1,000 feet of a public park or residential zone.

In reaching that conclusion, the court considered the availability of alternative channels of communication outside of New Jersey—specifically in Staten Island, New York.

The matter was appealed.

The Appellate Division reversed. In reversing, it commented that "[t]he inclusion of Staten Island [in the relevant market area] presents an independent basis for rejecting the [Chancery] court's analysis with respect to the availability of suitable sites."

The matter was appealed as of right to the Supreme Court of New Jersey. (The appeal arose only though the dissent in the Appellate Division, and thus the Supreme Court was confined to the issue which was the subject matter of the dissent: whether a trial court addressing an as-applied challenge to the statute may consider potentially available alternative sites that are outside of New Jersey's borders.)

DECISION: Affirmed in part and reversed in part.

The Supreme Court of New Jersey held that "in evaluating the adequacy of alternative channels of communication," New Jersey trial courts may consider the existence of sites that are located outside of New Jersey but that are found within the relevant market area as defined by the parties' experts.

In reaching its conclusion, the court noted that the legislature's statewide approach to regulating sexually-oriented businesses demanded that any ordinance be tested by means of a regional market rather than be confined to the borders of any particular municipality. The court had previously held that, in the context of a statewide statute, New Jersey trial courts could look beyond the borders of any particular municipality and consider on a broader scale whether there were adequate alternative avenues for the operation of those business establishments.

Here, the court now determined that just as it had held courts could look beyond municipal borders in evaluating the availability of alternative avenues of communications, courts could also look beyond the borders of the state if within the relevant market area.

The court based that determination on several grounds:

> First, the court recognized that it might be "far more convenient for a patron to travel a few minutes into New York or Pennsylvania than to travel twenty minutes away to [another municipality in New Jersey]."

Second, the court found the record made clear that patrons of sexually-oriented businesses often travel from and to states other than the ones in which they reside to access this sort of entertainment. Confining court review only to potentially available locations within state borders thus "may not comport with the manner in which individuals in fact exercise the rights that the First Amendment protects," said the court.

The court also noted that "refusing to permit any consideration of locations that are found in nearby states would result in unequal treatment among [New Jersey] municipalities themselves because a town in the middle of the State would be able to use a wide market area," while a town on the border would have a "truncated" regional market approach. This, said the court, could require border municipalities to host far more sexually-oriented businesses than would otherwise be the case.

Finally, the court rejected the argument that courts should not consider sites beyond New Jersey borders because the operators of sexually-oriented businesses have no voice in the government of those out-of-state municipalities. The court found that argument ignored the fact that such

businesses had no more voice in the government of other municipalities within New Jersey borders.

The court concluded that, as a part of the evaluation of the regional market, it is permissible to consider not only the "neighboring communities" that lie within New Jersey's borders, but to consider as relevant to the question those "neighboring communities" that are beyond those borders.

See also: *Township of Saddle Brook v. A.B. Family Center, Inc., 156 N.J. 587, 722 A.2d 530 (1999).*

Case Note: The court emphasized that its holding was a narrow one. "We do not suggest that a record that demonstrates that the only available alternate sites are beyond our borders would be constitutionally defensible. Nor do we suggest that a record in which the majority of such sites are in another state would pass constitutional muster. But travel between states on our roads and through our public transportation system, factors that both experts in this case found relevant to their market analysis, is a fact of modern life in our increasingly mobile society."

Case Note: The court noted that in determining whether the statute was unconstitutional as-applied to 35 Club required "difficult, fact-sensitive, inquiries" with the following steps: (1) determination of the relevant market area; (2) determination of the availability of suitable sites within that market area; and (3) determination of whether the number of suitable sites in relation to the size of the market area provides Club 35 with enough alternatives to withstand constitutional scrutiny.

Standing—Circuit Court Overturns BZA Denial of Variance

Abutting landowner, who was not a party in circuit court case, appeals circuit court's decision

Citation: *Underwood v. St. Joseph Bd. of Zoning Adjustment, 2012 WL 117747 (Mo. Ct. App. W.D. 2012)*

MISSOURI (01/17/12)—This case addressed the issue of whether an adjacent property owner has standing to appeal a circuit court decision in which he/she was not a party.

The Background/Facts: Kelvin Underwood ("Underwood") sought to construct a detached garage on his property in the city of St. Joseph (the "City"). He submitted construction plans to the City for approval. The City approved the plans and Underwood obtained a building permit.

When Underwood's garage construction was 80% complete, it was determined that: (1) it was nearly 100 square feet larger than permitted; and (2) the City had erred in approving the garage plans submitted by Underwood since, under the size limitations provided by ordinance, the garage should have been nearly 300 feet smaller than permitted. The City advised Underwood to either: obtain a demolition permit, with the City paying for 76% of the required downsizing in light of the City's permitting mistake; or seek an area variance with the City's Board of Zoning Adjustment ("BZA").

Underwood chose to seek the variance. Before the initial hearing on the variance request, abutting property owners, including Sharon Kennedy ("Kennedy"), submitted comments related to the variance request. Kennedy expressed her opposition to the variance. She was concerned that the garage did not fit the character of the neighborhood due to its size and construction material. She indicated her belief that "[t]his may adversely affect property values in the neighborhood."

Underwood's variance request was denied by the BZA.

Underwood appealed to the circuit court. The circuit court reversed the BZA's denial. It remanded the case to the BZA with orders that the BZA grant Underwood's variance request. The BZA did not appeal that decision. Instead, the BZA granted the variance request.

One week later, Kennedy filed a notice of appeal in the Missouri Court of Appeals. She sought to challenge the circuit court's decision reversing the BZA's denial of Underwood's variance request.

Underwood filed a motion to dismiss the appeal. He argued that the appeal must be dismissed because Kennedy did not have standing to appeal.

DECISION: Motion to dismiss appeal granted.

The Missouri Court of Appeals granted Underwood's motion to dismiss Kennedy's appeal. In doing so, it held that because Kennedy was not a party to the cause below in the circuit court (i.e., Underwood's appeal from the BZA decision following the initial hearing), she did not have standing to seek an appeal therefrom.

The court explained that standing is a precursor to the right to appeal. If a party does not having standing, the party's appeal must be dismissed.

The court looked at Missouri statutory law, RSM 64.660.2, governing decisions made by county boards of zoning adjustment. The court

noted that the statute expressly indicates that "[a]fter entry of judgment in the circuit court in the action in review, any party to the cause may prosecute an appeal to the appellate court ... ." Again, since Kennedy was not a party to the cause—the circuit court case—the court concluded that she could not prosecute an appeal.

Kennedy, however, argued that she still had standing despite her nonparty status. First, she contended that § 536.100 of the Missouri Administrative Procedures Act expressly conferred standing upon her as a "person ... aggrieved by a final decision in a contested case." Second, she argued that even if she did not having standing under § 536.100, the City's standing should be deemed to have transferred to her for purposes of appeal once the City acted in an allegedly arbitrary and capricious manner in choosing not to pursue the appeal. The court rejected both arguments.

The court found that § 536.100 did not confer standing to nonparties on appeal in the appellate courts. Rather, § 64.660.2 provided the mechanism for judicial review here. Again, that section conferred standing only upon parties to the cause—of which Kennedy was not one.

The court also concluded that standing could not automatically transfer from a named party (e.g., here, the City) to a nonparty (e.g., here, Kennedy) for purposes of appeal. Kennedy had argued that she would have been unable to intervene in the circuit court case because the City was adequately representing her interests. As such, she contended that it was not until the City decided not to pursue the appeal that their interests diverged. The court rejected that argument as speculative. Moreover, the court found that, had she tried, Kennedy would not have been precluded from seeking permissive intervention ("which does not involve the question of adequate representation") to become a party to the litigation, and thereby acquire standing to appeal the circuit court's judgment.

See also: *F.W. Disposal South, LLC v. St. Louis County Council, 266 S.W.3d 334 (Mo. Ct. App. E.D. 2008).*

See also: *City of Bridgeton v. Norfolk & W. Ry. Co., 535 S.W.2d 99 (Mo. 1976).*

Case Note: This case makes clear that opponents of land use requests should intervene in any original court action rather than relying on the municipality to represent their interests. Otherwise, as was the case with Kennedy here, they lose all opportunity to challenge the matter, and risk a municipality's decision to deny a land use request being overturned without further appeal.

Constitutional Validity of Regulation—Ordinance Declares Abandoned Vehicles Nuisance

Property owners argue ordinance is ultra vires and unconstitutional because it does not require establishment of a nuisance in fact

Citation: *Borough of New Bloomfield v. Wagner, 2012 WL 130668 (Pa. Commw. Ct. 2012)*

PENNSYLVANIA (01/18/12)—This case addressed the issue of whether a nuisance ordinance prohibiting the accumulation of abandoned vehicles on private or public property was unconstitutional as applied to property owners.

The Background/Facts: In September 2006, the Borough of New Bloomfield (the "Borough") passed Ordinance No. 256 (the "Ordinance"). The Ordinance prohibits nuisances on private or public property within the Borough, including, among other things, the accumulation of abandoned vehicles.

The Wagners and the Henches (the "Property Owners") owned and stored a variety of unregistered or uninspected vehicles on their respective properties. The Property Owners' vehicles would be deemed "abandoned" under the Ordinance.

In August 2009, the Borough filed a declaratory judgment action with the trial court. It asked the court to: declare that the Property Owners' vehicles were "abandoned" under the Ordinance, and direct the Property Owners to remove the abandoned vehicles from their property.

The Property Owners responded by arguing that the Ordinance was ultra vires (i.e., beyond the Borough's powers) and unconstitutional as applied to them. They maintained the Ordinance was ultra vires because it declared the storage of abandoned vehicles a nuisance per se—without having to show a nuisance in fact. The Property Owners argued that the Ordinance was unconstitutional as applied to them because there was no evidence that the vehicles on their property actually were a nuisance in fact. They contended that an unregistered or uninspected vehicle has no more impact on the public welfare than a registered or inspected vehicle in the absence of facts that such vehicle creates a nuisance. In other words, they argued that for the Ordinance to automatically deem their vehicles a nuisance, without the Borough actually having to establish they were in fact a nuisance—causing a harm (such as a harm greater than a registered and inspected vehicle)—was unconstitutional.

The trial court held the Ordinance did not declare the storage of vehicles a nuisance per se. The court reasoned that because the Ordinance listed certain exceptions or circumstances where a vehicle was not con-

sidered abandoned, the Ordinance did not declare the storage of unregistered or uninspected vehicles to be a nuisance per se.

DECISION: Reversed, and matter remanded.

The Commonwealth Court of Pennsylvania disagreed with the trial court. It found that the Ordinance did declare vehicles stored on a private property owner's property for more than 48 hours that fall within the definition of "abandoned vehicle" a nuisance per se. This was, concluded the court, ultra vires, and therefore unconstitutional as applied to the Property Owners.

The court explained: The Borough had only those powers specifically delegated to it by the General Assembly. Under statutory law—§ 1202(5) of The Borough Code—the Borough was authorized to enact an ordinance "[t]o prohibit and remove any nuisance, including but not limited to ... the storage of abandoned or junked automobiles ... on public or private grounds, or to require the removal of any such nuisance ... by the owner or occupier of such grounds." However, noted the court, a borough's ordinance seeking to abate the storage of abandoned vehicles could not "declare the mere presence of such vehicles on any given piece of property to be a nuisance per se." Rather, "the ordinance must be phrased in such a way as to require the municipality to affirmatively establish that a nuisance in fact existed."

Here, the court found that, under the Ordinance, a vehicle was "automatically deemed 'abandoned' if the vehicle [was] unregistered, uninspected, or ha[d] no title and ha[d] remained on an owner's private property ... for more than forty-eight hours." The court further found that, while the Ordinance's definition of "nuisance" included a standard of harm, the Ordinance did not specifically state that such harm must be shown before a vehicle falling within the definition of "abandoned vehicle" would be deemed a nuisance in accordance with the Ordinance. "In other words," found the court, the Ordinance was not "phrased in such a way as to require the [Borough] to affirmatively establish that a nuisance in fact" existed. Rather, the Ordinance "declare[d] the mere presence of unregistered or uninspected vehicles on private property for more than forty-eight hours to be a nuisance per se."

In light of that analysis, the court agreed with the Property Owners that the Ordinance was therefore ultra vires and unconstitutional as applied to the Property Owners.

See also: *Com. v. Creighton, 163 Pa. Commw. 68, 639 A.2d 1296 (1994).*

See also: *Kadash v. City of Williamsport, 19 Pa. Commw. 643, 340 A.2d 617 (1975).*

See also: *Teal v. Township of Haverford, 134 Pa. Commw. 157, 578 A.2d 80 (1990).*

Zoning News from Around the Nation

MAINE

A civil lawsuit has been filed by landowners against the Town of Frankfort, challenging a town ordinance that bans wind turbines. The landowners argue that the wind ordinance is an illegal land use regulation that acts as a "regulatory taking" of their property in violation of the constitutions of Maine and the United States.

Source: *Bangor Daily News; http://bangordailynews.com*

SOUTH CAROLINA

The Charleston City Council moved to place a six-month moratorium on approving zoning, permitting, and licensing for any new Internet cafes or arcades. The moratorium is reportedly "designed to give the city time to explore the rise of gaming businesses where patrons can use a personal computer to log on and play video games that resemble electronic slot machines regularly featured at full-scale casinos." Reportedly, State Representative Phyllis Henderson (Republican-Greenville) has also "offered a bill" "designed to outlaw the use of casino-type video games in sweepstakes scenarios."

Source: *The Post and Courier; www.postandcourier.com*

WEST VIRGINIA

The City of Morgantown is looking to limit, through zoning, hydraulic fracturing. Morgantown had banned hydraulic fracturing but a county circuit court overturned the ban, "ruling that regulation of oil and gas activity lies in the purview of the state." "As an alternate approach to a ban," Morgantown is now looking to "zoning as a means of limiting the activity to certain areas."

Source: *The State Journal; www.statejournal.com*

WISCONSIN

State Senator Kathleen Vinehout (Democrat-Alma) recently introduced two bills "designed to give local officials more power over silica mines and residents more warning before they are approved." Reportedly, one bill "would make frac sand mining a conditional use in land zoned agricultural and prohibit it in residential zones." The other bill "would require local governments to give 30-day notices of a public hearing and send letters to residents within a mile of a proposed mine."

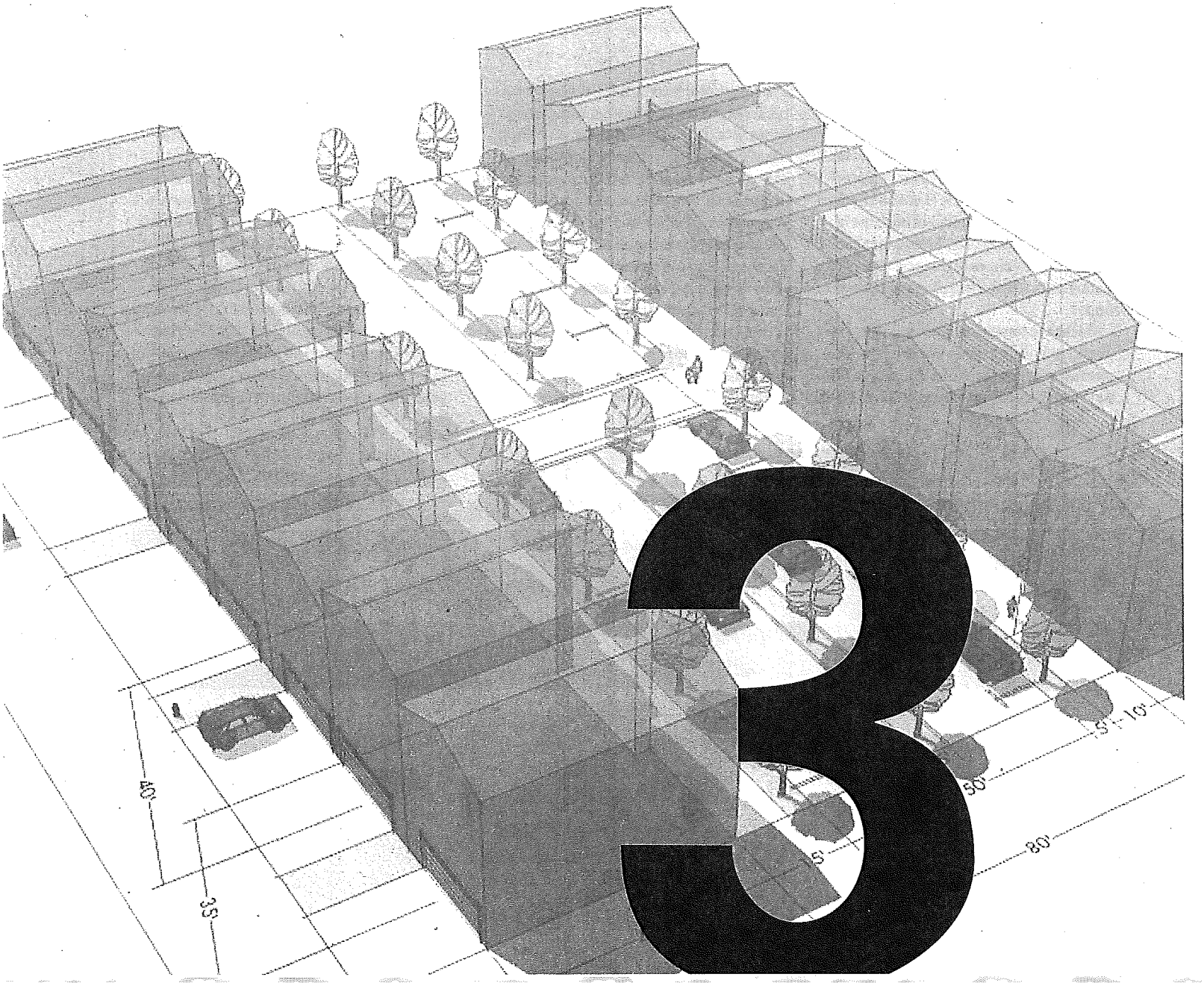
Source: *LaCrosse Tribune; http://lacrossetribune.com*

ZONING PRACTICE MARCH 2012

AMERICAN PLANNING ASSOCIATION

ISSUE NUMBER 3

PRACTICE VISUALIZATION



New Tools for Zoning and Development Visualization

By Devin Lavigne, AICP

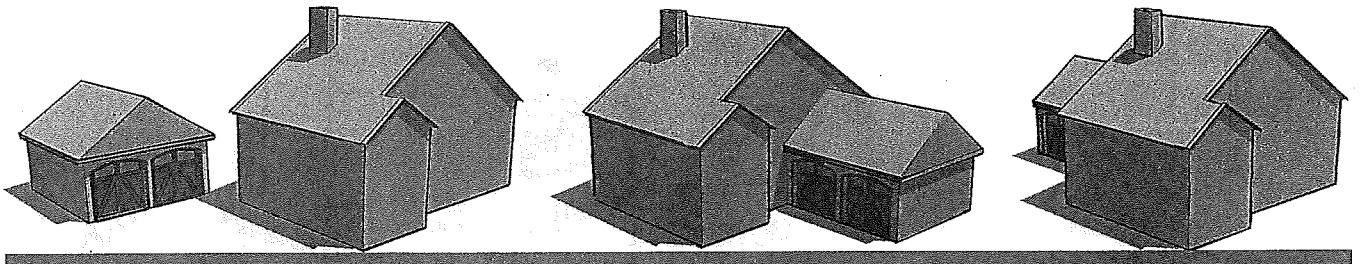
Plans have almost always included figures and photos to explain recommendations and planning concepts, and now zoning ordinances, design guidelines, and other regulatory tools are starting to follow suit.

All images by Houseal Lavigne Associates

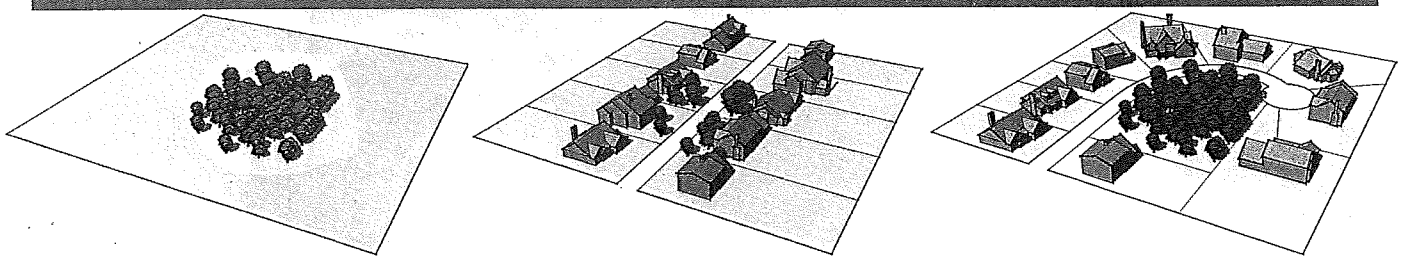
Supporting illustrations, sketches, and photos integrated into these documents can show standards that the text describes, and development visualization can show what our codes strive to foster. Even if you are not a "graphics" person, it is still important to know what today's tools are capable of and build an appreciation for the inclusion of graphics to improve the usefulness of documents that have traditionally been text based.

Technological innovations have changed how documents are prepared, printed, packaged, and distributed. In the past these documents would sit on bookshelves in the back offices of city hall or be served online through a static website as pure text, stripped of maps and graphics. As our tools, software, and the web evolve, so must our practices, codes, and ordinances. The increased transparency in government and the availability of digital documents has broadened the audience of potential users and readers, and expectations of easy access and user friendliness are at an all-time high. However, in light of all the technological advances in graphics and visualization, and the increased document accessibility and awareness, many communities and planning professionals struggle with how best to appropriately and effectively utilize these new tools to create better, more user-friendly codes, guidelines, and ordinances.

This article highlights the software and techniques that can provide the imagery to enhance zoning ordinances, explain zoning changes, and highlight the development potential of key sites. It reviews common and attainable software tools, including Google SketchUp, Google Earth, Pictometry, and Adobe Photoshop, and explains how each program can be used independently or together to enrich documents and improve land-use and development regulations.



Communities can use simple SketchUp drawings to illustrate design and development alternatives, such as permissible configurations for garages or alternatives for site development.



ASK THE AUTHOR JOIN US ONLINE!

Go online during the month of March to participate in our "Ask the Author" forum, an interactive feature of Zoning Practice. *Devin Lavigne, 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
Devin Lavigne, AICP, is a principal and cofounder of Houseal Lavigne Associates with special expertise in urban design, land-use and site planning, illustration and development visualization, web development, and geographic information systems. Lavigne's contributions to his firm's graphics and plans have helped Houseal Lavigne garner national recognition.

THE TOOLS

While no article could cover the full breadth of software and tools available, there is a small collection of programs that have emerged as the most common tools for the profession. Each of the tools and their applicability to creating development regulations is outlined on the following pages. Although not all the tools summarized are new, all have been recently upgraded or expanded, adding features that improve their usefulness in assisting with development regulation and visualization.

Google SketchUp

Google SketchUp has become firmly established in the planning toolbox primarily because of its cost and the fact that it is being taught and promoted in most planning programs. SketchUp was created by @Last Software in 2000 as a general purpose three-dimensional (3-D) modeling program that sought to simplify 3-D design and development. In 2006 @Last Software and SketchUp were purchased by Google, which now distributes the software at http://sketchup.google.com.

There are two types of SketchUp available: a free version for home and personal use and a professional version. For those unfamiliar with the program, the free version provides an opportunity to learn the software and become familiar with drawing in three dimensions. The professional version expands the software's exporting abilities allowing for better integration with other software, including AutoCAD.

SketchUp is easy to use and can quickly generate simple, dimensioned diagrams that can illustrate basic zoning requirements. More experienced users can create detailed models that can visualize new development and create scenes that portray activity, character, and excitement.

Google SketchUp has become firmly established in the planning toolbox primarily because of its cost and the fact that it is being taught and promoted in most planning programs.

SketchUp has a number of features that make modeling fast and easy, including its ability to reuse and repurpose elements from drawing to drawing. By creating "components," SketchUp allows users to create reusable elements within individual drawings or between drawings. SketchUp's 3-D Warehouse (http://sketchup.google.com/3dwarehouse), which allows users to retrieve models that have been created and shared by others, is full of elements to add detail and interest to a model, including buildings, trees, people, cars, and other objects.

SketchUp also has the ability to create styles for line types, backgrounds, shadows, and other elements, making it easy for a city or private firm to maintain a consistent look and feel among drawings and illustrations.

Google Earth

Google Earth is a virtual globe that allows its users to view aerial imagery from all over the world. Developed by Keyhole, Inc., it was acquired by Google in 2004, which now distributes the software at http://earth.google.com. Like SketchUp, Google Earth offers free and professional versions. The free version's functions allow users to "fly" around the globe, download aerial images, view 3-D buildings and terrain, and perform basic measurements, including area and distance. Google Earth Pro extends the capability of the software by allowing higher-resolution image exports (4,800 pixels compared to 1,000 pixels), the ability to import GIS data, and in some areas, access to parcel and tax information. Recent improvements to Google Earth include access to historical imagery, the ability to place 3-D models created in SketchUp into Google Earth, and the ability

to control the location of the sun by date and time of day.

Pictometry

In 2005 Bing Maps (formerly known as Virtual Earth and Windows Live Local) started offering oblique-angle, bird's-eye imagery of cities and towns. These photographs are provided by the Rochester-based company Pictometry, which crisscrosses the skies in low-flying airplanes to capture images of Earth at different angles. While the usefulness of Pictometry photos on Bing Maps is mostly limited to seeing unique perspectives of Earth, software developed and provided by Pictometry significantly extends the functionality and usefulness of these images. As Pictometry captures its photographs, each pixel of the images is georeferenced in three dimensions—latitude, longitude, and altitude. With Pictometry Online, Pictometry Field Study, or its plug-ins for ArcGIS and AutoCAD, end users are able to measure area, bearing, distance, height, elevation, and slope/pitch of anything visible in the image.

Adobe Photoshop

Adobe Photoshop is a raster image editing program that has been around for more than 20 years. Although there is little competition for Photoshop, Adobe continues to make improvements and add enhancements, releasing a new version about every 18 months. Adobe Photoshop CS5 was released in 2010 and added several new features that assist in creating and altering images and graphics that support the needs of our profession. As it relates to codes, ordinances, design and development guidelines, and development visualization, Photoshop provides a powerful tool to quickly generate alternative outcomes and desired ends. Existing conditions can be "altered" by deleting or removing undesirable elements or adding missing and desired features and details. Photoshop can also be used to manipulate 3-D images generated in SketchUp and aerial imagery from Google Earth and Pictometry.

Internet Imagery

As we enrich our documents with images of desired and undesired elements, we are sometimes without the image we want or need to use. While using your own photographs is always the recommended first option, the Internet can be a valuable resource for finding images we cannot capture ourselves.

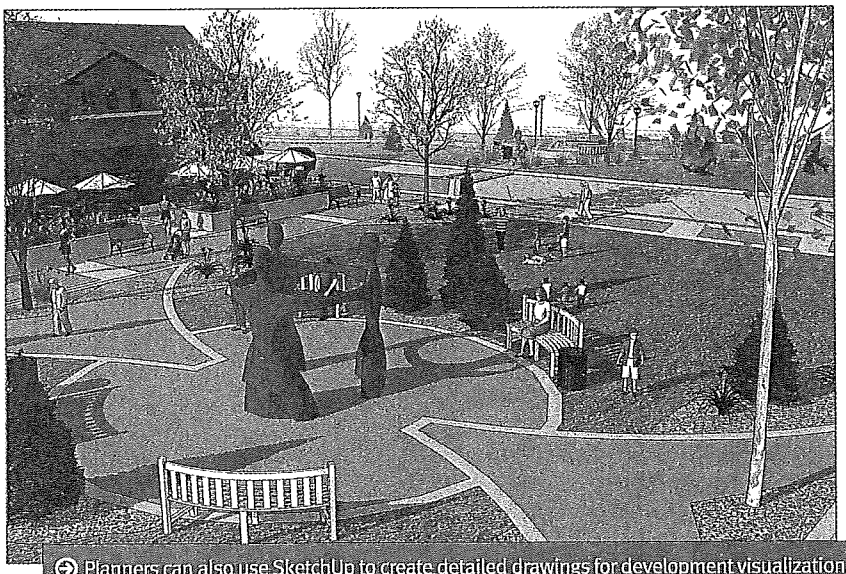
While using your own photographs is always the recommended first option, the Internet can be a valuable resource for finding images we cannot capture ourselves.

The photo management and sharing website Flickr (www.flickr.com) allows users to easily upload full-resolution images and to tag those photos with keywords and places. Many photographers on Flickr have made their images available through Creative Commons licensing (http://creativecommons.org). Other websites, such as iStockphoto.com and shutterstock.com, provide large libraries of stock photos tagged with keywords that can be purchased for a small price.

SketchUp Plug-Ins

SketchUp's default output can be best described as line drawings that simulate pen and ink or pencil and paper. While this may be acceptable for supporting illustrations of codes and ordinances, its inability to render photorealistic images for visualization projects can sometimes fail to capture a potential development's true essence. However, other companies have developed plug-ins or add-ons that expand SketchUp's functionality.

For example, plug-ins like Maxwell Render or V-Ray allow users to assign materials to their models, add light sources and atmospheric conditions, and place cameras to render and capture photorealistic scenes. Although higher-end dedicated 3-D programs like Autodesk's 3ds Max and Maya are capable of the same output, SketchUp-integrated plug-ins have a smaller learning curve for those already familiar with the software.



Planners can also use SketchUp to create detailed drawings for development visualization.

APPLICATION OF THE TOOLS

Next we turn to an exploration of how these new tools can be used independently or together to enrich and improve development regulations and visualization processes.

SketchUp

SketchUp is the perfect tool for creating simple illustrations to support a zoning ordinance. Using its dimensioning tool, a user can create a basic illustration of minimum and maximum setbacks and height and define the "building envelope" for any lot.

The Village of Prairie Grove, Illinois, is a small, growing community located about 30 miles northwest of Chicago. In 2005 a 1,500-acre annexation and development proposal prompted the village to adopt design and development guidelines covering architecture, materials, building placement and ori-

entation, and the design of the right-of-way. Our firm created SketchUp illustrations to add interest to the guidelines and illustrate various recommendations.

SketchUp also has the ability to create detailed drawings, making it an effective development visualization tool. The images above were created to visualize a recommendation to convert an unfinished development site into a public plaza until such time that development may be feasible. Graphics prepared for the assignment include several perspectives of a detailed SketchUp depicting site elements such as outdoor dining, active open space, and improved circulation.

Pictometry

The real power of Pictometry images is the geographic information they contain. With Pictometry's measuring tools, you can document the existing built form (an important first step in developing a form-based code) and build an accurate 3-D model with properly scaled buildings and structures.

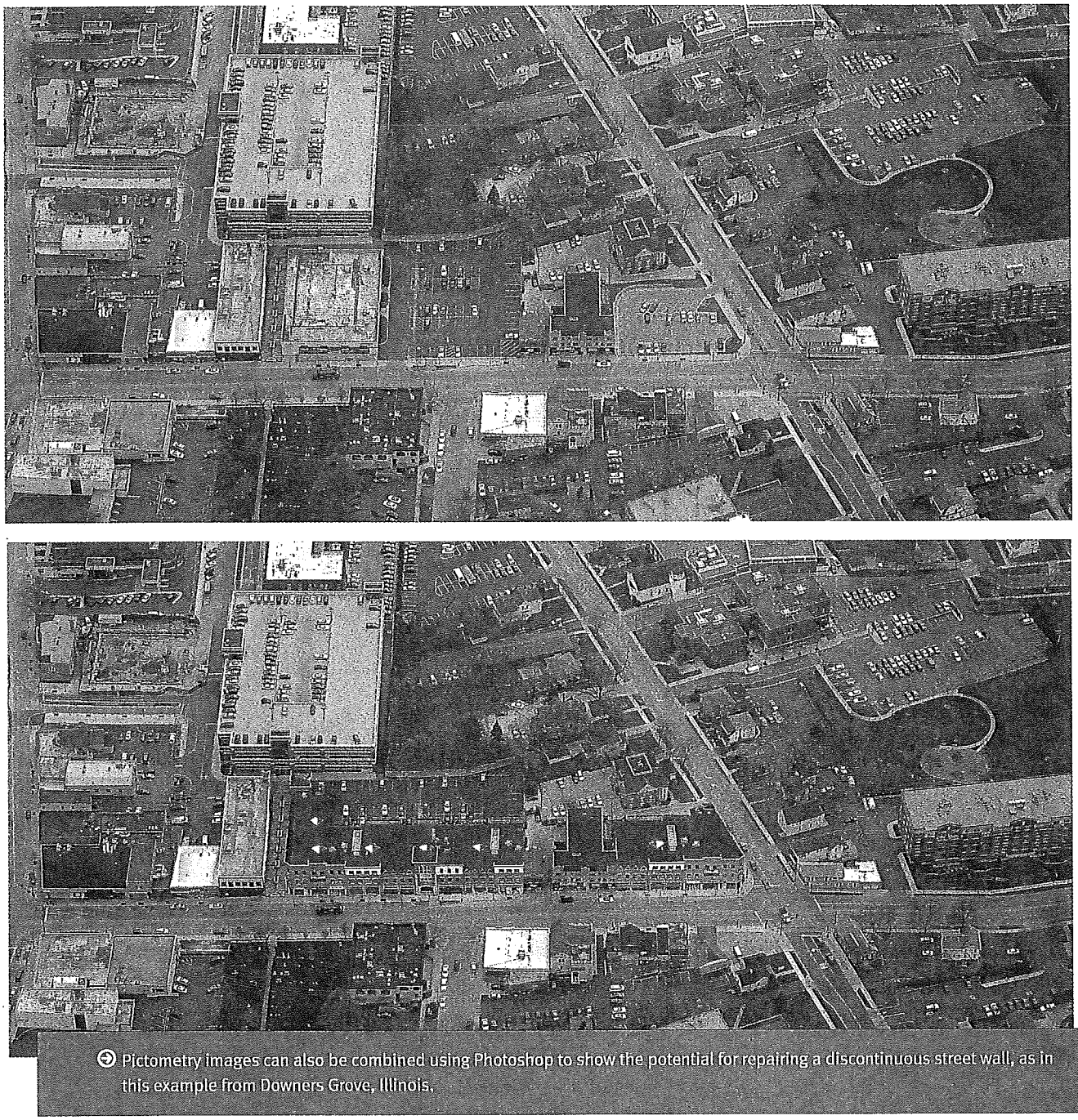
How accurate are the measurements from Pictometry? In a recent assignment for Westfield, an international shopping mall operator, we created a cross section for a distance of 1,000 linear feet—from a highway interchange to the location of new pylon sign being proposed by Westfield. Between the highway interchange and the sign were power lines, pole signs from other businesses, traffic signals, and a fairly significant change in grade, all affecting the sign's visibility and line-of-sight from the interchange. Our exhibit, based solely on measurements obtained from Pictometry, illustrated that the proposed sign would be slightly visible above all of the existing structures and signage and helped to demonstrate the justifiable need for a variance to permit the height of the proposed new sign.

Photoshop + Pictometry

Pictometry images opened in Photoshop have no georeferenced information; however, they still provide an excellent resource to quickly visualize development.

In the Chicago suburb of Mundelein, Illinois, the state has acquired land for a future highway and is waiting for funding for construction and additional land acquisition in adjacent communities. Over the last 10 years new development has grown adjacent to the fallow right-of-way. In order to illustrate what the future highway corridor

These images show how Pictometry images were combined using Photoshop to illustrate a new highway in Mundelein, Illinois.



Pictometry images can also be combined using Photoshop to show the potential for repairing a discontinuous street wall, as in this example from Downers Grove, Illinois.

will look like, we used Photoshop to scale and merge two Pictometry images: an existing oblique angle image of the area and a recently constructed highway segment 20 miles south.

This technique is equally effective in urban areas. In another community, our goal was to show how the fabric of a downtown that had been weakened by auto-oriented development could be repaired through strategic infill. We used Photoshop to blend and scale a Pictometry image of a desired development into an existing Pictometry image of downtown. Photoshop also allowed us to clone the parking areas in the rear and sidewalks in the front to create the desired character.

SketchUp + Google Earth + Pictometry

SketchUp closely integrates with Google Earth imagery, allowing you to retrieve an aerial photograph that can be traced to create a 3-D model of a place or area. The resolution of the import image is defined by a fixed import window. This can be problematic if you are trying to accurately trace existing conditions of a large area brought into SketchUp with a single import. When you import an aerial image of a large geographic area, important details are not always clearly discernable, including building footprints, sidewalks, parking areas, and other features. To overcome this, you can simply

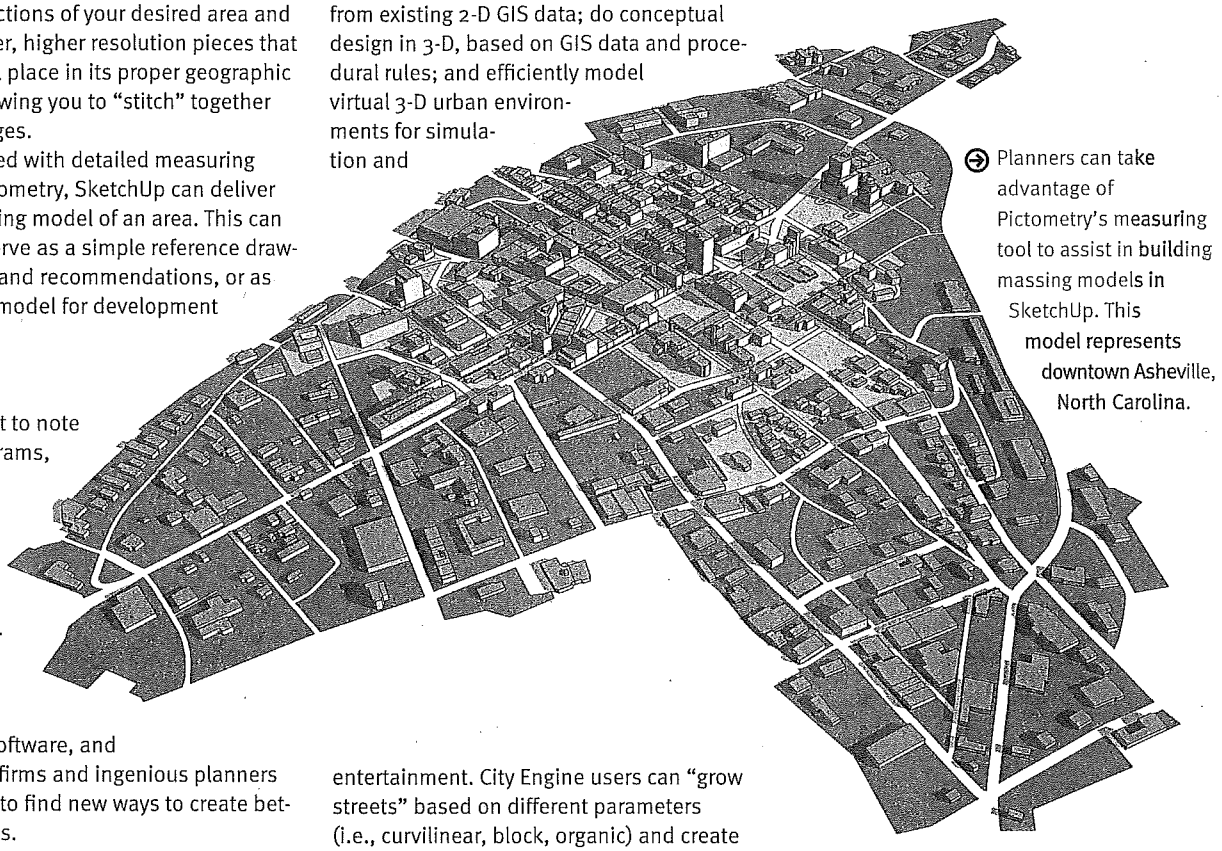
zoom into sections of your desired area and import smaller, higher resolution pieces that SketchUp will place in its proper geographic location, allowing you to "stitch" together multiple images.

Combined with detailed measuring ability of Pictometry, SketchUp can deliver a quick massing model of an area. This can be used to serve as a simple reference drawing for notes and recommendations, or as a contextual model for development visualization.

CONCLUSION

It is important to note that the programs, tools, and techniques I covered in this article are not the definitive list. Software companies will continue developing software, and cutting-edge firms and ingenious planners will continue to find new ways to create better documents.

Take for instance City Engine. Developed by Procedural in Switzerland and recently acquired by Esri, City Engine is a software application for the design, planning, and modeling of cities and urban environments in 3-D. City Engine allows professional users to quickly generate 3-D cities from existing 2-D GIS data; do conceptual design in 3-D, based on GIS data and procedural rules; and efficiently model virtual 3-D urban environments for simulation and entertainment. City Engine users can "grow streets" based on different parameters (i.e., curvilinear, block, organic) and create blocks that can be subdivided and "developed" based on a set of rules for setback, lot size, building height, and several other parameters.



Planners can take advantage of Pictometry's measuring tool to assist in building massing models in SketchUp. This model represents downtown Asheville, North Carolina.

Finally, as you begin to include and introduce graphics and illustrations to improve the effectiveness and user friendliness of your products, remember that everything conveyed in this article is only a tool or a technique and that supporting graphics should be used appropriately. Knowing when to use an illustration is as equally important as how to do an illustration.

RESOURCES

- Google SketchUp
  http://sketchup.google.com
- Google Earth
  http://earth.google.com
- Adobe Photoshop
  www.adobe.com/products/photoshop
- Pictometry
  www.pictometry.com
- Pictomtetry Online
  http://pol.pictometry.com
- V-Ray
  http://chaosgroup.com
- City Engine
  www.esri.com/software/cityengine
- 3D Warehouse
  http://sketchup.google.com/3dwarehouse

The cover depicts a Google SketchUp model created to illustrate design guidelines for the main street of a town center development. © Houseal Lavigne Associates

VOL. 29, NO. 3

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.

NON-PROFIT ORG.
U.S. POSTAGE
PAID
CHICAGO, IL
PERMIT# 4342

ZONING PRACTICE
AMERICAN PLANNING ASSOCIATION

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

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

RECD FEB 29 2012

S2 P7 **********AUTO**3-DIGIT 553
Z4I-D March
231626
Tim Gladhill
City of Ramsey
7550 Sunwood Dr NW
Ramsey MN 55303-5137

IS YOUR COMMUNITY MAKING THE MOST OF NEW VISUALIZATION TOOLS?

3