

Zoning Bulletin

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Freedom of Religion (RLUIPA)— Town's administrative proceedings under statutory environmental review process effectively prevent church's building project from going forward

Church alleges town's actions violate the

Contributors

Corey E. Burnham-Howard

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Religious Land Use and Institutionalized Persons Act of 2000

Citation: *Fortress Bible Church v. Feiner*, 2012 WL 4335158 (2d Cir. 2012)

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

SECOND CIRCUIT (NEW YORK) (09/24/12)—This case addressed the issue of whether a municipality's use of a statutory environmental review process is within the purview of the federal Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA")—and, thus, whether the actions of a municipality during a statutory environmental review process could violate RLUIPA. It also addressed whether a specific municipality's actions violated RLUIPA as well as a church's Free Exercise and Equal Protection rights under the United States Constitution.

The Background/Facts: Fortress Bible Church (the "Church") planned to build a worship facility and school on land that it owned in the Town of Greenburgh, New York (the "Town"). To construct its proposed building, the Church required three discretionary land use approvals from the Town: (1) site plan approval from the Town Board (the "Board"); (2) a waiver of a landscaped parking island requirement; and (3) a variance from the Town's Zoning Board of Appeals (the "ZBA") to allow the building to be located closer to one side of the property. Because the Church's proposal required discretionary government approval, it triggered New York's State Environmental Quality Review Act ("SEQRA"), N.Y. Comp. Codes R. & Regs. Tit. 6, §§ 617.2(b), 617.3(a).

The SEQRA review process entails several stages. First, the "lead agency" (in this case, the Board) must make an initial determination of environmental significance. If the environmental impact of the proposal is small, the lead agency can issue a negative declaration, meaning there is no potential for significant adverse environmental impact, or a conditioned negative declaration, meaning that the potential for adverse environmental impact can be mitigated by the agency. Alternately, if the lead agency determines that the proposal has the potential for at least one significant adverse environmental impact, the lead agency must issue a "positive declaration" and require the applicant to submit an Environmental Impact Statement ("EIS") evaluating the environmental impact of the project. Preparation of an EIS involves several steps. The applicant prepares a scoping document (outlining the scope of the environmental impact), a draft EIS ("DEIS"), and a final EIS ("FEIS"), and must seek feedback at each stage from the public and approval from the lead agency.

The Church submitted its initial proposal in November 1998. After submitting a revised proposal in January 2000, the Town's Planning Commissioner advised the Board that it could issue a Conditioned Negative Declaration. However, after the Church declined the Town's request to donate a fire truck or make some other payment in lieu of taxes, the Board issued a positive declaration, triggering the full SEQRA review process.

Over the next several years, the Church provided all of the information required by the SEQRA process. The Church eventually submitted a proposed FEIS. Although the universe of issues relevant to the SEQRA review was complete, the Town began to request new information and raise new issues for the Church to address. The Church provided the requested information and attempted to meet the Town's demands. During the summer of 2002, the Town stopped the review process altogether due to the Church's refusal to reimburse it for certain disputed fees the Town had incurred during the process.

In June 2003, the Church brought a legal action against the Town. Among other things, it alleged violations of RLUIPA. It sought an order compelling the Town to complete SEQRA review and approve the project.

RLUIPA bars states from imposing or implementing a "land use regulation" in a manner that imposes a substantial burden on a person or institution's religious exercise unless it is the least restrictive means of furthering a compelling state interest. (42 U.S.C.A. § 2000cc(a)(1).) A "land use regulation" is defined as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land." (42 U.S.C.A. § 2000cc-5(5).) A substantial burden is one that "directly coerces the religious institution to change its behavior." To find a violation of RLUIPA, the burden must be more than a minimal impact on religious exercise, and there must be a close nexus between the two.

The Town had contended that RLUIPA was entirely inapplicable because SEQRA was not a land use regulation within the meaning of RLUIPA.

The district court entered judgment for the Church on all counts; it found that RLUIPA applied and that the Town had violated RLUIPA.

The Town appealed.

DECISION: Affirmed.

The United States Court of Appeals, Second Circuit, held that the actions of the Town in conducting the statutory environmental review process violated RLUIPA.

In so holding, the court agreed with the Town that SEQRA itself was not a zoning or landmarking law for purposes of RLUIPA. However, the court held that when a government uses a statutory environmental review process as the primary vehicle for making zoning decisions, those decisions constitute the application of a zoning law and are within the purview of RLUIPA. Thus, the Town's use of the SEQRA process did not automatically implicate RLUIPA. However, concluded the court, the Town's actions in using the SEQRA review process as its vehicle for determining the zoning issues related to the Church's land use proposal and its denial of the Church's proposal constituted an application of its zoning laws "sufficient to implicate RLUIPA for a number reasons": First, the SEQRA review process was triggered because the Church required three discretion-

ary land use approvals from the Town which all related to zoning and land use rather than traditional environmental concerns. Second, in its Town Code, the Town had intertwined the SEQRA process with its zoning regulations. Third, once the review process was underway, the Town focused on zoning issues rather than traditional environmental issues. Finally, the court declined to “endorse a process that would allow a town to evade RLUIPA by what essentially amounts to a re-characterization of its zoning decisions.”

Having found RLUIPA was applicable to the circumstances here, the court then determined that the Town had violated RLUIPA. The court found that “the Town’s actions during the SEQRA process substantially burdened the Church’s religious practice” where: the Church’s current facilities were inadequate to accommodate its religious practice; and the Town was acting in bad faith and in hostility to the project such that it would not have allowed the Church to build any worship facility and school on the subject property.

See also: *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 226 Ed. Law Rep. 595 (2d Cir. 2007).

See also: *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005).

Case Note:

No court of appeals had previously addressed whether an environmental quality statute could constitute a zoning law under RLUIPA. In its decision, the court emphasized that in no sense did it “believe that ordinary environmental review considerations are subject to RLUIPA. However, when a statutorily mandated environmental quality review process serves as a vehicle to resolve zoning and land use issues, the decision issued constitutes the imposition of a land use regulation as that term is defined in RLUIPA.”

Case Note:

The Church had also alleged that the Town’s actions violated its rights under the First (free exercise of religion) and 14th (equal protection) Amendments, as well as New York law. The Second Circuit agreed.

The First Amendment generally prohibits government actions that “substantially burden the exercise of sincerely held religious beliefs” unless those actions are narrowly tailored to advance a compelling government interest. Without resolving whether zoning variance decisions challenged under the Free Exercise Clause are subject to strict scrutiny or rational basis review, the court concluded that the Town lacked a rational basis for delaying and denying the Church’s project and therefore violated the Church’s Free Exercise rights.

The Equal Protection Clause has traditionally been applied to governmental classifications that treat certain groups of citizens differently than others. Here, the

church had brought a class-of-one equal protection claim (i.e., where a single individual can claim a violation of his/her/its Equal Protection rights based on arbitrary disparate treatment). The court concluded that the Church's class-of-one claim was cognizable given the context: the case presented a clear standard against which departures could be easily assessed; the SEQRA review process was guided by regulation and the result could be challenged under Article 78; the Town was acting in its regulatory capacity as a sovereign rather than as a proprietor, making decisions about the ways in which property owners could use their land; and the evidence provided by the Church illustrated a disparity in treatment that could not fairly be attributed to discretion. Moreover, while the court recognized that the Church's "use of multiple comparators [was] unusual" (and provided the court with its first opportunity to address that issue); the court concluded that the Church's evidence of several other projects treated differently with regard to discrete issues was sufficient in this case to support a class-of-one claim. "Where, as here, the issues compared are discrete and not cumulative or affected by the character of the project as a whole, multiple comparators are sufficient so long as the issues being compared are so similar that differential treatment with regard to them cannot be explained by anything other than discrimination."

Under Article 78 of New York's Civil Procedure Law, a town's SEQRA determination may be set aside when it is "arbitrary, capricious or unsupported by the evidence." The court concluded that the record contained "ample evidence to support the district court's conclusion that the Town's actions were wholly disingenuous."

Validity of Zoning Ordinance— Property owner seeks rezone via curative amendment

Property owner also argues current zoning is
confiscatory

Citation: *Rice Family Trust v. City of St. Marys*, 51 A.3d 913 (Pa. Commw. Ct. 2012)

PENNSYLVANIA (09/07/12)—This case addressed the issue of whether a zoning ordinance that limited a landowner's property to a specified zoning district and specific allowed uses was: "arbitrary, unreasonable, or inconsistent with the stated purpose" of the zoning district, and thus subject to a curative amendment; and/or "confiscatory."

The Background/Facts: In April 2010, to protect its position as a third mortgage lienholder, the Rice Family Trust (the "Trust") purchased certain

property (the "Property") in the City of St. Mary's (the "City") in a mortgage foreclosure proceeding.

Prior to its acquisition by the Trust, the Property had undergone a series of different uses: As of 1983, the Property was used as a single-family residence and professional office. From 1983 to 1996, the Property was used as a single-family residence and the office of a public accounting firm. (The latter use was not permitted under the then-applicable zoning ordinance and operated without a zoning permit.) From 1996 to April 2010, the Property was used as four apartments and office space. (Both the former and latter uses were not permitted under the applicable zoning ordinance and operated without a zoning permit.)

Also prior to acquisition by the Trust, zoning ordinances applicable to the Property had been revised: In 1977, the Zoning Ordinance permitted single-family residences and medical offices. In 2006, the current Zoning Ordinance (the "2006 Ordinance") was enacted. The Ordinance limited the Residential Urban District, where the Property was located, to single-family detached houses and duplexes. The 2006 Ordinance prohibited professional offices, except for those properties abutting arterial streets. (The Property was not on an arterial street.)

After the Trust purchased the Property, it wanted to continue to use the Property as an office and four apartments. The Trust sought to have the Property rezoned from Residential Urban to Central Business in order "to use [the Property] as an economic return as best as [the Trust] c[ould] for the real estate market to return." The Trust submitted a curative amendment to the City Council.

The City Council did not act upon the amendment. Accordingly, under state law, it was deemed denied.

The Trust appealed to the trial court. The Trust contended that its request for a curative amendment should be granted because the 2006 Ordinance was arbitrary and unreasonable in that it excluded the uses currently and historically conducted on the Property. The Trust also argued that the 2006 Ordinance was confiscatory because it prohibited economically feasible uses for the Property.

The trial court denied the Trust's appeal. It found that a curative amendment was not warranted. The court found that the zoning of the Property was "a natural extension of the Residential-Urban District to the west and north" of the Property. The trial court also rejected the Trust's argument that the Property could not be used in an economically feasible manner in the Residential Urban District. It found the Trust's evidence on this point unpersuasive because the Trust had not explored alternative uses, such as turning the Property into a rental duplex.

The Trust again appealed.

DECISION: Affirmed.

The Commonwealth Court of Pennsylvania agreed with the trial court. It similarly found that a curative amendment was not warranted, and that the 2006 Ordinance was not confiscatory.

In finding a curative amendment was unwarranted, the court rejected the Trust's argument that the 2006 Ordinance was arbitrary and unreasonable with respect to the Property because it ignored the historic use of the Property and the commercial nature of other nearby properties. The court explained that a curative amendment would be granted where necessary to make a zoning ordinance valid. Thus, to obtain a curative amendment, the Trust had to establish that the 2006 Ordinance was invalid in that it was "unreasonable, arbitrary or not substantially related to the police power interest." The 2006 Ordinance would only be found arbitrary or unreasonable if it was "obvious that the classification ha[d] no relation to public health, safety, morals or general welfare."

The court found the 2006 Ordinance was valid in that it was reasonable given that it was consistent with the stated purpose of the Residential Urban District—which was to preserve the residential character of the neighborhood. "To protect the residential character of the neighborhood, the City Council made the legislative judgment that prohibiting professional offices would discourage commercial development that detracts from the 'residential character' of the neighborhood." Moreover, the court noted that the Property's prior uses as an apartment building and professional office were not dispositive or inconclusive given that the Property had also been used as a single-family house in the past. Also, noted the court, zoning district lines "must be fixed somewhere; and "[d]istrict lines drawn in the past do not control the future placement of zoning district lines."

In finding the 2006 Ordinance was not confiscatory, the court explained that the Trust had failed to prove that the Property had no value or only distressed value (i.e., was valueless) as a result of the 2006 Ordinance. To succeed on its claim, the Trust had to demonstrate one of three things, said the court: (1) physical features prevented the use of the Property as permitted under the 2006 Ordinance; (2) conforming the Property to a permitted use could be done only at a prohibitive expense; or (3) the Property had no value under any of the permitted uses. The court found that the Trust had not argued that the Property's physical features prevented its use in the manner zoned or that it could be done only at prohibitive expense. Instead, the Trust had argued that the Property was valueless under the 2006 Ordinance because the Property was not suitable for use as a single-family home or duplex. However, the court found that the Trust had "never explored the costs of using the Property as a duplex or as a single-family residence." The court also noted that the Property had been used as a single-family residence for many years. "An ordinance is not invalid merely because it does not permit the most lucrative use of property," said the court. The court concluded that the Trust's evidence did not prove that the Property has been rendered valueless. Thus, the Trust's claim that the 2006 Ordinance was confiscatory failed.

See also: *Briar Meadows Development, Inc. v. South Centre Tp. Bd. of Sup'rs*, 2 A.3d 1303 (Pa. Commw. Ct. 2010).

See also: *C & M Developers, Inc. v. Bedminster Tp. Zoning Hearing Bd.*, 573 Pa. 2, 820 A.2d 143 (2002).

See also: *Laurel Point Associates v. Susquehanna Tp. Zoning Hearing Bd.*, 887 A.2d 796 (Pa. Commw. Ct. 2005).

Validity of Zoning Ordinance—City Bans Natural Gas Drilling and Exploration for Two Years

Landowners say ban is invalid because it is a moratorium that fails to meet legal requirements

Citation: *Jeffrey v. Ryan*, 37 Misc. 3d 1204(A), 2012 WL 4513348 (N.Y. Sup 2012)

NEW YORK (10/02/12)—This case addressed the issue of whether a city ordinance banning natural gas drilling and exploration was invalid as a moratorium that did not meet the legal requirements for a moratorium.

The Background/Facts: On December 21, 2011, the City of Binghamton, New York (the “City”) adopted as Local Law 11-006: Chapter 250 of the City’s Code of Ordinances, entitled “Prohibition of Gas and Petroleum Exploration and Extraction Activities, Underground Storage of Natural Gas, and Disposal of Natural Gas or Petroleum Extraction, Exploration, and Production Wastes” (the “Ordinance”). The Ordinance banned gas drilling and exploration within the City until December 31, 2013, unless sooner repealed.

Subsequently, several entities (the “Opponents”) with interests related to natural gas drilling and exploration filed, among other things, a declaratory judgment action seeking to invalidate the Ordinance. The Opponents included: property owners in the City; an unincorporated group of landowners from the town adjoining the City; and the owner of a hotel in the City. Among other things, the Opponents argued that the Ordinance was a moratorium and that the requirements for a moratorium had not been met and thus the law was invalid.

The City maintained that the Ordinance was enacted pursuant to their police powers, and not as a zoning law. The City contended that the Ordinance was not a moratorium.

The Opponents moved for summary judgment. They asked the court to find that there were no material issues of fact in dispute and to decide the matter in their favor based on the law alone.

DECISION: Opponents’ motion for summary judgment granted.

The Supreme Court, Broome County, New York, found that the

Ordinance was a moratorium and held that the Ordinance was invalid because it failed to meet the criteria necessary for a properly enacted moratorium.

In so holding, the court found that the Ordinance was, in fact, a moratorium because it met the hallmark definition of a moratorium: it was a temporary ban on development or certain land uses. The City had argued that although the Ordinance was effective for a finite period, it was “not literally a moratorium because [the Ordinance] was not literally a zoning ordinance.” Again, the City maintained that the Ordinance was enacted pursuant to their police powers, and not as a zoning law. The court concluded that the two-year “sunset” rendered the City’s claims that the law was solely an exercise of their police powers “illusory”. “This activity [(i.e., natural gas drilling and exploration)] cannot be so detrimental that it must be banned, but only for two years, particularly when it is clear that the City is not engaging in any investigation, studies or other activities in the interim in order to determine if there is a way to alleviate any harm to the people of the city from this future activity,” said the court. The court found the Ordinance’s inclusion of a “sunset” provision led to “no other rational conclusion except that the law [was] a moratorium.”

The court said that for the Ordinance to be valid as a moratorium, the City had to show that its actions were: (1) in response to a dire necessity; (2) reasonably calculated to alleviate or prevent a crisis condition; and (3) that the City was presently taking steps to rectify the problem. The Court found that the Ordinance failed to meet the criteria for a properly enacted moratorium: First, there had been no showing of a dire need. There could be no showing of dire need, noted the court, since the New York State Department of Environmental Conservation (“DEC”) had not yet published the new regulations that were required before any natural gas exploration or drilling could occur in the state. Since there were no regulations, no permits were being granted. Second, since the DEC was not yet issuing permits, there was also no crisis nor a crisis condition that could possibly be shown by the City at this time, said the court. Finally, the court concluded that the “City clearly did not enact this law so that it could take steps to study or alleviate any problems that may be caused by gas drilling, exploration or storage.”

Accordingly, the court declared the Ordinance invalid.

See also: *Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc. 3d 450, 940 N.Y.S.2d 458 (Sup 2012) (holding ECL § 23-0303(2) does not supersede local government’s rights to regulate the use of the lands within their jurisdiction).

See also: *Cooperstown Holstein Corp. v. Town of Middlefield*, 35 Misc. 3d 767, 943 N.Y.S.2d 722 (Sup 2012) (holding ECL § 23-0303(2) does not supersede local government’s rights to regulate the use of the lands within their jurisdiction).

See also: *Belle Harbor Realty Corp. v. Kerr*, 35 N.Y.2d 507, 364 N.Y.S.2d 160, 323 N.E.2d 697 (1974).

Case Note:

The Opponents had also argued that the Ordinance: was a zoning law that was required to be referred to the Broome County Planning Board prior to enactment; and was superseded by state Environmental Conservation Law ("ECL") § 23-0303 (governing mineral resources). The City contended that: because the Ordinance was enacted pursuant to the City's police powers, the City was not required to refer the local law to the Planning Board prior to enactment; and the Ordinance was not superseded by ECL § 23-0303.

Citing prior New York case law, the court concluded that ECL § 23-0303 "does not supersede local government's rights to regulate the use of the lands within their jurisdictions"; the Ordinance was not superseded by ECL § 23-0303.

Further, the court agreed that a municipality could enact laws pursuant to its police powers to protect the health, safety, and welfare of its citizens, and that it does not have to do so through a zoning law. If the Ordinance was not a zoning law, then the City would have no obligation to refer the Ordinance to the County Planning Board. However, the court determined that the City "failed to provide any evidentiary proof that would provide a justification, based upon the health and safety of the community, for the banning of gas exploration, storage and extraction. Instead of proof, the City [has] produced only conclusions." Those conclusions—that the law was enacted pursuant to the City's police power—could not, said the court, "change the true character of [the Ordinance]." The court then went on to declare the Ordinance as an invalid moratorium on a particular land use.

Case Note:

In its decision, the court recognized "that the issue of gas exploration, extraction and storage is a controversial issue currently being debated throughout the state, and that there may be fierce opposition to gas exploration, extraction and storage by some members of the community." However, the court said that "the City cannot just invoke its police power solely as a means to satisfy certain segments of the community. Rather, the [C]ity must satisfy the well[-]established legal requirements that show a dire emergency; that the moratorium is reasonably calculated to alleviate a crisis; and that they are taking steps to solve the problem."

Zoning News from Around the Nation

NATIONWIDE

On October 5, 2012, the U.S. Supreme Court agreed to hear the

combined cases of *Arlington, Texas v. FCC* and *Cable, Telecommunications & Tech v. FCC*, which seek guidance on the standard to apply when reviewing an agency's own determination that it has the authority to interpret federal law. The petitions before the court allege that the Federal Communications Commission has wrongly been awarded a certain deference standard for jurisdictional review that is allowing it to override state and local zoning laws for wireless facilities. The question the Supreme Court will now consider is whether "a court should apply *Chevron [v. Natural Resources Defense Council]* [which offers the highest degree of deference] to review an agency's determination of its own jurisdiction."

Source: *Bloomberg BNA*; www.bna.com

HAWAII

Recently, Maui County Council members unanimously moved forward a resolution urging the state Legislature to repeal Act 55 and the Public Land Development Corp ("PLDC"). Opponents of Act 55 said it "has wasted ceded state lands on public-private developments with no county oversight." "The law states that public lands can be used for parking lots, offices, retail, hotels, homes, time shares developments, storage facilities, garages, gas stations and industry, among other projects." Opponents say that while the law calls for the PLDC to coordinate with county planning departments, the language is "vague," and there is no mechanism to ensure local cooperation and oversight.

Source: *The Maui News*; <http://www.mauinews.com>

NEW JERSEY

Still pending in the state legislature is a bill (A2586 and S1534) that would exempt private universities and colleges from land use law. The Borough of Princeton recently hosted a public forum to discuss A2586. City officials said they consider the bill to be a "'slippery slope' that could eventually decimate local zoning in the name of institutions serving the public good." Reportedly, the Assembly Higher Education Committee is expected to discuss the bill in November.

Source: *New Brunswick Patch*; <http://newbrunswick.patch.com>

NEW YORK

"A state judge invalidated [the City of] Binghamton's two-year moratorium on natural gas drilling, marking the first time a local law that would ban or delay hydraulic fracturing in New York has been struck down." (See summary of case in this bulletin). "Local bans in Dryden and Middlefield have already passed muster with state courts." Reportedly, lawyers for environmental groups said they do not believe this ruling would imperil the other local bans.

Source: *The Huffington Post*; www.huffingtonpost.com

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First Amendment—City says proposed sign is commercial and subject to Sign Ordinance's permitting requirements

Sign owners argue sign advertises expressive works and thus constitutes noncommercial speech and is protected by the First Amendment

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Citation: *Charles v. City of Los Angeles*, 2012 WL 4857194 (9th Cir. 2012)

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

NINTH CIRCUIT (CALIFORNIA) (10/15/12)—This case addressed the issue of whether advertisements for expressive works constituted noncommercial speech within the meaning of a city's ordinance and were thus protected speech under the First Amendment to the U.S. Constitution.

The Background/Facts: The City of Los Angeles, California (the "City") has a sign ordinance (the "Sign Ordinance") that requires a building permit for all temporary signs other than those containing a "political, ideological or other noncommercial message."

In the City, Fort Self Storage had agreed to lease exterior wall space to Wayne Charles for the display of temporary signs bearing "content related to motion pictures, theatrical productions, television and radio programming, music, books, newspapers, paintings, and other works of art." As their first image, Wayne Charles and Fort Self Storage (hereinafter, collectively, "C & F") proposed to display an image composed of the logo for the television show "E! News," and photographs of the show's hosts, Ryan Seacrest and Giuliana Rancic. Before erecting the sign, C & F sought confirmation from the City's Building and Safety Department that the proposed sign was indeed exempt from the permitting requirements.

The City found the sign "appear[ed] to be strictly commercial in nature" and was thus subject to the Sign Ordinance's permitting requirements.

On September 29, 2010, C & F sued the City in federal district court. They asked the court to declare that the proposed "E! News" sign and all other signs they intended to display with "content related to motion pictures, theatrical productions, television and radio programming, music, books, newspapers, paintings, and other works of art" were exempt from the Sign Ordinance's permitting requirements under the clause exempting signs "contain[ing] a . . . noncommercial message" from the permitting requirements. Among other things, C & F argued that the City's decision to classify their proposed signs as commercial speech violated the First Amendment as applied to C & F's speech. C & F contended that the proposed "E! News" billboard should be considered an adjunct of or incidental to the "E! News" television program, which enjoys the same First Amendment protection for noncommercial expression as the advertised news program itself.

The district court dismissed C & F's claims concerning unspecified future signs bearing "content related to . . . works of art." As to the "E! News" sign, the court rejected C & F's argument. It found that the "E! News" billboard qualified as commercial speech and did not contain "even arguably noncommercial content." The district court entered judgment in favor of the City.

C & F appealed.

DECISION: Judgment of district court affirmed.

The United States Court of Appeals, Second Circuit, held that because the “E! News” billboard did not present solely noncommercial speech or even “intertwined [commercial and non-commercial] speech”, it had properly been classified by the City as commercial, and thus was subject to the Sign Ordinance’s permitting requirements.

In so holding, the court explained that: “Commercial speech enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression.” In other words, municipalities can more strictly regulate offsite commercial signs than noncommercial signs.

So to determine whether C & F’s First Amendment rights were being violated here, the court had to determine whether the “E! News” billboard was commercial or noncommercial speech. The court admitted that the “the boundary between commercial and noncommercial speech” was a bit fuzzy. However, the court explained that where it is difficult to determine which category specific speech falls under, there is “strong support” that the speech should be characterized as commercial speech where: the speech is an advertisement; the speech refers to a particular product; and the speaker has an economic motivation.”

Here, C & F had conceded that the proposed “E! News” sign was an advertisement. And, it was undisputed that the sign referred to a particular cultural product and that C & F had an economic motivation in encouraging the public to view the program.

C & F had tried arguing that this advertisement went “beyond a bare proposal for a commercial transaction” because it also “promote[d] the ideas, expression, and content contained” in the television program and thus was entitled to full First Amendment protection. The court rejected that argument. It acknowledged that certain advertisements for noncommercial works might include both an invitation to participate in a commercial transaction as well as some amount of noncommercial expression entitled to heightened First Amendment protection. However, as long as those commercial and noncommercial messages were not “intertwined”, then “the government may permissibly restrict the commercial message regardless of its proximity to noncommercial speech.” On the other hand, if the speech includes both noncommercial and commercial elements that “are inextricably intertwined, . . . [the court applies its] test for fully protected expression.”

Here, the court concluded that the “E! News” billboard did not present intertwined speech. The sign consisted only of photographs of the program’s hosts and the name of the program; no other message was conveyed. That the underlying “E! News” program was itself entitled to full First Amendment protection did not cloak all advertisements for the program with noncommercial status, said the court. The court found that the district court properly determined that the “E! News” sign was commercial speech and correctly dismissed C & F’s claims.

See also: *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983).

See also: *Hunt v. City of Los Angeles*, 638 F.3d 703 (9th Cir. 2011).

Case Note:

C & F has also presented an alternative, "novel" argument: "truthful advertisements for expressive works are inherently noncommercial speech, because they are accorded the same First Amendment status as the underlying advertised work." The court rejected this argument. It acknowledged that in the limited context of specific tort actions, that rule may apply. However, the court declined to extend that limited exception.

Proceeding—Despite vote of three to zero with one abstention, variance application is denied under state statute requiring four concurring votes for variance approval

Applicant contends approval should be given since abstention created a situation where it was impossible to have a sufficient vote

Citation: *Green Falls Associates, LLC v. Zoning Bd. of Appeals of Town of Montville*, 138 Conn. App. 481, 2012 WL 4797820 (2012)

CONNECTICUT (10/16/12)—This case addressed the issue of whether the vote of a zoning board of appeals on a variance application, with a vote of three to zero with one abstention, is insufficient to have a vote under Connecticut statutory law, Conn. Gen. Stat. § 8-7, which requires the concurring vote of four members of a zoning board of appeals to vary a zoning ordinance.

The Background/Facts: In December 2006, Green Falls Associates, LLC ("Green Falls") entered into an agreement to purchase certain property in the town of Montville, Connecticut. The property was owned by Arthur W. DeGezelle. In June 2007, Green Falls applied to the zoning board of appeals of the town of Montville (the "ZBA") for a variance from certain yard setback requirements.

Two hearings were held on Green Falls' variance request. At both hearings, the chairman of the ZBA recused himself. At the second hearing, another member of the ZBA was absent. The four other members heard the presentations and deliberated. Of those four members, three voted in favor

of the variance application, and one abstained without giving reason for her abstention. Pursuant to Conn. Gen. Stat. § 8-7, notwithstanding the three votes in favor of the application, the ZBA denied the application.

Section 8-7 provides in relevant part: "The concurring vote of four members of the zoning board of appeals shall be necessary to . . . vary the application of the zoning bylaw, ordinance, rule or regulation. . . ."

Green Falls appealed the denial to the trial court. The trial court dismissed the appeal, finding the variance application failed to receive the necessary four votes pursuant to § 8-7. Green Falls again appealed. Green Falls argued: (1) the variance application did not fail to receive the necessary votes pursuant § 8-7 as the member's abstention "created a situation where it was impossible to have a sufficient vote by the [ZBA]"; and (2) the member's abstention could be counted as an affirmative vote.

DECISION: Judgment of superior court affirmed.

The Appellate Court of Connecticut rejected Green Falls' argument found that the member's abstention, which left only three voting members on the ZBA, was insufficient for a valid vote under § 8-7.

In so holding, the court found that Green Falls' "misconstrue[d] the meaning of § 8-7 in claiming that a vote of three in favor, zero opposed and one abstention constitutes only three votes and in concluding that therefore the composition of the [ZBA] was insufficient." The court explained that "a zoning board of appeals may not act unless there are at least four qualified members present and voting." This, said the court, means that Green Falls was entitled to the "full deliberation of its application by at least four of the members of the [ZBA], but not to a specific outcome or voting ratio by the [ZBA]."

Here, found the court, the abstaining member was present for the proceedings as Green Falls' application and she participated in the deliberation. Notwithstanding her ultimate abstention, she was present and qualified, allowing the ZBA to act on the application.

The court also rejected Green Falls' argument that the member's abstention could and should be considered an affirmative vote in favor of Green Falls' application. Having found that a vote of three to zero with one abstention "does not create an impossibility under § 8-7," the court said it need not require the member's abstention be either affirmative or negative. The statute specifically required a number of affirmative votes, and "an abstention is not counted with the majority," said the court. Further, said the court, "[w]hen one abstains from casting a vote, that person does not intend that their vote be either for or against the particular proposition, but only that they do not wish to be recorded on either side of the issue."

See also: *S.I.S. Enterprises, Inc. v. Zoning Bd. of Appeals of City of Bristol*, 33 Conn. App. 281, 635 A.2d 835 (1993).

Case Note:

In its discussion, the court also noted that Green Falls had failed to raise the issue

of an insufficient panel at the time of the member's abstention. In proceeding with its application, the court said Green Falls "accepted the possibility of any combination of voting outcomes".

Spot Zoning—Through ordinance, city rezones parcel that was split-zoned so that entire parcel has same zoning

Opponents challenge the ordinance, arguing it constitutes unlawful spot zoning

Citation: *Historic Charleston Foundation v. City of Charleston*, 2012 WL 4903040 (S.C. 2012)

SOUTH CAROLINA (10/17/12)—This case addressed the issue of whether the rezoning of one parcel of property, which benefited the parcel's owner, constituted unlawful spot zoning.

The Background/Facts: Prior to 2006, much of the Upper King neighborhood, in the Marion Square area of the city of Charleston, South Carolina (the "City"), was zoned 3X—meaning the maximum height of a building on the property could be three times the distance from the faade of the building to the center of the right-of-way in front of it. In 2006, in an effort to eliminate the "prehistoric" 3X zoning, the Charleston City Council (the "City Council") passed an ordinance rezoning the area. Under that rezoning, only four properties in the vicinity were left with at least part of the property zoned 3X. One of those properties was 404 King Street (the "Property"). The Property was split-zoned: Approximately 60% of the building was zoned 3X—meaning its maximum height could be three times the distance from the faade of the building to the center of King Street. The interior of the building was zoned 55/30—meaning the height could not exceed 55 feet nor could it be less than 30 feet high.

At some point, Library Associates purchased the Property with plans to build a large, full-service hotel on the lot. In 2007, the City initiated the rezoning of the Property so that the entire parcel could be zoned 3X. The City Council adopted an ordinance (the "Ordinance"), which applied only to the Property, rezoning the entire Property 3X. No other property in the City was rezoned under the Ordinance.

Thereafter, the Historic Charleston Foundation and the Preservation Society of Charleston (the "Opponents") brought a legal action challenging the Ordinance. The Opponents contended that the Ordinance constituted illegal spot zoning.

The circuit court's Master-in-Equity agreed. The Master found the Ordinance was unlawful spot zoning, and invalidated it.

The City appealed.

DECISION: Judgment of circuit court reversed.

The Supreme Court of South Carolina held that the Ordinance was not unlawful spot zoning.

In so holding, the court explained that “spot zoning” is the “process of singling out a small parcel of land for use classification totally different from that of the surrounding area, for the benefit of the owners of that property and to the detriment of other owners.” The court also noted that “[i]t is not unlawful spot zoning if ‘the proposed change is from one use to another and there is already a considerable amount of property adjoining the property to be reclassified falling within the proposed classification.’”

The court acknowledged that, here, the Ordinance, rezoning the Property, singled out a small parcel of land and benefited the owner who sought it. The court also acknowledged that the rezone was a change from the rear-abutting property. However, the court also found that since the Ordinance only changed the zoning for a portion of the Property (since it was previously split-zoned with the “front” portion having the 3X zoning), the rezone was “not a change from the property that literally adjoin[ed] it.” And, the court emphasized that the three other properties on the block were zoned 3X, determining that there was “‘a considerable amount of property adjoining. . . . falling within the proposed classification’ and thus the change to 3X for [the Property was] not ‘totally different from the surrounding area.’” Accordingly, the court concluded that the rezone of the Property to 3X was not unlawful spot zoning.

See also: *Bob Jones University, Inc. v. City of Greenville*, 243 S.C. 351, 133 S.E.2d 843 (1963).

See also: *Knowles v. City of Aiken*, 305 S.C. 219, 407 S.E.2d 639 (1991).

Case Note:

For purposes of its opinion, the court accepted that a variance in height classification (not just in use classification) may constitute unlawful spot zoning.

Proceedings—County council adopts ordinance that replaces agreement for a planned unit development with an amended agreement

Citizens object to approval and seek administrative review, contending ordinance was an administrative act not a legislative act

Citation: *Suarez v. Grand County*, 2012 UT 72, 2012 WL 5233510 (Utah 2012)

UTAH (10/23/12)—This case addressed the issue of whether a county council's adoption of an ordinance that replaced an original agreement for a planned unit development with an amended agreement was an administrative act—subject to an exhaustion of administrative remedies, or a legislative act—subject to an appeal to district court.

The Background/Facts: Moab Mesa Land Company, LLC (“Moab Mesa”) sought to develop a nearly two-thousand acre parcel of land in Grand County Utah (the “Cloudrock Development” or the “development”). In February 2002, the Grand County Council (the “Council”) adopted a resolution (the “2002 Resolution”), approving a planned unit development (“PUD”) for the Property. The 2002 Resolution stated that the preliminary master plan for the development was subject to a development agreement (the “Original Agreement”) between the County and Moab Mesa.

Then, from 2002 to 2006, the Cloudrock Development was involved in litigation that stalled work on the development. Eventually, Cloudrock Land Company, LLC (“Cloudrock”) succeeded to Moab Mesa's interest in the development. In 2006, Cloudrock submitted an application to the County Planning Commission to begin the process of amending approvals granted in the 2002 Resolution (the “Cloudrock Application”).

The County Planning Commission recommended approval of the Cloudrock Application, subject to certain conditions, including that Cloudrock make specified changes to the Original Agreement. Cloudrock submitted its Amended Agreement, which incorporated changes suggested by the Planning Commission. The Council ultimately voted to adopt Ordinance 454, which approved the Cloudrock Application, including the Amended Agreement, an Amended Master Plan, and an Amended Preliminary Plat.

A group of citizens (“Citizens”) objected to the approval of the Cloudrock Application. Citizens argued that approval of the Cloudrock Application was illegal because approval for Cloudrock's preliminary phase 1 plat had lapsed, and that the preliminary plat was therefore void.

Citizens filed an appeal to the Council's decision with the Grand County Board of Adjustment (the "Board"). The Board determined that it lacked jurisdiction to consider the appeal. It concluded that Ordinance 454 was a legislative act and therefore could only be reviewed by the district court.

Citizens had already filed a challenge to Ordinance 454 in district court, arguing that the Ordinance should be set aside because it had been adopted illegally. Citizens amended their complaint to argue that the Council's adoption of Ordinance 454 was administrative, rather than legislative, and that the matter must therefore be remanded to the Board so that Citizens could exhaust their administrative remedies, as required by § 17-27a-801(1) of the County Land Use, Development, and Management Act ("CLUDMA").

The district court ruled that the council had acted legislatively in enacting Ordinance 454, that the ordinance furthered the purpose of CLUDMA, and that it was not otherwise illegal.

Citizens appealed, again arguing that the Council's approval of Ordinance 454 was administrative and therefore should be heard by the Board, not the district court.

DECISION: Judgment of district court affirmed.

The Supreme Court of Utah held that Ordinance 454 was a legislative act and therefore properly before the court.

The court explained the difference between administrative and legislative acts: "[L]egislative power gives rise to new law, while [administrative] power implements a law already in existence." Legislative power generally involves the promulgation of laws of general applicability; and is based on the weighing of broad, competing policy considerations."

In its decision, the court recognized that some "zoning decisions are more difficult to classify, as they involve acts in the gray area between the clearly legislative and the clearly [administrative]." The court provided another guideline: when land use decisions "are at least arguably legislative," the court will "give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance."

Under these two guidelines, the court concluded that the County acted in its legislative capacity in adopting Ordinance 454 because: (1) it was a new law of general applicability that the Council adopted after weighing policy considerations; and (2) it had the formal nature of a legislative act.

Citizens had contended that, rather than weighing policy considerations and creating new law, Ordinance 454 simply implemented law already in existence. Specifically, they contended that the 2002 Resolution created the PUD and granted the approvals associated with the project; thus, Ordinance 454 merely implemented existing law by allowing minor deviations from the approvals granted in the 2002 Resolution. Citizens also argued that as a "site-specific land use decision," Ordinance 454 was not a law of general applicability. In other words, because Ordinance 454 governed one parcel of property owned by a single owner, Citizens contend that it could not be considered a law of general applicability.

The court disagreed with these arguments. It concluded that Ordinance 454 was a new law of general applicability that the Council adopted after the weighing of policy considerations because: (1) the Ordinance created new law by replacing the Original Agreement with the Amended Agreement; (2) the Amended Agreement stated that it would run with the land; and (3) the findings in the Ordinance illustrated that the Council considered policy matters.

Although the court's analysis indicated that Ordinance 454 was a new law of general applicability that the Council adopted after weighing policy considerations, the court again acknowledged that some "zoning decisions are . . . difficult to classify," and that "[s]ite-specific zoning ordinances," such as Ordinance 454, "present the classic hard case." The court explained that when considering whether such ordinances are legislative or administrative, "[i]n cases of doubt," the court "give[s] controlling significance to the form of the underlying governmental decision." Thus, when land use decisions "are at least arguably legislative," the court "give[s] understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." In this case, the court found that because Ordinance 454 was at least arguably legislative, the court could defer to the legislative form of the underlying decision, as evidenced by: (1) the County's characterization of its action; (2) the substance of Ordinance 454; and (3) the formal process by which the Council adopted Ordinance 454.

On appeal, Citizens had also argued in the alternative that Ordinance 454 should be set aside because the Council's adoption of the Ordinance was illegal. Specifically, Citizens contended that Ordinance 454 was illegal because the Council could not have approved the Amended Agreement after the preliminary plat had lapsed. The court disagreed. It held that the Council's decision to adopt Ordinance 454 more than 12 months after the approval of the original preliminary plat was not illegal because the Council had good cause to extend the approval period. And the court found that the Council complied with applicable zoning ordinances.

Accordingly, the court affirmed the district court's grant of summary judgment in favor of Cloudrock.

See also: *Carter v. Lehi City*, 2012 UT 2, 269 P.3d 141 (Utah 2012).

Zoning News from Around the Nation

MASSACHUSETTS

With the potential to spur related municipal zoning laws, Question 3 on the Massachusetts ballot (to be voted on November 6) seeks to enact a proposed law that would eliminate state criminal and civil penalties related to the medical use of marijuana.

Source: *Massachusetts Information for Voters 2012 Ballot Questions*

NEW JERSEY

A superior court judge has upheld a restraining order against the Borough of Union Beach, blocking Union Beach from enforcing its wind turbine ordinance. The ordinance, adopted in 2009, restricts height of wind turbines in the borough to 120 feet. In 2010, a judge granted the Bayshore Regional Sewerage Authority (“BRSA”) the restraining order after it argued that state agency permits it had received to build the turbine trumped any municipal land use laws. In upholding the restraining order, the judge ruled that the ordinance was valid but that a state statute prevents it from being applied to the BRSA project. (That statute “essentially prevents municipalities from blocking construction of a turbine once the entity attempting to build it has received a CAFRA permit.”)

Source: *Holmdel Independent*; <http://ind.gmnews.com>

NORTH DAKOTA

Among items on the November 6 ballot is Measure 3, which would amend the state constitution to “forever guarantee” “the right of farmers and ranchers to engage in modern farming and ranching practices.” Measure 3 would prohibit the enactment of any law “which abridges the right of farmers and ranchers to employ agricultural technology, modern livestock production and ranching practices.” Those opposed to the Measure say that it “would prohibit any local zoning law, state statute or state regulation ranging from animal cruelty prevention to segregation of genetically modified crops.”

Source: *Minot Daily News*; www.minotdailynews.com

OHIO

The Marietta City Council recently adopted legislation creating a new “H/M” or hospital/medical zoning within the city limits. The zoning designation was requested by the Marietta Memorial Health System, and will, reportedly, ultimately allow the System to make some improvements at its Memorial, Selby and Wayne Street campuses without having to go through a lengthy approval process with city council.

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

PENNSYLVANIA

On October 17, the Pennsylvania Supreme Court heard oral arguments over challenges to the state’s Act 13—a new law that regulates the natural gas industry. Municipalities have challenged the law as unconstitutional, saying it violates their rights and takes away their authority to control gas drilling operations through local zoning.

Source: *The Wall Street Journal*; <http://online.wsj.com/>

ZONING PRACTICE

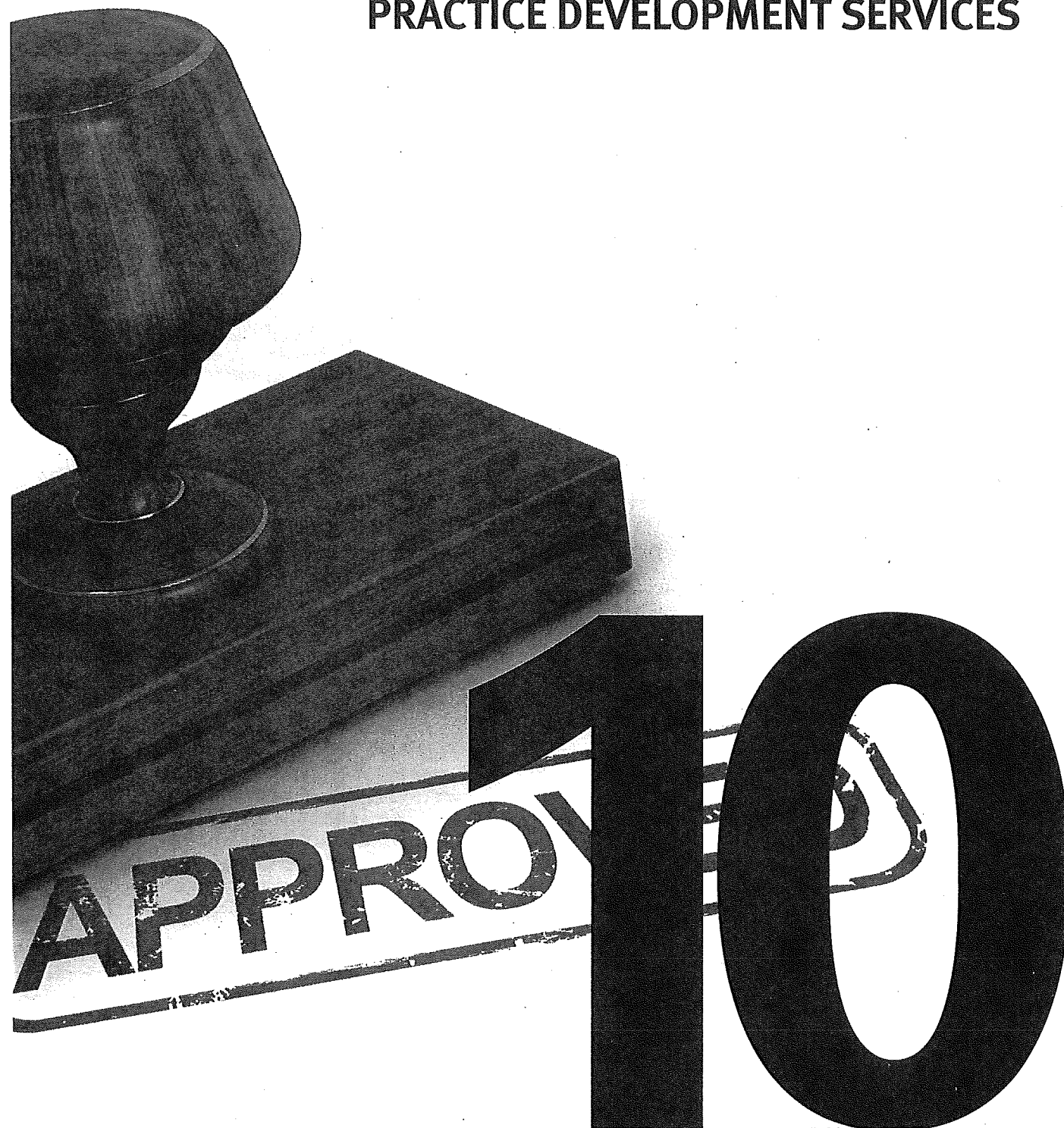
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PRACTICE DEVELOPMENT SERVICES



Transparent Development Services

By George Arimes

“I submitted a building permit to expand a business thinking it was going to be easy and quick. Now the city says that I have to go through a nine-month process to get a conditional use permit and go through environmental reviews,” Joe Builder complained. “I sure wish someone would’ve told me this when I first came in to get my project started.”

All diagrams by George Arimes

Joe’s story is not an uncommon one. Many businesses, builders, contractors, consultants, developers, and home owners have horror stories about trying to navigate development review and permitting processes. In my experience, a lack of communication and coordination up front, poor handoffs or disjointed steps, complex regulations, and fragmented organization and permitting requirements are common in communities across the country. Fortunately, a growing number of agencies are striving to become more transparent (i.e., easier for customers to understand). This article delves into some concepts of transparency and also examines how planning and zoning practitioners can take advantage of expanded skills to become more professionally versatile.

DEVELOPMENT SERVICES AS A BUSINESS AREA

Providing development-related services is challenging for local government agencies due to the numbers of different staff disciplines and types of regulations that are involved. Simply, “development services” includes any city or county department or division that has to ensure development proposals are consistent with adopted regulations, including planning and land use and environmental, infrastructure, and building safety-related requirements. From a customer-oriented perspective, development services is a business area that includes any staff that may handle or review a development proposal.



➡ Development services includes a range of business areas tasked with administering different sections of the local development code.

Traditionally, local governments have separate planning and zoning, building, environmental, public works, and utility departments. However, in recent decades a number of cities and counties have reorganized to create a single development services agency that includes most or all staff under a single manager (i.e., a planning, building, and development department; a development services department; or a community development department). Communities may use organizational re-

structuring to address customer service, budgetary shortfalls, better management and coordination, or to clarify how the local government’s overall development services business area works. However, the bottom line for customers is they have to work with the same staff, no matter how the city or county chooses to organize its departments.

CUSTOMER CHALLENGE

Who are your customers? In most cases, the customer is the owner (applicant) that sub-

ASK THE AUTHOR JOIN US ONLINE!

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

About the Author

George Arimes is a registered professional engineer with more than 34 years of public- and private-sector experience in the development services and one-stop permitting arena. He has managed multimillion-dollar local government development services organizations and customer service improvement efforts in Austin, Texas, and San Diego. As a development services consultant, he has over 16 years of experience in improving complex regulatory systems through innovative business process integration, one-stop permit streamlining, performance measurement, strategic change management, organizational and cost-of-service analysis, integration of new technologies, and educational seminars and training.

mits a project. Owners often have representatives like consultants, builders, or contractors acting on their behalf. Other customers include citizens interested in active projects or individuals doing research. The fact that customers have different levels of knowledge and experience creates a dilemma for development services administrators. At a moment's notice, staff has to be prepared to answer the following questions:

- Where do I start?
- What permits or approvals do I need?
- What codes or other requirements apply to my project?
- How do I know if my project is feasible?
- How long will it take before I can start construction?

Just as all customers are not alike, projects vary in both size and complexity. The following examples hint at some of the variables:

- Simple permits to replace a water heater or change out a window
- More complex residential projects like interior remodels, additions, or decks
- Simple commercial projects like tenant finishes
- Complex residential or commercial projects like new structures, nonconventional construction, or special design requirements
- Any of the projects above linked with some discretionary administrative or public hearing approval like a variance, conditional use, subdivision, or rezoning

A diversity of projects (both in size and complexity) and customer types can pass through a development services agency's door on any given day. Unfortunately, agencies often ignore this most basic customer reality and don't tailor services or processes to address this variability.

Customers want staff to provide consistent code interpretations, comprehensive and reliable information, and coordination and collaboration.

When communities have a complex regulatory environment, numerous professionals must review projects against applicable requirements. Even the simplest project can be complex due to site constraints, previous approvals or conditions, type of construction, number of permits needed, or the customer's level of readiness.

With multiple reviewers and review requirements, customers can get lost in the process. They may complain of receiving limited empathy and little assistance in moving their project through the system and may feel as though they have no option but to seek help from influential friends or elected officials when their project stalls due to red tape.

Customers want staff to provide consistent code interpretations, comprehensive and reliable information, and coordination and collaboration. They expect a timely and predictable process and accountability for decision making. While it seems reasonable for customers to expect greater transparency, this improvement will likely require a change in institutional thinking.

ECONOMIC REALITIES

As the economy has faltered, many local governments are looking for ways to bolster economic development and customer service in order to attract new businesses and aid in expansions. With the lean economy and reduced budgets, communities are looking for ways to more fully utilize staff resources and at the same time meet customer service objectives. When reorganizations occur to consolidate staff with fewer managers, cities and counties may require formerly specialized staff to become generalists. In these scenarios, cross training becomes an important tool to deal with workload.

At the most basic level, businesses create jobs. Job creation and retention are vital to sustained economic vitality and growth. Local governments must provide an environment that makes it easy for businesses and investors to establish or expand their operations. As an incentive, more and more local governments are marketing customer service in the development services process as they strive to compete with other communities in the economic development realm and the quest for sustained or increased revenues and tax base. These cities and coun-

ties understand that, while regulations must still be met, they can use customer service as a “carrot” for inviting businesses and promoting business expansion, especially given the scarcity of financial incentives.

THE EVOLUTION OF CUSTOMER SERVICE IMPROVEMENT

Many agencies seek to evolve by simplifying the customer’s experience. In this context simplification means that the overall development services system must move from a very opaque (fragmented and unclear) experience to the most transparent experience possible (Intuitive and accountable).

For an agency to even consider this evolution, it must be willing to ask some fundamental questions about the following system components:

Core Business Processes: Are the steps in the development processing system process integrated and efficient, and do they reflect a culture that is sensitive to the customer’s point of view?

People Interactions: Are communication mechanisms for staff, customers, and citizens structured to share information freely, manage projects effectively, and resolve issues or conflicts as they occur?

Regulatory Framework: Are the policies, codes, and support documents that drive the review and construction process understandable, objective, and reasonable?

Technology: Do the tools available to participants provide for accurate and real-time information and project tracking, and do they assist in informed decision making?

Physical Space: Does the physical environment reflect a user-friendly, service-oriented approach for customers and citizens that interact with the process?

Organizational Structure: Is the organization structured to be cost effective, provide appropriate resources for staff and tools, and support a project management approach with accountability for performance?

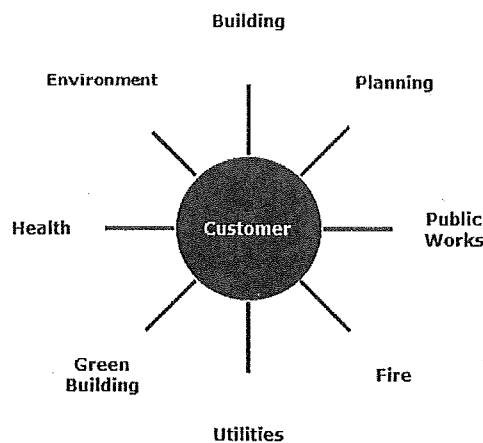
At one extreme of the evolution spectrum, services are disjointed by being in multiple physical locations, have limited or no common technology, and typically have several “siloed” permitting agencies for the customer to traverse. As agencies evolve, they begin to colocate staff members from some departments, add some consistent technology for tracking, and start to reorganize individuals under more uniform manage-

ment. However, experience has shown that reorganization, colocation, and technology alone won’t alter the service culture significantly. While each helps service to improve, the underlying process does not change. With further evolution, agencies begin to simplify business processes; provide case management, coordination, and more colocation; and create one-stop permitting centers to improve customer access. However, the system is still permit oriented as customers have to orchestrate several phases of approvals on their own (discretionary to design to construction). Some communities are taking ad-

colocated but have limited tracking technology or electronic access to historical records.

KEYS TO TRANSPARENT SERVICE DELIVERY
 Transparency, as used in a social context, implies openness, communication, and accountability. In the development services arena it is characterized by visibility or accessibility of information; especially concerning business practices. Transparency is an essential condition for a free and open exchange, where the rules and reasons behind regulatory measures are fair and clear to all participants. The key elements of transparency include a seamless system, a focus on customer objectives or results, a project-oriented approach, tailored processing steps, accountability, and a robust performance measurement system.

Multiple Staff Discipline in the System



➔ The development services system typically involves staff trained in a variety of disciplines.

ditional steps to ensure that customers won’t need to be concerned about which department or organizational unit they are dealing with. This represents the opposite extreme of the evolution spectrum, where a local government superimposes an integrated and seamless face on the entire system.

While there is no perfect development services system, agencies that strive to implement transparent processes and services have less frustrated and more satisfied customers. It is natural for each agency to excel at some improvements but still be lacking in other areas. For example, an agency may have excellent technology but limited colocation of staff. Other agencies may have all staff

Seamless System

Customers don’t just walk in to receive service. They also phone in, go online, and some still use the mail to interact with an agency. No matter how a customer enters the development services system, they should have the same experience. This means a simple triage of their need and a single handoff to a point person who will facilitate their request. Conversely, customers in most systems are routed to multiple staff for piecemeal feedback or permit processing. This is one of the toughest parts of transparency to accomplish since it requires redesign of the core business processes to integrate and formalize customer flow and create consistent terminologies for multiple entry types. Transparency mandates consistency and coordination from the outset.

Focus on Results

Customers interact with the development services system to accomplish several major objectives or results depending on their immediate need, including the following:

- To collect comprehensive and reliable information (e.g., information about property constraints)
- To obtain a project decision
- To obtain permission to occupy or use their facility
- To report ongoing compliance or code enforcement issues

In order for the customer to exit the system with any of the results above, they usually have to obtain feedback from mul-

multiple staff members depending on the complexity of their request. For example, let's say a customer wants to answer the following questions about a particular property:

- What use restrictions and development standards apply under the current zoning?
- Are there any easements or floodplains on the property?
- Are there protected areas on the land?
- Is this a legally subdivided parcel?
- Are there any existing code enforcement actions on the property?

In most communities, this means the customer would have to visit with a staff member from the planning and zoning, public works, environmental, and building inspection (code enforcement) departments. In an opaque system they go to multiple building locations, sign in, and perhaps see the right person. In a more colocated environment they may visit a one-stop center to meet with staff at different counters. But while creation of a one-stop center is a positive trend, colocation alone is not the complete answer. Ideally, the customer should "sit in one chair" with appropriate staff and information coming to the customer, versus the customer being routed to counters or organizational units (and websites) and left on his own to bridge the gaps and solve overlapping interpretation conflicts.

Project-Oriented Approach

As soon as the customer defines an immediate project objective, the agency should assign a point of contact to confirm, organize, and coordinate the required approvals and permits from start to finish (e.g., preapplication assistance through certificate of occupancy). To improve consistency the point of contact working with assigned technical team members should document the "roadmap" for required approvals, estimated timing, expected fees, and any potential roadblocks. The goal is for the assigned point of contact to stay involved throughout the entire project lifecycle.

Tailored Processing Steps

Some information requests or projects can be done quickly at the counter by a single individual or online in a single interaction. Some service requests require more coordination at a counter, with multiple staff members available to make interpretations or sign off on a proposal. Some projects are submittal based and are managed (mostly by appoint-

ment) with longer timelines, especially if a discretionary action is part of the immediate project objective. The key is establishing a standard set of processes with a flexible project management system that handles phasing of approvals or permits as appropriate. Standardization makes it clear to customers what steps to expect on their projects.

Accountability

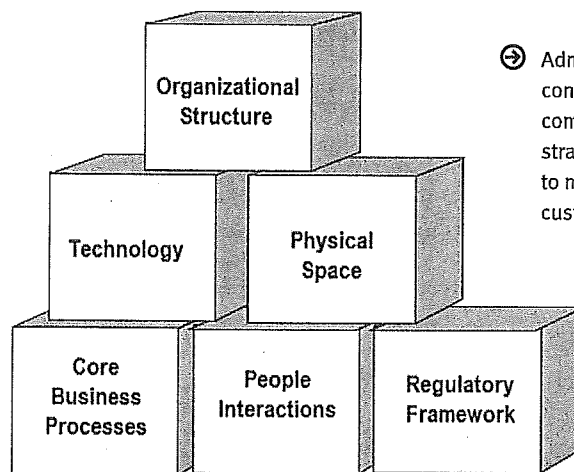
Someone has to be in charge to ensure that staff from different disciplines or departments work together to solve issues in a timely manner (preferably the point of contact acts in this role). A clear and consistent issue resolution process is crucial. Customers

group). Perception of customer satisfaction and internal metrics should both be used to gauge feedback (customer reality) to numbers. The program should be designed and implemented system wide instead of in a fragmented or piecemeal manner by individual departments (typically with their respective budgets).

HOW AM I AFFECTED?

Every agency is different and will likely implement a subset of the improvements that are possible. However, one thing that is critical for success is truly addressing the service culture and attitude of both staff and customers. As a planning or zoning

Development Services System Infrastructure Components



- ➔ Administrators have to consider multiple infrastructure components when developing strategies and a plan of action to make improvements to customer service.

and staff alike have to feel good about their experience. If a customer is not satisfied with a decision, there should be a reliable protocol for proactively elevating issues without fear of retribution. To be successful, administrators must support cultural change and address silo-based mentalities.

Robust Performance Measurement

The system administrator should design and adopt a performance measurement program to measure timeliness, predictability, and accountability. Measurement is more than how much work comes in or how much gets approved (i.e., inputs and outputs). The program should be based on a defined set of customer expectations for a successful system (usually generated with feedback from an ongoing customer

professional you may see your primary role as implementing regulations; however, it is also critical as a public servant to see your job as helping customers succeed. It's not one or the other. It's both. Customers pay fees, and therefore deserve comprehensive, reliable, and timely services. In many cases the system is wrought with redundancies, structural defects, and poor informational resources. Staff is usually caught between providing good service and insufficient tools to do their jobs. But there are things you can do as an individual to strive to be more successful in the transparent system approach.

New or Expanded Point-of-Contact Role

When implementing transparency, an essential new or expanded role is the customer point of contact or interface. Given

the complexity of most regulatory systems, having a clear processing advocate throughout the project's life cycle is singularly the most important benefit the customer seeks. However, this role is not for everyone. Given your background as a zoning official, planner, engineer, or other technical professional, you have what it takes to tackle this role. To be successful, you should be willing to focus on the big picture, broaden your experience and knowledge, and accept a leadership role.

"Walking in the customer's shoes" is an essential transparency element. You should be able to embrace the customer's view of their project, be empathetic to what they're trying to accomplish, understand their timeline needs, and build a trusting relationship. Very few staff members in the system will take this role upon themselves to the extent needed. In most cases staff have to be more focused on their individual reviews and leave it up to the customer to bridge the gaps. In the transparent system it is essential for a point of contact to help customers define their projects, to organize necessary approvals, and to facilitate reviews and issue resolution through project completion (including facilitating revisions during the construction process). Therefore, if this role does not formally exist, development services administrators must recognize the void and develop a strategy to implement improvements. This will allow interested staff to gravitate to this role in a more structured and consistent way.

Each technical person in the development services system can interpret particular regulations. However, as a point of contact, having a broader range of skills and experience will assist you. Cross training is the key element of the customer interface. Clearly it's important to have an expertise; however, having knowledge that is "a mile wide and a foot deep" will prove essential for your success as a point of contact. It is good to know a little bit about everything in the process. Remember, you will have technical experts to bring to the table when needed. In addition to technical knowledge it is important to gain additional skills in project management, such as meeting facilitation, issue resolution, and organizing multiple projects. Some individuals gravitate toward the technical side of development services. In an integrated system, the point-of-contact role requires more attention to interpersonal relationships with customers and staff while managing project performance for results.

Another essential element of this role is the acceptance of responsibility. It is not enough to participate in meetings; instead, you have to have a bias to facilitate and control the agenda. Lead by example and instill accountability in the staff participating in the review process. The leadership role requires an individual to promote the team environment and act as a catalyst to solve problems for the customer.

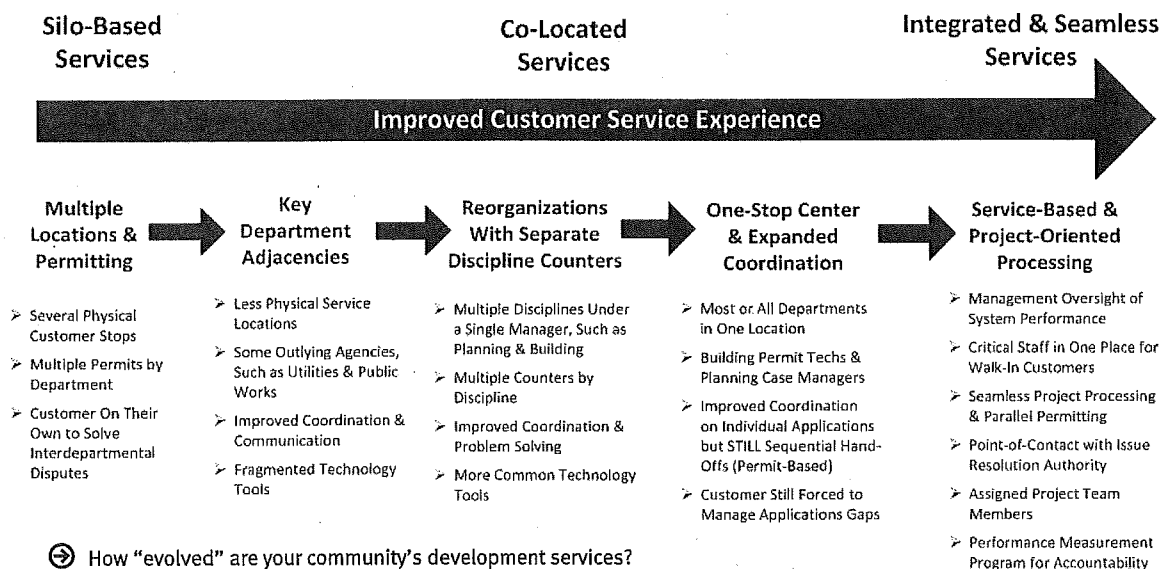
Problem-Solving Attitude

Effective problem solving centers on staff members having a bias to get things resolved. In the team environment it is essential that each person be an "options thinker." Individual staff disciplines have to be prepared to come up with multiple ways to solve a particular code issue instead of providing a fixed solution to a customer. Customers want to meet the regulations and solve problems; however, they also want flexibility to meet their design goals and personal visions. Customers have to accept that some designs don't meet the regulations. However, a partnership attitude is needed to solve problems, and this requires that both customers and staff work together to look for solutions that meet everyone's needs.

The point-of-contact role is essential in bringing the right people together, promoting options thinking, and providing advocacy for ensuring that problems are solved in a timely manner. The point of contact promotes flexibility and a little risk taking.

Assigned team members, on the other hand, have to come to the table with the authority to make decisions and an "options thinking" frame of mind as well. Team members often play an important role during preapplication reviews of potential projects. Practicing issue avoidance at this early stage likely will make the process move faster, create better projects, and build trust between customers and staff. Issue avoidance is much more palatable than issue resolution,

Evolution of Customer Service Delivery



which is reactive and often creates ill will or angst.

Willingness to Use Technology

Another key trait is the willingness to learn and use technology to simplify and make the process more efficient. To be more effective as a staff member, technology will allow you to gain access to information to provide more comprehensive and reliable preapplication assistance, to document agreements and track project milestones, and perform reviews or inspections with fewer steps.

Some examples of technologies include the following:

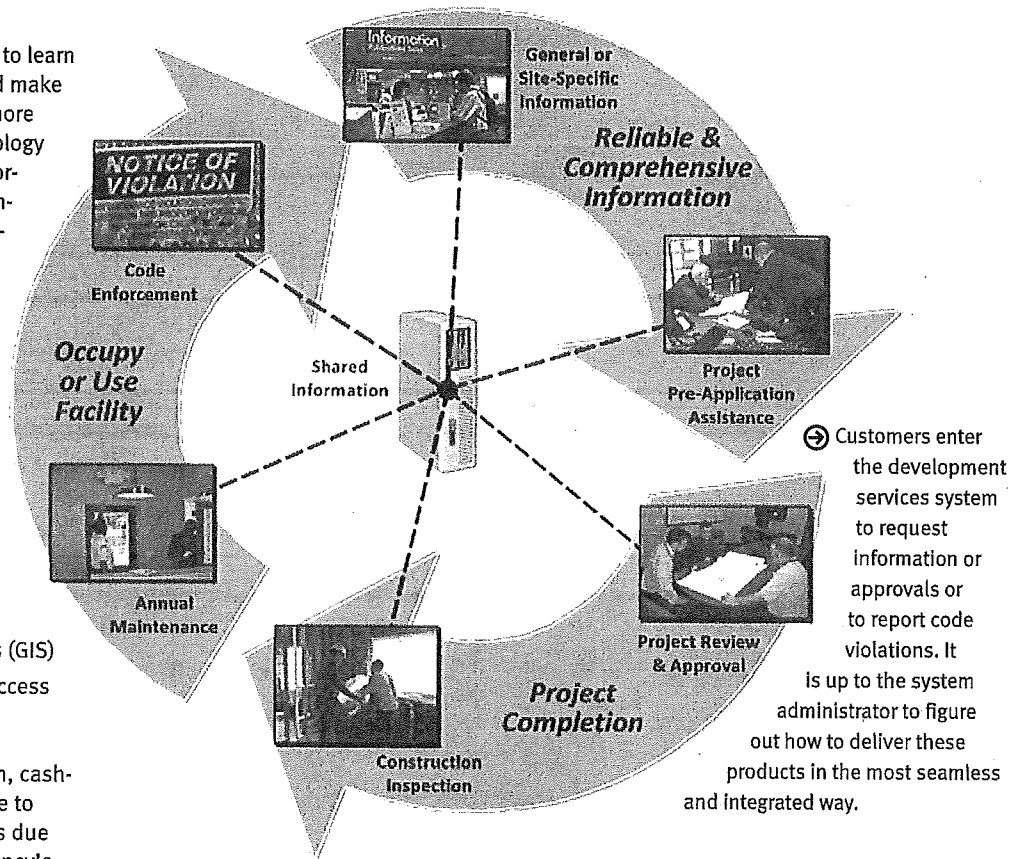
- Project tracking software
- Document management system (electronic records)
- Electronic plan review
- Mobile access for inspectors
- Management reporting
- Geographic Information Systems (GIS)
- Integrated website and citizen-access portal

Given the economic downturn, cash-strapped agencies may not be able to implement all the technology tools due to budgetary constraints or an agency's place in the evolution process. However, your willingness to embrace new technologies as they become available will signal to management your support of change and striving for a more efficient and effective process. If current technologies in your agency are not uniformly used by all work units, suggest to management that directing consistent use will offer better coordination and transparency for the team. Volunteer for training opportunities and explore online tools to supplement your knowledge.

CONCLUSION

Communities can invest a lot of resources in their development services systems, including physical space improvements and technology tools. However, in the end, successful service really boils down to culture and attitude of both staff and customers as they work together. This partnership is essential for satisfaction and quality service. Since you are an integral part of this service structure, it's imperative that you expand your knowledge and capabilities to

Customer Life Cycle



make yourself as indispensable as possible. You know your job. The essential ingredient is being responsive, collaborative, and accountable in your dealings with other staff and customers. Taking on new roles

and gaining useful knowledge and skills of project management, effective issues resolution, and customer service ethics will go a long way to help your career and elevate you in the transparent agency.

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