

Zoning Bulletin

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Time for Proceedings—Neighbor challenges issuance of building permit

City says challenge is untimely and that permit issuance triggered appeal period

Citation: *Ferguson v. City of Dayton*, 277 P.3d 705 (Wash. Ct. App. Div. 3 2012)

WASHINGTON (06/05/12)—This case addressed the issue of what constituted the final “land use decision” in an action brought under Washington’s Land Use Petition Act (“LUPA”).

Contributors

Corey E. Burnham-Howard

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The Background/Facts: On August 14, 2009, the City of Dayton (the "City") issued a building permit to Thomas Goddard ("Goddard"). The building permit allowed Goddard to erect a 36-foot by 30-foot pole building on his property. On September 2, 2009, the City planner advised Goddard that under the planner's interpretation of the allowed building height, the building height was to be measured to the top of the wall where the roof system attached.

Goddard's neighbor, Laurie Ferguson ("Ferguson") questioned the building permit and challenged the planner's interpretation and asked that it be reviewed. On October 12, 2009, the city council, mayor, planning committee, and staff concluded that the building permit was valid. On July 21, 2010, the City's Planning Commission eventually affirmed the planner's interpretation of the building height measurement.

Subsequently, on August 9, 2010, Ferguson filed a LUPA petition, challenging the City's issuance of the building permit.

The City asked the court to dismiss the action. The City argued that the building permit was the final land use decision that triggered the 21-day appeal period. LUPA requires a challenge to a land use decision be filed in superior court within 21 days of the "land use decision."

The trial court agreed. It concluded that since the August 14, 2009 building permit was the final land use decision, Ferguson's August 9, 2010 LUPA appeal was untimely.

Ferguson appealed.

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

The Court of Appeals of Washington, Division 3, held that, "[t]he August building permit was not a 'land use decision' because it was not a final determination." The "land use decision" appealable under LUPA occurred when the administrative appeals process was exhausted—which was when the City Planning Commission issued its determination on Goddard's building permit (on July 21, 2010).

The court reached its conclusion by interpreting the definition of "land use decision" under LUPA. A "land use decision" is defined as: "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on. . . [a]n application for a project permit." (RCW 36.70C.020(2).) A "final determination," said the court, "is one that ends an action between the parties." Since a petitioner only has standing to bring a LUPA action once he/she has exhausted his/her administrative remedies, a "final determination" comes at the end of the administrative appeals process, concluded the court.

Thus, here, the court found that the building permit was a "land use decision," but that it was not a "land use decision" under LUPA until final determination by the City Planning Commission, which was "the entity with the last word on the permit." Thus the land use decision did not occur on August 14, 2009 when the building permit issued; rather, it occurred on July 21, 2010, when the Planning Commission reached its conclusion on the building permit.

See also: *Samuel's Furniture, Inc. v. State, Dept. of Ecology*, 147 Wash. 2d 440, 452, 54 P.3d 1194 (2002).

See also: *Asche v. Bloomquist*, 132 Wash. App. 784, 133 P.3d 475 (Div. 2 2006), as amended, (Apr. 4, 2006).

Case Note:

After making its conclusion as to the interpretation of "land use decision," the court did not explicitly decide whether Ferguson's LUPA appeal was timely; rather, the court remanded the matter to the lower court to make that determination. However, since Ferguson's appeal (brought on August 9, 2010), was brought within 21-days of the "land use decision" (the Planning Commission's July 21, 2010 decision), it is expected that the lower court will find it was filed timely.

Fees—Township imposes "impact fees" upon applicants for zoning certificates for new construction or redevelopment

Applicants contended "impact fees" are actually taxes, unauthorized under Ohio statute

Citation: *Drees Co. v. Hamilton Twp.*, 2012-Ohio-2370, 2012 WL 1957881 (Ohio 2012)

OHIO (05/31/12)—This case addressed the issue of whether an "impact fee" imposed by a township upon applicants for zoning certificates for new construction or redevelopment within the township's unincorporated areas, was a tax—unauthorized under Ohio's home rule statute (R.C. 505.04(A)(1)).

The Background/Facts: Hamilton Township (the "Township") is a township that has adopted a limited-home-rule government, as defined under Ohio's home rule statute. In May 2007, the Township adopted an Amended Resolution. The resolution adopted a schedule of fees to be charged to applicants for zoning certificates for new construction or redevelopment within unincorporated areas of the Township. The resolution included four categories of fees: a road-impact fee; a fire-protection-impact fee; a police-protection-impact fee; and a park-impact fee. The purpose of the impact fee was "to benefit the property by providing the Township with adequate funds to provide the same level of service to that property that the Township currently affords previously developed properties." The impact fee assessed was intended to offset increased services and improvements needed because of the new development. The amount of the fees varied based upon the land use. All impact fees collected by the township were deposited into impact-fee accounts, not into a general fund. The township would not issue a zoning certificate until the applicant had paid the applicable impact fee.

Several developers, including the Drees Company, Fischer Single Family

Homes II, L.L.C., John Henry Homes, Inc., and Charleston Signature Homes, L.L.C., all: sought zoning certificates to construct single-family homes; paid a \$200 zoning-application fee; and, under protest, paid impact fees of \$2,030.16 per application. These developers, along with Home Builders Association of Greater Cincinnati, (collectively, the "Developers") eventually brought an action against the Township, challenging the impacts. The Developers alleged that the impact fees were a prohibited form of taxation that were contrary to Ohio's home rule statute.

Under Ohio's home rule statute, limited-home-rule townships such as the Township here, are prohibited from enacting taxes other than those authorized by general law.

Here, the Developers noted that Ohio law already empowers townships to employ specified methods of taxation to raise money to pay for police and fire service (R.C. 505.51 and 505.39), parks (R.C. 511.27 and 511.33), and roads (R.C. 5571.15, 5573.07, 5573.10, 5573.11, and 5573.211). There was no dispute that the impact fees imposed by the Township did not meet the requirements of those methods of taxation. The Developers argued that the "impact fees" imposed by the Township were taxes "other than those authorized by general law," and thus the Township was unauthorized to impose them.

The Township maintained that the impact fees were permitted fees, not taxes.

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

The Developers appealed. The Twelfth District Court of Appeals affirmed. It held that, contrary to the Developers' arguments, the impact fees were fees and were not a prohibited form of taxation, and did not conflict with general laws of the state.

The Developers again appealed.

DECISION: Judgment of court of appeals reversed and matter remanded.

The Supreme Court of Ohio held that the Township's impact fees were taxes, imposed in violation of Ohio's limited home rule statute.

In so holding, the court explained that in order to determine whether certain assessments are taxes, it must analyze "the substance of the assessments and not merely their form." Impact fees are a revenue-generating measure designed to support infrastructure improvements benefitting the entire township, said the court. Whereas, "[t]axation refers to those general burdens imposed for the purpose of supporting the government, and more especially the method of providing the revenues which are expended for the equal benefit of all the people."

The court acknowledged that it was "not possible to come up with a single test that will correctly distinguish a tax from a fee in all situations where the words 'tax' and 'fee' arise." However, the court was able to look to its own case law and that of other jurisdictions for guidance in making its determination in this case. The court said that in determining whether an assessment is a fee or a tax, the court must consider: "(1) the entity that imposes the assess-

ment; (2) the parties upon whom the assessment is imposed; and (3) whether the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed.”

Generally, found the court, a fee is: (1) usually imposed by an agency upon those subject to its regulation, in furtherance of regulatory measures; (2) not placed in a general fund, but is to be used only for “narrow and specific purposes”; (3) a charge imposed by the government in return for a service it provides.

In comparison, generally, a tax is: (1) imposed by a legislature upon many, or all, citizens; (2) placed in a general fund; and (3) spent for the benefit of the entire community.

The court noted that since most assessments fall “somewhere near the middle of the spectrum between a fee and a tax,” the use of funds may be the predominant factor in making the ultimate determination as to whether the assessment is a fee or tax.

Here, the court concluded that the Township’s impact fees were taxes in light of the facts that the assessments: (1) were imposed by a legislative body, not a regulatory body, to a “fairly large swath of people—anyone who wants to engage in any type of development in the [T]ownship”; and (2) although not deposited into a general fund, but into segregated accounts; (3) were used for general purposes of police protection, fire protection, road improvement, and parks—that benefited the entire community.

The Township had argued that the impact fees were not for general public benefit, but, as the resolution provided, were intended: “to benefit *the property* by providing the Township with adequate funds to provide the same level of service to *that property* that the Township currently affords previously developed properties.” The court rejected that interpretation, finding the goal of the impact fees “to allow *all* properties in the township to maintain their same level of service despite recent, rapid growth.” “[M]aintaining the general welfare of the community [was] the aim of the resolution,” found the court. The assessments, found the court, resulted in no direct service to the landowner, other than the issuance of a zoning certificate, for which there was already a separate \$200 fee. Since the amount of the fee imposed exceeded the cost and expense of the service, the court concluded the “impact fee” constituted a tax.

See also: *State, ex rel. Petroleum Underground Storage Tank Release Comp. Bd., v. Withrow*, 62 Ohio St. 3d 111, 579 N.E.2d 705, 11 A.L.R.5th 1010 (1991).

See also: *American Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Management Dist.*, 166 F.3d 835, 29 Env'tl. L. Rep. 20500, 1999 FED App. 0035P (6th Cir. 1999).

Eminent Domain—Parish adopts ordinances imposing weight restriction on roadway

Property and business owners argue ordinances effectively ended their truck business, constituting an unconstitutional taking of property

Citation: *Boudreaux v. Larpenier*, 2011-410 La. App. 1 Cir. 6/1/12, 2012 WL 1964098 (La. Ct. App. 1st Cir. 2012)

LOUISIANA (06/01/12)—This case addressed the issue of whether enforcement of a zoning ordinance that established a 15-ton limit weight restriction on a road deprived the landowners of virtually all economically viable use of their property though an unconstitutional taking of property.

The Background/Facts: Robert and Jessica Boudreaux lived on Bayouside Drive in Chauvin, Louisiana. This was also the location of Tradewinds, their family-owned business. As early as 1990 or 1991, Tradewinds hauled and sold river sand and limestone. In order for Tradewinds to conduct this work, it was necessary for large, heavy, commercial trucks to traverse Bayouside Drive to conduct business at the Boudreauxs' property. By 1999 or 2000, Tradewinds owned twelve to fourteen tandem dump trucks (weighing up to twenty-five tons when fully loaded), a fleet of eighteen-wheel trailer trucks (weighing up to forty-four tons when fully loaded), three bulldozers, and two excavators.

In October 1996, the Terrebonne Parish Consolidated Government ("TPCG") enacted an Ordinance 5685, which, among other things, established a 15-ton weight limit restriction on the entirety of Bayouside Drive. Ordinance 5685 was based on engineering studies of Bayouside Drive that were performed to establish the condition and capacity of the roadway.

In December 2000, TPCG adopted Ordinance 6362, which, among other things, repealed the weight limit restrictions established in Ordinance 5685 and enacted section 18-30 of the Terrebonne Parish Code. Section 18-30 re-enacted the 15-ton weight limit on Bayouside Drive, and allowed for a person to obtain a permit to operate vehicles in excess of the weight limit.

Through January 2002, Tradewinds and its drivers continued to violate the weight limit restrictions on Bayouside Drive, without applying for a permit. In January 2002, Tradewinds received a notice from the Sheriff of Terrebonne Parish, advising it to cease operating trucks on Bayouside Drive in violation of the weight limits.

Thereafter, the Boudreauxs and Tradewinds (hereinafter, collectively "Tradewinds") filed a legal action in court. Among other things, Tradewinds alleged that the TPCG's passage of the weight limit restrictions constituted an unconstitutional taking—an inverse condemnation—of the Bayouside Drive Property because it deprived the Tradewinds of the practical economic uses of the property and substantially diminished the value of the property, without expropriation, due process, and compensation. Specifically, Tradewinds

contended that, by passing Ordinances 5685 and 6362, the TPCG destroyed Tradewinds' business value, as Tradewinds could no longer operate its trucks to haul dirt, sand, and limestone from the Bayouside Drive property to their customers.

The trial court issued judgment in favor of TPCG. It found that Tradewinds "failed to carry their burden of proving that the ordinance in question was unconstitutional."

Tradewinds appealed.

DECISION: Judgment of trial court affirmed.

The Court of Appeal of Louisiana held that Tradewinds failed to show that the ordinances amounted to an unconstitutional taking of property.

In so holding, the court explained that the ordinances would be found to be constitutionally valid exercises of the TPCG's police power if, under all circumstances, the ordinances were "reasonable" and "designed to accomplish a purpose properly falling within the scope of the police power."

The parties did not dispute that TPCG had the power to pass ordinances to establish weight limits on the roads within the parish. However, Tradewinds contended that the passage of these ordinances constituted an inverse condemnation of its property in violation of the constitutional provisions of reasonableness and for a public purpose.

The court concluded that the TPCG's establishment of the weight limits was reasonable to prevent roadway damage for which it was financially responsible. Thus, the court found the ordinances were constitutional.

Looking at whether the ordinances amounted to inverse condemnation, the court further explained that to establish inverse condemnation, a party must show that: (1) a recognized species of property right has been affected; (2) the property has been taken or damaged in a constitutional sense; and (3) the taking or damaging was for a public purpose.

Here, the court found that: (1) the imposition of the 15-ton weight limit on Bayouside Drive affected Tradewinds' ability to use its property in the manner it had previously been used, at least without their having to go through the additional steps necessary to qualify for a permit; and (2) any alleged taking or damaging of the Bayouside Drive property by the passage of the ordinances would have been for a public purpose (i.e., maintenance of the roadway). However, the court did not find that the Bayouside Drive property had been taken or damaged in a constitutional sense. In order for the ordinance to constitute a constitutional taking, it had to destroy a major portion of the property's value. And, here, the court found that Tradewinds failed to show that the TPCG's adoption of the ordinances destroyed Tradewinds' business value by prohibiting Tradewinds operation of its trucks. The court found that Tradewinds had the ability to continue conducting its business at the Bayouside Drive location by complying with the requirements necessary to obtain a permit that would have allowed it to operate its trucks with a total weight in excess of the limit on Bayouside Drive, but, chose not to comply.

See also: *Wes-T-Erre Development Corp. v. Terrebonne Parish, Through Police Jury of Terrebonne Parish*, 416 So. 2d 209 (La. Ct. App. 1st Cir. 1982), writ denied, 421 So. 2d 251 (La. 1982).

See also: *Suire v. Lafayette City-Parish Consol. Government*, 907 So. 2d 37 (La. 2005).

Case Note:

Tradewinds had argued that it could not comply with the requirements to obtain a permit because the amount of security required by the TPCG was excessive (i.e., a \$125,000 bond in favor of the Parish). The court found that the TPCG had relied on DOTD guidelines in establishing the amount of security requested, and that another company had been required to post a \$375,000 line of credit for an overweight permit to operate on Bayou Drive. Accordingly, the court found that Tradewinds "failed to carry its burden of proof that the passage of the ordinances caused the Bayou Drive property to be taken or damaged in a constitutional sense."

Case Note:

Tradewinds had also alleged deprivation of procedural due process, substantive due process and right to equal protection. The Court of Appeal rejected these arguments.

Time for Proceedings—Property owner appeals neighbor's building permit nearly four years after issuance

Board of appeals says appeal is untimely since property owner had constructive notice at the time of permit issuance

Citation: *Richardson v. Board of Appeals of Chilmark*, 81 Mass. App. Ct. 912, 2012 WL 2053200 (2012)

MASSACHUSETTS (06/11/12)—This case addressed the issue of whether a property owner brought a timely appeal. Specifically, the case addressed whether a property owner had constructive notice of the issuance of a building permit to her neighbor, such that the 30-day period for appeal was triggered and ran before she brought her challenge.

The Background/Facts: Edwin C. Cohen ("Cohen") proposed construction of a large single-family dwelling on property he owned in the town of Chilmark, Massachusetts (the "town"). Cohen's neighbor, Jacqueline Carlin ("Carlin") opposed Cohen's proposed construction. By September 1999, Carlin had an attorney to assist in her opposition of Cohen's proposed construction. Carlin's attorney was "intimately involved in all the proceedings and met with members of the town." In April of 1999, Carlin filed a complaint

in Superior Court appealing from the issuance of a septic system upgrade permit to Cohen. In that complaint, Carlin acknowledged Cohen's plans to build a large single-family dwelling on his property.

On September 11, 1999, a building permit was issued to Cohen. The permit authorized him to demolish and replace a small dwelling on his property with the larger proposed one. Cohen began construction in the fall of 2001. By letters dated June 20, 2004 and September 21, 2004, Carlin urged the town to revoke the building permit. She appealed the building inspector's inaction to the town's zoning enforcement officer and board of appeals (the "board") on October 8, 2004. She argued that the building permit was issued in violation of a zoning bylaw; she alleged that Cohen's property lacked adequate frontage.

The board denied Carlin's appeal. She appealed to the Land Court.

Before the Land Court, the board argued that Carlin had failed to timely appeal within 30 days of the issuance of the building permit.

Under Massachusetts statutory law (Mass. Gen. L. c. 40A, §§ 8, 15) "a party with adequate notice of an order or decision that violates a zoning provision must appeal that order or decision to the appropriate authority within the thirty-day period allotted for such an appeal."

Carlin contended that she did not have "chargeable" knowledge of the building permit until construction began in the fall of 2001.

The Land Court dismissed the appeal on the grounds that Carlin failed to timely appeal.

DECISION: Judgment of land court affirmed.

The Appeals Court of Massachusetts held that Carlin had constructive notice of the issuance of the permit in 1999 and failed to timely appeal within 30 days of that constructive notice.

The court explained that the "adequate notice" that starts the 30-day appeal period may be "actual or constructive." The court said that a party has constructive notice "when the evidence is 'sufficient to place on [that party] a duty of inquiry' regarding the building permit's issuance."

The court found that "although 'difficult questions concerning adequacy of notice may arise at the margins,' Carlin had constructive notice of the issuance of the permit on September 11, 1999." The court made this finding based on the facts of: Carlin's attorney's "intimate" involvement with Cohen's proceedings, as well as Carlin's 1999 appeal from Cohen's municipal permit for a septic system upgrade. The court found these facts established Carlin's awareness of Cohen's intention to begin construction on his property as soon as possible. The court concluded that Carlin possessed evidence "more than 'sufficient to place on [her] a duty of inquiry' into the building permit's issuance on September 11, 1999."

Moreover, noted the court, even assuming Carlin did not have chargeable knowledge of the permit until construction began (as she alleged), Carlin still delayed her challenge to the permit by more than two additional years. (Carlin had brought a 2001 Land Court action alleging infringement of her beach access easement, but she had failed to raise the alleged zoning by-law violation in that action.)

The court concluded that Carlin's subsequent enforcement request "could not resurrect the neglected appeal for which she possessed actual or constructive notice." It said her failure to timely appeal within thirty days of the issuance of the permit on September 11, 1999, required the entry of summary judgment in favor of Cohen (and the board) and dismissal of her complaint.

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

Case Note:

The court also concluded, as an independent ground of decision, that the doctrine of laches applied to bar Carlin's appeal. The doctrine of laches says that a legal right or claim will not be enforced or allowed if a long delay in asserting the right or claim has prejudiced the adverse party (e.g., here, harmed Cohen). Here, the court found that Carlin's delay was "unjustified, unreasonable, and prejudicial."

Case Note:

The plaintiff-appellant in the case was actually John W. Richardson, the bankruptcy trustee for Carlin's estate. For simplification, the appeal was referred to as Carlin's.

Zoning News from Around the Nation

PENNSYLVANIA

After a recent hearing, "[a] constitutional challenge by seven municipalities to Pennsylvania's new law regulating the growth of natural gas exploration is in the hands of seven Commonwealth Court judges." "The heart of the argument is the extent of the state's power to tell municipalities where they must allow drilling-related activity, including rigs, waste pits, pipelines and the compressor and processing stations that help move gas from the underground Marcellus Shale formation in Pennsylvania to consumers across the northeastern United States. Among the objectionable provisions cited by the towns' March 29 lawsuit are requirements that drilling, waste pits and pipelines be allowed in every zoning district, including residential districts, as long as operators observe certain buffers."

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

VIRGINIA

Governor Bob McDonnell recently signed several bills into law, which went into effect July 1, 2012. Included in those new laws are: (1) HB869/SB 274- Urban Development Areas—making incorporation of urban development areas optional rather than mandatory; and (2) HB1216- Zoning Amendment Notices on Federal or State Lands—providing that when a proposed amendment to the zoning ordinance involves a tract of land of not less than

500 acres owned by the Commonwealth or by the federal government, and when the proposed change affects only a portion of the larger tract, notice need be given only to the owners of those properties that are adjacent to the affected area of the larger tract.

Source: *Augusta Free Press*; <http://augustafreepress.com>

WASHINGTON

Pasco City Council have voted to end a moratorium on collective medical marijuana gardens and amend Pasco's zoning code to prohibit anything that violates local, state and federal law. Accordingly, now prohibited is the issuing of a building permit or business license for a collective medical marijuana garden, where authorized patients would grow cannabis plants together.

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

WEST VIRGINIA

The Morgantown City Council unanimously passed the first reading of zoning ordinances that will limit extraction activities only to industrialized zones that meet certain requirements. The ordinance is an effort to regulate extractive industries such as drilling for natural gas in the Marcellus shale. Under the proposed ordinance, extractive drilling would be allowed in six industrial districts in the city, but only if the site is: 625 feet from any residential areas, schools, day care facilities, hospitals, churches or parks; 100 feet from the floodplain; 1,000 feet from the public water supply intake; and 1,000 feet from the floodplain of the Monongahela River south or upstream of the Morgantown Lock and Dam.

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

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Validity of Regulation/First Amendment—State Agency Regulations Require Permits for Commercial Weddings on State Beaches

Wedding planners say permit requirement violates their First Amendment rights

Citation: *Kaahumanu v. Hawaii*, 2012 WL 2018171 (9th Cir. 2012)

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

NINTH CIRCUIT (HAWAII) (06/06/12)—This case addressed the issue of whether state agency regulations requiring permits for commercial weddings on state beaches and placing specific terms and conditions on such permits violated the First Amendment to the United States Constitution.

The Background/Facts: In November 2002, the State of Hawai'i Department of Land and Natural Resources ("DLNR") began to regulate commercial activities on "unencumbered" public beaches. Unencumbered beaches include those that have not been: "(1) Set aside for any purpose, by statute, executive order, or other means to a governmental agency; or (2) Encumbered by lease, license, permit, easement, or other document issued by [DLNR]." (Haw. Rev. Stat. § 171-1.) Beaches within the jurisdiction of DLNR extend from the water's edge to the hightide line.

DLNR regulations require a permit for commercial activities on unencumbered beaches, including—beginning in August 2008—commercial weddings (i.e., those involving compensation for services or goods rendered). Those obtaining a commercial wedding permit had to comply with "General Terms and Conditions for Commercial Activity" (the "Terms and Conditions"). Among other things, the Terms and Conditions required that an applicant: obtain "comprehensive public liability insurance," naming the State of Hawai'i as an additional insured, of "at least \$300,000 per incident and \$500,000 aggregate"; and agree to indemnify and hold harmless DLNR for loss or damage arising out of actions by the applicant. The Terms and Conditions also, with certain exceptions, prohibited "accessories" (such as arches, alters, tables, tents, signage, posts, and ropes) from being placed on the permitted right-of-entry area.

Laki Kaahumanu, a Native Hawaiian pastor who performed religious wedding ceremonies, and Maui Wedding and Event Professionals Association ("Event Professionals"), an association of individuals and businesses providing commercial services for weddings (collectively, the "Wedding Planners"), challenged DLNR's permit requirements. They filed suit in federal district court, alleging, among other things, that DLNR's commercial wedding permit requirements unduly burdened their right to organize and participate in weddings on unencumbered state beaches, in violation of the First Amendment.

The Wedding Planners argued that wedding ceremonies constitute "speech" that is protected by the First Amendment. They also argued that DLNR's commercial wedding permit requirements unconstitutionally burdened that speech because the permit requirements "unduly burden[ed] their right to organize and participate in weddings on unencumbered state beaches."

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

The Wedding Planners appealed.

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

The United States Court of Appeals, Ninth Circuit, held that the DLNR regulations requiring permits for commercial weddings on unencumbered

state beaches did not violate the First Amendment. The court also found that the accessories limitations and the insurance and indemnity requirements did not violate the First Amendment. The court did, however, conclude that unbridled discretion reserved to DLNR to revoke permits or add to permits' terms and conditions violated the First Amendment.

In so concluding, the court first held that wedding ceremonies are protected expression under the First Amendment. The court said this was because the First Amendment protects more than political speech and more than just the spoken and written word; it also protects expressive conduct so long as that conduct "convey[s] a particularized message" and is likely to be understood in the surrounding circumstances. The court found wedding ceremonies were protected expressive conduct in that they conveyed "important messages about the couple, their beliefs, and their relationship to each other and to their community."

Next, the court explained that the level of its scrutiny regarding the constitutionality of DNLR's commercial wedding permit requirements depended on the nature of the public forum at issue. The Wedding Planners contended that the unencumbered state beaches were traditional public forums—subjecting them to the most exacting test for restrictions on forum. Under that test, the government can exclude a speaker "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." DLNR, on the other hand, contended that the beaches were "nonpublic forums"—requiring the least exacting test and that regulations simply be reasonable and viewpoint neutral.

The court said that it "need not decide the precise nature of the forum." For the regulations it upheld, it assumed without deciding that unencumbered state beaches in Hawai'i were a traditional public forum. For the regulations that it concluded were invalid, the court assumed without deciding that the unencumbered state beaches in Hawai'i were nonpublic forums.

The court explained that restrictions on speech in a traditional public forum are reasonable, and thus permissible, provided that they: (1) serve a significant governmental interest; (2) are narrowly tailored to serve that significant governmental interest; (3) are content neutral (i.e., justified without reference to the content of the regulated speech); and (4) leave open ample alternative channels for communication of the information.

Here, the court found that DLNR's regulations requiring a permit to hold commercial weddings on Hawai'i public beaches did not violate First Amendment free speech because they: (1) served a significant governmental interest in minimizing conflicting uses of limited beach area and conserving the physical resource of the beaches; (2) were narrowly tailored given that the application process was not burdensome, and there was no evidence that any application had ever been denied; (3) were content-neutral, requiring a permit for any kind of commercial activity; and (4) left open ample alternate opportunities for public beach weddings, including county beaches or private property.

The court also found DLNR's regulations limiting accessories that may be used in commercial weddings on Hawai'i public beaches did not violate the First Amendment free speech as applied because it found such accessory limitations: (1) served a significant governmental interest in not allowing such

weddings to interfere unduly with activities of other beachgoers; (2) were narrowly tailored to serve that interest in that while there were some limitations, allowance was made for other things such as unamplified musical instruments, loose flowers, chairs for elderly or disabled attendees, a podium, and nonobtrusive hand-carried wedding accessories; (3) were content-neutral in that they made no reference to religion; and (4) left open ample alternate opportunities for public beach weddings, including county beaches or private property.

Also, the court held that the regulations' insurance, and indemnification requirements did not violate the First Amendment as applied because if found such requirements: (1) served a significant governmental interest in compensating third parties and DLNR for injury or property damage caused by the permit holder and in protecting DLNR from liability to third parties caused by the permit holder; (2) were not overly broad since they did not require a permittee to hold the state harmless for all consequences of the event, including those caused by the state's own actions, but only required indemnification for acts or omissions of the permittee; and (3) were content-neutral in that they did not depend on the type of wedding, its religious content, or any content-based discrimination, and the amount of insurance did not vary depending on the type of commercial wedding or the content of what might be said at the wedding.

The court, however, held that the discretion that DLNR reserved, under the regulations, was not sufficiently constrained, and thus violated First Amendment right to free speech on its face. The court said that "a time, place, and manner regulation [must] contain adequate standards to guide the official's decision and render it subject to effective judicial review." The court found that "adequate guiding standards [were] not provided here" given that DLNR could revoke a permit authorizing commercial weddings on Hawai'i public beaches "at any time," "for any reason," and "in the sole and absolute discretion of the Chairperson," and could add to its terms and conditions "as it deem[ed] necessary or appropriate."

See also: *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006).

See also: *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011 (9th Cir. 2009), cert. denied, 130 S. Ct. 1569, 176 L. Ed. 2d 110 (2010).

Case Note:

The Wedding Planners sought to bring both facial and as-applied challenges to DLNR's commercial wedding regulations. The court concluded that they could bring only an as-applied challenge because DLNR's regulations did not require permits for anything inherently expressive; the regulations did not, on their face, seek to regulate spoken words or patently expressive or communicative conduct. However, the court did allow the Wedding Planners to bring a facial challenge to the portion of the regulations that gave DLNR discretion to grant and revoke the permits and amend their terms and conditions.

Case Note:

The Wedding Planners also brought equal protection and due process claims. The court found the regulations did not violate equal protection as DLNR clearly had a rational basis to regulate commercial beach weddings—given the large number of them—but to leave noncommercial beach weddings unregulated—given the relatively small number of them. The court also rejected the due process claims, finding they failed.

Validity of Statute—Permit Applicants Challenge State Statute Placing Limitations on Size and Location of Solid Waste Landfills

Applicants argue statute is unconstitutional in violation of the Commerce Clause and Contract Clause

Citation: *Waste Industries USA, Inc. v. State*, 725 S.E.2d 875 (N.C. Ct. App. 2012)

NORTH CAROLINA (05/01/12)—This case addressed the issue of whether a North Carolina statute that places limitations on the size and location of solid waste landfills violated the commerce clause and contract clause of the United State Constitution.

The Background/Facts: In 2007, North Carolina’s General Assembly enacted legislation governing approval of solid-waste landfills: 2007 N.C. Sess. Laws ch. 543 and ch. 550. The legislation, codified in N.C. Gen. Stat. § 130A-295.6, included additional restrictions for landfills relating to buffers, height, capacity, and size. More specifically, among other things, under the law, the North Carolina Department of Environmental and Natural Resources (“DENR”) “shall not issue a permit” for a sanitary landfill if it is located: (1) within five miles of a National Wildlife Refuge; (2) within one mile of a State gameland owned, leased, or managed by the Wildlife Resources Commission; or (3) within two miles of a component of the State Parks System. The DENR also “shall not issue a permit” for a sanitary landfill that exceeds: (1) a capacity of 55 million cubic yards of waste; (2) a disposal area of 350 acres; or (3) a maximum height of more than 250 feet above the mean natural elevation of the disposal area.

These restrictions (the “challenged restrictions”) applied to the permit application of Black Bear Disposal, LLC (“Black Bear”), a wholly-owned subsidiary of Waste Industries USA, Inc. (“Waste Industries”) (hereinafter, both entities are collectively referred to as “Waste Industries”). After Waste Industries paid a \$50,000 permit fee, DENR denied their application for a sanitary landfill permit. The permit application was denied because, among other reasons, Waste Industries’ proposed sanitary landfill site did not comply

with the requirements of N.C. Gen. Stat. § 130A-295.6(d) due to its proximity to a national wildlife refuge and state park.

Waste Industries brought suit against the State of North Carolina and DENR (hereinafter, collectively "the State"). Waste Industries alleged that 2007 N.C. Sess. Laws ch. 543 and ch. 550 (the "Statute") violated the United States Constitution and the State Constitution on various grounds and deprived Waste Industries of their common law vested rights. Among other things, Waste Industries alleged that: (1) the statute had a discriminatory purpose against out-of-state waste in violation of the Commerce Clause in that its purpose was to block out-of-state waste from entering the state; (2) the statute had prohibited discriminatory effects under the Commerce Clause evidenced by the nonconstruction of four proposed landfills which were intended to accept out-of-state waste; (3) the statute violated the Commerce Clause because it had incidental effects on interstate commerce in that it resulted in increased costs for waste disposal; and (4) the statute violated the Contract Clause because it "substantially impair[ed]" Waste Industries' franchise agreement with the county (North Carolina statutory law, N.C. Gen. Stat. § 130A-294(b) required Waste Industries to obtain a franchise agreement from the county prior to applying for a permit to operate a solid waste facility in the state).

All parties moved for summary judgment, asking the court to find there were no material issues of fact in dispute and to decide the matter in their favor based on the law alone. The trial court entered an order denying Waste Industries' motion for summary judgment and granting the State's motion for summary judgment.

Waste Industries appealed.

DECISION: Affirmed.

The Court of Appeals of North Carolina held that: (1) the statute did not have a discriminatory purpose against out-of-state waste in violation of the Commerce Clause; (2) the statute did not have prohibited discriminatory effects under the Commerce Clause; (3) the statute did not violate the Commerce Clause based on any incidental effect on interstate commerce; and (4) the statute did not violate the Contract Clause.

In evaluating whether the statute had a discriminatory purpose in violation of the Commerce Clause, the court said that it must "assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation." The court found that none of the purposes articulated by the General Assembly suggested a purpose of discriminating against out-of-state waste. Rather, the court found that the state had a history of concern about the disposal of waste in landfills regardless of source. The court also found no evidence that the General Assembly, in adopting the statute, was motivated by an intent of discriminating against interstate commerce by blocking out-of-state waste from entering the state. Although Waste Industries' CEO had claimed that "certain legislators had reported to him that other unidentified legislators wanted to block the importing of out-of-state waste," the court rejected them as evidence of a discriminatory intent, noting they: were secondhand statements; not part of any legislative history; and not part of any other official reporting of legislators' positions and views.

Waste Industries had argued that, in any case, the statute had prohibited discriminatory effects in violation of the Commerce Clause evidenced by the nonconstruction of four proposed landfills that were intended to accept out-of-state waste. The court disagreed. The court found the buffer, height, area, and capacity limitations of the statute did not distinguish between in-state and out-of-state waste. Also, the court found out-of-state waste could still continue to come into the state because existing landfills could expand or new landfills could be built in compliance with the challenged regulations.

Waste Industries had also argued that the statute violated the Commerce Clause because it had the incidental effect on interstate commerce of increasing costs for waste disposal. The court said that where a statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld against a commerce clause challenge; it will only be found to be unconstitutional if the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. Here, the court found the Statute effectuated legitimate local public interests of the following benefits: environmental; public health; environmental justice; and financial security. Also, the court found that Waste Industries failed to provide evidence that any related burden on interstate commerce clearly outweighed those benefits.

As to Waste Industries' Contract Clause violation argument, the court explained: "Whether a change in state law is an impairment of contract in violation of the Contract Clause 'has three components': (1) whether there is a contractual relationship; (2) whether a change in law impairs that contractual relationship; and (3) whether the impairment is substantial." The court found there was no dispute in this case that a contract existed. As for the second element, the court found the statute did not retroactively alter any rights of Waste Industries or the county under the franchise agreement or change either party's obligations. The franchise agreement did not grant plaintiffs a right to build or operate a landfill, but rather simply made it possible for plaintiffs to apply to the state for a permit allowing them to build and operate the landfill. Indeed, the agreement anticipated that a permit might be denied or—as happened here—the law governing landfills might be changed.

See also: *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S. Ct. 715, 66 L. Ed. 2d 659, 15 Env't. Rep. Cas. (BNA) 1473, 11 Env'tl. L. Rep. 20070 (1981).

See also: *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 127 S. Ct. 1786, 167 L. Ed. 2d 655, 64 Env't. Rep. Cas. (BNA) 1129, 41 A.L.R. Fed. 2d 601 (2007).

See also: *General Motors Corp. v. Romein*, 503 U.S. 181, 112 S. Ct. 1105, 117 L. Ed. 2d 328 (1992).

Case Note:

Waste Industries had also contended that they had a common law vested right and, therefore, were entitled to have the law applied to their landfill project as it existed before the change in the statutes. (In 2004, Waste Industries had first submitted a site study to DENR, as required by law, in order to obtain a sanitary landfill permit.) The

court explained that a party's common law right to develop and/or construct vests when: (1) the party has made, prior to the amendment of a zoning ordinance, expenditures or incurred contractual obligations substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building; (2) the obligations and/or expenditures are incurred in good faith; (3) the obligations and/or expenditures were made in reasonable reliance on and after the issuance of a valid building permit, if such permit is required, authorizing the use requested by the party; and (4) the amended ordinance is a detriment to the party. Here, because no permit was issued in this case, the court found that Waste Industries could not meet the requirement for the vested rights analysis that their expenditures on the proposed landfill "were made in reasonable reliance on and after the issuance of a valid . . . permit." As a result, the court held that Waste Industries had no common law vested rights in the proposed landfill.

Standing—Nonprofit Organization Appeals Board's Decision to Rezone Property

Board and applicant maintain organization lacks standing to bring challenge

Citation: *Dakota Resource Council v. Stark County Bd. of County Com'rs*, 2012 ND 114, 2012 WL 2053713 (N.D. 2012)

NORTH DAKOTA (06/07/12)—This case addressed the issue of whether a membership-based nonprofit corporation had "associational standing" (i.e., the legal right) to challenge a board of county commissioner's decision to approve a zone change.

The Background/Facts: Great Northern Project Development ("Great Northern") planned to construct and operate a coal gasification facility on a tract of land in Stark County, North Dakota (the "County"). Great Northern's planned 8,100-acre complex would include: a coal gasification plant; a chemical fertilizer plant; an electrical power plant; a coal mine; a solid waste landfill; and facilities for manufacture and storage of hazardous, explosive, and odorous products.

In furtherance of this planned construction, Great Northern submitted an application to the County Zoning Commission (the "Commission"). Great Northern asked the Commission to change the zoning of the subject land from agricultural to industrial and to allow nine conditional uses of the land.

Following a hearing, the Commission voted to recommend that the County Board of County Commissioners (the "Board") approve Great Northern's application for a zone change, conditioned upon Great Northern obtaining all necessary local, state, and federal permits or approvals.

Subsequently, the Board approved Great Northern's application to rezone

the property from agricultural to industrial and approved the requested conditional uses.

The Board's approval of the rezone was opposed by several parties, including: Dakota Resource Council (the "Council"), a membership-based nonprofit corporation which, among other things, works for preservation of family farms, regulation of coal mining and oil and gas development, protection of ground water and clean air, and sound management of solid and toxic wastes.

The district court affirmed on the merits the Board's decision to rezone the property and allow the conditional uses.

The Council appealed. In their cross-appeal, the Board and Great Northern contended that the Council lacked standing to appeal the Board's decision to the district court.

DECISION: Affirmed

The Supreme Court of North Dakota held that the Council had associational standing to appeal the Board's decision.

In so holding, the court explained that "standing" is "the concept used 'to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court.'" The court said that a party seeking relief from a court "must demonstrate they have standing by alleging such a personal stake in the outcome of a controversy to justify the court's exercise of remedial powers on their behalf."

Here, the Council had contended that it had associational standing because it was representing the interests of some of its members who would have individual standing.

The court said that as a nonprofit that had not suffered an injury itself, the Council could bring this challenge to the rezone as a representative of its members (with associational standing) if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it [sought] to protect [were] germane to the organization; and (c) neither the claim asserted nor the relief requested require[d] the participation of individual members in the lawsuit."

The Board and Great Northern contested only the first element of that three-prong test for associational standing. They argued that the record did not establish that any of the Council's members had standing to sue in their own right.

The court disagreed with the Board and Great Northern. It found that at least two of the Council's members had standing to appeal the Board's decision in their own right because the two individuals were "aggrieved" by the Board's approval of Great Northern's request for a zone change. The court found they were aggrieved in that they had a personal interest that could be enlarged or diminished by the Board's decision. More specifically, the County zoning ordinance required all landowners within 200 feet of the proposed rezoned tract be given notice of the hearing on any application for a zoning change. The court found this notice requirement was "effectively a legislative determination that landowners within 200 feet of the proposed rezoned property have a significant, protectable interest in the Board's decision whether to

grant an application to rezone the property and permit requested conditional uses." Since the two individuals were within 200 feet of the proposed rezoned tract and had received notice, the court found that the notice requirement established that those individuals' property interests were affected by the Board's decision "in a manner different than that suffered by the public generally," and they were "more than just an elector and resident taxpayer affected by the . . . decision."

Accordingly, the court concluded that the Council established that at least some of its members were "aggrieved" by the Board's decision and would have had standing to appeal the decision in their own right. Therefore (and because the Board and Great Northern did not challenge the Council's satisfaction of the two remaining requirements for associational standing), the court concluded that the Council had associational standing to appeal the Board's decision to the district court.

The court went on to uphold the Board's decision to grant Great Northern's application to rezone the property. The court found the Board did not, as the Council had argued, misinterpret or misapply the applicable zoning ordinance when it granted to the application to rezone and allowed the requested conditional uses for the property.

See also: *Nodak Mut. Ins. Co. v. Ward County Farm Bureau*, 2004 ND 60, 676 N.W.2d 752 (N.D. 2004).

See also: *Hagerott v. Morton County Bd. of Com'rs*, 2010 ND 32, 778 N.W.2d 813 (N.D. 2010).

Case Note:

Along with the Council, Neighbors United, an unincorporated association that promotes the protection of farming and ranching, as well as individual landowners, also challenged the Board's approval of the zone change. Because Neighbors United and the individual landowners did not appeal the matter to the Supreme Court of North Dakota, the court did not address whether they had standing.

Zoning News from Around the Nation

CONNECTICUT

Under a new state law, zoning enforcement officers in Connecticut "will no longer be subject to being sued for triple damages by angry landowners." Previously, "zoning enforcement officers were liable for triple damages if they issued a citation 'frivolously or without probable cause' against a landowner. Under the new law, they are liable for actual damages, and then only if they are found to have issued a citation 'maliciously or wantonly.'"

Source: *The Hour*; www.thehour.com

MAINE

The Maine Supreme Judicial Court has struck down a "consent judgment"

that the City of Westbrook had negotiated with Pike Industries. The consent order sought to “permanently settle the dispute related to the lawful status of Pike’s right to operate [a] quarry,” by providing conditions of Pike’s operations and release from liability and a covenant not to sue Pike. “The Supreme Judicial Court concluded that the consent judgment violated the law by circumventing Westbrook’s zoning rules and procedures and illegally cutting off the rights of ordinary citizens (and Westbrook’s other businesses) to stop Pike from violating local zoning laws.”

Source: *The Portland Daily Sun*; <http://www.portlanddailysun.me>

MICHIGAN

In an effort to “keep fireworks sales in [its] business districts and out of its subdivisions,” Macomb Township board of trustees recently approved a zoning ordinance amendment to allow the sale of fireworks in commercial and warehouse districts. “Because the Michigan Fireworks Safety Act, which went into effect on Jan. 1 of this year, forbids local governments from restricting fireworks sales in any way, Macomb officials have elected to use zoning power to retain some oversight on the location of sales By amending its ordinances to allow fireworks sales in commercial zones, the township keeps sales out of residential areas without violating state law.”

Source: *Macomb Patch*; <http://macomb.patch.com>

NEW JERSEY

The state Legislature is considering legislation (S-1534 and A-2586) which would reportedly exempt some private colleges and universities in New Jersey from following local zoning regulations. Currently, under New Jersey law, “private universities and colleges in the state must receive planning and zoning approvals from the municipalities in which their projects are built,” while “public institutions do not need to receive local approvals” and instead need only a “courtesy review that is non-binding.” Opponents reportedly fear the legislation could have “long term consequences,” setting a precedent for other nonprofits.

Source: *Planet Princeton*; <http://planetprinceton.com>

NORTH CAROLINA

The state Senate recently approved a second reading of a bill that would take away Boone’s extraterritorial jurisdiction (ETJ) powers. (“North Carolina law allows towns and cities to wield ETJ powers as a way of helping oversee growth near the communities’ corporation limits.”) Opponents of the legislation reportedly say it will pave the way for construction of high-density housing and industrial or retail development near the town. Proponents, on the other hand, say it will “help people who live in the 1-mile perimeter affected by Boone’s ETJ, saying those people are controlled by town officials but don’t have representation in town government.”

Source: *Charlotte Observer*; www.charlotteobserver.com

Zoning Bulletin

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Constitutional Validity of Regulations—Through Ordinances, City Imposes, Extends Moratorium on Shoreline Development

Waterfront-property owners assert the moratorium violates their constitutional substantive and due process rights

Citation: *Samson v. City of Bainbridge Island*, 2012 WL 2161371 (9th Cir. 2012)

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

NINTH CIRCUIT (WASHINGTON) (05/15/12)—This case addressed the issue of whether a city's moratorium on pier and dock construction violated waterfront-property owners' substantive and due process rights under the 14th Amendment to the United States Constitution.

The Background/Facts: In Washington, shoreline property is subject to a regulatory scheme that consists of three parts. One of those parts is "Shoreline Master Programs," which are comprehensive use plans adopted by local jurisdictions and approved by the Washington Department of Ecology.

The City of Bainbridge Island (the "City") adopted a Shoreline Master Program in 1996. In 2000, the Washington Department of Ecology revised its statewide shoreline regulations. State law in effect at the time required the City to update its Shoreline Master Program to comply with the new regulations within two years of their passage.

While undertaking a comprehensive review of its 1996 Shoreline Master Program, the City, through a series of ordinances, imposed a moratorium on applications for "new overwater structures (piers, docks and floats) and new shoreline armoring (bulkheads and revetments) where none ha[d] previously existed." In imposing that moratorium, along with several extensions initiated via ordinances, the City Council found, among other things that: "shoreline structures such as piers, docks, and bulkheads had the 'potential to cause significant impact to critical shoreline habitat' and to adversely affect juvenile salmon populations." The City Council also found that with regulatory changes pending, it would receive an increased volume of applications from landowners seeking to be subject to the existing regime.

Kelly and Sally Samson, along with other persons and corporate entities (totaling 18) (collectively, the "Samsons"), owned waterfront property in Blakely Harbor in the City. They wished to build a pier or a dock on their property during the time that the moratorium was imposed. The Samsons challenged the moratorium in state court. The state courts ultimately declared that the moratorium violated the state constitution. Shortly thereafter, the City amended the Shoreline Master Program to permanently ban new dock construction in Blakely Harbor. The state courts eventually upheld those permanent changes.

The Samsons then challenged the moratorium in federal court. They argued that the moratorium violated their substantive and procedural rights under the 14th Amendment, and sought damages against the city under 42 U.S.C.A. § 1983.

The 14th Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." A government entity may be held liable under 42 U.S.C.A. § 1983 if an "action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."

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

The Samsons appealed.

DECISION: Affirmed.

The United States Court of Appeals, Ninth Circuit, held that the City ordinances establishing and extending the moratorium did not violate the Samsons' substantive or procedural rights under the 14th Amendment.

The court explained that for the Samsons to succeed on their claim under § 1983 for an unconstitutional deprivation of property, they had to show: (1) a deprivation; (2) of property; (3) under color of state law.

The parties disputed whether the Samsons had a property interest sufficient to support their § 1983 claims. The City argued that the property right the Samsons asserted was merely the "abstract need or desire to construct private, single-use docks on Blakely Harbor." The Samsons insisted that their property interest was grounded firmly in Washington's "vested rights doctrine" (an "unusual legal rule that gives Washington residents who apply for building permits a vested right to have their application processed according to the zoning and building ordinances prevailing at the time of the application").

The court, however, decided it need not determine whether the Samsons had a cognizable property interest. This was because the court found that, even assuming that the Samsons did have such a property interest, the City did not violate the Samsons' substantive due process rights. To establish a substantive due process violation, the Samsons had to show that the City's ordinances establishing and extending the moratorium were "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." The court found that the Samsons could not make that showing.

The court found that none of the City's conduct "was arbitrary in the constitutional sense." Rather, the court found that, "[a]t a minimum, it [was] 'at least fairly debatable' that [the City] furthered its legitimate interest in orderly, environmentally protective shoreline development by instating a moratorium on new over-water projects."

The court also rejected the Samsons' procedural due process claim. The court said the due process is satisfied when the legislative body performs its responsibilities in the normal manner prescribed by law. Here, the court found that the City Council had used validly enacted ordinances to impose and extend the moratorium, and the ordinances applied generally to all owners of shoreline property in Blakely Harbor.

See also: *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227 (9th Cir. 1994).

See also: *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517, 54 Env't. Rep. Cas. (BNA) 1129, 32 Env't. L. Rep. 20627, 10 A.L.R. Fed. 2d 681 (2002).

Case Note:

The Samsons had argued that the state supreme court's judgment that the moratorium violated the state constitution sufficed to establish that the City was liable under § 1983. The federal appeals court disagreed, noting that "not every violation of state law amounts to an infringement of constitutional rights." "Unless there is a breach of

constitutional rights, . . . § 1983 does not provide redress in federal court for violations of state law." Finding the Samsons had suffered no violation of their constitutional rights to substantive and procedural due process, the court affirmed the order granting the City's motion for summary judgment.

Case Note:

In finding that the choice of a moratorium as the favored policy mechanism for regulating development was nonarbitrary, the court noted that "moratoria, or 'interim development controls' . . . are an essential tool of development."

Restrictive Conditions/Landfill— State Agency Permits Landfill Expansion Subject To Restrictive Condition

City challenges restriction, saying it is unsupported by substantial evidence

Citation: *Department of Environmental Services, City and County of Honolulu v. Land Use Com'n, State of Hawaii*, 127 Haw. 5, 275 P.3d 809 (2012)

HAWAII (05/04/12)—As a matter of first impression (i.e., the first time the court addressed such an issue), this case addressed the issue of whether a restrictive covenant imposed by decision or order of an agency (the Land Use Commission) was supported by substantial evidence, and thus valid.

The Background/Facts: In 2008, the Department of Environmental Services for the City and County of Honolulu (the "DES") applied to the state Land Use Commission ("LUC") for a special use permit ("SUP") to expand the existing Waimanalo Gulch Sanitary Landfill ("WGSL"). The LUC approved the SUP (the "LUC Order") subject to, among other things, a condition prohibiting the WGSL from accepting municipal solid waste after July 31, 2012 ("Condition 14").

DES appealed the LUC Order, challenging the validity of Condition 14. DES argued that Condition 14 was "Arbitrary and Capricious, Characterized by Abuse of Discretion, and a Clearly Unwarranted Exercise of Discretion." DES asserted that the record on which the LUC relied established that there would always be waste material that could not be combusted, recycled, reused, or shipped. Therefore, DES argued, an option to dispose of municipal solid waste at WGSL would continue to be necessary beyond the July 31, 2012 deadline as imposed in Condition 14.

Among other things, the LUC maintained that Condition 14 was reasonable and supported by the record.

The circuit court affirmed Condition 14.

DES appealed, and the Supreme Court of Hawai'i granted an application of transfer to itself.

On appeal, DES reiterated its position that the imposition of Condition 14 was arbitrary in light of the record and findings adopted by the LUC, which it said: "clearly demonstrated the continuing need to dispose of, [among other things], [municipal solid waste] at WGS� beyond July 31, 2011." Moreover, DES argued that no other landfill site would be available by July 31, 2012, as the record and the findings adopted by the LUC established that it would take more than seven years to identify and develop a new landfill site to either replace or supplement WGS�. DES asked the court to strike the July 31, 2012, deadline to accept municipal solid waste at WGS�, contained in Condition 14 of the LUC Order, and to permit the disposal of municipal solid waste at WGS� until that site reached capacity.

DECISION: Vacated, and matter remanded with instructions.

The Supreme Court of Hawai'i held that, as a matter of first impression (i.e., the first time the issue was addressed by the court), the LUC's action in imposing Condition 14 was not supported by substantial evidence.

The court explained that although the LUC had the authority to impose restrictive conditions in its approval of SUPs (HRS § 205-6(d)), its decision to impose such a restriction had to be supported by substantial evidence.

Never having previously looked at the issue of whether a restrictive condition imposed by decision or order of the agency (LUC) was supported by substantial evidence, the court looked to the federal Administrative Procedure Act. Under that Act, the court found the authority that: a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence." (5 U.S.C.A. § 706(2)(E).)

Ultimately, the court found that the LUC's action in imposing Condition 14 was inconsistent with the evidence shown in the record and not supported by substantial evidence. The court found that the facts adopted by the LUC did not support the restriction in Condition 14 imposing a termination date of July 31, 2012, for the deposit of municipal solid waste at WGS�. To the contrary, as DES had argued, the court found the facts clearly demonstrated: the continuing need to dispose of municipal solid waste at WGS� beyond July 31, 2012; that the WGS� was the only permitted public municipal solid waste facility on the island of Oahu; and that a related City and County Planning Commission's Decision and Order had expressly provided that municipal solid waste could be deposited at WGS�'s expanded site "until capacity as allowed by the State Department of Health is reached."

Thus, concluded the court: "the evidence in the record as a whole d[id] not support, much less constitute 'substantial evidence' for the imposition of Condition 14." Accordingly, the court held that Condition 14 could not stand.

Having held that Condition 14 could not stand because it was inconsistent with the evidence shown in the record and not supported by substantial evidence, the court concluded that the LUC's approval of the SUP also could not stand because Condition 14 was a material condition to the LUC's approval.

Consequently, the court remanded the matter to the LUC for further hearings as the LUC deemed appropriate.

See also: *Kinkaid v. Board of Review of City and County of Honolulu*, 106 Haw. 318, 104 P.3d 905 (2004), as amended, (Nov. 10, 2004).

See also: *Bustamante v. Massanari*, 262 F.3d 949, 75 Soc. Sec. Rep. Serv. 358, *Unempl. Ins. Rep. (CCH) P 16620B* (9th Cir. 2001).

See also: *Sousa v. Callahan*, 143 F.3d 1240, 57 Soc. Sec. Rep. Serv. 22, *Unempl. Ins. Rep. (CCH) P 16035B* (9th Cir. 1998).

Case Note:

Again, not finding a case directly on point from its jurisdiction, the court looked to caselaw from other jurisdictions to support a remand to LUC where LUC's action was not supported by substantial evidence.

Authority/Jurisdiction—Town Says Airport Authority Must Get Town's Zoning Approval Before Undertaking Construction

Airport authority insists it has exclusive zoning jurisdiction over airport

Citation: *Town of Zionsville v. Hamilton County Airport Authority*, 2012 WL 2343370 (*Ind. Ct. App.* 2012)

INDIANA (06/20/12)—This case addressed the issue, as a matter of first impression (i.e., the first time the court heard such an issue), of whether, as a governmental unit of general authority, a town had zoning jurisdiction over an airport within the town, or whether the airport authority had sole zoning jurisdiction.

The Background/Facts: In 2003, Hamilton County purchased an airport located in Boone County. The airport was along Hamilton County's border. In 2006, Hamilton County created the Hamilton County Airport Authority (the "Airport Authority"). It then transferred ownership of the airport to the Airport Authority.

In 2008, three towns combined into a single entity, known as the Town of Zionsville (the "Town"). The newly created Town gained zoning jurisdiction over certain townships in areas where Boone County had previously exercised zoning jurisdiction, including the airport.

In 2010, the Town's planning director informed the Airport Authority that it needed approval from the Town's planning department prior to obtaining construction permits. The Airport Authority, which had adopted its own land use ordinance for the airport, disagreed.

The Airport Authority filed a complaint for declaratory judgment in superior court. Among other things, it asked the court to declare that the Airport Authority had exclusive jurisdiction over the zoning at the airport.

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

The Town appealed.

On appeal, the Town and the Airport Authority each argued they had exclusive zoning jurisdiction over the airport, citing pertinent state statutes.

The Town noted that the Indiana Code's leading provisions granting general zoning authority over a relevant geographic area assign that authority to "units" of local government and specifically define a "unit" as a county, municipality, or township, not including specialized entities like airport authorities. (Ind. Code § 36-1-2-23.) The Town maintained that because it had adopted a comprehensive zoning ordinance pursuant to the processes the Code prescribed, and because the airport lay within the Town's geographic boundaries, the Town had sole zoning jurisdiction over the airport. (Ind. Code § 36-7-4-601.)

In response, the Airport Authority contended that it had separate statutory authority to exercise zoning jurisdiction over the airport. It cited the Code's list of powers for an airport authority. (Ind. Code § 8-22-3-11.) One of the powers on the list is that the Authority may "fix and determine exclusively the uses to which the airport lands may be put." (Ind. Code § 8-22-3-11(16)) (hereinafter "Subsection 16"). The Airport Authority reasoned that the power to control "the uses" of airport property included the power to control the zoning of airport property.

DECISION: Reversed.

The Court of Appeals of Indiana held that the Town, not the Airport Authority, had zoning jurisdiction over the airport.

In so holding, the court observed that cities and towns could develop a comprehensive land use plan that was broad-reaching. The court recognized that "the general power to regulate zoning does not specifically include the power to require that other political subdivisions comply with zoning regulations." The court also noted that "a survey of other statutes granting local authority to perform and regulate government functions shows that none of the powers delegated to government units contain explicit authority to require compliance by another political subdivision. Thus, while [units] may 'regulate the use of public ways,' Ind. Code § 36-9-2-7, no specific authorization is given to enforce such regulation on any other political subdivision." However, said the court, strict interpretation of the limitation that a unit may not impose a duty on a political subdivision without express statutory authority would lead to . . . absurdity" (i.e., inability to enforce speed zones on city employees, or environmental regulations on counties).

So, concluded the court, while the Town had broad zoning authority over the airport, it did not mean that the Town had absolute power to enforce its zoning requirements against the Airport Authority. Rather, the Airport Authority "must be allowed to seek relief under some circumstances [but] must . . .

bear the burden [of showing] that . . . [such relief] is necessary to advance the governmental ends it seeks." If the Town denied such a request, the Airport authority could appeal to the courts, which would "balance the interests to determine which must prevail."

As for the Airport Authority's argument that subsection 16 gave it zoning jurisdiction over the airport because it authorized the Airport Authority to "fix and determine exclusively the uses," the court found subsection 16 actually "cut[] against the Authority's position." The court found that subsection 16 did not give the Airport Authority zoning jurisdiction over the airport. The legislature had elsewhere given airport authorities actual zoning authority beyond the boundaries of their own property to the extent that it was necessary to assure safe descent and ascent of aircraft. Thus, when the legislature desired to grant airport authorities zoning powers, it did so in § 14(d) and did not do so in subsection 16. In other words, the court determined that if the legislature had intended to grant the Airport Authority sole zoning jurisdiction over the airport, it would have done so. The court concluded that subsection 16 did not prevail over the general zoning powers of the Town.

See also: *City of Crown Point v. Lake County*, 510 N.E.2d 684 (Ind. 1987).

Case Note:

In its decision, the court noted that there were "a host of specialized local government entities authorized under Indiana law" which have "enumerated powers [that are] often read as rather robust in order to portray a sufficient picture of independence to warrant avoidance of the municipal debt limitations [under the Indiana Constitution]." Thus, the legal claim of exclusive power advanced by the Airport Authority was one that, the court recognized, "could be deployed by any number of other local governmental entities."

Case Note:

The court also concluded that covenants governing uses at the airport, which the Airport Authority's predecessor (Hamilton County) had executed with Boone County in exchange for Boone County's creation of a special airport zoning district, were not rendered invalid by the creation of the Airport Authority and the passage of ownership from Hamilton County to the Airport Authority—at least not by the grounds espoused by the Airport Authority (which were that Subsection 16 gave the Airport exclusive zoning jurisdiction), which the court had rejected.

Billboard/Injunctive Relief—State Agency Issues Permit for Billboard

Neighboring landowners assert permit applicant failed to satisfy regulatory requirements

Citation: *Plamondon v. Outcepts Management & Consulting, LLC*, 81 Mass. App. Ct. 845, 969 N.E.2d 730 (2012)

MASSACHUSETTS (06/11/12)—This case addressed the issue of whether a permit was wrongly issued for a billboard (under state regulations), warranting injunctive relief of removal of the billboard.

The Background/Facts: Michael Rodrigues (“Rodrigues”) owned property in Westport, Connecticut. For 40 years, a billboard had stood on his property. In 2009, Rodrigues agreed to partner with Outcepts Management & Consulting, LLC (“Outcepts”) to replace an existing billboard. Because the new billboard was to be different from the old one, it had no grandfather status and was required to meet all of the requirements for new billboards as contained under Massachusetts statutory and regulatory law—G.L. c. 93 and 711 Code Mass Regs. § 3.00.

Under G.L. c. 93, § 29, the state’s Outdoor Advertising Board (“OAB”)—now known as the Massachusetts Office of Outdoor Advertising (“MOOA”)—was given the power to make rules and regulations that “may require billboards . . . be located in business, commercial, industrial, marketing or mercantile areas.” Under 711 Code Mass. Regs. § 3.07, OAB regulations provide that: “No permit shall be granted or renewed for a sign that is not located in an area of a business character.” An area of “business character” is defined as one, when viewed from the principal highway upon which the sign is to face, both of the following requirements are met: “(a) At least two separate business, industrial or commercial activities are being conducted within a distance of 500 feet from the proposed location of the sign, measuring from such proposed location to the buildings or parking lots or other places of actual business, industrial or commercial activity . . .”; and “(b) The area in which the sign is to be located is not predominantly residential, agricultural or open space or natural area.”

As required by law, in 2010, Outcepts filed two written applications with the MOOA.

Since the OAB had been essentially dismantled in 2009, permitting decisions were made solely by MOOA’s director, Edward Farley (“Farley”), without a public hearing. In acting on applications to approve billboards, Farley relied on information provided by applicants, as well as information from MOOA’s field inspectors. A MOOA field inspector had visited Rodrigues’ property and concluded that: there were two businesses (i.e., storage garages) within 500 feet of the proposed billboard location; and the area was not residential in character. Based partly on this information, Farley approved Outcepts’ application.

Subsequently, residents living within a 500 foot radius of the billboard (the

"Neighbors") filed an action in superior court, seeking injunctive relief. The Neighbors argued that the requirements of 711 Code Mass. Regs. § 3.07(3)(b) had not been met because the billboard was placed in a residential area. Within a 500-foot radius of the billboard there were seven homes, a large tract of undeveloped residential agricultural land, and two garages used for commercial storage.

The superior court judge visited the site, and agreed with the Neighbors. The judge concluded that Outcepts failed to show that the area in which their new billboard was located was "not predominately residential, agricultural or open space or natural area" "when viewed from the principal highway upon which the sign [was] to face." (711 Code Mass. Regs. § 3.07(3) (2010).) The judge ordered the billboard be removed within 90 days.

Outcepts appealed.

DECISION: Affirmed.

The Appeals Court of Massachusetts agreed that removal of the billboard was warranted. The court found it undisputed that the new billboard did not satisfy the regulatory requirements of 711 Code Mass. Regs. § 3.07 in two respects: First, the MOOA did not consider the characteristics of the neighborhood as viewed from the highway. Second, the MOOA ignored the word "both" in § 3.07. MOOA, found the court, in concluding that the area was "not residential in character," relied only on the fact that two separate businesses were being conducted within 500 feet of the billboard (§ 3.07(a)); it did not give independent meaning to § 3.07(b), which required that the billboard location area not be predominantly residential, agricultural or open space or natural. Here, the court found that the presence of two businesses within 500 feet of the billboard location satisfied subsection (a). However, the court also found that there was nothing more to satisfy the independent requirements of subsection (b). The court said that while MOOA could consider the presence of two businesses in determining whether the neighborhood was primarily residential, it could not rely solely on the two businesses without considering the entire composition and character of the relevant area.

Considering the fact that there were seven homes within a 500-foot radius of the billboard, and 20 homes within a 1,000-foot radius, the court concluded that the area around the billboard was not primarily of a business character as viewed from the highway. Having found the requirements of 711 Code Mass. Regs. § 3.07 were not satisfied, the court concluded that ordering removal of the billboard was warranted.

Zoning News from Around the Nation

MICHIGAN

Michigan lawmakers are considering a bill that may make development on dunes easier. Under current law, "[p]eople wanting to build in critical dune areas must prove the construction won't harm the ecosystem." Under the proposed bill, the burden of proof would shift; in order to deny a construction permit, the Michigan Department of Environmental Quality would have to

show that the construction will cause significant harm. Reportedly, “[t]he bill would also make it harder for residents to request a public hearing before a permit is issued, remove local zoning that is stricter than the state’s and prohibit the denial of a permit for not being in the public interest.” The bill was approved by the state Senate in early June, and now awaits House consideration.

Source: *Great Lakes Echo*; <http://greatlakesecho.org>

PENNSYLVANIA

The state’s General Assembly “has approved legislation that places a drilling moratorium on any oil or gas operations in the South Newark Basin which lies under much of Bucks County.” Proponents of the moratorium tout it as being “entirely appropriate at this point in time because it gives all of the interested stakeholders in the process—local residents, scientists and governments—the ability to study the formation in depth and to determine the next appropriate steps on whether or not drilling is even possible or desirable.”

Source: *Bucks Local News*; <http://www.buckslocalnews.com>

WASHINGTON

The Maple Valley City Council approved a ban on medical marijuana collective gardening. Under a new ordinance, collective gardens are prohibited from being grown within the city limits. The reasons cited for the ban were “[t]he conflict between state and federal law [regarding legality of medical marijuana], and the concept of federal preemption.”

Source: *Covington & Maple Valley Reporter*; <http://www.maplevaleyreporter.com>

WEST VIRGINIA

The Morgantown City Council has voted to limit gas drilling to 600 acres surrounding the city’s airport. Reportedly, the council “unanimously approved six zoning ordinances restricting all mining and drilling to designated industrial zones around the Morgantown Municipal Airport.” Under the ordinances, drilling sites must be 100 feet from the floodplain, 1,000 feet from the public water supply intake, and 1,000 feet from the floodplain of the Monongahela River south or upstream of the Morgantown Lock and Dam.

Source: *The Marietta Times*; <http://www.mariettatimes.com>

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Constitutionality of Statute—State Statute Preempts Local Zoning Regulation of Oil, Gas Operations

Municipalities say statute is unconstitutional
because its provisions do not further police power
purpose of zoning

Citation: *Robinson Tp. v. Com.*, 2012 WL 3030277 (Pa. Commw. Ct. 2012)

PENNSYLVANIA (07/26/12)—This case addressed the constitutionality of provisions of Pennsylvania's recently enacted Act 13 (58 Pa. C.S. §§ 2301-

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3504) pertaining to Oil and Gas—Marcellus Shale, which repealed Pennsylvania's Oil and Gas Act and replaced it with a codified statutory framework regulating oil and gas operations in Pennsylvania.

The Background/Facts: Among other things, Pennsylvania's Act 13 (58 Pa. C.S. §§ 2301-3504) preempted local regulation, including environmental laws and zoning code provisions (except in limited instances regarding setbacks in certain areas) involving oil and gas operations.

In March 2012, several Pennsylvania municipalities, among others (collectively, the "Municipalities"), filed a legal action against the Commonwealth of Pennsylvania (the "Commonwealth"). They asked the court to declare Act 13 unconstitutional and to order injunctive relief, permanently enjoining the Commonwealth from enforcing its provisions. The Municipalities' petition was lengthy, consisting of 108 pages and 12 counts. Among other things, the Municipalities alleged that Act 13—specifically § 3304—violated Article 1, § 1 of the Pennsylvania Constitution and violated the Equal Protection Clause (the 14th Amendment) of the United States Constitution.

Section 3304 mandated that all municipalities had to enact zoning ordinances in accordance with its provisions. It provided that "all local ordinances regulating oil and gas operations shall allow for the reasonable development of oil and gas resources" by, among other things: not imposing more stringent "conditions, requirements or limitations on the construction of oil and gas operations" than imposed on "construction activities for other industrial uses"; not imposing more stringent "conditions, requirements or limitations on the heights of structures, screening and fencing, lighting or noise relating to permanent oil and gas operations" than "imposed on other industrial uses or other land development within the particular zoning district"; authorizing "oil and gas operations, other than activities at impoundment areas, compressor stations and processing plants, as a permitted use in all zoning districts"; and by not imposing more stringent setback, noise or vehicular access provisions than those specified in § 3304.

The Municipalities argued that § 3304 forced municipalities to enact zoning ordinances regarding mining and gas operations in all zoning districts, which were incompatible with municipalities' comprehensive plans that denominated different zoning districts—thus making zoning irrational. They argued that, under § 3304, they could not constitutionally enact a zoning ordinance even if they wanted to. Accordingly, they specifically alleged that § 3304 violated Article 1, § 1 of the Pennsylvania Constitution and violated the Equal Protection Clause (the 14th Amendment) of the United States Constitution because: it was an improper exercise of the Commonwealth's police power that was not designed to protect the health, safety, morals, and public welfare of the citizens of Pennsylvania; it allowed for incompatible uses in like zoning districts in derogation of municipalities' comprehensive zoning plans and constituted an unconstitutional use of zoning districts; and it was impossible for municipalities to create new or to follow existing comprehensive plans, zoning ordinances or zoning districts that protect the health, safety, morals, and welfare of citizens and to provide for orderly development of the community in violation of the Pennsylvania Municipalities Planning Code ("MPC") resulting in improper use of its police power.

DECISION: Municipalities' motion for summary relief granted (and with other counts dismissed).

The Commonwealth Court of Pennsylvania agreed with the Municipalities. It held that § 3304 was unconstitutional—in violation of substantive due process—because it required all oil and gas operations in all zoning districts, including residential districts, as a matter of law.

In other words, it was unconstitutional because the “changes required by [3304] d[id] not serve the police power purpose of the local zoning ordinances, relating to consistent and compatible uses in the enumerated districts of a comprehensive zoning plan,” and therefore, “any action by the local municipality required by the provisions of Act 13 would violate substantive due process as not in furtherance of its zoning police power.”

The court explained that to determine whether a zoning ordinance is unconstitutional under Article 1, § 1 of the Pennsylvania Constitution and the 14th Amendment to the United States Constitution, a substantive due process inquiry must take place. When making that inquiry, the court said it takes into consideration the rights of all property owners subject to the zoning and the public interests sought to be protected. In order for a zoning ordinance to be constitutional, it “must be directed toward the community as a whole, concerned with the public interest generally, and justified by a balancing of community costs and benefits.”

The Commonwealth had essentially argued that its police powers allowed a mandate under Article 13 that zoning regulations be rationally related to its objective of promoting exploitation of oil and gas resources. The court responded that “the interests that justify the exercise of the police power in the development of oil and gas operations and zoning are not the same” as those interests to be protected by zoning: While the “state’s interest in oil and gas development is centered primarily on the efficient production and utilization of the natural resources in the state,” “[z]oning, on the other hand, is to foster the orderly development and use of land in a manner consistent with local demographic and environmental concerns.”

The court found that § 3304 required zoning amendments that had to be “normally justified on the basis that they were in accord with the comprehensive plan, not to promote oil and gas operations that were incompatible with the uses by people who had made investment decisions regarding businesses and homes on the assurance that the zoning district would be developed in accordance with comprehensive plan and would only allow compatible uses.” The court said that “[i]f the Commonwealth-proffered reasons [were] sufficient, then the Legislature could make similar findings requiring coal portals, tipples, washing plants, limestone and coal strip mines, steel mills, industrial chicken farms, rendering plants and fireworks plants in residential zones for a variety of police power reasons advancing those interests in their development. It would allow the proverbial ‘pig in the parlor instead of the barnyard.’”

Having found § 3304 allowed incompatible uses in zoning districts and failed to protect the interests of neighboring property owners from harm, altered the character of the neighborhood, and made irrational classifications—the court declared § 3304 unconstitutional and null and void. The court permanently enjoined the Commonwealth from enforcing it, as well as

the remaining provisions of Chapter 33 that enforced 58 Pa.C.S. § 3304 (other than 58 Pa.C.S. §§ 3301 through 3303, which remain in full force and effect).

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).

Case Note:

The Municipalities had brought many other counts, on which the court held as follows:

Section 3215(b)(4) is also unconstitutional. It violates Article 2, § 1 of the Pennsylvania Constitution because Act 13 provides insufficient guidance to the DEP as to when to grant a waiver from the setback requirements established by the Legislature—thus giving DEP the power to make legislative policy judgments otherwise reserved for the General Assembly.

Act 13 does not violate Article 3, § 32 of the Pennsylvania Constitution—which prohibits passage of “special laws.” While Article 13 does treat the oil and gas industry differently from other extraction industries, it is not unconstitutional because the distinction is based on real differences that justify varied classifications for zoning purposes.

The Municipalities’ claim that Act 13 was unconstitutional under the United States and Pennsylvania Constitutions because it allowed on behalf of a private person the taking of property for storage reservoirs and protective areas around those reservoirs failed because, in order to bring such a claim, the Municipalities’ had to first take the step of filing preliminary objections to a declaration of taking.

Chapter 33 of Act 13 does not violate Article 1, § 27 of the Pennsylvania Constitution in taking away municipalities’ ability to strike a balance between oil and gas development and “the preservation of natural, scenic, historic and esthetic values of the environment by requiring a municipality to allow industrial uses in nonindustrial areas with little ability to protect surrounding resources and community” because, under § 3203, the General Assembly specifically stated that all local obligation or power to deal with the environment was preempted because Chapter 32 occupied “the entire field to the exclusion of all local ordinances.” Because municipalities were relieved of their responsibilities to strike a balance between oil and gas development and environmental concerns under the MPC, the Municipalities failed to make out a cause of action under Article 1, § 27.

Section 3305(a) does not violate the Separation of Power doctrine by permitting an executive agency, i.e., the Pennsylvania Public Utility Commission (the “Commission”), to perform both legislative and judicial function. Section 3305(a) merely allows the Commission to give a nonbinding advisory opinion, and § 3305(b) specifically gives the Court de novo review of a Commission final order.

The setback, timing and permitting provisions and requirements for municipalities under Act 13 are not unconstitutionally vague. Both §§ 3304 and 3215 provide specific information regarding the local ordinance requirements. Section 3215 specifically provides well location restrictions and the distance within which they may be drilled from existing water wells, surface water intakes, reservoirs or other water supply extraction points. While § 3304(b)(4) does not provide for adequate standards, § 3304 is not unconstitutionally vague.

Constitutionality of Ordinance—City Ordinance Restricts Medical Marijuana Collectives to Those Previously Registered, Banning All Others

Collectives argue ordinance is unconstitutional in violation of equal protection and procedural due process

Citation: *420 Caregivers, LLC v. City of Los Angeles*, 207 Cal. App. 4th 703, 143 Cal. Rptr. 3d 754 (2d Dist. 2012)

CALIFORNIA (07/19/12)—This case addressed the issue of whether a municipal zoning ordinance restricting medical marijuana collectives was unconstitutional and/or preempted by state law.

The Background/Facts: In January 2010, the City of Los Angeles, California (the “City”), passed an ordinance (the “Ordinance”) that regulates the number and geographic distribution of medical marijuana collectives within City limits. The City enacted the Ordinance “for the express purpose of protecting the health, safety, and welfare of the City residents by regulating the collective cultivation of medical marijuana inside City limits.” The Ordinance regulates all “medical marijuana collectives,” defined as “incorporated or unincorporated associations of four or more qualified patients, persons with identification cards, or primary caregivers, who collectively or cooperatively associate at a given location to cultivate medical marijuana in accordance with the [California’s Compassionate Use Act] CUA and [California’s Medical Marijuana Program Act] MMPA.” The Ordinance caps the total number of medical marijuana collectives to 70. The Ordinance limits those eligible to register for the 70 spots to including those who had previously registered with the City under a prior ordinance three years earlier. In enacting those limits, the City reasoned that collectives that had registered under the prior ordinance had already shown a willingness to be openly compliant with and regulated by the law. The Ordinance essentially banned from operating in the City medical marijuana collectives that had not previously registered.

In March 2010, various collectives and members of collectives (the “Collectives”) filed lawsuits seeking to enjoin enforcement of the Ordinance. Those lawsuits were eventually consolidated. Among other things, the Collectives argued that the: (1) the Ordinance was unconstitutional in violation of federal equal protection rights because it required eligible collectives to have previously registered; (2) the Ordinance violated state constitutional procedural due process rights because it required collectives that did not previously register to cease operation immediately without the benefit of a hearing.

The trial court agreed with the Collectives’ arguments. The court issued a preliminary injunction, enjoining enforcement of portions of the Ordinance on those grounds.

The City appealed.

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

The Court of Appeal, Second District, Division 8, held that the Ordinance did not violate equal protection (requiring parties similarly situated with respect to a law to be treated alike under the law) by requiring eligible collectives to have previously registered.

The Collectives had failed to make an “as-applied” equal protection challenge, so the court looked only at the constitutionality of the Ordinance on its face. The court explained that where a statute makes distinctions involving inherently suspect classifications or fundamental rights, it is subject to strict scrutiny under the equal protection clause and may be upheld only if the government establishes the distinction is necessary to achieve a compelling state interest. However, in areas of social or economic policy not involving suspect classifications or fundamental rights, a statute must be upheld against an equal protection claim so long as there is any reasonably conceivable set of facts that provides a rational basis for the classification.

Here, the court found the Ordinance did not make a distinction involving either fundamental rights or suspect classification. At its base, held the court, the Ordinance essentially provided a “grandfather provision” “with the added gloss of a prior registration requirement.” So-called “grandfather provisions,” noted the court, “have routinely withstood equal protection challenges.” The court concluded that the exclusion of a group of (unregistered) medical marijuana dispensaries, while perhaps arguably “unfair,” did not violate equal protection under the rational basis test.

The court also held that the Ordinance did not violate state procedural due process by requiring collectives that did not previously register to cease operation immediately without the benefit of a hearing. The court said that California due process protection requires the existence of some statutory benefit or entitlement before it is triggered. Here, the court found no such benefit or entitlement that was in any way affected by the Ordinance. The MMPA did not create a right collectively to cultivate medical marijuana. The MMPA created no right or benefit, other than the right of certain specified persons to be free from prosecution for certain specified state offenses based upon certain specified conduct. The court found that the Ordinance in no way affected the availability of this limited immunity and thus did not abrogate any right or benefit created by the MMPA.

Furthermore, noted the court, even if the MMPA could be construed to create some type of benefit or right affected by the Ordinance, there was no deprivation without due process. The Ordinance was enforceable by the City only if the City commenced formal legal proceedings—misdemeanor criminal prosecutions, nuisance actions, or civil suits—subject to all the procedural protections that full adversarial hearings provide.

The trial court’s order granting preliminary injunction was reversed. The case was remanded for further proceedings consistent with this opinion.

See also: *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976).

See also: *Martinet v. Department of Fish & Game*, 203 Cal. App. 3d 791, 250 Cal. Rptr. 7 (4th Dist. 1988).

Case Note:

The Collectives had also argued that the Ordinance's sunset and penal provisions were preempted by the CUA or the MMPA. The court disagreed, finding neither of these state laws expressly or impliedly sought to occupy the entire field of medical marijuana use. In fact, found the court, the MMPA "expressly contemplates" local regulation in the area of medical marijuana use.

Case Note:

The Collectives had also alleged that the Ordinance's record-keeping and record disclosure requirements violated the state constitutional right to privacy. The court disagreed. Since the Collectives operated in a heavily regulated area, and a number of collectives were involved in criminal activity, any expectation of privacy in the information was unreasonable, and any invasion of any reasonable expectation of privacy was justified by a legitimate and competing state interests.

Water-Related Uses/Authority— Waterfront Property Owners Argue Their Construction of Boathouses on Lake Placid Not Subject to Local Zoning Laws

Owners contend New York's Navigation Law preempts local laws regarding construction in those waters

Citation: *Town of North Elba v. Grimditch*, 2012 WL 2431687 (N.Y. App. Div. 3d Dep't 2012)

NEW YORK (06/28/12)—This case addressed the issues of: whether the State of New York holds title to a lake bed (Lake Placid); whether the State of New York has exclusive jurisdiction over structures on Lake Placid; and whether New York's Navigation Law displaces local land use laws on navigable waters not owned by the state in its sovereign capacity.

The Background/Facts: William H. Grimditch Jr. ("Grimditch") owned lakefront property on the shores of Lake Placid in the Town of North Elba (the "Town"). Grimditch began construction of a boathouse in the waters of Lake Placid adjacent to his lakefront property. He did so without first applying to the Town for a building permit. Similarly, Grimditch's children had begun construction of a second unpermitted boathouse adjacent to their nearby, separate parcel of lakefront property. The Town's Code Enforcement Officer

("CEO") issued a stop work order on the construction of the boathouses. The Town then asked the court to issue a preliminary injunction preventing further construction.

The Supreme Court issued a limited preliminary injunction.

The Town then sought a permanent injunction on the ground that the boathouses were in violation of the Town's Land Use Code ("LUC").

The Grimditches argued that New York's Navigation Law § 30 preempted Town enforcement of the LUC, making it inapplicable to any construction in the waters of Lake Placid. The Grimditches contended that, under the Navigation Law, "navigable waters of the state" (Navigation Law § 2(4)) are subject to the exclusive jurisdiction of the state (Navigation Law §§ 30 and 32).

The Supreme Court later vacated the preliminary injunction, and the Grimditches completed construction of the boathouses.

As to the permanent injunction sought by the Town, alleging violations of LUC, both parties moved for summary judgment. Finding there were no material issues of fact in dispute and deciding the matter on the law alone, the court issued summary judgment to the Grimditches. It dismissed the action against them. In doing so, the Supreme Court held that the waters of the lake were "not privately owned" because of the State's ownership of a public boat launching site and the northeast portion of the lake. As a result, the court concluded that Lake Placid met the definition set forth in Navigation Law § 2(4)—and was "navigable waters"—and, therefore, Navigation Law §§ 30 and 32 applied, conferring exclusive jurisdiction over structures in the lake upon the State. Accordingly, the Supreme Court declared that the LUC did not apply to the construction of the Grimditches' boathouses. The court further declared that the boathouses complied with the State Uniform Prevention and Building Code (the "SBC") and ordered the Town to issue building permits.

The Town appealed.

DECISION: Judgment of Supreme Court affirmed as modified.

The Supreme Court, Appellate Division, Third Department, New York, agreed with the Supreme Court that Lake Placid was subject to the Navigation Law. The court also agreed that the Grimditches' boathouses were structures subject to the SBC. However, the court disagreed that the lake bed was owned by the state in its sovereign capacity, instead finding that title to the lake's bed was held by riparian owners. Most significantly, the court held that the Navigation Law, although applicable, did not preempt the power of local municipalities to administer and enforce local land use laws by conferring upon the State exclusive jurisdiction over structures in the navigable waters of the state. The court held that only when the State owns title to the land under the water in its sovereign capacity does it have exclusive jurisdiction preempting local land use laws.

In so holding on the ownership of the lake bed, the court applied common-law principles governing ownership of inland lakes and rivers. As a general rule, said the court, nontidal waters, with the exception of those that courts have deemed to be owned by the State in its sovereign capacity, are owned in a proprietary capacity by the riparian owners, whether such owners be the State, individuals or other entities. Title to the beds of "these smaller and less

important bodies of water” passes into private ownership with a grant of riparian land, absent an express reservation. Applying this rule to Lake Placid, a nontidal, inland lake, the riparian owners have title to the bed of the lake, concluded the court. Therefore, explained the court, while the State may hold proprietary title to portions of the lake bed based on its ownership of riparian property on the lake, it does not own Lake Placid in a sovereign capacity and, accordingly, does not have “absolute control” over the lake.

In light of its conclusion that the State did not own Lake Placid in its sovereign capacity so as to give it exclusive jurisdiction over “every form of regulation [of the lake] in the public interest,” the court next addressed the issue of whether the Navigation Law was the source of exclusive jurisdiction preempting local authority here. While the court agreed with Supreme Court’s finding that the Navigation Law applies to Lake Placid, the court found that none of the Navigation Law’s provisions gave the State exclusive jurisdiction over structures located in the lake so as to preempt the application of the Town’s zoning restrictions to defendants’ boathouses.

While Navigation Law § 2(2) and § 30 give the Commissioner of Environmental Conservation jurisdiction “over navigation on the navigable waters of the state” in the region where Lake Placid is located, § 30 explicitly provides that “nothing authorized hereunder shall be construed to . . . authorize . . . any infringement of . . . local laws or regulations,” found the court. Thus, by its plain language, Navigation Law § 30 applies only to navigation and does not infringe upon the application of the LUC to structures built upon the waters of Lake Placid, concluded the court.

Likewise, the court found that Navigation Law § 32 was not an exclusive statute controlling the placement of docks and other similar structures in the navigable waters of the state, but was enacted to provide an administrative remedy if a structure placed in navigable waters of the state should interfere with “free and direct access” to the water from any other person’s property, wharf, dock or similar structure. The court concluded that Navigation Law § 32 did not infringe upon the Town’s use of the LUC to regulate the construction of boathouses on the lake.

Moreover, the court found that Navigation Law §§ 46 and 46-a allowed local municipalities to regulate the use of a lake or other body of water within the municipality by setting speed limits for vessels or prohibiting personal watercraft within a designated “vessel regulation zone.”

The court concluded that: “As Lake Placid is not owned by the State in its sovereign capacity and most of the lake is within the Town’s boundaries, the Town’s zoning authority includes that portion of the lake, making the LUC applicable to structures constructed therein.” The Grimditches’ boathouses were subject to the Town’s LUC.

Case Note:

The holding here that the Navigation Law does not confer exclusive jurisdiction upon the State over structures in the navigable waters of the state abrogated holdings in Mohawk Valley Ski Club, Inc. v. Town of Duanesburg, 304 A.D.2d 881, 757 N.Y.S.2d

357 (3d Dep't 2003) and *Higgins v. Douglas*, 304 A.D.2d 1051, 758 N.Y.S.2d 702 (3d Dep't 2003).

Zoning News from Around the Nation

NEW JERSEY

The state Senate has passed a bill (S-1534) that would exempt private universities and colleges from following local zoning laws. The bill now awaits consideration by the state Assembly.

Source: *Town Topics*; www.towntopics.com

PENNSYLVANIA

As detailed in a case summary in this bulletin, a Pennsylvania court has found portions of Act 13 unconstitutional. "That law enacted a sweeping set of changes for how the gas drilling industry operates within Pennsylvania. It created a per-well annual fee, updated dozens of regulations, and, most controversially, dictated which aspects of drilling can and cannot be regulated locally." The court concluded that the Commonwealth "cannot require municipalities to allow drilling in areas where it would conflict with their zoning rules." Other portions of the law, including those governing impact fees, remain in effect.

Source: *Pittsburgh Post-Gazette*; <http://shale.sites.post-gazette.com>

WISCONSIN

The Wisconsin Supreme Court has ruled that municipalities are barred from placing conditions on a livestock facility siting permit that exceed state requirements under the state's livestock and facility siting law, Wis. Stat. § 93.90. The court held that state siting laws and regulations now generally preempt such municipal action.

Source: *State Bar of Wisconsin*; www.wisbar.org

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Zoning Bulletin

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Estoppel—After Issuing Zoning Permit for Project, Zoning Officer Issues Cease and Desist Order

Project applicant invokes doctrine of municipal estoppel

Citation: *Crisman v. Zoning Bd. of Appeals of Town of Morris*, 137 Conn. App. 61, 46 A.3d 1005 (2012)

CONNECTICUT (07/24/12)—This case addressed the issue of

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whether the doctrine of municipal estoppel applied, thereby precluding the enforcement of a cease and desist order that prohibited construction of a proposed structure.

The Background/Facts: Forrest E. Crisman, Jr. (“Crisman”) owned property on the east shore of Bantam Lake in Morris, Connecticut (the “Town”). The primary dwelling on the property was less than 800 square feet in size. Prior to December 2007, a one-car garage erected circa 1900 also was located on the property. The garage was a preexisting, legal nonconforming structure. In December 2007, a tree fell on the garage and caused substantial damage.

Shortly after the tree damaged the garage, Crisman met with the town’s zoning enforcement officer, Leon Bouteiller (“Bouteiller”). Crisman wanted to obtain the requisite permits and approvals for the replacement and enlargement of the garage. After repeated meetings between Crisman and Bouteiller, Bouteiller issued a zoning permit on April 23, 2008. The zoning permit provided for restoration of the existing nonconforming garage and construction of a 1,536-square-foot addition.

In July 2008, at the direction of the Town’s planning and zoning commission (the “PZC”) Bouteiller issued a cease and desist order to Crisman. Although not clear in the cease and desist order, it was later determined that the PZC issued the cease and desist order because Crisman’s proposed structure was not subordinate to the primary dwelling on the property. Therefore, the Town determined that the structure was not a permissible accessory building under the Town’s zoning regulations. At the time the cease and desist order was issued, Crisman had already had expended approximately \$100,000 on the project.

Crisman appealed to the Town’s zoning board of appeals (the “ZBA”). The ZBA upheld the cease and desist order.

Crisman then appealed to superior court.

The court found there was sufficient evidence in the record to support the ZBA’s conclusion that the proposed building was not a permissible accessory building.

Crisman argued, however, that the doctrine of municipal estoppel should apply, barring the Town from enforcing the cease and desist order.

The doctrine of estoppel may be applicable to municipalities in the enforcement of zoning laws. “There are two essential elements to an estoppel: (1) the party [here, the Town] must do or say something that is intended or calculated to induce another [here, Crisman] to believe in the existence of certain facts and to act upon that belief”; and (2) “the other party [here, Crisman], influenced thereby, must actually change his position or do some act to his injury which he otherwise would not have done”

The court agreed with Crisman, finding that he had satisfied all of the requirements necessary to invoke the doctrine of municipal estoppel. Essentially, the court found that Crisman, in reliance on the zoning permit issued to him by the Town's authorized representative, Bouteiller, began construction and expended more than \$100,000 on the project prior to the issuance of the cease and desist order. For those reasons, the court found that the Town should be estopped from enforcing the cease and desist order.

The ZBA and David M. Geremia ("Geremia"), an abutting landowner, who had intervened in the case, appealed.

DECISION: Affirmed.

The Appellate Court of Connecticut held that the doctrine of municipal estoppel applied to bar the Town from enforcing the cease and desist order against Crisman's construction of the garage.

In so holding, the court explained that in seeking municipal estoppel, Crisman had a substantial burden of proof. Crisman needed to establish that: (1) an authorized agent of the Town had done or said something calculated or intended to induce Crisman to believe that certain facts existed and to act on that belief; (2) Crisman had exercised due diligence to ascertain the truth and not only lacked knowledge of the true state of things, but also had no convenient means of acquiring that knowledge; (3) Crisman had changed his position in reliance on those facts; and (4) Crisman would be subjected to a substantial loss if the Town were permitted to negate the acts of its agents.

The court found that Crisman established all of those necessary factors: (1) Bouteiller, as the Town's authorized agent, made statements and took actions calculated to induce Crisman to believe that he was proceeding in compliance with zoning regulations and to induce him to act on that belief; (2) Crisman proved that he had exercised due diligence to ascertain the truth and that he did not know that his proposed structure was not a permissible accessory building and that he had no convenient means of acquiring that knowledge; (3) Crisman relied on Bouteiller's advice and the issuance of the zoning permit; and (4) Crisman's expenditure of more than \$100,000 would be a substantial loss if the cease and desist order was enforced.

See also: *O'Connor v. City of Waterbury*, 286 Conn. 732, 945 A.2d 936 (2008).

Preemption—City Ordinance Bans Medical Marijuana Dispensaries

Dispensaries argue ban is void because it is preempted by state medical marijuana laws.

Citation: *County of Los Angeles v. Alternative Medicinal Cannabis Collective*, 207 Cal. App. 4th 601, 143 Cal. Rptr. 3d 716 (2d Dist. 2012)

CALIFORNIA (07/02/12)—This case addresses the issue of whether a county's complete ban on "medical marijuana dispensaries" conflicts with, and is thus preempted by, California's medical marijuana laws.

The Background/Facts: On December 7, 2010, the Los Angeles County Board of Supervisors banned medical marijuana dispensaries in all zones in unincorporated areas of the County of Los Angeles (the "County") effective January 6, 2011. The County Code ("LACC") § 22.56.196B provides that "medical marijuana dispensaries which distribute, transmit, give, or otherwise provide marijuana to any person, are prohibited in all zones in the County."

In March of 2011, the County filed a nuisance action against Alternative Medicinal Cannabis Collective (doing business as Alternative Medicinal Collective of Covina), Erik M. Andresen, Kara Reyes, Justin W. Samperi, Martin Hill, and Mardy and Nordy Ying (collectively, the "Dispensaries"). It alleged that the Dispensaries violated § 22.56.196 B of the County Code by operating or permitting the operation of a medical marijuana dispensary in the County when such use was banned in all zones in the unincorporated areas of Los Angeles County. The County moved for a preliminary injunction. The trial court granted the motion. It enjoined the Dispensaries "from operating or permitting to operate a medical marijuana dispensary . . . from any . . . location within the unincorporated area of the County"

The Dispensaries argued that the County's ban on all medical marijuana dispensaries conflicted with, and thus was preempted by, California's Compassionate Use Act of 1996 ("CUA") (Health & Saf. Code, § 11362.5) and the Medical Marijuana Program Act ("MMPA") (Health & Saf. Code (§§ 11362.7 et seq.)). The CUA authorized the use of marijuana for medical purposes. The MMPA authorized the operation of a "medical marijuana cooperative, collective, dispensary" in a "storefront . . . outlet."

The County contended that its ban was a permissible land use regulation that was consistent with, and not preempted by, state medical marijuana laws.

The superior court agreed with the County. It characterized the pro-

visions of the CUA and MMPA as “limited criminal defenses from prosecution” for cultivation, sale, and purchase of marijuana. Noting that the County’s ban was “not a criminal ordinance,” but “merely a zoning restriction and ha[d] no impact on the criminal defenses provided by the CUA and MMP[A],” the court rejected the Dispensaries’ preemption argument. The court also found that the County had “ ‘authority to regulate the particular manner and location in which a business may operate’ under the Constitution.”

The Dispensaries appealed.

DECISION: Reversed, and matter remanded with directions.

The Court of Appeal, Second District, Division 1, agreed with the Dispensaries. It held that the County’s complete ban on all “medical marijuana dispensaries,” including collectives and cooperatives authorized under the Health and Safety Code § 11362.775, conflicted with, and was thus preempted by, California’s medical marijuana laws. Accordingly, the court reversed the order granting a preliminary injunction to the County against the Dispensaries’ operation.

In so holding, the court explained that “[i]f otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.” A conflict exists, said the court, if the local legislation “duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication;” “Local legislation is ‘duplicative’ of general law when it is coextensive therewith.” “Similarly, local legislation is ‘contradictory’ to general law when it is inimical thereto.” Also, “local legislation enters an area that is ‘fully occupied’ by general law when the Legislature has expressly manifested its intent to ‘fully occupy’ the area, or when it has impliedly done [so]. . . .”

Here, the court found California’s medical marijuana laws preempted the County’s ban on medical marijuana dispensaries because: “the MMPA authorizes marijuana cooperatives, collectives, and dispensaries and “shields them from nuisance abatement actions.” The court found that “the repeated use of the term ‘dispensary’ throughout the statute and the reference in subdivision (e) of [§ 11362.768] to a ‘storefront or mobile retail outlet’ ” made it “abundantly clear that the medical marijuana cooperatives or collectives authorized by [§] 11362.775 are permitted by state law to perform a dispensary function.” The court also found that the MMPA expressly afforded immunity to nuisance abatement actions under § 11570. Section 11570 provides for exclusively civil remedies to curb the use of property for illegal drug activity, such as injunctions, damages, closing a building, and selling fixtures and personal property therein. Moreover, the court pointed to Civil Code § 3482, which specifies “[n]othing which is done or maintained under the express authority of a statute can be deemed a

nuisance.” Because medical marijuana cooperative or collective cultivation projects were authorized by the express terms of Health and Safety Code § 11362.775, the court found that Civil Code § 3482 applied, and their mere existence and operation (i.e., as dispensaries) pursuant to state law could not be deemed a nuisance under Civil Code §§ 3479 or 3480.

The court concluded that state law preempted the County’s ban.

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

See also: *City of Corona v. Naulls*, 166 Cal. App. 4th 418, 83 Cal. Rptr. 3d 1 (4th Dist. 2008).

See also: *City of Riverside v. Inland Empire Patient’s Health and Wellness Center, Inc.*, 133 Cal. Rptr. 3d 363 (Cal. App. 4th Dist. 2011).

See also: *City of Lake Forest v. Evergreen Holistic Collective*, 138 Cal. Rptr. 3d 332 (Cal. App. 4th Dist. 2012).

Case Note:

In its holding, the court made clear that a complete ban, such as the County’s ordinance here, stood in an “entirely different relationship to California’s medical marijuana law than a temporary moratorium, general regulations applicable to all business operations, and reasonable restrictions on the location of medical marijuana collectives or cooperatives”—which all had been upheld as valid.

Case Note:

The court further concluded that “the Legislature in Health and Safety Code [§] 11362.775 intended not only to bar civil nuisance prosecutions under [§] 11570, but also to preclude nuisance claims under Civil Code [§] 3479,” the general nuisance statute (i.e., applying the “special over the general” rule of statutory construction).

Case Note:

The court held that the County’s ordinance banning medical marijuana dispensaries was preempted by the MMPA, notwithstanding § 11362.768. Section 11362.78(f) provides that the MMPA does not prohibit local governments from adopting ordinances that “further restrict the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment or provider.” Section 11362.768(g) provides that nothing in the MMPA “shall preempt local ordinances, adopted prior to January 1, 2011,

that "regulate the location or establishment" of medical marijuana dispensaries. The court looked at the ordinary meanings of "restrict" and "regulate" and found they suggested a "degree of control or restriction falling short of 'banning,' 'prohibiting,' 'forbidding,' or 'preventing'." The court determined that had the Legislature intended to include an outright ban or prohibition among the local regulatory powers authorized in § 11362.768, subdivisions (f) and (g), it would have said so. The court found, therefore, that the Legislature decided in § 11362.775 to insulate medical marijuana collectives and cooperatives from nuisance prosecution "solely on the basis" that they engage in a dispensary function. "To interpret the phrases 'further restrict the location or establishment' and 'regulate the location or establishment' to mean that local governments may impose a blanket nuisance prohibition against dispensaries would frustrate the Legislature's intent and purpose in enacting the MMPA and CUA," said the court.

For similar reasons, the court also held that § 11362.83, which provides that the MMPA does not prohibit local governments from adopting "local ordinances that regulate the location, operation, or establishment of a medical marijuana cooperative or collective," does not authorize local governments to ban, prohibit, forbid, or prevent all medical marijuana collectives and cooperatives from operating within the entire jurisdiction solely on the basis that they engage in medical marijuana activities authorized by the MMPA.

Case Note:

The court also concluded that the CUA § 11362.5(b)(2), which states that nothing in its section should be construed to "supersede legislation prohibiting persons from engaging in conduct that endangers others," does not authorize local governments to completely ban medical marijuana dispensaries. The court said that in light of the provisions and intent of the MMPA, merely operating a medical marijuana collective or cooperative authorized by § 11362.775 cannot be deemed to constitute "engaging in conduct that endangers others" or "condon[ing] the diversion of marijuana for nonmedical purposes."

Uses/Construction of Ordinance— Village Zoning Ordinance Prohibits Operation of Formula Fast-food Restaurants

Property owner says ordinance unlawfully
regulates ownership of property

Citation: *Mead Square Commons, LLC v. Village of Victor*, 97 A.D.3d 1162, 948 N.Y.S.2d 514 (4th Dep't 2012)

NEW YORK (07/06/12)—This case addressed the issue of whether a zoning ordinance prohibiting formula fast-food restaurants was invalid for unconstitutionally regulating based solely upon the ownership or control of the restaurant owner and not upon the characteristics of the use itself.

The Background/Facts: Mead Square Commons, LLC (“Mead”) owned property in the Central Business District of the Village of Victor (the “Village”). Mead sought to rent its commercial space to a Subway restaurant.

Section 170-13(C)(1) of Village’s Zoning Ordinance (the “Ordinance”) prohibited the operation of a formula fast-food restaurant (“FFFR”) in the Village’s Central Business District. A FFFR was defined as “[a]ny establishment, required by contract, franchise or other arrangements, to offer two or more of the following: [1] Standardized menus, ingredients, food preparation, and/or uniforms[;] [2] Prepared food in ready-to-consume state[;] [3] Food sold over the counter in disposable containers and wrappers[;] [4] Food selected from a limited menu[;] [5] Food sold for immediate consumption on or offpremises [;] [6] Where customer pays before eating.”

The Subway that Mead sought to rent its commercial space to qualified as an FFFR under the Ordinance.

Mead commenced a legal action challenging the validity of the Ordinance. It argued that the Ordinance should be declared invalid because it was unconstitutional. Mead alleged that the Ordinance was unconstitutional because it was “based solely upon the ownership or control of the restaurant owner and not upon the characteristics of the use itself.”

Both Mead and the Village moved for summary judgment. Each asked the court to find that there were no material issues of fact in dispute and to decide the matter in its favor on the law alone.

The Supreme Court granted summary judgment in favor of the Village.

Mead appealed.

DECISION: Affirmed as modified.

The Supreme Court, Appellate Division, Fourth Department, New York, held that the Ordinance validly regulated use, not ownership, of Mead's property.

The court noted that the Ordinance did not single out a particular property owner for favorable or unfavorable treatment. Rather, the court found that all property owners in the Central Business District were treated the same under the Ordinance; all property owners were prohibited from operating an FFFR. Indeed, Mead was not an FFFR, nor did it seek to operate an FFFR. Therefore, Mead's ownership status bore no relationship to its inability to use its property for an FFFR; rather, Mead's use of the property was what was being regulated.

Thus, the court concluded that the Ordinance regulated the use, not the ownership, of the subject property.

The court declared the Ordinance, including the prohibition of FFFRs, was valid and enforceable.

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

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

Case Note:

Mead had further alleged that the Ordinance was invalid because it "excessively regulate[d] the details" of Mead's business operations. The court disagreed, but did not provide an explanation for its holding.

Case Note:

The court noted that Mead failed to preserve for the court's review any contention that there was no rational basis for distinguishing between FFFRs and non-FFFRs that meet two or more of the criteria set forth in the Ordinance. Mead failed to advance that contention in support of its motion for summary judgment.

Zoning News from Around the Nation

NEW YORK

Reportedly, Lenape Resources, a natural gas drilling company, is threatening to sue if New York regulators do not end moratoriums on horizontal drilling and high-volume fracturing (i.e., "fracking"). John Holko, president of Lenape Resources, argues that such moratoriums violate a 1981 law that says state rules supersede local ordinances in the regulation of gas development. Lenape argues that the state's Department of Environmental Conservation has an obligation to take enforcement action against towns that ban drilling.

Source: *The Republic*; <http://www.therepublic.com>

The Cape Vincent Town Council has voted to adopt a new zoning law that includes strict restrictions on wind turbines.

Source: *WRVO*; www.wrvo.fm

PENNSYLVANIA

On June 30, 2012, "state legislators slipped a ban on drilling in the South Newark Basin into a tax law, which passed. The ban on granting drilling permits will extend to 2018 to give the state time to evaluate the potential of the reserves and the impact on the environment." Reportedly, the ban "was also an attempt to protect the region from the new natural gas development law, Act 13."

Source: *Warminster Patch*; <http://warminster.patch.com>

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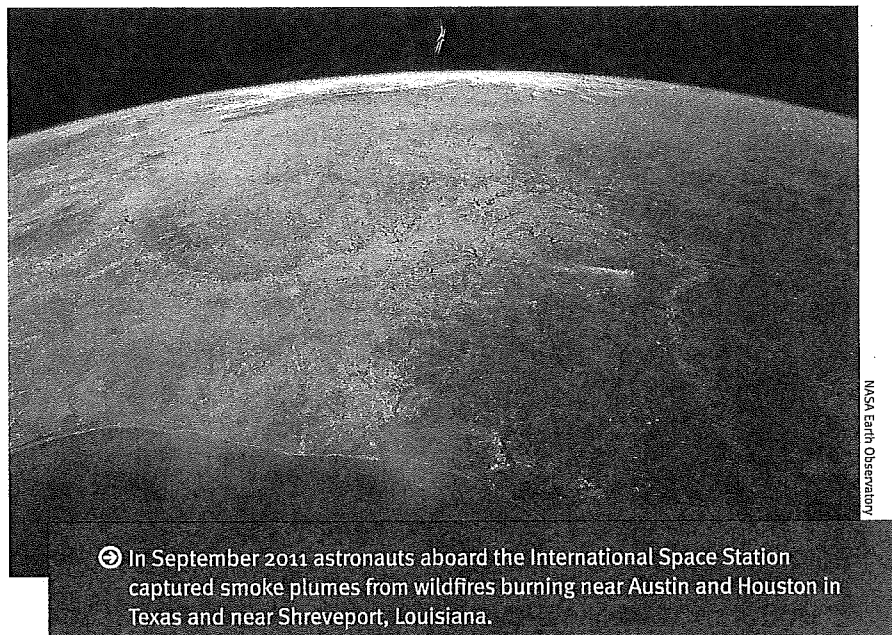
PRACTICE WILDFIRE MITIGATION



Limiting Wildfire Risk Through Land-Use Controls

By Molly Mowery and Paul Anthony, AICP

Wildfire hazard is a growing threat to communities around the United States.



📍 In September 2011 astronauts aboard the International Space Station captured smoke plumes from wildfires burning near Austin and Houston in Texas and near Shreveport, Louisiana.

Preferences for second homes, suburban lifestyles, and the desire to live closer to nature have pushed populations into the wildland-urban interface (WUI)—areas with more vegetation, parks, and forests than their dense city center counterparts. Living closer to nature offers many benefits, but all too often the risk of brush, grass, or forest fires gets overlooked.

The reality of wildfire, however, is one we cannot afford to ignore. In 2011 the National Interagency Fire Center reported nearly 75,000 wildfires in the U.S., the majority of which were a result of human activities. At a time when public-sector

budgets are being slashed, wildfire costs for suppression and damages are soaring. The federal government typically spends more than one billion dollars annually on responding to fires on both public and private land. In fact, the bulk of suppression costs goes to protecting homes, infrastructure, and other community amenities in the WUI (Headwaters Economics 2009). Losses associated with fires occurring on municipal lands also cost local governments millions of dollars annually (Thomas and Butry 2012).

In addition, the impacts to our communities play out in other tragic ways. A recent illustration is the historic 2011 fire season in

Texas. At its peak last October, nearly 97 percent of the state was experiencing extreme or exceptional drought. This was preceded by 12 months of record-breaking temperatures and the driest period on record since the state began record keeping in the late 19th century. The extreme heat and dry conditions resulted in wildfires throughout Texas that burned nearly four million acres of land, destroyed nearly 3,000 homes, and claimed 10 lives. Major disaster declarations were made for 52 counties. Damage from the fires was estimated at roughly a half-billion dollars (Dutzik and Willcox 2012).

Texas is not alone. Trends throughout the country remind us that many different regions are facing prolonged droughts, longer and hotter summers, a rising number of climate-related threats to forest health such as pine beetle infestation, and the limited ability to manage landscapes—all of which can significantly increase wildfire risk (Bachelet et al. 2007). As communities push for strong economic, social, and environmentally responsible agendas, we should not be caught off guard by the next wildfire disaster. We know fires will continue to happen; the question is, how can we reduce wildfire threat to communities living close to nature and enjoying its benefits without causing harm and compromising safety?

The National Fire Protection Association (NFPA), a nonprofit organization whose mission since 1896 has focused on protecting lives and property from fire, has made it a priority to answer this question. For the past 25 years NFPA has been engaged with

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About the Authors

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a host of federal, state, and local government agencies to support voluntary and mandatory measures that address wildfire risk. These efforts range from outreach and education, such as the successful Firewise Communities/USA recognition program, to the more recent Fire-Adapted Communities initiative, a major awareness campaign to increase public knowledge of resources and actions to reduce wildfire risk in the WUI.

NFPA has also been building stronger connections with the planning and development community, seeing a significant opportunity to influence the wildfire outcome through proactively planning for safer, more resilient communities. Very little research, however, has been done on the effectiveness of current land-use tools that planning professionals can employ as a means for reducing wildfire risk.

With WUI fire risks rising and public budgets shrinking, NFPA embarked on a study to assess the potential effectiveness of using local regulatory and planning tools to address community wildfire risk. The ultimate purpose of the study, however, was not to provide an inventory of wildfire regulations used by local communities, but to identify how planners can (and should) become more active participants in keeping their communities safe from wildfire. Clarion Associates was hired to conduct the study because of its broad national practice and expertise in sustainable development practices including hazard mitigation and efficient public administration.

The good news, as reinforced by the study's findings, is that the current tech-

nical tools and approaches available for addressing wildfire risk, such as defensible space and fire-resistant roofs, are effective at protecting structures and lives if used appropriately. Planners can confidently rely on the proven work of professional firefighters, foresters, landscape architects, and others who have developed these tools to fight wildfire, many of which are published in model codes and are easy to find.

serve as advisors for the study. The communities were selected to include a mix of geographic, demographic, and regulatory environments and were located in the regions with the highest wildfire risk—the Southwest, Rocky Mountains, West Coast, and Florida.

We then prepared a comprehensive inventory of the regulatory techniques used in each community to address wildfire risk. Few

With WUI fire risks rising and public budgets shrinking, NFPA embarked on a study to assess the potential effectiveness of using local regulatory and planning tools to address community wildfire risk.

The focus of this article will be on the lessons learned and regulatory implications of the study for planners, rather than a comprehensive recitation of the raw data or a listing of all the wildfire-related techniques used in local codes, both of which are available in the full report (www.nfpa.org/regulatorytools). We begin with an overview of the study's methodology and results.

REVIEW OF WILDFIRE REGULATORY TOOLS

Forty-two communities were initially selected for a targeted review of their local wildfire regulations. This selection was based on a literature review of current wildfire regulatory issues and included input from a panel of technical experts formed to

studies have collected this type of regulatory data in one place. Voluntary programs such as Community Wildfire Protection Plans or Firewise Communities/USA were not included in the research because our focus was on local regulatory controls (not advisory, voluntary, or educational programs) and especially those in fire, building, and land-use codes.

The inventory separated wildfire tools into one of four categories: 1) community scale, 2) neighborhood or subdivision scale, 3) individual lot scale, and 4) individual building scale. This approach provides a hierarchy of tools that allows planners to quickly assess and compare at what "level" each WUI tool regulates and to select the tools that correspond most closely with

PROFILES OF INTERVIEWED COMMUNITIES

Community	Population	State Regulatory Environment	Primary WUI Official(s)	Community-wide tools	Neighborhood subdivision level tools	Lot-Specific tools	Structural tools
Palm Coast, Florida	74,000	State WUI mapping	Building Dept.	High	Medium	Medium	None
North Port, Florida	56,000	State WUI mapping	Fire Dept.	High	Low	Medium	None
Clark County, Washington	425,000	No state WUI requirements	Building Dept.	Medium	Medium	Medium	Medium
Missoula County, Montana	110,000	No state WUI requirements	Fire Dept.	None	Low	Medium	Low
Bend, Oregon	76,000	State WUI mandate	Code Enforcement	High	High	High	Medium
Boise, Idaho	205,000	No state WUI requirements	Fire Dept.	Low	High	High	High
City of Santa Barbara, California	88,000	State WUI mandate	Fire Dept.	High	High	High	High
Glendale, California	192,000	State WUI mandate	Fire Dept.	High	High	High	High
Douglas County, Colorado	285,000	State WUI mapping	Building (Fire Specialist)	High	High	High	High
Utah County, Utah	530,000	State WUI model code	Fire Dept.	Medium	High	Medium	High
Village of Ruidoso, New Mexico	8,800	No state WUI requirements	Forestry Dept.	High	High	High	High
Prescott, Arizona	40,000	No state WUI requirements	Fire Dept.	High	High	High	High

their wildfire hazard needs and political environment.

INTERVIEWS WITH LOCAL COMMUNITIES

Based on the literature review and categorization of regulatory tools, 12 communities were selected for phone interviews with those local officials most responsible for the creation, implementation, and enforcement of local wildfire regulations (usually the fire marshal, building official, planner, local forester, landscape architect, or WUI specialist, as applicable). These discussions analyzed how well local wildfire regulations were working and where improvements could be made. This “ground truthing” is critical because, as planners know too well, regulations that appear innovative and desirable on paper may prove to be ineffective, unenforceable, or even counterproductive in practice.

The full text of the interview questions can be found in the report, but the purpose of the questions was to find out why communities adopted WUI standards, how the political process went, how their standards are working, whether enforcement was a problem, and how WUI regulations can be improved.

The 12 communities were selected to represent a range of cities and counties within each of the following four regulatory

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categories, namely: 1) states with a WUI regulatory mandate; 2) states with a WUI model code; 3) states that provide WUI mapping; and 4) states without WUI mapping, models, or requirements. These categories are important because a community’s regulatory response to wildfire is often heavily influenced by state regulations and resources or the lack thereof. The table above provides a summary of each community’s WUI profile.

The interview responses did not lend themselves to quantitative summary (i.e., five of 12 respondents said X) because the questions often required nuanced or multi-layered answers. Thus, answers were summarized according to the levels of general agreement and central themes, with indications of frequency where applicable (i.e., “most” communities do X).

The most significant general responses are summarized below:

- Most interview communities adopted their first set of WUI regulations in response to a major wildfire or due to state requirements or incentives. A smaller minority adopted wildfire regulations proactively based on historical trends and concerns about imminent wildfire danger.
- The public was often skeptical of proposed WUI regulations at first but usually came to accept or support the wildfire standards if a strong public education effort (such as

Firewise Community initiatives) was made to address concerns and correct misinformation in a transparent and open manner. Reaching out to stakeholders with a vested interest in wildfire regulations, such as home builders, second-home owners, and real estate brokers, was often necessary.

- Some communities adopted some portion of a NFPA uniform standard, an International Code Council model WUI code, or both. No community adopted a model WUI-related code from either organization in full, usually because those “packages” of standards were more comprehensive and complex than the community needed. Many communities used the models codes for guidance in crafting their own regulations, but did not adopt them in any formal way.
- Most communities were generally happy with the technical aspects of their WUI standards because wildfire standards are based on proven science and techniques for reducing wildfire risk.
- By far the most common WUI enforcement problem was the lack of ongoing maintenance

wildfire risk than new development because there is usually more of it in high-hazard areas and it is often served by nonconforming infrastructure (narrow streets, inadequate water supply, etc.), while new development is typically constructed in accordance with the latest WUI standards.

- Public education and nonregulatory programs that provide direct assistance to home owners (e.g., free expert consultations, free “chipper” days, or regular debris pick-up days during fire season) are important contributors to the effectiveness of WUI regulations.
- WUI regulations were usually administered and enforced by the fire or building department, and planners were rarely directly involved. However, because fire department personnel were usually not trained to perform enforcement duties, shifting enforcement to staff specifically trained in enforcement often resulted in better compliance. In all cases, having one or more persons with clear responsibility for and expertise in wildfire regulatory implementation was a significant aid to effective and consistent enforcement of wildfire regulations.

sections, reflecting the need for interdepartmental enforcement of many wildfire programs. For example, the structural protections (e.g., fire-resistant roofs) may be in the building code, the fire-fighting water supply and road access requirements may be in the fire code, and the vegetative (e.g., defensible space) requirements may be in either the fire or land-use code. In other cases a separate, stand-alone wildfire ordinance may be adopted. Generally speaking, land-use codes were the least likely to contain significant wildfire regulations.

USING LAND-USE REGULATIONS TO REDUCE WILDFIRE RISK

So how can the report’s findings help planners address (or improve) wildfire regulations in their community? As mentioned above, land-use planners have traditionally not played a significant role in wildfire mitigation, instead deferring responsibility to the fire marshal, building official, or other professionals. The number of ways planners can positively influence the outcome, however, is myriad. The following recommendations represent an abbreviated list of ways that planners can engage in addressing wildfire risk while working in their community. Many of these tools overlap and can be combined in unique ways to respond to local circumstances.

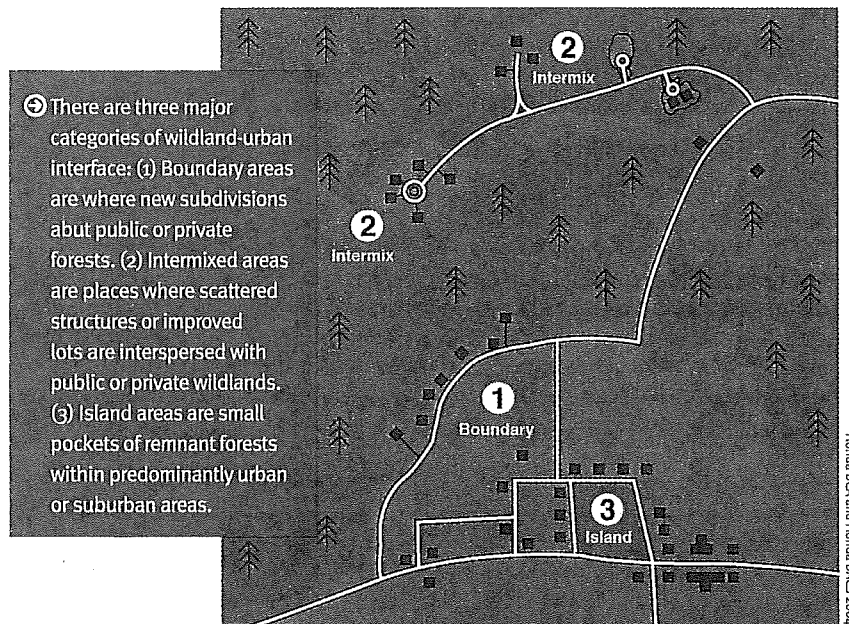
Comprehensive Plan/Zoning Policies

Zoning requirements that are explicitly supported by public policy through, for example, the goals and policies in a comprehensive plan tend to be much more legitimate and legally enforceable. Thus, the reduction of fire risk and protection of the ability to fight fires in the WUI should be added into local comprehensive plans and zoning purpose statements.

Subdivision Ordinances

Subdivision controls are one of the two most fundamental land-use regulatory tools—the other being zoning. In most states local government powers to regulate subdivision are independent of their powers to zone (i.e., to control the use of land). In communities that have not adopted zoning, subdivision controls may be the best and only option to address wildfire risk at a landscape level. Here are a few possible approaches to reducing fire risk through subdivision standards:

- For unplatted and undeveloped areas, add mapped high and extreme fire risk areas as types of sensitive lands where plats may not locate buildable lots, where allowed density



nance of defensible space (i.e., control of vegetation that creates wildfire risk) due to the lack of landowner knowledge, political will, or local financial resources. In addition, the lack of funding to conduct public education and vegetative clearing was cited as a significant deficiency.

- The interview communities agreed that existing development presents a greater

flexibility in the administration of WUI regulations is critical for maintaining community and political support. One-size-fits-all solutions that are unable to respond to unique wildfire and development circumstances in the community are seldom effective and often create political opposition.

- Wildfire regulations typically are scattered throughout multiple local codes and code

is reduced, or where building envelopes located to reduce fire risk must be shown.

- Ensure that subdivision regulations include adequate standards for fire protection water supply and access roads to allow efficient firefighting.
- Adopt a cluster subdivision regulation that requires lots to be grouped away from high and extreme fire risk areas.
- Require or encourage new subdivisions to adopt defensible space standards in their covenants, conditions, and restrictions with clear language for enforcement by the homeowner's association.

Overlay Zoning

Overlay zones are most useful when the intent is to regulate development on a geographic basis rather than a parcel basis. And because high wildfire risk area can usually be mapped clearly, a wildfire overlay is often the centerpiece of a local wildfire program. An analogous and common example is the Federal Emergency Management Agency's flood risk maps that create overlay zones to govern the uses, location, and design (i.e., "floodproofing") of buildings in floodplains. The risks involved in WUI areas are different, but the legal principles are the same—local governments can always prevent risky busi-

nesses in the overlay zone or require specific construction techniques (e.g., fire-retardant roofs, special soffit, or vent design) or specific site management practices (e.g., vegetation control) within the overlay zone.

Development and Design Standards

When development is allowed in the WUI, it is important that specialized development standards be included to minimize the risk of wildfire:

- Ensure that all existing code standards, especially those for landscaping, scenic protection, stream/riparian buffers, steep slopes, and tree preservation, are consistent with defensible space/vegetation management requirements.
- Ensure that sign regulations do not prohibit signs required by WUI regulations or those necessary to allow firefighters to locate rural and remote properties and structures.
- Consider requirements for postfire recovery to, in particular, protect soils from erosion where vegetation has been damaged by fire.

Incentives

For communities not ready to adopt mandatory WUI standards, especially rural or low-density communities, incentives may be the more politically acceptable option:

- Waive platting or site plan approval fees for development applications that agree to implement and maintain defensible-space protections or install fire-resistant roofs.
- Allow construction of a larger house in return for commitment to build a more fire-resistant house and to implement good vegetation management practices.
- In many cases any regulation that can be imposed on a mandatory basis can be con-



USDA Forest Service

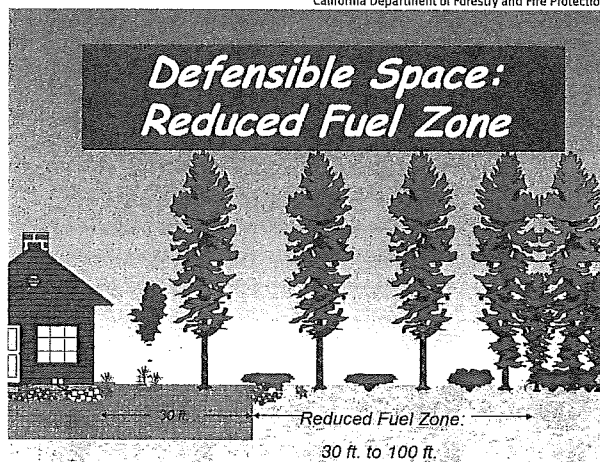
Residents of these homes are at an especially high risk from wildfires, given the lack of defensible space around many of the structures and the subdivision's single access route.

- Require that open space areas, whether required or part of the project's design (e.g., golf course), be located to also serve "double-duty" as a community wildfire break.

Zoning

Zoning is the local government's right to control what uses can occur on legally platted lots and tracts of land as well as the size and location of structures on those lots and tracts. Cities and counties can use zoning to prohibit risky businesses (industry using or storing combustible or hazardous materials, gas stations, etc.), sensitive populations (hospitals), and large assembly uses (schools) in high and extreme fire risk areas. Alternately, the local zoning may only permit these risky or sensitive activities and operations as conditional uses subject to a public hearing, where fire risks can be considered and a permit denied if the risks cannot be adequately mitigated. Possible conditions include limitations on the size or capacity of the facility or requirements for an evacuation plan.

nesses, sensitive populations, and large assemblages of people from occupying lands with higher risks to public health and safety. Cities and counties can draft an overlay district based on high and extreme fire risk mapping to prevent the establishment of risky



- Defensible space requirements, either in development regulations, or in the covenants, conditions, and restrictions for new residential subdivisions are one of the most important pieces of a local wildfire mitigation strategy.

verted into an incentive by offering landowners something of value in exchange for voluntary wildfire mitigation.

Site Plan Review

Site plan review allows a “second look” at the proposed development (after subdivision and zoning) before issuing building permits. If zoning and subdivision approvals are not needed, site plan review can be used to ensure, for example, that high and extreme fire risk areas are avoided, that adequate and well-sited access is provided, and (if possible) that defensible spaces are included.

Transfer of Development Rights

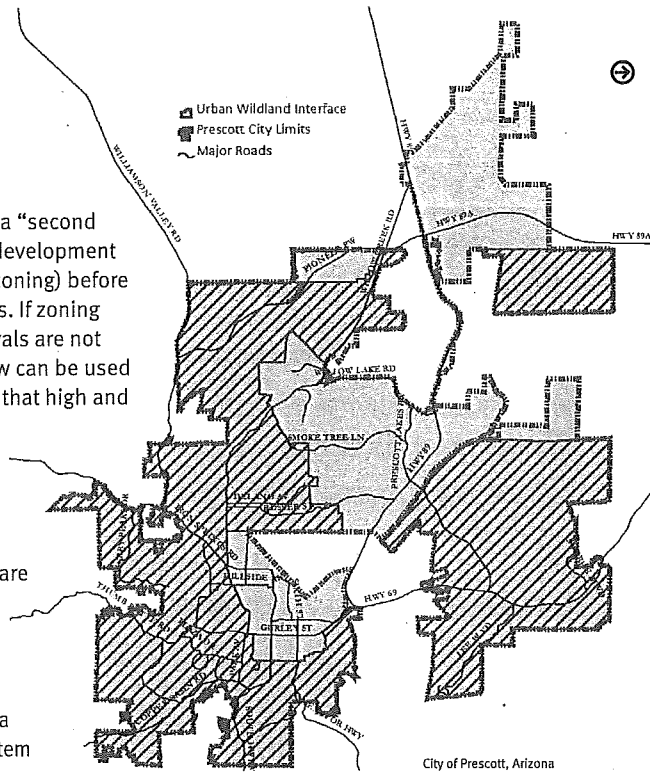
If the city or county uses a growth management system to ration development approvals, it can ensure that avoidance of high and extreme fire risk areas is reflected in the criteria for evaluation of proposals or for admission to a lottery system.

Maintenance and Operation Standards

Communities can include operating and maintenance standards in the zoning code that obligate all property owners subject to defensible space requirements. These standards may include provisions to ensure that vegetation is removed and the resulting debris disposed of safely on an annual basis and that required address or directional signs on the property be maintained in legible condition. Perhaps the simplest and most effective strategy is to adopt a jurisdiction-wide “weed ordinance” that requires all properties to prevent the growth of vegetation that could become a wildfire hazard (or be deemed a public nuisance subject to corrective actions and fines). Alternatively, these types of requirements can be added to development agreements.

Enforcement

Cities and counties can ensure that the land-use code enforcement provisions clarify that failure to maintain required fire risk reduction features is a violation of that code. List violations of the fire code as violations of the land-use code so they can (at the local



Prescott, Arizona, has some of the nation’s most comprehensive WUI standards. The city entrusts primary enforcement responsibilities to its Wildfire Code Enforcement Officer, who has demonstrated expertise in WUI implementation.

wildland-urban interface is not just a wildfire problem, it is a development location problem, just as building in a floodplain is not just a flood problem but an issue with dangerously located development.

If planners continue to assume that fire and building professionals will handle this issue, the result will be regulatory schemes that fail to address the underlying risks and costs created by the approval of development in high risk areas. In short, “planning” to prevent or minimize structures in the WUI is different than merely “bracing” structures for an impending wildfire event with regulatory controls.

Instead of just deferring to fire and building officials, planners should embrace their role as being uniquely qualified and positioned to assist the public in creating a more comprehensive approach to wildfire risk—one that goes beyond traditional fire-centric mitigations and applies land-use planning tools and regulations to fundamentally change the location, design, and type of development in high wildfire zones. These actions can complement and augment the already well-proven techniques applied in local fire and building codes for addressing wildfire risk.

government’s option) be enforced through administrative land-use enforcement procedures often available in land-use codes.

CONCLUSION

Although traditional roles may have dictated that the wildfire problem was someone else’s responsibility, planners can and should have a significant role in protecting communities from this hazard. After all, the

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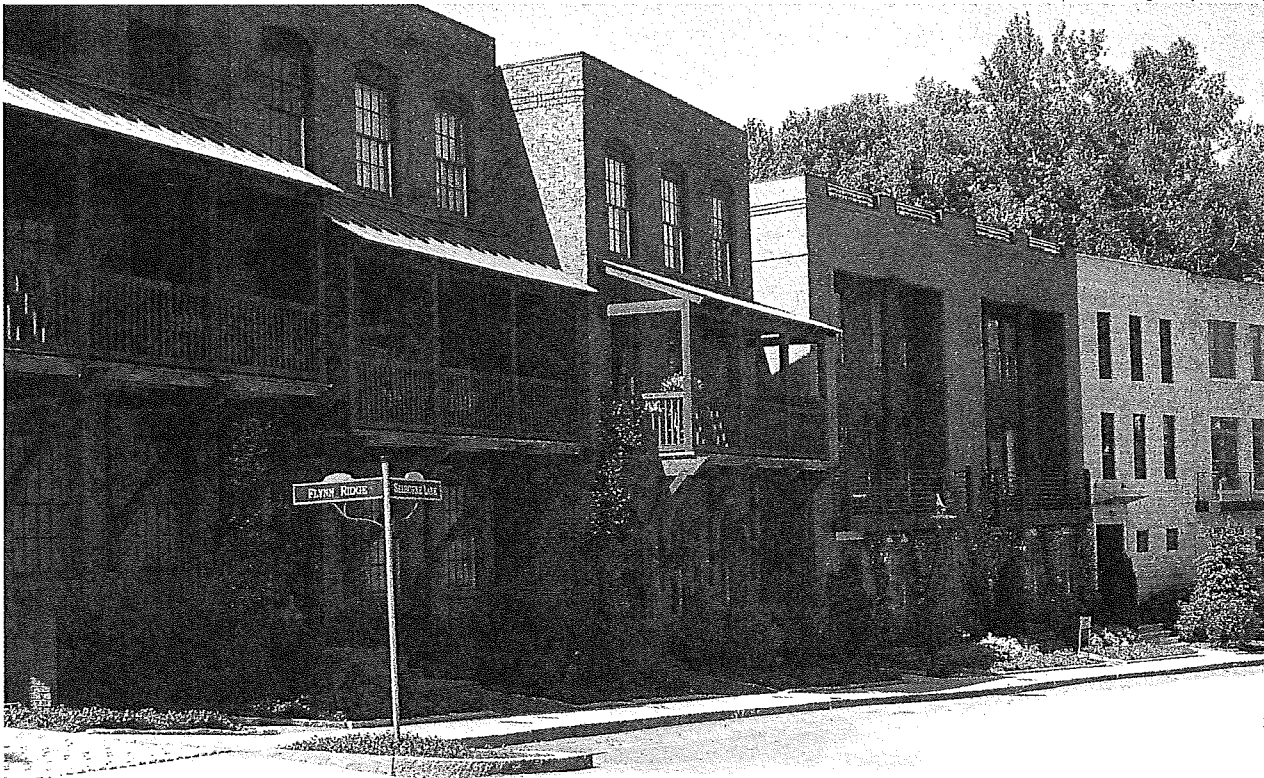


Avoiding Idiotic Variances

By Lane Kendig

The drafters of the first zoning ordinances felt it was legally essential to provide a variance procedure to deal with unique circumstances that render a lot unbuildable.

All photos and diagrams by Lane Kendig



⊕ Because these town houses have a variety of unit configurations, many communities would require variances before approving the project.

For example, an existing lot might have a small ravine on it, making it impossible to locate a home within the required setbacks. The ravine was a unique condition that differed from the conditions on neighboring lots and a variance could allow for a relaxation of the setbacks to make the lot buildable.

All state enabling laws delegate the power to grant variances to a zoning board or board of appeals (comprised either of elected or appointed officials). These state laws generally include criteria that should

be met in granting a variance. Some common ones are:

- There is a special condition on the site not present on other properties in the district.
- A literal enforcement of the provisions will result in unnecessary hardship.
- The condition is not self created.
- A strict interpretation would prevent the owner from enjoying the same rights as others in the district.

- A variance would not create a special privilege for the land owner.

The variance was an excellent tool for big cities where streets and blocks were often platted in advance of development and before the adoption of zoning. The initial intent of the variance was to grant relief to an existing lot that was rendered unbuildable, but planning and zoning objectives have expanded greatly since the first zoning codes. Consequently, there is now a second class of variances that develop-

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About the Author

Lane Kendig is the founder and former president of Kendig Keast Collaborative. He has been practicing and writing about the relationship between community design planning and regulatory tools for more than 40 years. In addition to the recent books *Community Character* and its companion, *A Guide to Planning with Community Character*, Kendig is the author of *Performance Zoning* and the PAS reports *Too Big, Boring, or Ugly*; *Traffic Sheds*, *Rural Highway Capacity*, and *Growth Management*; and *Performance Standards for Non-Residential Uses*.

ers seek because standards in the code do not permit a creative solution to laying out the development or result in the loss of lots or increased costs. A third class of variance applies to a whole series of controls in the zoning—none of which render a site unbuildable—that simply frustrate a developer's attempt to build a different type of community. For example, in some communities developers might have to obtain more than a dozen variances to build a cluster subdivision, planned unit development (PUD), or a rural hamlet. Yet another class of variances is attributable to code amendments that create a host of nonconforming uses. These last three classes are foolish, or idiotic, variances because good planning is frustrated by the ordinance.

Unfortunately, the administration of variance requests in many communities can also be described as idiotic. It is not unusual for communities to grant 70 to 95 percent of all variance requests. When nearly every variance for a larger sign, enclosed porch, or reduced setback is granted, then it is foolish to force owners to go through the variance process. This means zoning boards are either ignorant of or not following the local zoning code and variance criteria established by state statute.

Leaving aside the possibility that zoning board members are incompetent, why is this happening? One reason is that zoning boards see themselves as problem solvers for the residents. In small communities this may be a "help your neighbor" attitude. In other cases zoning board members may not understand the role of their quasi-judicial body. In older cities it may simply

be a desire not to impede reinvestment. Too few communities use a hearing officer to create a truly quasi-judicial process, and there is rarely a review of the zoning board's performance.

Planners often share the blame. For example, some planners fail to strongly recommend denial in staff reports when an application fails to meet the criteria. There are many communities where staff never makes recommendations. In the absence of strong recommendations it is easy for zoning boards to grant variances. Furthermore, many variances are the result of poorly written or obsolete codes. Citizens are left to muddle through the zoning board instead of planners proposing code amendments to fix the code and eliminate the need for a variance. If there are many approved variances to a specific provision, it is irresponsible not to amend the code.

The last reason for the idiotic variance is rigidity. The first zoning codes used a minimum lot size combined with setbacks from front, side, and rear property boundaries to control character. Over the last nearly 100 years, designers developed more creative approaches to development: cluster, PUD, mixed use, and traditional neighborhood design. Unfortunately, zoning has not kept up and Euclidean provisions remain the dominant form of ordinance.

In an attempt to provide flexibility, communities introduced conditional approval processes instead of writing flexible standards. In many codes there is a specific enumeration of variances required for cluster or planned development options. The problem with this approach is that it is pro-

cedural and does not address the underlying inflexibility and rigidity. Worse, the approval process quickly became a battleground between developers seeking flexibility and NIMBYists who would prefer no development. While new urbanists decry the failure of Euclidean zoning to permit mixed use and traditional designs, form-based codes are rigid too in their street design, setbacks, requirements for porches and fences, and architectural detailing.

THE SOLUTION

The tongue-in-cheek solution is to permit "idiot variances" when the code is foolish as applied or if it stifles creativity. The reality is this would exacerbate the problem. It is unconscionable for a community to force its citizens to seek a variance (at considerable time, effort, and expense) when relief is nearly always granted. The solution is to reduce the need for variances to a few unique conditions. The discussion in the following sections details various approaches that eliminate the need for a variance to be requested.

Annual Review

One simple procedural means of eliminating improper variance approvals is an annual review. At the end of the year all approved variances would be submitted to the elected officials for review. The staff would prepare a report as to whether the approvals conformed to the required standards. In the case of the municipality that approved numerous sign-size variations, the elected officials could indicate to the zoning board that their actions were either improper—



➡ This mix of single- and two-family homes in Serenbe Hamlet (Chattahoochee Hill Country, Georgia) shows how flexible standards can encourage high-quality design.

directing them not to approve similar requests, or proper—directing staff to change the maximum sign size. Either of the actions should eliminate the need for variances.

Neighborhood Conservation Districts

In cities and counties with a long development history, many subdivisions are nonconforming. Often the problem arose because areas were platted before zoning or because the zoning was changed. The problem of nonconforming residential lots is best addressed by creating a neighborhood conservation (NC) district that matches existing conditions. The NC district is applied to existing developed areas that were built to different standards than current districts, and no unplatted land may be zoned NC.

An example of the problem was a community that 20 years previously had changed the frontage requirement for their 5,000-square-foot lots from 50 to 60 feet. The result was that nearly half the homes in the zone were nonconforming, requiring many home owners to seek variances. This was corrected by creating two neighborhood conservation districts, an NC5n (narrow) and an NC5w (wide). The zoning map was revised to place all 5,000-square-foot lots in the proper class. The result was that

the existing 5,000-square-foot district was eliminated and the map revised so that all the nonconforming narrow lots became conforming. Since these are residential districts, all single-family NC districts can be treated as one with a single-use table entry and lot requirements in tabular form for each district.

to 25-, 26 to 30-, 31 to 35-, 36 to 40-, and 41 to 49-foot lot widths. The result of these two approaches is that all, or nearly all, existing lots become conforming, eliminating the need for a variance. Where setbacks of existing homes are not uniform, the community can use setback averaging to eliminate the need to request a variance.

The problem of nonconforming residential lots is best addressed by creating a neighborhood conservation (NC) district that matches existing conditions.

The NC district works very well when the nonconforming areas are entire developments or blocks, and in most municipalities or counties this will be the case. Occasionally single-family lot size may vary within the block or development, which would require parcel-by-parcel mapping that would be tremendously costly and prone to error. A different approach can be used for these types of areas. All such areas would be NC single family with a table showing ranges of lot sizes, with a setback related to each range. Thus, the table might show 20

Limited Uses

Limited uses are uses permitted by right, provided they meet specific performance criteria. The performance criteria could be location, history, design, or other factors. For example, in many older cities sizeable areas were developed in the 1920s through 1950s with single-family homes, even though the zoning permitted duplexes or multifamily buildings. Decades later, developers saw opportunities to replace single-family homes in these aging neighborhoods with permitted duplexes or

apartments. Predictably, residents often objected that the redevelopment was inconsistent with the character of their neighborhood. While downzoning is a logical response, all existing higher-intensity uses would then become nonconforming. This was a problem for about 25 percent of such areas. However, if the downzoned district permits duplexes or apartments as limited uses, provided they existed on the date of the downzoning all existing units remain conforming uses and can be remodeled or rebuilt. This approach increases the likelihood that residents will accept the existing units, while preventing teardowns that change neighborhood character.

A similar approach can be used to address corner stores, restaurants, or even bars that existed prior to the zoning and have continued as nonconforming uses. Despite the convenience these uses provide to residents, their value has depreciated because of the nonconforming status. Corner stores are a particular problem because it is difficult to convert the ground floor to residential use. As a consequence, they sit vacant, or the lower floor is abandoned, creating an eyesore. All of these uses could be made limited uses in the district, with conditions that the buildings not only had to be built prior to a specific date, but that they also had to have been built for commercial use. For some uses such as restaurants or bars, additional criteria could be added to prevent a neighborhood-serving use from becoming a regional use involving late-night music or street activity. In this strategy the neighborhood is protected from the introduction of high-intensity commercial uses or nuisances while still permitting local commercial services. If formerly nonconforming uses can invest in improvements, it enhances the value of the neighborhood.

Mitigation

In theory nonconforming uses are supposed to disappear. In fact, nonconformities may continue for decades. When this happens, the nonconforming use often declines in value and appearance because the owner is unable to obtain financing for improvements. For this reason, communities should allow for conditional approvals to provide a means of mitigating nonconforming uses. A landowner can apply for mitigation via a conditional use. This requires a hearing to be held to examine the current effects of the use and to recommend improvements to make the use a better neighbor.

Converting a nonconforming use to a conditional use can remove the cloud that discourages investment and maintenance while protecting the neighbors. An example of this is a tire store on an arterial highway in a residentially zoned neighborhood. It has been nonconforming for decades and remains a viable business. For most residents, who have lived with it for years, the store is only a minor nuisance. The conditional use process would allow the owner to propose expansion of the use while providing things like screening walls or landscaping, facade renovation, or ensuring that tire work occurs indoors. Subject to a hearing that allows the neighborhood to review the proposal and suggest mitigation measures that improve the neighborhood, a conditional use permit can be issued.

ADDING FLEXIBILITY

Why are codes so rigid? First, mandating specific lot area, frontage, use, and other standards is easy to write or illustrate in drawings. No thought needs to be given to a problem with a particular property or to conflicting goals. One-dimensional thinking is easier than systemic thinking. As soon as one identifies a series of objectives that zoning is supposed to address, one needs to understand how all elements of design interact. Secondly, there is complexity associated with flexibility. If something is a problem, it is easier to throw the baby out with the bathwater than to write a section that identifies exceptions to a prohibition and rules governing permitting the design to be used. There are two basic approaches to dealing with rigidity: providing targeted flexibility and providing general flexibility.

Targeted Flexibility Using Modulation

As an alternate to variances or conditional uses, modulation is a tool that can address most flexibility issues. A great many regulations are written to eliminate a specific problem, by prohibiting the use of a design element or setting a limit. Unfortunately, this may mean prohibiting something that, while generally undesirable, can be a valuable tool in specific conditions. Providing flexibility requires looking beyond a specific problem and determining where or when the tool might be useful. Modulation provides staff with rules that permit modulation of the standards without having to appear before the zoning board.

For example, developers used flag lots in the past to avoid building a street. In extreme cases there may be two rows of lots

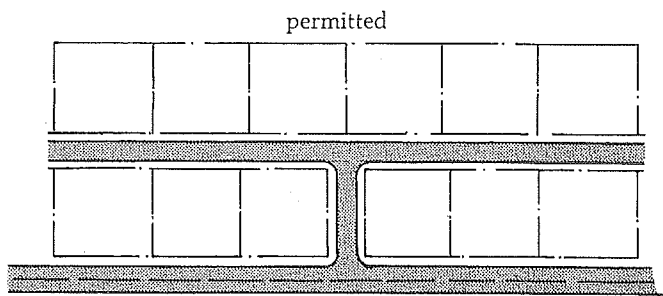
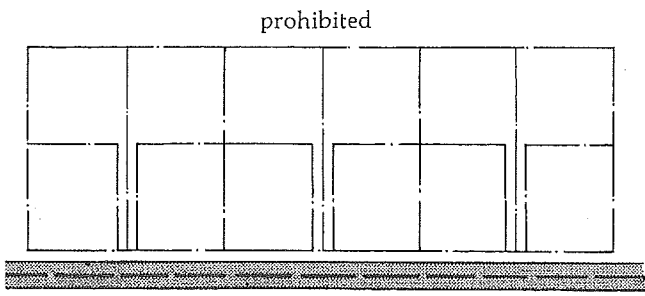
taking access off a street, resulting in numerous additional curb cuts and potential hazards. Consequently, most ordinances prohibit them. However, there are several situations where flag lots actually could result in better planning. As noted above, it is cumbersome and complex to write a series of exceptions to the prohibition. A better solution is a modulation article containing the conditions where the rules can specifically be relaxed, eliminating the need for a variance. Two exceptions illustrate the point. A flag lot that eliminated access on a collector road would be desirable. Another case would be using a shorter cul-de-sac with flag lots accessing several lots to reduce the disturbance of a wooded area created by a longer cul-de-sac.

A modulation chapter allows for simple base regulations while providing more complex rules in another article that is only used by those needing them. Rigid limits on block, cul-de-sac, or town house group length, or prohibitions on trapezoidal lots, are examples of regulations where flexibility is desirable. The key is providing staff with specific rules for the granting or denying of the modulation. Thus the areas of flexibility are pre-identified as are the rules for granting the flexibility.

Targeted Flexibility Using Pattern Books

Because poor design may make a unit undesirable, a means of permitting good design while avoiding the undesirable is important. For example, to avoid the monotony of row houses, communities often require facade offsets. Unfortunately, the same pattern of setbacks repeated on 100 or more units is equally monotonous. The uniformity of front setbacks makes great sense in cities where blocks are platted and uniformity is desirable. However, for hamlet, village, small traditional neighborhood, or estate developments this can be a severe design restriction. A pattern book includes the site plan but also all the essential design elements, building types, lot standards, setback, facades, and all the design details. It is akin to a final planned development approval in that it locks the developer into building what has been shown in the pattern book submission.

The conditional approval process used by most local governments includes review criteria that have nothing to do with design. Worse, they introduce nondesign issues into the approval process, most of which can be used to deny the approval, lower density, or otherwise frustrate a good design. The



⊕ Without carefully written standards, developers may use flag lots to avoid building new roads.

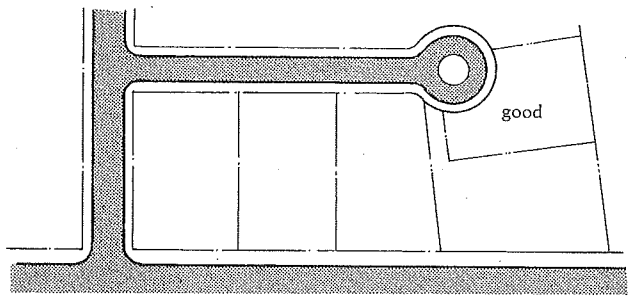
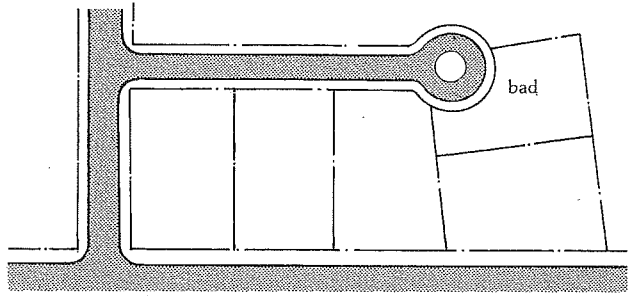
approval of the pattern book addresses the value of the modulation in achieving a superior design. While a single front yard setback makes sense in a large urban area, in a small hamlet or a traditional mixed use neighborhood decreasing setbacks as lots approach the center is one design technique to emphasize the pedestrian-oriented nature of the center. The modulation article should provide for approval of the pattern book-controlled modulation where it creates a desirable design, and the approval criteria should be limited to design considerations. When the regulations prohibit modulation to modify density, land use, and height, many common concerns of citizens at conditional use hearings are taken off the table. Also, limiting modulation to interior lots ameliorates the concerns of citizens worried about impacts on the character of adjoining development.

The modulation article should provide for approval of the pattern book-controlled modulation where it creates a desirable design, and the approval criteria should be limited to design considerations.

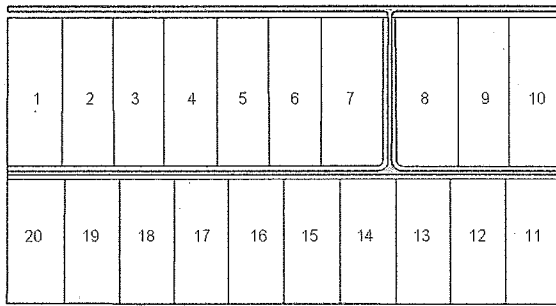
developments were new and planners had no experience with them, the conditional approval made sense. But now it makes no sense for a better design form to have to go through a lengthy, costly, and uncertain process.

Communities can provide general flexibility by adopting ordinances that are designed to allow a developer multiple ways of meeting the standards of a district. For residential areas, all dwelling unit types should be permitted in the district subject to meeting density, open space, or design standards to protect the character of the district and to encourage traditional neighborhood, planned, and cluster developments. Permitting all dwelling units eliminates the exclusionary nature of many zoning districts. Development forms such as clustering, planned and traditional neighborhood, and mixed use should be permitted as a matter of right. The zoning standards would still regulate district intensity through density, open space, use mix, scale, average and maximum height, and form requirements. These basic controls are essential to ensure the design intent or character is met. Street width can be varied with general rules that address traffic volumes on the street, unit frontage, and parking needs. Quality should be addressed by sign and other controls that address quality of design by setting high standards that should not be modulated. Landscape can be addressed

General Flexibility Permitting All Development Forms
Euclidian zoning is very inflexible. Other approaches like clustering, planned developments, traditional neighborhood development, and mixed uses have all been found to be more desirable forms of development. In some states this finding is included in the statutes. Despite this, alternative development patterns are often forced to seek conditional approvals. In the 1960s, when clustering and planned

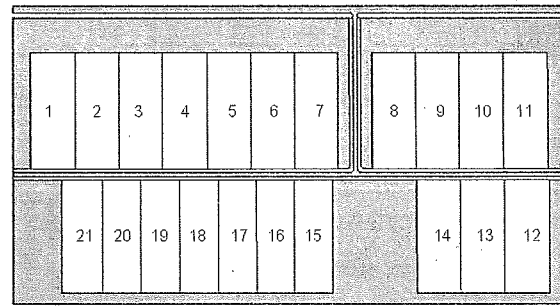


⊕ With targeted flexibility, communities can permit flag lots only in special cases, such as when a flag lot would eliminate lot access from a collector road.



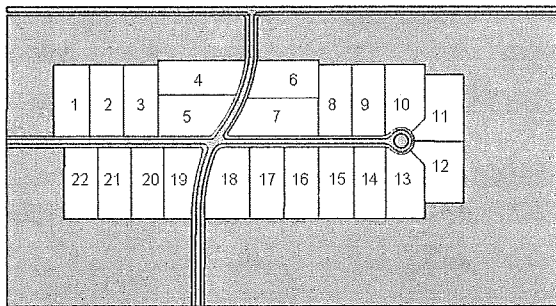
Single Family (20 du's)

OSR 0.00



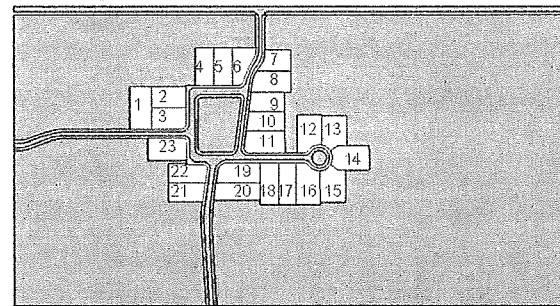
Cluster (21 du's)

OSR 0.30



Conservation (22 du's)

OSR 0.50



Preservation (23 du's)

OSR 0.80

☞ Communities can use general flexibility to encourage residential clustering by offering increasing density with increasing levels of clustering.

with flexible tools that describe the degree of opacity of the vegetation that is to be required, allowing the landscape architect flexibility in choosing the plant material to achieve the desired result.

Design Rules for Special Cases

There are relatively unique development forms like hamlets, villages, transit-oriented development, or new (very large) new communities where specific design standards are needed over and above density and other controls. For example, a hamlet or village needs a center where commercial and the highest intensities are located, perhaps an employment area for industrial uses, interior open space, provisions for a rural buffer, and setbacks from other developments. These design rules should be included in a modulation or a design article. The rules should be highly generalized, using ranges and illustrations so as not to force a rigid template. Pattern book approval allows a designer freedom to work site constraints and the forms of development in a design review.

CONCLUSION

The excessive use of variances, in conflict with state enabling legislation or through poor planning and zoning, is very costly. The

general solution is to eliminate the need for variations. This can be accomplished by providing a legal path for transitioning existing nonconforming uses to conditional uses and by adopting zoning standards that acknowledge historic development patterns and permit both targeted and general flexibility. All of the tools above can be used in

combination to virtually eliminate the need for a variance. In small communities it should be rare to even have variance request. In larger cities and counties a combination of these rules should also make legitimate variances rare. When variances are necessary, a professional hearing examiner should hold a quasi-judicial hearing for each request.

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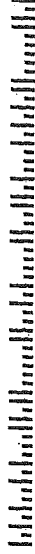
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**DOES YOUR COMMUNITY
HAVE A VARIANCE PROBLEM?**

6

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PRACTICE URBAN FORESTRY



The Role of Tree Preservation Ordinances in Green Infrastructure

By Nancy Templeton, AICP, and David Rouse, AICP

The premise of green infrastructure planning is that the vegetative elements of the landscape, including trees, shrubs, grass, etc., interact with other natural systems of air, water, and soil to protect and enhance ecosystem functionality within urban environments.

Central to the concept of sustainable development and green infrastructure is that amenity and functionality come together to provide a “triple bottom line” of social, environmental, and economic benefits to people and the planet. While all vegetative elements, including open green spaces, are part of a community’s green infrastructure network, urban forests arguably comprise the largest structural component of the network. Close to 80 percent of U.S. citizens live in urban areas. It is estimated that urban forests in the United States contain about 3.8 billion trees (Alig, Carr, Comas, Greenfield, Nowak, Randler, Stein, 2010). As urban areas continue to expand across the country, communities will depend more and more on the benefits of the urban forest as the largest component of the green infrastructure network. Protecting and enhancing this valuable resource is critical as a growing body of research and planning in green infrastructure has quantified the social, environmental, and fiscal benefits of the urban forest.

SOCIAL BENEFITS OF THE URBAN FOREST

Research on the impacts of trees on public health, safety, social behavior, and community interaction indicates that there are direct positive social influences from exposure to trees. For example, a 2001 study by Frances Kuo and William Sullivan of the University of Illinois compared the social behavior of low-income residents living in different parts of the Robert Taylor Homes public housing complex in Chicago. One part

of the complex was planted with trees and other greenery, while the other had little or no landscaping. The study concluded that residents with views of trees and greenery from their homes experienced more social interaction with neighbors and less aggressive behavior toward their partners or children.

❖ GREEN INFRASTRUCTURE

Green infrastructure encompasses the naturally occurring and human-built features that manage stormwater, remove pollutants, conserve energy, and provide other ecological, cost-effective, and environmentally sustainable services (Vibrant Cities & Urban Forests Task Force 2011).

❖ URBAN FORESTRY

Urban Forestry means the planning, establishment, protection, and management of trees and associated plants, individually, in small groups, or under forest conditions within cities, their suburbs, and towns (Cooperative Forestry Act 1978).

Trees have also been recognized as positively influencing the academic performance of high school students based on research findings for “attention restoration” theory (Augustin and Cackowski-Campbell 2011). Attention restoration theory, developed by the University of Michigan School of Natural Resources and Environment, sug-

gests that exposure to natural environments, either visual or tactical, restores mental energy and enhances concentration.

Crime and public safety are additional social conditions impacted by trees. There has been some disagreement among scholars as to whether trees deter crime by attracting more people to an area and signifying community strength, or facilitate it by providing concealment for criminals. A study by a team of environmental researchers from the University of Vermont examined crime rates and tree canopy coverage over an area from inner city Baltimore to suburban Baltimore County. Although disparities were found primarily because of the diversity in scale from urban to suburban communities, the researchers found that “a 10% increase in tree canopy was associated with a roughly 12% decrease in crime” (Troy, Grove, and O’Neil-Dunne 2012). In areas where high canopy coverage was also associated with high crime rates, it was found that poorly groomed and low-lying vegetation provided concealment for criminal activity.

ENVIRONMENTAL BENEFITS OF THE URBAN FOREST

The environmental benefits of urban forestry as a component of the green infrastructure network are well documented by federal agencies such as the U.S. Environmental Protection Agency and the U.S. Forest Service, as well as state departments of natural resources, universities, and local utility and watershed organizations. According

ASK THE AUTHOR JOIN US ONLINE!

Go online during the month of September to participate in our "Ask the Author" forum, an interactive feature of Zoning Practice. Nancy Templeton, AICP, and David Rouse, 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 authors will reply, and Zoning Practice will post the answers cumulatively on the website for the benefit of all subscribers. This feature will be available for selected issues of Zoning Practice at announced times. After each online discussion is closed, the answers will be saved in an online archive available through the APA Zoning Practice web pages.

About the Authors

Nancy Templeton, AICP, is a WRT associate and certified planner with 16 years of diverse experience in community and comprehensive planning, development regulations, and design guidelines with an emphasis on sustainability and natural resource protection.

David Rouse, AICP, is a WRT principal, planner, and landscape architect with 30 years of experience. His work ranges from comprehensive plans and green infrastructure plans for regions and cities to zoning ordinances, design standards, and other implementation projects.

to *Planning the Urban Forest* (Schwab, ed. 2009), the environmental benefits of the urban forest include the following:

- Streambank stabilization—tree roots bind soil and prevent sedimentation.
- Carbon sequestration—trees absorb atmospheric carbon, which reduces greenhouse gases.

- Reduced air pollution—trees remove many pollutants from the atmosphere, including nitrogen dioxide, sulfur dioxide, ozone, carbon monoxide, and particulate matter.
- Urban heat island mitigation—trees absorb sunlight, provide shade, and prevent sunlight from reaching heat radiating surfaces (e.g., concrete, asphalt, and brick).

- Reduced energy consumption—trees provide shade and cooling in hot weather and block strong winds in cold weather.
- Stormwater interception and filtration—trees reduce stormwater runoff flow by intercepting rainwater on leaves, branches, and trunks; pollutants in stormwater runoff are also absorbed and filtered in the soil and taken up and filtered by trees.



Atlanta's urban tree canopy provides shade in extreme summer heat.

ECONOMIC BENEFITS THE URBAN FOREST

The economic benefits of the urban forest have also been realized and quantified, including both direct benefits (e.g., return on investment through real estate values and taxes) and indirect cost savings (e.g., health benefits and energy savings). These benefits have been well documented in studies, surveys, and reports, including a survey of realtors in 10 states conducted by Arbor National Mortgage, Inc. in 1993. When presented with a scenario in which two homes were identical except for the presence of trees, 84 percent of the participants felt the home with trees would be as much as 20 percent more sellable.

There is even a National Tree Benefit Calculator based on a street tree assessment tool called STREETS in the U.S. Forest Service's i-Tree software suite. This calculator measures the economic and ecological benefits of individual trees.

Evidence-based research concludes that protecting and enhancing the urban forest provides a high return on investment for municipalities, developers, and citizens. The most comprehensive research on the economic value of trees dates back

to the early 1990s in a study for the *Journal of Arboriculture* entitled "Assessing the Benefits and Costs of the Urban Forest" (Dwyer, McPherson, Schroeder, and Rowntree 1992), which documented the following economic benefits:

- increased property values;
- increased tax revenue;
- reduced building energy costs (by blocking wind and providing shade);
- reduced stormwater impacts and related costs; and
- improved health and lower health care costs.

URBAN FORESTRY IN DEVELOPMENT CODES

Given the strong social, ecological, and economic benefits of trees, communities should regard urban forest protection and enhancement as an investment that needs to be effectively managed over time. To this end, many cities and counties have adopted long-term urban forestry plans and added forestry provisions in their development regulations to manage and protect this critical resource.

Recognizing the range in benefits and return on investment of the urban forest, many municipalities have adopted regulations to ensure the preservation and replenishment of their tree canopy. Successful tree preservation ordinances consider the triple bottom line benefits of urban forestry that are most meaningful to their community. Tree protection standards will be most effective when based on goals and objectives that vary based on each community's unique conditions, yet there are common elements that can be found among municipalities with robust tree protection standards.

Statement of Purpose and Intent

The statement of purpose should be clear and concise, and is ideally based on the goals and objectives of an urban forestry master plan, green infrastructure plan, or urban forest element of the comprehensive plan. These objectives should enumerate the social, environmental, and financial benefits of tree preservation that justify a significant investment by the community.

Applicability

Tree ordinances generally come in two different categories: those that apply only to trees on public property (i.e., street trees) and those that apply to development on private

Recognizing the range in benefits and return on investment of the urban forest, many municipalities have adopted regulations to ensure the preservation and replenishment of their tree canopy

property. In most cases a municipality will not attempt to preserve or replace all trees everywhere to avoid placing a significant financial burden on individual home owners and the city's resources for enforcement and maintenance. In general, individual residential lots, developed lots, or properties under a certain size threshold are exempt from the regulations, although there are some exceptions depending on the circumstances of the community. Atlanta, for example, places preeminent value on its tree canopy because of its humid subtropical climate and recent substantial tree loss from development practices. With one of the most aggressive tree protection ordinances in the country, Atlanta requires a permit to remove healthy trees above a certain size threshold on any property of any size. While this approach has been successful in helping to maintain tree canopy for this large city, most communities must be

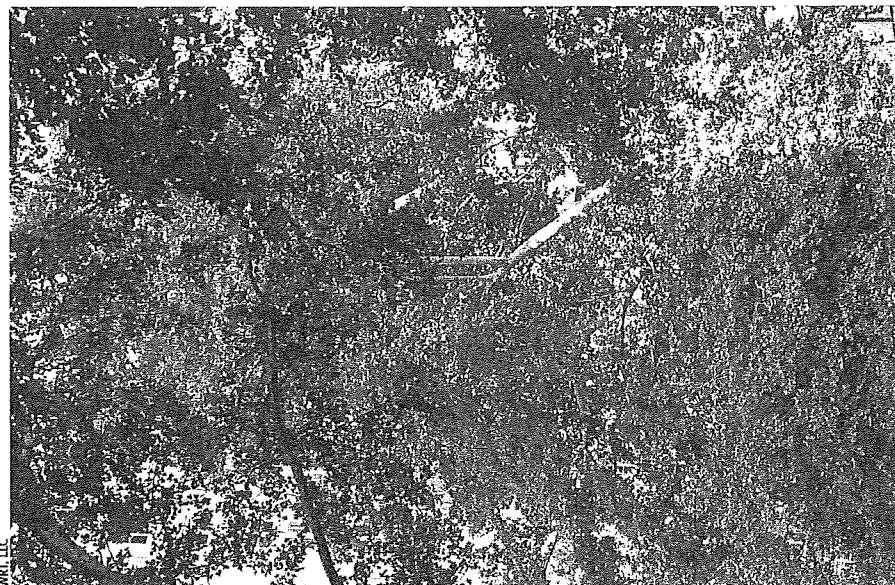
more selective to maximize the effectiveness and benefits of tree preservation regulations.

Minimum Tree Coverage or Density Requirements

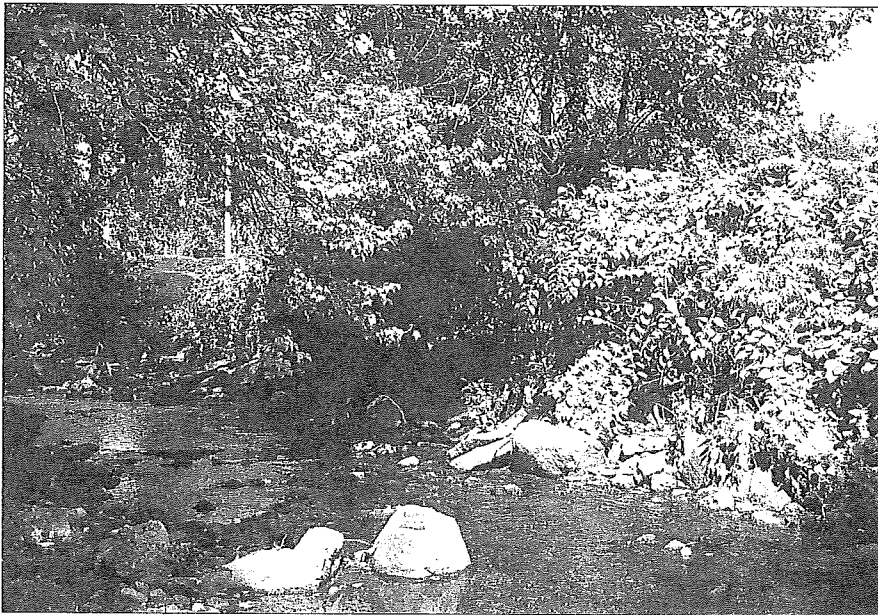
Typical tree ordinances establish a minimum number or percentage of trees of a given size, usually measured as diameter at breast height (dbh), which must be protected or planted on a site. Some communities apply a minimum percent tree canopy requirement that emphasizes the preservation of stands or clusters of mature trees, rather than individual trees. Existing tree canopy is considered more socially, economically, and environmentally beneficial because of the fully realized shade quality and root structure. By placing higher value on tree canopy, communities have a better probability of promoting preservation over planting of trees that could take years to mature. Fairfax County, Virginia, regulates tree canopy coverage based on 10-year tree canopy requirements (percentage of site to be covered by tree canopy in 10 years) that vary by zoning district. The ordinance requires that all efforts be made to preserve the existing tree canopy; however, any portion of the tree canopy requirement that cannot first be met through the preservation of trees can be provided through tree planting.

Protection of Special Trees

Many communities apply special regulations to trees that they consider to have



➔ In addition to providing shade, trees intercept rainwater.



➞ Trees help to stabilize streambanks from erosion.

proper pruning, watering, and fertilization standards.

Tree Maintenance Requirements

Tree ordinances often mandate that planted trees must be maintained over a limited period of time, usually one to three years, and require replacement of trees that die within that time frame. Because of the limitations that can be placed on developers or landowners for maintenance responsibility, some communities partner with nonprofit or volunteer tree organizations to ensure ongoing tree maintenance. One example is Ithaca, New York's Citizen Pruner program, a partnership between the city, Cornell Cooperative Extension, and Cornell University. Under the program, volunteer citizen pruners receive free training in exchange for assisting the city forester with maintaining public trees, shrubs, and other landscape beautification projects.

Fee-In-Lieu of Tree Replacement Option

Good ordinances incorporate flexibility to address sites that are physically constrained and cannot accommodate the required tree coverage. In such cases, a fee-in-lieu option is an effective approach that allows developers to compensate for lost trees by paying into a tree fund, which can be used by the municipality for a variety of urban forest management functions, such as planting and maintenance of trees, administrative enforcement, and even education and outreach programs. The fee-in-lieu of replacement option places a monetary value on removed trees and the deficit of trees that are not replaced. Most ordinances apply a cost-per-caliper-inch or cost-per-tree fee. Sandy Springs, Georgia, takes a more progressive approach by basing the monetary replacement formula on the potential canopy coverage (estimated size at maturity) of planted trees rather than on a per-tree or per-caliper-inch basis. This approach avoids applying a one-size-fits-all cost formula to trees with different values.

Enforcement

Enforcement is critical to successfully fulfilling the purpose and intent of the tree preservation ordinance. No matter how advanced and progressive the regulations, without proper and consistent enforcement, the municipality will not achieve its urban forestry goals. When developing tree preservation codes, municipalities should revisit their goals and deter-

Tree Size	Canopy (square feet)	Canopy Credits	Approximate Dimensions	Cost per \$375/credit	Trees/acre per 50 percent Canopy	Minimum size at planting (Inches)
Small	250	1	16 x 16	\$375	87	1.5
Medium	500	2	22.5 x 22.5	\$750	43.6	2 to 2.5
Large	1,000	4	31.5 x 31.5	\$1,500	21.7	2 to 2.5

City of Sandy Springs, Georgia

➞ This table shows the compensation requirements for removing trees in Sandy Springs, Georgia.

exceptional value, including historic or landmark trees and specimen trees. Historic trees are usually defined as having notable historic value and interest because of age, size, or historic association. Specimen trees apply to certain species of trees that provide particular value to a location. Communities with historic or specimen tree regulations typically prohibit their removal unless the tree is considered a nuisance or hazard. To discourage removal or destruction of special trees, some communities require extensive compensation for a lost tree. Sandy Springs, Georgia, requires replacement of a historic tree with a comparable species and with a canopy potential of 150 percent of the canopy of the removed tree.

Preservation and Planting Requirements

When developing tree preservation requirements, cities and counties typically avoid

trying to preserve all trees everywhere in order to maximize benefits by balancing environmental goals and economic impacts. To this end, communities must determine which trees are worth protecting. That is, does a tree provide benefits greater than the cost of maintaining it, and is the tree a public safety risk? Communities must also consider the cost/benefit ratio when requiring replacement trees to compensate for removal. Most tree ordinances include a list of tree species that are acceptable replacement options for removed trees. Tree species must be selected to remain healthy and perform well in specific conditions and environments (i.e., climate conditions, soil conditions, and the built environment). Planting requirements also need to consider proper planting and maintenance procedures to ensure that trees will survive to maturity. This includes determining appropriate depths for planting and

As the largest natural resource component of the green infrastructure network, the urban forest should ideally be addressed through an integrated green infrastructure code and management structure that optimizes the ecological, social, and financial benefits it yields as part of a larger system.

mine how much capacity they have to commit to enforcement. A higher level of complexity in regulations may require more staff commitment. However, the regulations do not have to be complex to be effective. They do need to be clearly tied to the objectives of the community and should be enforced by the proper professionals with in-depth knowledge of trees (i.e., arborists, foresters, or landscape architects) and established authority for enforcement and applying penalties.

RELATIONSHIP TO OTHER ORDINANCES

The tree preservation ordinance, when closely tied to community objectives and

properly enforced, is a powerful tool for protecting and enhancing the urban forest. Yet it is only one of several municipal codes that impact urban forestry and interact to achieve the social, environmental, and economic benefits of the urban forest.

Stormwater Management Ordinances

Trees have an important function in stormwater management, including intercepting rainwater and filtering pollutants. These functions can be incorporated into stormwater management ordinances by requiring tree preservation and replacement stan-

dards as part of the stormwater management infrastructure and factoring the presence of trees in pre- and postdevelopment calculations for stormwater flow.

Zoning Ordinances

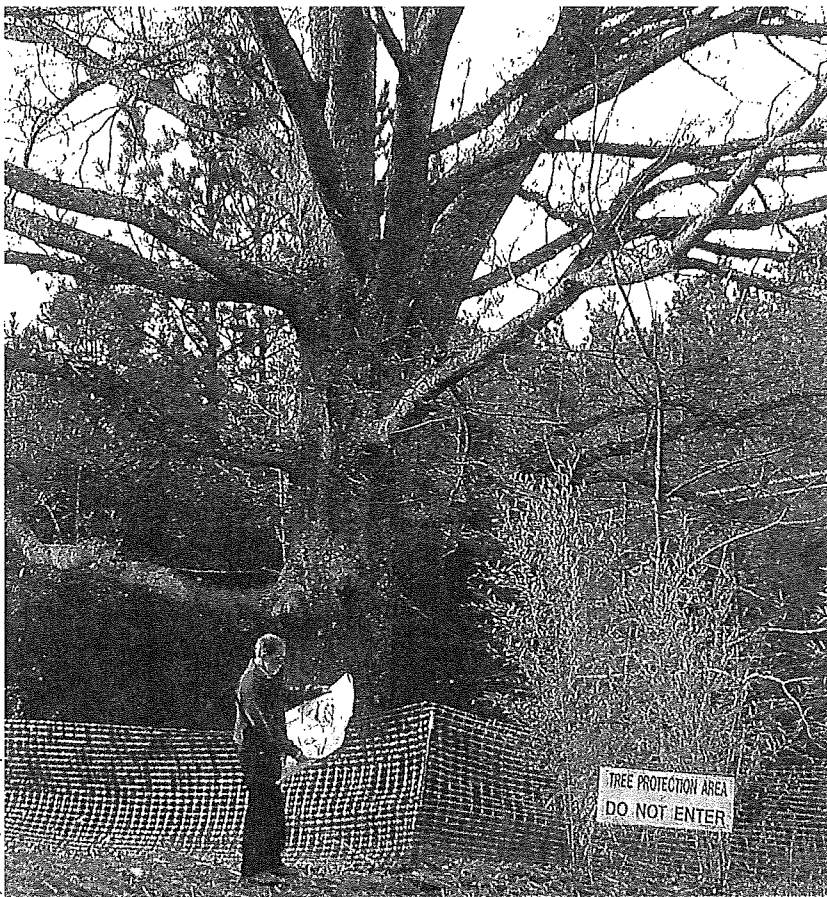
Tree preservation regulations are often included in zoning and development codes as a stand-alone chapter or section. However, trees also typically appear in several other sections of the code, including landscaping standards, parking lot design, and riparian buffer requirements. The zoning ordinance should consider the various vegetative requirements in each section and make sure they are complementary and not redundant or conflicting. Development standards, such as setbacks, minimum lot sizes, and parking regulations should also be conceived with tree coverage in mind to make sure the required amount of trees can be accommodated on a site. As an example, Seattle allows for reduced front and rear yard setbacks of up to five feet to protect existing healthy trees. Reductions of more than five feet may be approved by special exception.

Erosion and Sedimentation Control Ordinances

Like stormwater management, trees can be incorporated into the traditionally engineered standards for managing the impacts of development on streambanks and steep slopes. Trees stabilize streambanks and slopes by binding soil and preventing sedimentation. Arlington County, Virginia, requires a landscape conservation plan, a stormwater management plan, and an erosion and sediment control plan for development projects that would disturb at least 2,500 square feet of land. The landscape conservation plan helps ensure the health and survival of trees.

Subdivision Ordinances

Right-of-way requirements and street- and sidewalk-design standards are typically found in subdivision regulations. Right-of-way and street and sidewalk design are



Emily Cameron, Town of Chapel Hill

☉ The urban forester for the Town of Chapel Hill, North Carolina, inspects a construction site to determine compliance with tree protection requirements.

critically linked to the ability to plant and maintain healthy street trees by ensuring adequate planting widths and depths, providing the structure to avoid sidewalk obstructions (e.g., grates), preventing interference with underground and overhead utilities, and considering the types and sizes of trees that can thrive in such an environment. For example, the subdivision regulations for Bentonville, Arkansas, require that trees not be placed where they will require frequent pruning in order to avoid interference with overhead power lines. The ordinance provides a list of understory trees that are suitable to be placed under overhead utility lines.

THE CASE FOR AN INTEGRATED GREEN INFRASTRUCTURE CODE

The tree preservation ordinance has proven to be a valuable community tool for protecting and enhancing the urban forest. However, municipalities often develop these ordinances in isolation and don't always consider the relationship with other codes and regulations that promote the triple bottom line benefits of urban forestry. Protecting the community's investment in the urban forest is best accomplished by going beyond traditional "silos" to address the synergies between tree preservation and other codes that promote green infrastructure. Many communities have incorporated some elements of urban forestry and green infrastructure into regulations addressing issues such as stormwater management, riparian buffers, land development, and landscaping requirements. While the collective regulatory approaches of these communities demonstrate the motivation to promote green infrastructure solutions, none has yet achieved a fully integrated development code that considers the interactions of all the elements that form the green infrastructure network. As the largest natural resource component of the network, the urban forest should ideally be addressed through an integrated green infrastructure code and management structure that optimizes the ecological, social, and financial benefits it yields as part of a larger system. A three-step process is proposed to achieve this ambitious goal. This process starts with an inventory of all the community's regulations that address green infrastructure, including stormwater management, erosion control, tree preservation, open space preservation, land develop-

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ment, street and sidewalk design, riparian standards, etc. The inventory should also include the various departments and personnel responsible for administering the different regulations and their individual permitting and enforcement procedures. Next, the existing regulations should be evaluated together to identify areas of inconsistency or conflicting standards, overlapping provisions, and opportunities for regulations to work together and provide incentives for achieving maximum benefits. For example, allowing developers to factor the presence of trees in postdevelopment calculations for stormwater flow would reduce engineering costs while mitigating stormwater runoff

and preserving trees. The evaluation should include an assessment of the various review and permitting procedures and consideration for how they might be integrated into one coordinated process. The regulatory evaluation will also help to identify any gaps and missed opportunities to apply green infrastructure best management practices. The final step in the process is to develop a recommended structure for bringing together existing regulations and review processes, along with new approaches, into an integrated ordinance that can maximize the triple bottom line of social, environmental, and economic benefits green infrastructure provides to communities.

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