

Zoning Bulletin

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Open Meetings Laws—Zoning board of appeals holds site visit, allowing only two representatives of the public and creating no record

Citizens maintain site visit violated open meetings laws

Citation: *WSG Holdings, LLC v. Bowie*, 2012 WL 6604519 (Md. 2012)

MARYLAND (12/19/12)—This case addressed the issue of whether a county zoning board of appeals violated various open meeting laws by conducting an

Contributors

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in-person inspection of the subject property of an application for a special exception, allowing only two representatives from the public opposition and creating no subsequent record of the visit.

The Background/Facts: WSG Holdings, LLC (“WSG”) owned land in the community of Nanjemoy, Charles County, Maryland (the “County”). WSG intended to build a “tactical research” facility on the property, comprised of: an office building, gun range, and driving track. Because the property was zoned as an Agricultural Conservation zone, WSG’s planned development was not permitted except by special exception. Accordingly, WSG applied to the County’s Board of Appeals (the “Board”) for the required special exception.

The Board held three public hearings on WSG’s application for the special exception. At these hearings, more than 22 people testified in opposition to WSG’s proposed facility.

The Board also conducted one trip to WSG’s property. For this “site visit,” the Board allowed representatives from WSG, as well as two representatives of the citizens who opposed the proposed development. However, the Board prohibited any other members of the public from attending and kept no transcript or other record of that which transpired at the site visit.

The Board eventually granted WSG’s application for the special exception.

Subsequently, various individuals (the “Opponents”) jointly filed a petition for judicial review in the Circuit Court for Charles County. Among other things, they contended that the Board conducted the visit to the subject property in a manner that was closed to the public in violation of various open meeting provisions, including: Maryland Code Article 66B, the Charles County Code, and Rule III of the Board’s Rules of Procedure.

Section 4.07 of Article 66B required that “[a]ll meetings of a board of appeals shall be open to the public.” Section 4.07(c)(5) of Article 66B required that the Board “shall make a transcript of all proceedings” which “shall be a public record.”

Section 297-415(G) of the Charles County Code contained a notice and public meetings provision related to consideration of special exception uses. Section 297-411 required notice to adjoining property owners, posted signs on the property, and, for special exceptions specifically, publication in a local newspaper of the time and place of a meeting and information regarding the special exception sought.

Rule III of the Board’s Rules of Procedure required: “all hearings shall be held in open public session”; “[a]ll evidence shall be presented to the [Board] in hearings open to the public”; and hearings shall be “electronically recorded.”

WSG contended that the Opponents’ objections to the site visit were not preserved for appellate review. WSG maintained this was because no one objected to the visit when it was proposed at one of the hearings, and no one attending the visit objected to the way in which the visit was conducted. WSG further contended that the site visit was not subject to open meetings requirements because it was limited to observation alone.

The Circuit Court agreed with WSG that the Opponents had failed to preserve the open meetings issue for appellate review.

The Opponents appealed. The Court of Special Appeals disagreed with the Circuit Court and WSG. It held that the Opponents had preserved the issue, and

that the Board had violated the open meetings provisions of § 4.07(c) of Article 66B and Rule III of the Board's Rules of Procedure.

WSG filed a Petition for a Writ of Certiorari, which was granted by the Court of Appeals.

DECISION: Judgment of court of special appeals affirmed.

The Court of Appeals of Maryland held that the Opponents had preserved their objections to the site visit under the public meetings provisions of § 4.07 of Article 66B, §§ 412 and 415E of Chapter 297 of the Charles County Code, as well as Rule III of the Board's Rules of Procedure. In so holding, the court noted that the burden was on the Board to enforce the open meetings mandates; it was not on the representatives of the public opponents to raise it. Moreover, two weeks before the Board's final hearing on WSG's special exception application, one of the Opponents had filed a Motion for Appropriate Relief, objecting to the fact that the public was not permitted to attend the site visit, citing violations of open meetings provision, and calling for the creation of a record of the site visit. That Motion was denied by the Board.

The court further held that the site visit constituted a "meeting" which was required to be open to the public by § 4.07(c)(4) of Article 66B, as implemented in the Charles County Code, and Rule III of the Board Rules of Procedure. Because the Board violated the open meeting provisions of Article 66B, the Charles County Code, and Rule III of its own Rules of Procedure, the court remanded the matter to the Board for a new hearing.

In its decision, the court acknowledged that: "It may be true that site visits without observance of the nuances of public meetings strictures are permitted if the board limits itself to observation alone." The site visit here, however, explained the court, was elevated beyond mere "observation" and required compliance with the open meetings provisions. The site visit constituted a meeting under the provisions of Article 66B and a hearing under the Charles County Code and the Board's Rules of Procedure. The court found that: "The Board was conducting a meeting when it was transacting public business as it visited the property under review. Board members interacted with WSG representatives and gathered information pertaining to the special exception at issue. The Board also was conducting a 'hearing,' because discussions occurred among Board members and WSG representatives, in contravention of the Board's own Rule that 'no evidence, argument, or other matter shall be received by the Board in closed session.'"

Moreover, said the court, because the Board relied upon information obtained from the site visit, it was required to create a record informing the parties and a reviewing court of the evidence gathered from the site visit that led the Board to credit WSG's testimony and approve its site plan. The Board's failure to keep a record of that which occurred at the site visit violated the requirements of Article 66B as well as that of § 297-412(E) of the Charles County Code and Rule V of its own Rules of Procedure, concluded the court.

The Board's violation of the mandatory open meeting provisions resulted in the Board's decision being "void ab initio" (i.e., to be treated as invalid from the outset).

See also: *Bowie v. Board of County Com'rs of Charles County*, 203 Md. App. 153, 36 A.3d 1038 (2012), cert. granted, 426 Md. 427, 44 A.3d 421 (2012) and judgment aff'd, 2012 WL 6604519 (Md. 2012).

See also: *White v. North*, 121 Md. App. 196, 708 A.2d 1093 (1998), judgment vacated on other grounds, 356 Md. 31, 736 A.2d 1072 (1999).

See also: *von Lusch v. Board of Com'rs of Queen Anne's County*, 268 Md. 445, 302 A.2d 4 (1973).

Case Note:

Section 4.07(c) of Article 66B of the Maryland Code has been repealed. See now, Maryland Land Use § 3-303.

Nonconforming Use—Legal nonconforming restaurant use seeks to change from seasonal to year-round

Town says change is an impermissible expansion of the legal nonconforming use, but restaurant argues it is merely an “intensification”

Citation: *Woodbury Donuts, LLC v. Zoning Board of Appeals of Town of Woodbury*, 2012 WL 6571452 (Conn. App., Dec. 25, 2012)

CONNECTICUT (12/25/12)—This case addressed the issue of whether a proposed year-round use of property as a restaurant was an impermissible expansion of a preexisting, legal nonconforming use established by a seasonal fast food restaurant.

The Background/Facts: EYRE, LLC (“EYRE”) owned property in Woodbury, Connecticut (the “Town”). From 1995 or 1996 until the fall of 2006, Corey’s restaurant, a tenant, operated a 3,000 square foot seasonal, mostly eat-in, restaurant on a portion of EYRE’s property. The building housing Corey’s restaurant was a preexisting, legal nonconforming structure, and the use as a seasonal fast food restaurant was a preexisting, legal nonconforming use.

In 2006, EYRE sought to construct a 42,000 square foot commercial retail center on the property. As part of this plan, EYRE intended to relocate Corey’s restaurant into a conforming building to be constructed on the site. In furtherance of its proposed plan, EYRE filed a special permit application with the Town’s zoning commission. The zoning commission approved the application (the “2006 special permit”), including the relocation of the existing legal nonconforming use within the same portion of the lot and subject to certain conditions.

EYRE and Corey’s restaurant were unable to agree on terms for a new lease in the new retail center. In September 2008, Woodbury Donuts, LLC (“Woodbury Donuts”) applied for a zoning permit to operate a Dunkin Donuts franchise at the location originally planned for Corey’s restaurant.

The zoning enforcement officer denied Woodbury Donuts’ permit. The zon-

ing enforcement officer found that the proposed use was “not permitted” under the Town’s zoning regulations and was “significantly different in character from[,] and [was] an impermissible expansion of[,] the previous non-conforming use.”

Woodbury Donuts appealed to the Town’s zoning board of appeals (the “ZBA”). After a four day public hearing, the ZBA agreed with the zoning enforcement officer’s findings and denied Woodbury Donuts’ appeal.

Woodbury Donuts appealed to the trial court. The trial court affirmed the ZBA’s decision.

Woodbury Donuts again appealed. It argued that the proposed use as a fast food restaurant was a vested nonconforming use. It noted that the 2006 special permit did not contain any seasonal restrictions. It also noted that the Town’s zoning regulation did not distinguish between seasonal and year-round use of properties. Woodbury Donuts argued that the expanded hours and months of operation for the proposed Dunkin Donuts franchise (compared to the seasonal Corey’s restaurant) represented “an intensification, not an expansion, of the previous legal nonconforming use.” Accordingly, it contended that the ZBA should have approved its zoning permit application.

DECISION: Judgment of superior court affirmed.

The Appellate Court of Connecticut held that Woodbury Donuts’ proposed year-round use of the property as a Dunkin Donuts restaurant was an impermissible expansion of the preexisting, legal nonconforming use established by Corey’s restaurant as a seasonal fast food restaurant.

In so holding, the court acknowledged that “a mere increase in the amount of business done pursuant to a nonconforming use is not an illegal expansion of the original use. . . .” However, “[a] change in the character of a use. . . does constitute an unlawful extension of the prior use.” Thus, explained the court: “In deciding whether the current activity is within the scope of a nonconforming use[,] consideration should be given to three factors: (1) the extent to which the current use reflects the nature and purpose of the original use; (2) any differences in the character, nature and kind of use involved; and (3) any substantial difference in effect upon the neighborhood resulting from differences in the activities conducted on the property.” The court further explained that: “[t]o be illegal, an extension of a permitted use need not necessarily consist of additional uses of a different character. It may consist of uses of the same character carried on over a substantially additional period of the year. . . .”

Relying on Connecticut case law, the court concluded that the proposed change of a nonconforming use from seasonal to year-round would constitute a change in character of the previous use. Therefore, it would be an impermissible expansion of that use.

Here, under Woodbury Donuts’ proposal, the Dunkin Donuts restaurant business would: expand the restaurant use into additional months of the year; change the restaurant use from primarily eat-in to primarily take-out; and potentially adversely impact nearby residents with truck deliveries prior to 5:00 a.m.

The court concluded that the ZBA’s determination that the proposed year-round use as a Dunkin Donuts franchise was significantly different in character from the previous seasonal use as Corey’s restaurant and was an impermissible expansion of the previous nonconforming use had support in the record, in the town’s zoning regulations and in Connecticut case law.

See also: *Helicopter Associates, Inc. v. City of Stamford*, 201 Conn. 700, 519 A.2d 49, 61 A.L.R.4th 789 (1986).

See also: *Zachs v. Zoning Bd. of Appeals of Town of Avon*, 218 Conn. 324, 589 A.2d 351 (1991).

See also: *Planning and Zoning Com'n of Town of Lebanon v. Craft*, 12 Conn. App. 90, 529 A.2d 1328 (1987).

Case Note:

Woodbury Donuts had also argued that the ZBA should have been estopped from prohibiting the operation of a Dunkin Donuts franchise at the proposed location. It maintained that the 2006 special permit expressly authorized the continuation of a fast food restaurant. The appellate court disagreed. It found that the 2006 special permit more specifically allowed the relocation of the existing legal nonconforming use of the seasonal fast food restaurant. Accordingly, the court determined that EYRE should have known that only seasonal fast food restaurants were permitted in the complex that it constructed subsequent to the issuance of the 2006 special permit.

Rezoning—Under settlement agreement with city, billboard companies are exempted from zoning regulations

Competitor billboard company challenges settlement agreement as beyond the powers of the city and void

Citation: *Summit Media LLC v. City of Los Angeles*, 211 Cal. App. 4th 921, 2012 WL 6126868 (2d Dist. 2012)

CALIFORNIA (12/10/12)—This case addressed the issue of whether a settlement agreement between a city and certain billboard companies, exempting those billboard companies from certain zoning regulations, was ultra vires (i.e., “beyond the powers” of the city) and void. It also addressed whether, if the settlement agreement was ultra vires and void, zoning permits already issued pursuant to the settlement agreement were also void.

The Background/Facts: In December 2000, the City of Los Angeles (the “City”) passed an ordinance imposing an interim prohibition on the issuance of permits for the construction or placement of new off-site signs. That ban became permanent in April 2002 when the City amended the Los Angeles Municipal Code (LAMC or municipal code) to establish a permanent, general ban (with exceptions not relevant to this case) on new off-site signs throughout the city (the 2002 sign ban). The 2002 sign ban also applied to “alterations or enlargements of legally existing off-site signs.”

Also, in February and July 2002, the City passed two ordinances amending

the municipal code to establish an off-site sign periodic inspection fee and an inspection program.

Litigation over the inspection program and sign fee ordinance ensued. Eventually, in September 2006, the City entered a settlement agreement with CBS Outdoor Inc. and Clear Channel Outdoor, Inc. (the "Billboard Companies") (the "Settlement Agreement"). Among other things, the Settlement Agreement granted the Billboard Companies exemption from the City's 2002 sign ban, the off-site sign inspection program, and numerous other zoning and building laws regulating signs in the City. The Settlement Agreement also required the City to issue new permits to allow the Billboard Companies to modernize up to 840 of their off-site signs without having to comply with at least 10 separate City laws in undertaking the modernizations. This latter provision of the Settlement Agreement allowed the Billboard Companies to, among other things, convert existing static, wood, and vinyl signs to LED digital displays, even though a municipal ordinance expressly prohibited "alterations or enlargements" of such signs.

A third billboard company, which was not part of the Settlement Agreement, Summit Media LLC ("Summit"), challenged the Settlement Agreement by filing a lawsuit for a writ of mandate. It asked the superior court to order the City to set aside the Settlement Agreement and withdraw all permits issued under it. It contended that the Settlement Agreement was ultra vires (i.e., beyond the powers of the city) and void. Additionally, it contended that because the Settlement Agreement was void, any permits issued under it should be revoked.

The superior court agreed that the Settlement Agreement was illegal and void because it allowed the alteration of billboards in violation of municipal ordinances. However, the court declined to revoke the permits that had been issued pursuant to the Settlement Agreement. The court concluded that permit revocation was an administrative issue for determination on an individual basis.

The Billboard Companies appealed, and Summit cross-appealed.

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

The Court of Appeal, Second District, Division 8, California, agreed that the Settlement Agreement exempting the Billboard Companies from billboard regulations was ultra vires (i.e., "beyond the powers" of the City) and void. The court also held that the permits issued to the Billboard Companies pursuant to the Settlement Agreement were void.

The court explained that "land use regulations involve the exercise of police power, and 'the government may not contract away its right to exercise the police power in the future.'" Thus, even agreements by the government that promise zoning laws thereafter enacted will not be applicable to a particular tract of land or party are invalid and unenforceable as contrary to public policy, said the court.

The Billboard Companies had argued that the Settlement Agreement was not a surrender of the City's police power. They had contended that, so long as the Settlement Agreement reserved the City's right to enact new laws in the future and apply them to the settling party (here, the Billboard Companies), the City had not "surrender[ed] its control over its police power." In other words, they argued that an agreement by a city is not ultra vires, so long as it does not "contractually exempt a private property from all future legislative and regulatory control." The court rejected that argument, concluding that it was "simply

wrong.” Rather, the court found that the caselaw was clear that “an agreement to circumvent applicable zoning laws is invalid and unenforceable.” In other words, an agreement is ultra vires when it contractually exempts settling parties from ordinances and regulations that apply to everyone else and would, except for the agreement, apply to the settling parties.

Here, the court found that the City, under the Settlement Agreement, did, in fact, contract away its right to exercise its police power in the future because under the Settlement Agreement the City and the Billboard Companies “circumvent[ed] the general ban on municipal code alterations to existing off-site signs.” Accordingly, the Settlement Agreement was ultra vires (i.e., “beyond the powers”) and void, concluded the court.

Summit had argued that because the Settlement Agreement was unlawful, the permits issued to the Billboard Companies pursuant to the Settlement Agreement—which could not have been issued if the City had enforced the 2002 sign ban against the Billboard Companies—must, like the Settlement Agreement, be void. The appellate court agreed. It held that, “[i]n short, permits issued in contravention of municipal ordinances are invalid.”

See also: *Avco Community Developers, Inc. v. South Coast Regional Com.*, 17 Cal. 3d 785, 132 Cal. Rptr. 386, 553 P.2d 546 (1976).

See also: *Trancas Property Owners Assn. v. City of Malibu*, 138 Cal. App. 4th 172, 41 Cal. Rptr. 3d 200 (2d Dist. 2006).

Case Note:

The Billboard Companies had argued for equitable estoppel against the City's revocation of the permits issued under the Settlement Agreement. In other words, they argued that they had relied in good faith on the City's issuance of permits and made expenditures on new signs that should not now be revoked. The court rejected that argument. It noted that equitable estoppel is available against the government "in only 'the most extraordinary case where the injustice is great and the precedent set by the estoppel is narrow.' "

Spot Zoning—County adopts special zoning district and regulations prohibiting mining in district

Mining company alleges adoption of district and regulations constitutes illegal reverse spot zoning

Citation: *Helena Sand and Gravel, Inc. v. Lewis and Clark County Planning and Zoning Com'n*, 2012 MT 272, 2012 WL 5986785 (Mont. 2012)

MONTANA (11/30/12)—This case addressed the issue of whether a county's adoption of a zoning pattern and regulations prohibiting mining in a special district constituted illegal reverse spot zoning. The case discusses the framework that courts use in evaluating whether a county has engaged in illegal spot zoning.

The Background/Facts: Helena Sand and Gravel, Inc. (“HSG”) owned ap-

proximately 421 acres located north of East Helena, Montana. In June 2008, HSG obtained a permit from the Montana Department of Environmental Quality ("DEQ") to mine gravel on 110 acres of its property. (Those 110 acres are not at issue in this case.) Before DEQ granted the permit, a group of citizens living north of East Helena submitted to the Lewis and Clark County (the "County") Board of Commissioners (the "Board") a petition seeking to create Special Zoning District Number 43 ("District 43"). The proposal delineated an area which encompassed the property owned by HSG, and its purpose was: "to accommodate and protect the use of single-family dwelling units and associated agricultural land uses while promoting and preserving the rural residential atmosphere of the area and enhancing the aesthetic character and property values of the area." It proposed to prohibit industrial and mining activities in District 43, including any sand and gravel operations to be performed by HSG on the remaining 311 acres of its property. The petition was signed by approximately 70% of the property owners within the proposed district.

The establishment of local zoning districts is governed by statute in Montana. A district may be created in one of two ways—by citizen petition to the board of county commissioners under § 76-2-101, MCA, known as "Part 1 zoning," or directly by the board of county commissioners under § 76-2-201, MCA, known as "Part 2 zoning." This case involved Part 1 zoning. The statutory provisions for Part 1 zoning authorize the board of county commissioners, "whenever the public interest or convenience may require," to create a planning and zoning district "upon petition of 60% of the affected freeholders," unless "50% of the titled property ownership in the district protest the establishment of the district within 30 days of its creation." (Section 76-2-101, MCA (2007).)

On April 1, 2008, following a public meeting, the Board voted to create District 43. On May 8, 2008, the Board adopted a resolution creating the boundaries of District 43.

The matter then proceeded to the County Planning and Zoning Commission (the "PZC"), which, pursuant to statutory requirements, adopted a development pattern for the new district. (Sections 76-2-104 and -107, MCA.) That development pattern and related zoning regulations prohibiting sand and gravel mining in the district were approved by the Board in July 2008.

HSG immediately filed a legal complaint in district court, challenging the County's decision to adopt the citizen-initiated proposal to configure District 43, which favored residential uses and prohibited mining. Among other things, it alleged that the County's adoption of the zoning regulations prohibiting sand and gravel mining in the newly created District 43 constituted illegal reverse spot zoning.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the District Court entered summary judgment in favor of the County. The court concluded that the zoning regulations did not constitute illegal reverse spot zoning because the zoning regulations substantially complied with the County's growth policy and did not single out HSG for disparate treatment since "the County's prohibition on sand and gravel operations applie[d] to all of the land within [District 43], not only to the property owned by HSG."

HSG appealed.

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

The Supreme Court of Montana agreed with the district court: the County's adoption of District 43 and the regulations prohibiting sand and gravel mining in District 43 did not constitute illegal reverse spot zoning.

The court explained that reverse spot zoning is defined as: "a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones." The court further explained that, in determining whether a county has engaged in illegal spot zoning, the court applies a three-part framework, evaluating whether: "(1) 'the requested use is significantly different from the prevailing use in the area' "; "(2) 'the area in which the requested use is to apply is rather small' "; and "(3) 'the requested change is more in the nature of special legislation.'" While "[t]here is no single, comprehensive definition of spot zoning applicable to all fact situations," "usually all three elements are present" when illegal spot zoning has occurred, said the court.

Here, HSG was able to establish that the second factor of the test had been met. HSG showed that it was the only landowner to be adversely affected by the zone change in the creation of District 43. However, the court noted that "zone changes for property owned by one person are not always spot zoning pursuant to the [three-part] test." Rather, emphasized the court, zoning will be held invalid as spot zoning "when it is not in accordance with a comprehensive plan." That is because compliance with a comprehensive plan, or growth policy as in this case, is especially relevant to the third factor of the analysis. The zoning is not "in the nature of special legislation" if it substantially complies with the growth policy. Here, also, the court determined that the adoption of District 43 and the regulations prohibiting mining did comply with the County's growth policy—which did not recommend development of mining in transitional areas but suggested such activity occur in the rural areas. Thus, the court concluded that HSG did not satisfy the third factor of the three-part analysis.

For similar reasons, the court also concluded that HSG did not satisfy the first part of the three-part test (i.e., HSG failed to show that the new zoning use designation was significantly different from the prevailing use in the area). The court found that, in adopting the zoning regulations prohibiting mining in District 43, the County did not unlawfully depart from the prevailing "rural residential" use in the surrounding area. Rather, the court found that the zoning pattern and regulations substantially complied with the prevailing land use, as expressed in the County's growth policy.

Accordingly, the court determined that HSG therefore could not demonstrate that its property was singled out for "a use classification totally different from that of the surrounding area." HSG's property was therefore not subjected to illegal spot zoning.

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

See also: *Little v. Board of County Com'rs of Flathead County*, 193 Mont. 334, 631 P.2d 1282 (1981).

See also: *Greater Yellowstone Coalition, Inc. v. Board of County Com'rs of Gallatin County*, 2001 MT 99, 305 Mont. 232, 25 P.3d 168 (2001).

See also: *Liberty Cove, Inc. v. Missoula County*, 2009 MT 377, 353 Mont. 286, 220 P.3d 617 (2009).

Case Note:

HSG had also alleged that the County's zoning decision constituted a taking of HSG's property. The court rejected these allegations, finding that HSG did not have the necessary element of a constitutionally protected property interest in its right to apply for a mining permit or permit amendment because DEQ retained discretion as to permit issuance.

Zoning News from Around the Nation

MASSACHUSETTS

Multiple communities have requested, by letters to the governor and other state representatives, a delay in the implementation of the Commonwealth's new medical marijuana law, "until proper rules and regulations have been set forth by the Department of Public Health (DPH)." Under the new law, "standards and regulations must be adopted through the DPH within 120 days" from when the law went into effect—which was January 1, 2013. The municipalities contend that without a delay in implementation of the new law, they would be obligated to "manage the medical marijuana dispensary process for four months without any guidance from the state."

Source: *Tri-Town Transcript*; www.wickedlocal.com

NEW HAMPSHIRE

State Representative, Katherine Rogers, reportedly plans to introduce "a bill for next year that would require projects by the state and other governments, such as cities and school districts, to conform to local land-use rules." Currently, under state law, "projects don't need to comply with local land-use rules as long as they represent a 'governmental use' by the state or a city, town, county, school district, public university, community college or village district. Projects that aren't a governmental use but are located on public land don't enjoy that exemption."

Source: *Concord Monitor*; www.concordmonitor.com

NEW JERSEY

State Assemblyman Peter Barnes reportedly plans to introduce a bill that would establish a state agency charged with assuming much of the authority for rebuilding shore towns battered by super-storm Sandy. Such an agency would purportedly "take over planning and zoning for all coastal communities, rendering their own planning and zoning boards moot." Local officials are concerned that such a commission would usurp the power of local officials, and "add another layer of bureaucracy and compliance on top of existing rules, regulations and compliance standards."

Source: *NJ.com*; www.nj.com

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Public and Low-Income Housing— Local zoning board denies developers' permit application for affordable housing construction

State agency says board should not have included unsubsidized low-cost market rate housing when calculating the need for

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○ affordable housing

Citation: *Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Committee*, 464 Mass. 38, 2013 WL 58183 (2013)

MASSACHUSETTS (01/08/13)—This case addressed the issue of whether low-cost market-rate housing that is not subsidized by the federal or state government can be considered in calculating the regional need for low-and-moderate income housing, on the application for a comprehensive permit under Massachusetts statutory law, c. 40B.

The Background/Facts: Under the Massachusetts Comprehensive Permit Act (sometimes referred to as the “anti-snob zoning act,” G.L. c. 40B, §§ 20-23 (the “Chapter 40B” or the “Act”), the legislature has attempted to “provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing’ in the Commonwealth.” Chapter 40B allows “a public agency, or a limited dividend or nonprofit organization, that wishes to construct low or moderate income housing ‘to circumvent the often arduous process of applying to multiple local boards for individual permits and, instead, to apply to the local board of appeals for issuance of a single comprehensive permit.’ ” If the board denies an application for a comprehensive permit, the developer may appeal to the Massachusetts housing appeals committee (“HAC”). The HAC then determines whether the decision of the local zoning board of appeals to deny the comprehensive permit, “was reasonable and consistent with local needs.” (G.L. c. 40B, § 23.)

Local requirements and regulations of affordable housing construction are considered “consistent with local needs” if they are “reasonable”: in view of “the regional need for low and moderate income housing”; “considered with the number of low income persons in the city or town affected”; and considered with “the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town”; and “to promote better site and building design in relation to the surroundings, or to preserve open spaces”; and “if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing.”

Requirements and regulations on affordable housing construction will also be considered “consistent with local needs” where low or moderate income housing comprises: more than 10% of the housing units in the municipality; or is on sites comprising 1.5% or more of the total land area zoned for residential, commercial or industrial use.”

In this case, Hollis Hills, LLC (“Hollis Hills”) sought to build 146 affordable housing condominium units in attached townhouses (the “Project”). Under Chapter 40B, Hollis Hills filed with the board of appeals of the Town of Lunenburg (the “Board”) an application for a comprehensive permit. The Board denied the application.

Hollis Hills appealed the Board's denial to HAC. HAC set aside the Board's decision and directed the Board to issue a comprehensive permit.

The Board appealed to the superior court. The superior court affirmed the HAC's decision.

The Board again appealed. Among other things, on appeal, the Board argued that in calculating the regional need for low and moderate income housing in the town of Lunenburg (the "Town"), low-cost market-rate housing that is not subsidized by federal or state government should be considered. In reviewing Hollis Hills' appeal and determining whether a comprehensive permit should have issued to Hollis Hills, the HAC had excluded housing that was unsubsidized by the federal or state government in weighing the regional need for affordable housing.

DECISION: Judgment of superior court affirmed.

The Supreme Judicial Court of Massachusetts rejected the Board's argument. It held that low-cost market-rate housing that is not subsidized by federal or state government is not to be considered in calculating the regional need for low and moderate income housing when reviewing an application for a comprehensive permit.

The court found this conclusion was required by the plain language of Chapter 40B and was in harmony with the purpose of Chapter 40B.

Under G.L. c. 40B, § 20, the factor that is to be considered in determining whether local requirements or regulations are "consistent with local needs" is the "housing need." The statute effectively defines "housing need" as "the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected." Also, under the Act, "[l]ow or moderate income housing" is defined as meaning "any housing *subsidized by the federal or state government* under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute, whether built or operated by any public agency or any nonprofit or limited dividend organization." (G.L. c. 40B, § 20.)

Looking at this plain text of the Act and the governing regulations, the court found that HAC, in weighing the housing need, was required to exclude from consideration any affordable housing that is not subsidized under a qualifying government-sponsored program. The court determined that this interpretation of the statutory language was in harmony with the purpose of Chapter 40B: to address "an acute shortage of decent, safe, low and moderate cost housing" throughout the Commonwealth. As the court noted: some market-rate housing may be affordable because the units are neither decent nor safe; and other affordable market rate housing units may be both decent and safe, but may be affordable only temporarily because of a weak housing market. Regarding the latter, the court emphasized that there was no way to ensure that affordable market-rate homes would be limited in availability to low or moderate income

households. In contrast, noted the court, housing that is subsidized by a Federal or State government or agency under a program to assist the construction of affordable housing, typically: must satisfy minimum requirements designed to ensure the quality of the housing and the reasonableness of the sale and resale price; and is restricted to “income eligible households” that meet maximum income thresholds. Without the use restriction, noted the court, there would be no guarantee that housing currently priced within the range targeted to income eligible families would be ultimately occupied by them or that it would remain affordable. In light of those differences between subsidized affordable housing units and unsubsidized market-rate units, the court concluded that: “evidence of low cost market-rate housing cannot be factored into the consideration of the regional need for affordable housing.”

Here, the court found there was substantial evidence to support the HAC’s finding that the existing subsidized housing in the region did not adequately address the regional need for housing.

See also: *Zoning Bd. of Appeals of Wellesley v. Housing Appeals Committee*, 385 Mass. 651, 433 N.E.2d 873 (1982).

Change of Regulations as Affecting Right—While a challenge to the validity of county regulations is being weighed, developer obtains permits under regulations

After regulations are found to have been adopted partly in violation of state law, opponents to development argue permits issued under regulations are invalid

Citation: *Town of Woodway v. Snohomish County*, 291 P.3d 278 (Wash. Ct. App. Div. 1 2013)

WASHINGTON (01/07/13)—This case addresses the issue of whether a property owner’s development permit application vests to the county’s regulations at the time the permit application is filed, despite the fact that the county’s regulations are later found to be adopted partly in violation of state environmental law. More generally, it addresses the issue of what happens to development permit applications filed with

counties and cities relying on recently adopted GMA enactments (comprehensive plan provisions and development regulations) that are being challenged in an administrative appeal before the state's Growth Management Board.

The Background/Facts: BSRE Point Wells, LP ("BSRE") owned a 61-acre site (the "Property") on Puget Sound in unincorporated Snohomish County (the "County") in the state of Washington. BSRE's Property had been used for industrial purposes. In 2007, BSRE sought to redevelop the site with residential and commercial uses. It sought a redesignation of the Property on the County's comprehensive plan map.

The County council granted BSRE's redesignation request in two separate actions in 2009 and 2010. In 2009, under the authority of the state's Growth Management Act ("GMA"), the County adopted ordinances redesignating the Property as an "urban center" on the County's comprehensive plan map. In 2010, the County council rezoned the Property to an "urban center" zone and adopted development regulations accommodating the mixed-use development at the site.

The neighboring Town of Woodway ("Woodway"), the neighboring City of Shoreline ("Shoreline"), and the neighborhood group Save Richmond Beach, Inc. ("SRB") (collectively, the "Neighbors"), together challenged to the state's Growth Management Board (the "Growth Board") the County's comprehensive plan amendments and the development regulations adopted for the urban center zone. Among other things, the Neighbors argued that the County's enactments were adopted partly in violation of the GMA and partly in violation of the State Environmental Policy Act ("SEPA").

In the meantime, following the Growth Board hearing on the challenges, but before the Growth Board issued its final decision and order, BSRE applied to the County for several development permits. The County published notices indicating that BSRE's applications for these various permits were complete.

Then, in April 2011, the Growth Board issued a final decision and order ruling that the County's challenged enactments were adopted partly in violation of the GMA and partly in violation of SEPA. The Growth Board also found the challenged comprehensive plan provisions, but not the development regulations, invalid under the GMA. The Growth Board remanded to the County, directing it to bring its comprehensive plan amendments into compliance with the GMA and SEPA. As to the regulations, the Growth Board found them noncompliant with SEPA and remanded for remedial action.

In September 2011, Woodway and SRB filed a complaint in superior court. They asked the court to declare that BSRE's development permit applications had not vested to the County's urban center designation or development regulations in effect at the time of filing. They argued that BSRE acquired no vested rights because SEPA noncompliance rendered

the County's urban center ordinances ultra vires (i.e., "beyond the powers" of the County) and/or void and thereby incapable of supporting vested rights.

The County and BSRE maintained that BSRE had a vested right to have its development permit applications processed under the urban center designation and development regulations in effect at the time of the filing—despite the fact that the Growth Board later determined the regulations had been partly adopted in violation of SEPA.

The superior court agreed with Woodway and SRB. 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 Woodway and SRB.

The County and BSRE appealed.

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

The Court of Appeals of Washington, Division 1, agreed with the County and BSRE. It held that BSRE's development permit applications vested to the County's urban center regulations at the time the application was filed, despite the Growth Board's later determination that the County did not fully comply with SEPA in developing the regulations.

In so holding, the court reviewed both Washington's rule on vested rights and the "invalidity provision" of the GMA.

The court explained that Washington's rule on vested rights entitles developers to have a land development proposal processed under the regulations in effect at the time a complete building permit application is filed, regardless of subsequent changes in zoning or other land use regulations. In other words, "[v]esting 'fixes' the rules that will govern the land development regardless of later changes in zoning or other land use regulations." Washington thus recognizes a "date certain" standard. Moreover, under Washington statute (RCW 19.27.095(1)), development rights vest upon the filing of a "valid and fully complete building permit application."

The court also analyzed the "invalidity provision" of the GMA—RCA 36.70A.302. Under the invalidity provision, if a local government's comprehensive plan provision or development regulation is deemed invalid by the Growth Board (because it is noncompliant with the GMA or SEPA and that noncompliance substantially interferes with the fulfillment of the GMA goals), the Growth Board can issue a determination of invalidity as to the challenged comprehensive plan provision or development regulations, but a development permit application filed prior to that determination of invalidity vests to the development regulations under which it was submitted. (RCA 36.70A.302.)

Here, Woodway and SRB had argued that under the GMA, "invalidity" only related to ordinances found to substantially interfere with the

GMA goals. In essence, they contended that the County's development regulations were void and the legislature left a "loophole" to be filled in by common law: There were a certain class of cases, of which they claimed this was one, where a procedural violation of SEPA would not result in a violation of the GMA goals, and in those instances, the prospective invalidity provisions of RCA 36.70A.302 would not apply. Instead, they argued, the pre-Regulatory Reform rule that vested rights cannot be obtained in an invalid ordinance applied and prevailed.

The appellate court rejected this argument. It concluded that RCW 36.70A.302(2)'s invalidity provision controlled the present dispute. The court found the invalidity provision "unambiguously describes what happens to development permit applications that are filed with counties and municipalities relying on recently adopted GMA enactments—comprehensive plan provisions and development regulations—that are challenged in a Growth Board administrative appeal": "those complete and filed applications vest to those challenged plan provisions and regulations, regardless of the Growth Board's subsequent ruling in the administrative appeal."

Thus, here, even if the urban center development regulations had violated the GMA's requirements (which they had not) and were later declared invalid, all development permit applications submitted prior to the County's receipt of the invalidity determination would remain vested to the invalidated development regulations, said the court.

See also: *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wash. 2d 242, 218 P.3d 180 (2009).

See also: *Weyerhaeuser v. Pierce County*, 95 Wash. App. 883, 976 P.2d 1279 (Div. 2 1999).

Case Note:

Washington's rule on vested rights is the minority rule. The majority rule on vested rights, which is applied in many other jurisdictions, provides that: "development is not immune from subsequently adopted regulations until a building permit has been obtained and substantial development has occurred in reliance on the permit."

Rezoning—Town rezones golf course property, limiting permitted uses

Property owner argues rezone violates several of its constitutional rights

Citation: *Dunes West Golf Club, LLC v. Town of Mount Pleasant*, 2013 WL 90419 (S.C. 2013)

SOUTH CAROLINA (01/09/13)—This case addressed the issues of: whether the denial of a rezoning request violated a property owner's equal protection rights; whether the town's criteria for determining the boundaries of a new zoning designation were arbitrary and capricious, thus violating a property owner's substantive due process rights; and whether the rezoning of a property amounted to an unconstitutional taking of the property.

The Background/Facts: The Dunes West Development (the "Development") was located on 4,518 acres of land within the Town of Mount Pleasant (the "Town"). Within the Development, was the Dunes West golf course, which consisted of 256 acres (the "Golf Course Property"). In 2002, Dunes West Golf Club, LLC (the "Golf Club") purchased the undeveloped residential lots and the master developer rights to the Development. The Golf Club acquired the Golf Club Property in 2005. At that time, the Golf Course Property was subject to the zoning requirements of the Dunes West Planned Development ("DWPD"), which permitted flexible land use at the developer's discretion.

In 2006, the Town adopted an ordinance which created a new Conservation Recreation Open Space ("CRO") zoning district. The CRO zoning designation permitted only recreation and conservation uses. By way of either direct rezoning or an amendment to the relevant planned development, each of the parcels in the Town comprising part of any one of the Town's five golf courses was designated a CRO district, including the Golf Club Property.

In 2009, the Golf Club submitted a rezoning petition to the Town. It sought residential development of 16.48 acres of the Golf Course Property. Ultimately, the Town Council denied the Golf Club's rezoning petition.

Thereafter, the Golf Club brought a lawsuit. Among other things, it claimed that the Town's actions in designating the entirety of the Golf Course Property as a CRO district had violated the Golf Club's equal protection rights. It contended that the Town had granted another substantially similar rezoning petition for another golf course in town.

The Golf Club further contended that the rezoning violated its due process rights because the CRO zoning boundary—which was based on tax map parcels—was arbitrary and capricious, sweeping too broadly. The Golf Course also contended that the rezoning of the Golf Course Property amounted to an unconstitutional taking of the property.

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

The Golf Club appealed.

DECISION: Judgment of circuit court affirmed.

The Supreme Court of South Carolina first held that the rezoning of the Golf Course Property did not violate the Golf Club's equal protection rights. The court explained that the Equal Protection Clause of the United States Constitution provides: "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const. amend XIV, § 1.) Since the claim here did not implicate a suspect class or abridge a fundamental right, the court applied the "rational basis test." Under that rational basis test, the Court had to determine: (1) whether the rezoning treated the similarly situated golf courses differently; and (2) if so, whether the Town had a rational basis for the disparate treatment; and (3) whether the disparate treatment bore a rational relationship to a legitimate government purpose.

Here, the court found that there were significant differences between the two rezoning petitions—one from the Golf Club, which the Town denied, and the other from another golf course, Snee Farm, which the Town approved. The court found that the Town had a rational basis for granting Snee Farm's proposal and denying the Golf Club's proposal. Specifically, the court found that the two rezoning petitions were not "similarly situated." Snee Farm's proposal presented "a compact, contiguous, unified site design that caused little alteration to the areas of play of the golf course." The Golf Club's proposal contemplated "spattering new lots throughout the Golf Course Property that caused multiple alterations to the areas of play." Moreover, the court found that the Golf Club failed to produce any evidence that the denial of its rezoning petition was motivated by discriminatory goals.

The court next held that the rezoning of the Golf Course Property did not violate the Golf Club's substantive due process rights. The court explained that "[i]n order to prove a denial of substantive due process, [the Golf Club had to] show that [it] was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." The court found that the Golf Club failed to meet that burden; rather the court found that the CRO ordinance "substantially advance[d]" numerous legitimate Town purposes. The court found that the Town's decision to base the CRO zoning boundaries on tax map parcels was not unreasonable. "Indeed, the rezoning of the Golf Course Property tracts

was part of a unified plan which applied to all golf courses in the Town, and the Town's use of tax map parcels as zoning district boundaries for each golf course [was] consistent with the stated tax-assessment purposes set forth in the CRO Ordinance."

Finally, the court also held that the rezoning of the Golf Course Property did not amount to a categorical taking or a regulatory taking (under the Fifth Amendment to the United States Constitution) of the Golf Club's property. The court found it was not a categorical taking because it did not deprive the Golf Club of "all economically beneficial uses" of its land; rather, the CRO designation permitted numerous recreation and conservation uses—which the Golf Club had failed to show were not economically beneficial. The court further found that the rezoning was not a regulatory taking because: the Town provided "legitimate and substantial public purposes" sought to be achieved in enactment of the CRO ordinance; the CRO designation did not eliminate all development potential, or "disadvantage" the Golf Club in a "constitutionally significant way"—since the CRO restrictions applied to all golf courses throughout the Town; and the Golf Course Property remained a valuable property, even if the rezoning denied the Golf Club its ability to exploit a property interest that it had believed was available for development.

See also: *Ed Robinson Laundry and Dry Cleaning, Inc. v. South Carolina Dept. of Revenue*, 356 S.C. 120, 588 S.E.2d 97 (2003) (addressing equal protection rights).

See also: *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798, 34 Env't. Rep. Cas. (BNA) 1897, 22 Envtl. L. Rep. 21104 (1992) (addressing categorical takings).

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

Zoning News from Around the Nation

CALIFORNIA

"Two medical marijuana cases going before the state Supreme Court could determine whether dispensary bans by dozens of California cities are legal." The case of the *City of Riverside v. Inland Empire Patient's Health and Wellness Center* was scheduled to begin February 5. That case addresses the city's legal authority to ban marijuana dispensaries. In another upcoming case, *City of Upland v. G3 Holistic Inc.*, a city's authority to ban medical marijuana dispensaries will also be argued, with lawyers for a dispensary "expected to argue that cities can't ban the

dispensaries because they're allowed under Proposition 215, the Compassionate Use Act, which legally allows doctors to prescribe marijuana to patients." The cities maintain that they have the authority to ban dispensaries under their zoning powers.

Source: *Daily News*; www.dailynews.com

CONNECTICUT

A state task force, the Shoreline Preservation Task Force, which studied the impact of damage from storms in shoreline communities, recently issued a report concluding that "towns along the shoreline need to adopt zoning laws accounting for rising sea levels." While the report does not offer specific regulations, it does provide "concepts and ideas that need to be fleshed out." Recommendations include: rules on where septic tanks can be located; streamlined state permits for seawalls and other coastal structures; increased financial help to towns, cities and nonprofit land conservation groups to acquire open space and watershed land recreation, tidal wetland preservation and habitat conservation; and requiring the state Department of Energy and Environmental Protection to map vulnerable shoreline areas.

Source: *Greenwich Time*; www.greenwichtime.com

FLORIDA

Lake Placid Town Council has asked that Highlands County legislators "carry proposed legislation to Tallahassee allowing municipal councils to meet outside their jurisdiction with the county commission." Under current law, "[a] municipality has no authorization to exercise its legislative and governing powers' outside its borders. . . 'and ha[s] no authority to hold meetings at which official business is conducted outside the municipal boundaries.'"

Source: *Highlands Today*; <http://www2.highlandstoday.com>

VIRGINIA

State Delegates Ben Cline and Scott Lingamfelter have each proposed a bill that "would prevent the state, and local governments, from adopting policies that 'restrict private property rights without due process,' especially if they can be traced to the U.N.'s "Agenda 21." Agenda 21 calls for "sustainable development." Cline's bill, HB 2223, for example, provides that: "The Commonwealth and its political subdivisions shall not adopt or implement policy recommendations that deliberately or inadvertently infringe upon or restrict private property rights without due process, as may be required by policy recommendations originating in, or traceable to, Agenda 21."

Source: *The News & Advance*; www.newsadvance.com

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Standing—Individual residents challenge approval of PUD

Developer maintains that residents lack standing because they lack proximity to PUD

Citation: *Ray v. Mayor and City Council of Baltimore*, 2013 WL 216298 (Md. 2013)

MARYLAND (01/22/13)—This case addressed the issue of whether individual residents of neighborhoods within a half mile of a planned unit development (“PUD”) had standing to challenge the city’s decision to approve the PUD.

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The Background/Facts: On November 22, 2010, the Baltimore City Council passed Ordinance 10-397 (the “Ordinance”). The Ordinance approved a planned unit development (“PUD”) for an 11.5-acre tract of land known as the “25th Street Station.” The PUD authorized a mixed-use development located in the Remington and Charles Village neighborhoods of Baltimore City. It was anticipated that the PUD would “bring approximately 20 national retailers . . .” including a super Wal-Mart store.

Benn Ray (“Ray”) and Brendan Coyne (“Coyne”) (collectively, the “Opponents”) filed a Petition for Judicial Review of the PUD’s approval. Ray lived 2,212.39 feet, or approximately 0.4 miles, away from the PUD. He claimed that he could see the PUD site from his second-floor bathroom during the winter months of the year, and that he could hear noise from the PUD site when his second-floor bathroom window was open. He also believed that the PUD would “directly and dramatically increase traffic . . . in front of [his] home,” which would “make it more dangerous for [him,]” given that his street was “a narrow residential road . . .” Ray also believed that “the Wal-Mart planned to be part of the project [would] change the character of [his] neighborhood.”

Coyne lived 2,002.18 feet, or approximately 0.4 miles, away from the PUD. Coyne believed that the PUD, and specifically the planned Wal-Mart store, would adversely change the character of his neighborhood, forcing out many local businesses that he frequented and resulting in vacant buildings in his neighborhood.

The circuit court judge concluded that the Opponents lacked standing to challenge the PUD. The judge said this was because: they were “not ‘adjoining, confronting or nearby’ property owners and thereby d[id] not enjoy prima facie [(i.e., “at first appearance”)] aggrieved status”; and had not “shown any special interest or damage unique to [themselves] that would distinguish them from the general public.”

The Opponents appealed. The Court of Special Appeals affirmed.

The Opponents again appealed. The Court of Appeals of Maryland granted a writ of certiorari to determine the issue of the Opponents’ standing.

On appeal, the Opponents advanced two arguments: (1) the entire neighborhoods in which Ray and Coyne lived were impacted by the PUD and thus should be considered an aggrieved class, therefore allowing the Opponents, as residents of those neighborhoods, standing; and (2) Ray and Coyne’s own claims for special aggrievement—including their proximity to the PUD, a change in the character of the neighborhood, increased traffic, and visibility of the PUD—were sufficient to establish standing.

DECISION: Affirmed.

The Court of Appeals of Maryland concluded that Ray and Coyne did not have standing to challenge the City Ordinance, approving the PUD.

The court explained that Maryland statutory law defines who may appeal a zoning decision or zoning action of Baltimore City: “any person,

taxpayer, or officer, department, board, or bureau of the City aggrieved” by the decision or zoning action. (Md. Code Article 66B, § 2.09(a)(1)(ii).)

The court further explained that a “person aggrieved” included: “one whose personal or property rights are adversely affected by the decision of the board. The decision must not only affect a matter in which the protestant has a specific interest or property right but his interest therein must be such that he is personally and specially affected in a way different from that suffered by the public generally.” Generally, “[a]n adjoining, confronting or nearby property owner is deemed, prima facie, to be specially damaged and, therefore, a person aggrieved.” However, “[a] person whose property is far removed from the subject property ordinarily will not be considered a person aggrieved . . . [unless] he meets the burden of alleging and proving . . . that his personal or property rights are specially and adversely affected.” The standard for determining whether a party is aggrieved so as to have standing is “flexible in the sense that it is based on a fact-intensive, case-by-case analysis.”

Addressing the Opponents’ arguments, the court held first that the creation of a class of aggrieved persons is done on an individual scale and not based on delineations of city neighborhoods; unless prima facie aggrieved, the requirement that an individual prove special aggrievement has been well-established. The Opponents’ argument that the entire neighborhood should be considered an aggrieved class depended, found the court, on subtracting individual special aggrievement from the analysis; it assumed that every member of the neighborhood was automatically specially aggrieved. The court declined to create such “a bright-line rule, under which each person in the entire neighborhood qualifies as a member of the specially aggrieved class in every PUD case.” Instead, the court said it would, on a case-by-case basis, continue to examine the specific facts alleged to show aggrievement and compare that injury to harm suffered by the general public.

Thus, here, since the Opponents could not claim standing based on being residents of an “aggrieved” neighborhood, Ray and Coyne each had to show: (1) he was “[a]n adjoining, confronting or nearby property owner” who was prima facie aggrieved; or (2) his “personal or property rights were specially and adversely affected.”

Both Ray and Coyne conceded that they were not prima facie aggrieved as both resided approximately 0.4 miles, or 2,000 feet, from the PUD. Therefore, the court said that in order to establish special aggrievement through proximity, the Opponents had to show they resided close enough to the rezoning action to be considered “almost” prima facie aggrieved and then show some additional evidence of harm. While the court found there was no bright-line rule for who qualifies as “almost” prima facie aggrieved, the court found that standing is usually given to those who live 200 to 1,000 feet away from the subject property, while those living more than 1,000 feet from a rezoning site are generally denied standing. Since Ray and Coyne lived more than 2,000 feet from the PUD, the court concluded that they were not “almost” prima facie aggrieved. In so concluding, the

court rejected the Opponents' argument that "the urban nature of the PUD" expands the proximity factor so that individuals challenging a large urban development are permitted to reside farther away from the PUD than nonurban protestants.

The court also found that the Opponents had failed to show that the PUD produced a harm directly and specifically impacting their property. Ray and/or Coyne had attempted to argue they would suffer harm from the PUD in three ways: (1) a change in the character of the neighborhood as a result of the PUD; (2) increased traffic, and (3) the PUD's visibility. The court found that generally claims of change in the character of the neighborhood by protestants who lack proximity are insufficient to prove special aggrievement. More specifically, the court found that, here, the Opponents' allegations of change in the neighborhood were not sufficient to show special aggrievement because the Opponents failed to identify a harm that directly impacted their properties; while they had complained that the commercial establishments now existing in their neighborhood would become vacant buildings, they failed to show that any of those businesses, whether open or closed, affected them in a manner distinct from the general public.

The court also found that generally claims of increased traffic, by protestants who lack close proximity, are insufficient to prove special aggrievement. More specifically, here, the court found that Ray's claim of increased traffic was not sufficient to show special aggrievement because any increased traffic from the PUD would have a common affect upon the public and would produce only a general aggrievement—not a specific aggrievement needed for standing.

Finally, the court also found that generally claims of limited visibility, by protestants who lack close proximity, are insufficient to prove special aggrievement. Thus, more specifically, here, the court found that Ray's argument that he had standing because he could see the PUD from his second-floor bathroom window during the winter months was insufficient. Special aggrievement needed for standing required "much more than . . . [this] *de minimis*" kind of visibility. "When one practically has to use a telescope to prove his harm from a rezoning, he has failed to show special aggrievement based on that harm," noted the court.

The court concluded that: "The aggrieved class continues to be limited to those individuals who can show by specific facts that they have been specially aggrieved in a manner different than the public generally." Here, the Opponents failed to allege such facts.

See also: *Bryniarski v. Montgomery County Bd. of Appeals*, 247 Md. 137, 230 A.2d 289 (1967).

See also: *Marcus v. Montgomery County Council*, 235 Md. 535, 201 A.2d 777 (1964).

See also: *Wilkinson v. Atkinson*, 242 Md. 231, 218 A.2d 503 (1966).

See also: *DuBay v. Crane*, 240 Md. 180, 213 A.2d 487 (1965).

Case Note:

Coyne had also argued that he had standing because the development of the PUD would adversely affect the value of his property. The circuit court judge ruled that Coyne's lay opinion testimony about future fluctuations in the value of his property was inadmissible. The Court of Appeals of Maryland agreed. It held that, in this case, such an argument required expert testimony.

First Amendment—Sign ordinance exempts public art and holiday decorations from residential sign restrictions

Resident contends those exemptions make the sign ordinance restrictions content based and subject to strict constitutional scrutiny

Citation: *Brown v. Town of Cary*, 2013 WL 221978 (4th Cir. 2013)

The Fourth Circuit has jurisdiction over Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

FOURTH CIRCUIT (NORTH CAROLINA) (01/22/13)—This case addressed the issue of whether a town's sign ordinance, which exempted public art and holiday decorations from residential sign restrictions, should be analyzed for constitutionality under a standard of strict scrutiny or intermediate scrutiny. It further addressed whether the ordinance was constitutional under that scrutiny.

The Background/Facts: William Bowden ("Bowden") lived in the Town of Cary (the "Town") for many years. Bowden had a quarrel with the Town over damage to his house allegedly caused by water discharge from municipal road-paving projects. Dissatisfied with the Town's efforts to resolve the dispute, Bowden responded by painting the words "Screwed by the Town of Cary" across a 15-foot swath of the facade of his home. The letters of the sign varied in height from 14 to 21 inches and were painted in a bright fluorescent orange paint.

The Town eventually issued to Bowden multiple notices of zoning violation. In those notices, the Town referenced Chapter 9 of its Land Development Ordinance (the "Sign Ordinance"). Specifically, the Town notified Bowden that he was in violation of the Sign Ordinance's: size limitation for residential signs; size limitations for wall signs; and violation of color restrictions for signs.

Bowden refused to remove or modify the sign. Instead, he sued the

Town. He asserted that the Sign Ordinance was unconstitutional both facially (i.e., on its face) and as applied (to him), violating his rights under the First Amendment to the United States Constitution.

Finding there were no material issues of fact in dispute, and deciding the matter based on the law alone, the district court ruled for Bowden. It held that since the Sign Ordinance exempted public art and holiday decorations from the restrictions that applied to all other types of signs, the Sign Ordinance was a content-based regulation, which had to be reviewed under a strict scrutiny standard. Under that standard, the court invalidated the Ordinance as being unconstitutional.

The Town appealed. On appeal, the Town argued that the district court erred in applying the strict scrutiny standard. The Town argued that its regulations may distinguish speech based on content so long as its reasons for doing so are not based on the message conveyed. In other words, it argued that the Sign Ordinance was content neutral despite the exclusion of public art and holiday decorations from the restrictions that applied to all other signs because its reasons for the exclusion were not content based. Accordingly, the Town contended that the content-neutral Sign Ordinance should be analyzed under an intermediate scrutiny standard. Also, the Town maintained that the Ordinance was constitutional under that standard.

DECISION: Reversed, and matter remanded.

The United States Court of Appeals, Fourth Circuit, agreed with the Town's argument. The court held that the Sign Ordinance was constitutional.

In so holding, the court "reject[ed] any absolutist reading of content neutrality, and instead orient[ed] [its] inquiry toward why—not whether—the Town ha[d] distinguished content in its regulation." The court said the purpose of content neutrality was to prevent a government from supervising the "marketplace of ideas . . . [by] choos[ing] which issues are worth discussing or debating." A regulation is not a content-based regulation of speech, said the court, if: "(1) the regulation is not a regulation of speech, but rather a regulation of the places where some speech may occur; (2) the regulation was not adopted because of disagreement with the message the speech conveys; or (3) the government's interests in the regulation are unrelated to the content of the affected speech." In other words, if a regulation is "justified without reference to the content of regulated speech," that regulation is deemed content neutral "even if it facially differentiates between types of speech."

Thus, here, in determining whether the Sign Ordinance was content based or content neutral, the court looked at: "whether the Sign Ordinance ha[d] distinguished content from whether it ha[d] distinguished *because* of content." (Emphasis in original.) In other words, the court refused to "mechanically 'scour the ordinance' to see if it omit[ted] some categories of signs," but instead focused on "whether the restriction was adopted because of a disagreement with the message conveyed."

The court found it clear that, while the Sign Ordinance distinguished

content (exempting public art and holiday decorations from its restrictions), the distinctions themselves were justified for reasons independent of content: “public art and holiday decorations enhance rather than harm aesthetic appeal, and . . . seasonal holiday displays have a temporary, and therefore less significant, impact on traffic safety.” The court concluded that the Sign Ordinance placed “reasonable time, place, and manner restrictions only on the physical characteristics of messages—including those voicing political protest—and exempt[ed] certain categories of signs from those restrictions solely on the basis of the Town’s asserted and legitimate interests of traffic safety and aesthetics.” In other words, the Town exempted the public art and holiday decorations from its restrictions simply because the Town determined such “signs” posed less traffic safety and aesthetic concerns, not because of any preference for content. Accordingly, the court held that the Sign Ordinance was content neutral.

Having found the Sign Ordinance was content neutral, the court proceeded to examine its constitutionality under intermediate scrutiny. The court explained that the Sign Ordinance would be constitutional if it: was found to further a substantial government interest; was narrowly tailored to further that interest; and was found to leave open ample alternative channels of communication.

The court found that the Town’s stated interests in promoting aesthetics and traffic safety were substantial. Next, the court found the Sign Ordinance was narrowly tailored and did not burden substantially more speech than was necessary to further those stated interests because: the Sign Ordinance’s size, color, and positioning restrictions did “no more than eliminate the exact source of the evil it sought to remedy.” Finally, the court found that the sign Ordinance “ ‘[left] open ample alternative channels of communication’ by generally permitting residential signs subject to reasonable restrictions”; within the Sign Ordinance’s reasonable restrictions, a sign could contain any message the speaker wished to convey.


Having concluded that the Sign Ordinance survived intermediate scrutiny, the court held that the Sign Ordinance was constitutional and did not violate the First Amendment.

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

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

See also: *Wag More Dogs, Ltd. Liability Corp. v. Cozart*, 680 F.3d 359 (4th Cir. 2012).

See also: *Covenant Media Of SC, LLC v. City Of North Charleston*, 493 F.3d 421 (4th Cir. 2007).

**Case Note:**


Bowden died during the pendency of the appeal. Dawn D. Brown, the administratrix of his estate, was substituted as the Plaintiff-Appellee in the case.

Case Note:

The court recognized that a nativity scene or an elaborate work of art could implicate traffic safety no less than an ordinary residential sign, but the court emphasized that "the content neutrality inquiry is whether the Sign Ordinance's exemptions have a reasonable, not optimal, relationship to these asserted interests."

Case Note:

Bowden had also contended that the Sign Ordinance exemptions were unconstitutionally vague. The court disagreed, noting that the Town had defined "public art" and "holiday decorations," which themselves were concepts that "do not lend themselves to easy definition."

**Case Note:**

*Several other circuits do apply an absolutist reading of content neutrality, including the Fifth Circuit (See *Service Employees Intern. Union, Local 5 v. City of Houston*, 595 F.3d 588, 596, 187 L.R.R.M. (BNA) 3167, 159 Lab. Cas. (CCH) P 10178 (5th Cir. 2010)), the Eighth Circuit (See *Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011), cert. denied, 132 S. Ct. 1543, 182 L. Ed. 2d 163 (2012)), and the Eleventh Circuit (See *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1263 (11th Cir. 2005)). Other circuits apply the "more practical test for assessing content neutrality" used by the Fourth Circuit here, including: the Third Circuit (See *Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380, 389 (3d Cir. 2010), cert. denied, 131 S. Ct. 1008, 178 L. Ed. 2d 828 (2011)); the Seventh Circuit (See *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 603, 40 Media L. Rep. (BNA) 1721 (7th Cir. 2012), cert. denied, 133 S. Ct. 651 (2012)); the Sixth Circuit (See *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 622 (6th Cir. 2009)); and the Ninth Circuit (See *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1079 (9th Cir. 2006)).*

Mobile Homes/Special Use Permit—County Board imposes 180-day limitation-of-stay condition on RV park use

RV park owners contend there is no authority
for the imposition of such a condition

Citation: *Schlotfeldt v. Benton County*, 292 P.3d 807 (Wash. Ct. App. Div. 3 2013)

WASHINGTON (01/22/13)—This case addressed the issue of whether a zoning board had the authority to impose a limitation-of-stay condition on a special use permitted recreational vehicle (“RV”) park.

The Background/Facts: David and Charlotte Schlotfeldt applied for a special use permit to construct and operate a RV park in Benton County, Washington (the “County”). The site of the proposed RV park was zoned light industrial with surrounding properties zoned agriculture. The Benton County Board of Adjustment (the “Board”) conditionally approved their application. One of the conditions of the approval was that RVs could not remain in the RV park for more than 180 days in any calendar year period.

The Schlotfeldts appealed. The superior court affirmed the Board’s condition on the approval.

The Schlotfeldts again appealed. They argued that the Board improperly imposed the limitation-of-stay condition because there was no authority to impose such a limitation and the Board lacked authority to impose such a limitation.

DECISION: Affirmed.

The Court of Appeals of Washington, Division 3, held that the limitation-of-stay condition was justified and supported by substantial evidence. The court concluded that the Board had inherent authority to impose the condition.

In so holding, the court noted that under the state’s Land Use Petition Act (“LUPA”), the Schlotfeldts could obtain relief from the Board’s land use decision if they could establish one of six standards, including showing that the imposed condition was: an erroneous interpretation of the law; not supported by evidence; and a clearly erroneous application of the law to the facts.

Here the court found the limitation-of-stay condition was justified by the law. The County Code allowed the Board to impose conditions on proposed uses to, among other things, insure the use: was compatible with other uses in the surrounding area; and would not hinder or discourage the development of permitted uses on neighboring properties in the applicable zoning

district. Here, the proposed site was in a light-industrial zoned area with the surrounding properties zoned agricultural. Here, the court found that restricting the time RVs could stay in one area “would relate to protecting the compatibility of uses in the surrounding area . . . , and not hindering the development of permitted uses on neighboring properties.” There were concerns that, with year-round lengths of stays, the RV park would become a residential subdivision, which would be inconsistent with a light industrial and agricultural area. Thus, concluded the court, “a conditional use permit is appropriate.”

The court also found that an imposition of a limitation-of-stay condition was supported by evidence: Other property owners were worried about the RV Park becoming a mobile home park and becoming a residential subdivision. The Board noted unfavorable conditions when RVs stay in one location for extended periods of time. State statutory law, RCW 43.22.335(7), defined an “RV” as a vehicle-type unit primarily designed as temporary living quarters for recreational camping, travel, or seasonal use. Likewise, the County Code defined an “RV” as a motorized or nonmotorized vehicle for recreational use. Since RVs are not considered as permanent dwellings, the court found that “substantial evidence” supported the Board’s decision to conditionally limit the length of stay in the proposed RV Park.

Finally, the court also found that the Board had the inherent authority to impose the length-of-stay condition on the RV park. The court reasoned: “[A] board with authority to grant a special permit has inherent power to attach conditions designed to carry out the purposes for which the permit requirement was imposed.” “If the conditions imposed were reasonably calculated to achieve the purposes set forth in the comprehensive plan and were not unnecessarily burdensome, the court should not set them aside.” Thus, “[r]easonably calculated conditions to protect adjacent land and to achieve legitimate zoning goals are permitted.” “[L]egitimate concerns in zoning decisions are to ‘stabilize the value of property, promote the permanency of home surroundings, and add to the happiness and comfort of the citizens.’ ” Here, the court found, the Board had inherent authority to impose conditions in harmony with those concerns, ensuring the RV park use met the county’s zoning goals as set forth in the County Code.

See also: *State ex rel. Standard Mining & Development Corp. v. City of Auburn*, 82 Wash. 2d 321, 510 P.2d 647 (1973).

See also: *Phoenix Development, Inc. v. City of Woodinville*, 171 Wash. 2d 820, 256 P.3d 1150 (2011).

Zoning News from Around the Nation

CONNECTICUT

State Senator Paul Doyle and Representative Antonio Guerrero have

introduced legislation that would bar nursing home facilities from housing state prison inmates and mental patients without prior local approval. In the meantime, the Town of Rocky Hill is seeking a temporary restraining order to prevent state prison inmates and mental patients from being moved into a private nursing home in the town. Reportedly, since 2011, Governor Malloy's administration has been "looking for a way to move very sick and terminally ill patients out of its facilities and into private nursing homes to reduce long-term care costs."

Source: *The Hartford Courant*; <http://articles.courant.com>

FLORIDA

The Florida League of Cities, an organization of more than 400 cities, is lobbying for state legislation that would define transition homes (i.e., homes for recovering addicts), require them to be licensed, more than 1,000 feet apart, and registered with local governments.

Source: *TCPalm*; www.tcpalm.com

NEW YORK

New York City's Board of Standards and Appeals recently ruled that the Metropolitan Transportation Authority ("MTA") must comply with local zoning regulations and take down signs on its property that run afoul of city rules. The MTA had argued that as a state agency it was exempt from local zoning laws that ban billboards within 900 feet of arterial highways.

Source: *Crain's New York*; www.craigslistnewyork.com

NEVADA

The Nevada Supreme Court has ruled as unconstitutional state legislation that prohibited Clark County from changing zoning laws to allow for more development on property adjacent to conservation areas. The court ruled that the law violated a provision of the Nevada Constitution that prohibits the Legislature from passing local laws that regulate county business.

Source: *Las Vegas Review-Journal*; www.lvrj.com

NEW HAMPSHIRE

State Representative Katherine Rogers introduced legislation that "would give local planning and zoning boards the power to approve or veto building projects by the state and local governments." Representatives from four state agencies—the Department of Resources and Economic Development, the Department of Administrative Services, the Community College System of New Hampshire, and the Fish and Game Department—reportedly have opposed the legislation, saying that requiring projects to go through local review and obtain local approval would cause delays and cost overruns.

Source: *Concord Monitor*; www.concordmonitor.com

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PRACTICE COMPLETE STREETS

A large, bold, black number '2' is the central focus of the lower half of the cover. It is set against a background of several horizontal, grey, textured bands that are slightly offset from each other, creating a sense of depth and movement. A large, faint, grey number '2' is also visible behind the main black one, and a faint 'APA' logo is visible in the background.

Completing the Streets

By Carol Gould, AICP, and Mike Morehouse

The responsibility for establishing a congruent interface between private land development and the public right-of-way is often hidden within a regulatory “twilight zone.”

This lack of clarity presents one of the greatest challenges to planners and policy makers striving to balance access with mobility and create a prosperous and livable community. This conundrum is especially vexing as many places are now looking for ways to reprioritize how transportation serves communities, switching from conventional mobility goals to those emphasizing safety, modal balance, healthy choices, environmental sustainability, character of place, and economic growth to name a few. The paradigms of the past must evolve in order to facilitate the needs of today’s towns and cities.

The term “complete streets” encompasses street design practices collectively aimed at the safety, mobility, and accessibility needs of users of all ages and abilities. With contemporary zoning practice focused increasingly on community character, land-use regulations need to address the concept of complete streets at the same time that they address how transportation serves as an element of that elusive “sense of place” often sought by municipalities. In the United States, municipal and state agencies typically build the public streets, and private developers build to the street line, inclusive of structures, access drives, and other frontage elements. Nonetheless, many private developers also construct what become new public streets as part of subdivisions, or new neighborhoods (such as new urbanist enclaves). So who is responsible for the design of what is or ultimately will be public rights-of-way? And who is responsible for the transition area between the public travel ways and private land both for new and upgraded infrastructure, where sidewalks, bicycle routes, and transit stops are meant to meet the pavement? The answer isn’t always clear.

To complicate matters, state and regional departments of transportation, local

public works and engineering offices, and planning and zoning commissions traditionally have all had different mandates for the design and function of public ways. Their decision making is commonly done in isolation from one another and, as a result, can be counterproductive. With the exception of buffer requirements, conventional zoning has historically had little to say about what happens in the legal gray zone between private property and the public right-of-way. In recent years, zoning requirements for access management and parking have been evolving as an increasing number of communities seek to address the need to control how travel on private property links to travel on the public way. Other contemporary zoning techniques, such as traditional neighborhood development (TND) and transit-oriented development (TOD) districts, emphasize the form of development and routinely include language requiring contributions to the public realm, including sidewalks and streets. Yet these techniques often fail to discuss transportation infrastructure in the context of a larger community mobility network.

If we, as planners, agree that how streets look, feel, and function impacts a person’s experience and impression of a place, then land-use regulations are an important tool to help manage the design and functionality of public streets, not only in terms of traffic, but in terms of balancing all modes of travel for improved connectivity and accessibility. According to the National Complete Streets Coalition, hundreds of communities nationwide have adopted complete streets policies and programs. The question becomes how best to mesh those local programs with private site design, where development meets the road.

This article looks at what it means to complete the streets and provides some ex-

amples of how communities are doing this. It then explores how zoning can be used as a means to help communities facilitate the complete streets process. It concludes with some thoughts about zoning and implementation of an effective complete streets approach to roadways.

PROBLEMS WITH THE STREET DESIGN STATUS QUO

Conventional traffic engineering for streets emphasizes capacity and safety for car and truck travel. Leading engineering organizations such as the American Association of State Highway and Transportation Officials (AASHTO) and the Institute of Transportation Engineers (ITE) publish guidance on the design and operation of public streets. Level of Service (LOS), a long-standing performance measure in the traffic engineering community, is often cited in these publications. LOS corresponds to a letter grade, A through F (with A being the best and F the worst), for the amount of delay a vehicle experiences on a road or intersection. It is a basic measure of congestion that only considers car and truck traffic. Conventional LOS determinations are based on subjective criteria; namely, what level of frustration (delay) is the average driver willing to tolerate? The problem with LOS is that it is biased against walking and bicycling and promotes sprawl by increasingly pointing to the need to add car capacity to roads to “improve” conditions. Relying on LOS to plan and design the street network limits opportunities to complete our streets. This is because car capacity is often provided at the expense of sidewalks and dedicated bicycle and transit infrastructure. Car capacity is quickly consumed, peak period congestion returns, and the demand for more capacity increases.

ASK THE AUTHOR JOIN US ONLINE!

Go online during the month of February to participate in our "Ask the Author" forum, an interactive feature of Zoning Practice. Carol Gould, AICP, and Mike Morehouse 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

Carol Gould, AICP, is a senior project manager at Fitzgerald & Halliday Inc. Her 18 years of experience at FHI has been in the area of community planning with a focus on livable communities, transportation/land-use connections, public involvement, parking, and access management.

Mike Morehouse is a licensed professional engineer who leads FHI's Mobility Service line, which focuses on multimodal transportation planning and engineering. In his work, Morehouse offers a comprehensive perspective of transportation engineering that values the relationship between vehicular mobility and placemaking.

Additionally, streets are organized into a functional classification system, which is required for municipalities to be eligible for federal funding for road projects. In the federal-aid classification system, arterials, collectors, and local roads are defined to describe the purpose, or function, of these roads in terms of mobility and access. Often, roadway design standards are tied to functional classification and many design manuals tend to favor optimizing the public right-of-way for automobile mobility. Since functional classification does not take context, non-auto modes, and a number of other factors into consideration, the incorporation of design elements for bicycles,

pedestrians, and transit take a back seat to creating space for cars.

Even as many communities look to better integrate land use with the transportation system as part of defining what community character and mobility means for them, transportation funding is still predominantly awarded to projects for physical upgrades to the safety and capacity of roadways as measured in LOS terms. So, even though more and more communities want public ways that are easily accessible, well connected by a variety of modes, and welcoming to pedestrians, bicyclists, and transit users and to create neighborhoods that are places for people more so than cars, federal and state

monies that have been the mainstay for funding public infrastructure have not been readily available to help communities meet those goals. Zoning, the primary means communities have to integrate private land use into the fabric of the community, is a significant opportunity to create public-private partnerships and make more holistically designed streets possible.

THE COMPLETE STREETS CONCEPT

In the most basic sense, complete streets are streets for everyone. They are streets that are designed for people first and foremost. This includes people driving in cars, walking on sidewalks and crossing the



Dan Burden, Walkable and Livable Communities Institute, Inc.

Motorists, pedestrians, bicyclists, and transit riders share complete streets in Santa Barbara, California.

street, riding on buses, pedaling bicycles, rolling in wheelchairs, and so on. These people consist of children, men, and women of all ages and abilities carrying out daily activities of all types. A complete street is one that accommodates each of these unique users safely and comfortably. There is no one-size-fits-all approach to developing the ideal complete street, as every place has its own specific context and unique set of needs; however, all complete streets share the common goal of creating a safe environment for all users of the road, regardless of age, ability, or mode of travel.

COMPLETE STREETS: POLICY TO DESIGN

The first step to achieving complete streets in a community is to develop a policy. Complete streets (CS) policies establish a set of principles emphasizing safe access for all users that guide the planning and development of the public right-of-way. A typical CS policy should

- establish a vision for the community;
- address all modes and users;
- consider context;
- set standards of performance;
- create flexible design standards;
- detail how CS is integrated into projects; and
- set up a process for measurement.

CS policies can range from brief statements to lengthy reports, but they all should, at a minimum, prompt a change in how municipalities approach the planning and design of their streets. This can include revising their design manuals, developing design guidelines based on best practices, using performance metrics that address all modes, training staff to think about context during planning and design, and establishing a process for public input. The National Complete Streets Coalition is a good resource for a list of communities with complete streets policies.

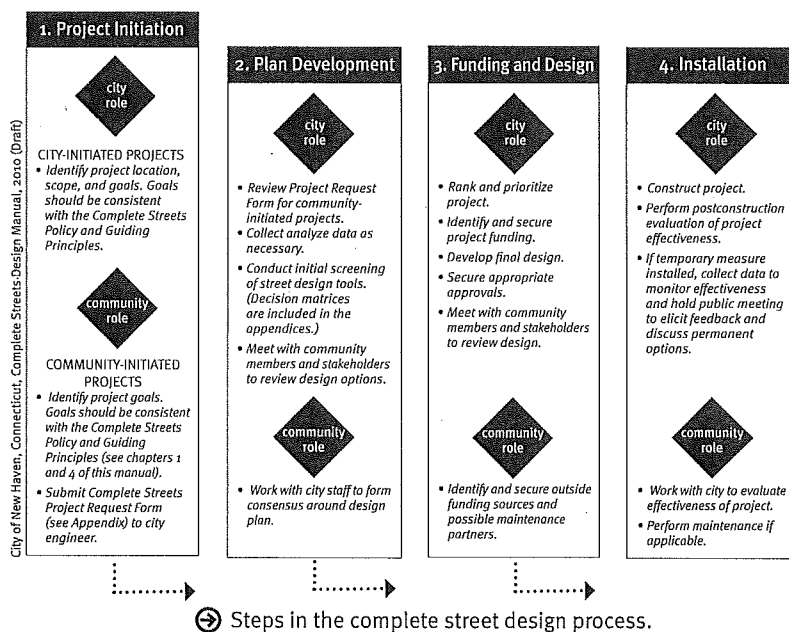
In New Haven, Connecticut, a CS policy was developed as a result of two tragic pedestrian fatalities that claimed the lives of a Yale medical student and an 11-year old girl. These incidents occurred within two months of each other, and a coalition of residents, civic leaders, city officials, community organizations, and Yale University representatives formed to coordinate community activity and accelerate the pace of change

with regard to improved traffic safety. In 2008, the New Haven Board of Aldermen unanimously passed an order creating a nine member Complete Streets Steering Committee to guide the development of a CS policy document and a design manual. The order also included the creation of a public process, an educational campaign, and increased traffic enforcement in the city.

The New Haven policy was guided by the following mission: "To develop and promote a safe, context-sensitive transportation network that serves all users and integrates the planning and design of complete streets that foster a livable, sustainable and economically vibrant community." One might ask how policy leads to practice. In the case of New Haven, a city ordinance mandated

WHO IS RESPONSIBLE FOR COMPLETING THE STREETS?

Under the status quo, state, regional, and local governments are fundamentally responsible for public ways. Street construction and maintenance are considered part of the suite of services a municipality provides for its residents. Nonetheless, state enabling acts for zoning generally authorize local governments to require streets, sidewalks, and bicycle facilities along with other essential services to occupants within or internal to a proposed development. As many as 26 states also authorize local governments to employ exactions or impact fees to pay for traffic impacts to existing, abutting public roadways. In addition, many states authorize zoning commissions to accept a fee in



the application of the policy, through adherence to principles of the Complete Streets Design Manual, to any new or improvement project affecting the public streets and sidewalks (including resurfacing, restoring, and rehabilitation projects).

Once a municipality has a clear policy on complete streets, and an approved process for delivering these projects, it then has an opportunity to engage the private development community on the value of site design that supports and enhances the improvements to the public ROW. Creating a strong set of design guidelines can be an effective mechanism for engaging a developer early in the project development cycle to establish a set of expectations for how the project will interface with the public realm.

lieu of parking, which monies can be used to enhance transit services. At a minimum, through zoning, property owners can be held responsible for safe ingress and egress to a site. This has been interpreted to include improvements to abutting streets with requirements for traffic impact mitigation in the form of turning lanes, signals, and medians, but only when the development is expected to generate significant traffic.

Zoning requirements can also include street elements, such as lighting, stretches of sidewalk, and crosswalks at the property line to serve public-safety objectives for pedestrians and bicyclists. At the same time, in the absence of measurable adverse effects to traffic on the adjacent roadway system, there are limited options for requiring a developer

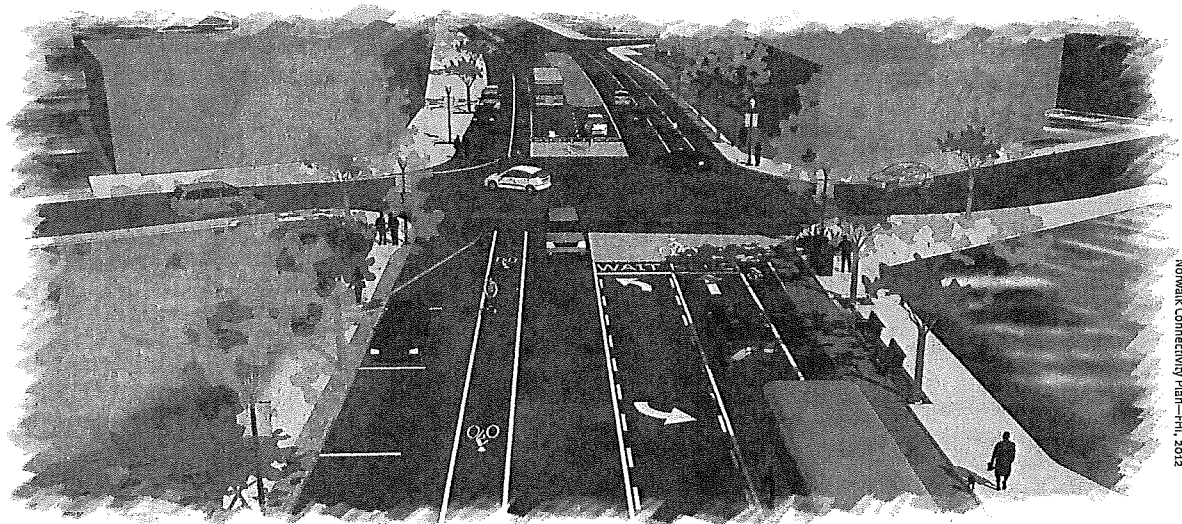
to improve the public way for broader goals of mobility, connectivity, and accessibility. The exception to this is for comprehensive master planned developments where the developer proposes a system of streets internal to the development as part of the site concept as a whole and will ultimately be dedicating those to the community as public streets. These types of developments commonly take the form of a planned unit development (PUD), TND, TOD, or occur within a form-based regulating plan area. In these cases, zoning language regulates street design within the confines of the development area and may require that design facilitate connections to transportation networks off-site. The challenge with such design provisions is to effectively achieve synergies between the internal circulation elements within that defined area and a system of complete streets on the connected

streets elements in zoning or subdivision regulations should be cross-referenced with a broader transportation policy. Where a community adopts not only a CS policy but a well-detailed design-guidance manual, then that can serve as a basis for comparable design language in the regulations.

In New Haven, along with the adoption of the city's CS complete streets policy and design manual into the code of ordinances, the zoning regulations were updated to include more comprehensive requirements for bicycle and pedestrian access internal to a development. Similarly, Charlotte, North Carolina, adopted an Urban Street Design Guidelines Policy Summary in 2007. The city subsequently added a subdivision ordinance amendment requiring all new streets in proposed subdivisions to meet those urban street design guidelines and adopted

approach has its place. While requiring features such as sidewalks and bicycle parking guarantees inclusion on a site plan, the drawback is that requirements tend to be rigid and need qualification. Conversely, street elements phrased as guidelines can leave their application open to interpretation, and it may be more challenging for a planning or zoning commission to get what they deem best for a site. In both cases, carefully drawn graphics depicting the desired design are extremely beneficial to making the regulations' intent clear.

Complete streets, by their very nature, are context sensitive. For example, it is not uncommon for an urban site within a TOD district to be essentially landlocked, with limited connectivity to existing public streets and where design flexibility for the interface with that street is desirable. Flexibility in



Norwalk Connectivity Plan—Final, 2012

➡ Visualizing a complete street for downtown Norwalk, Connecticut.

and surrounding public roadway system. Private development does have an impact, not only on traffic volumes on public streets but on access to the full range of modes by which people travel. If zoning is intended to manage private development in pursuit of implementing community-wide goals, including those for complete streets, then those elements should be part of any regulations package.

INCORPORATING CS PROVISIONS INTO DEVELOPMENT REGULATIONS

Just as a community's comprehensive plan establishes a legal standing for zoning, provisions for completing the streets are most sound when associated with a documented community-wide complete streets policy encompassing all public ways. Any language requiring complete

zoning language to require connectivity as part of its six distinct TOD overlay zones. The TOD regulations have the following guiding statement of intent: "Transit oriented development uses shall be integrated with the surrounding community, easily accessible, and have a good internal circulation system for a variety of travel modes." This statement of intent is followed by specific standards addressing the location and design of sidewalks, streetscapes, bicycle parking, urban open spaces, access/entrances, and consistency with station-area plans as well as other site features (§9.1201–1213).

It is worth noting that communities can take two overall approaches to incorporating CS principles into development regulations: as guidelines and as requirements. Each

design, written as guidelines as opposed to requirements, gives the zoning commission and developer room to negotiate the most effective means to ensure access by many modes in the specific context of the site.

CRAFTING REGULATORY AMENDMENTS FOR COMPLETE STREETS: TWO METHODS

There are many communities that have adopted zoning and subdivision provisions requiring individual CS elements such as sidewalks and bicycle parking as part of design for new developments. Many have also taken a fresh look at their parking regulations as a means to consider better accommodations for pedestrians and bicyclists. Consequently, communities commonly have incorporated language regarding mobility

and access either within the section on parking and loading, as an aspect of parking facility design, or in a subsection focused on design for internal circulation and streetscape character within a special district, such as a TOD zone. Few communities, however, have expressly tied those requirements to a community-wide CS policy or to connectivity goals for the transportation system as a whole. The Charlotte ordinances provide one example linking a municipal CS policy with subdivision site design as well as special district design. For a comprehensive approach to incorporating CS directives into zoning, two complementary methods should be considered: (1) CS-supportive provisions in special district regulations and (2) CS-supportive provisions in citywide design standards. Both should be linked to a communitywide CS policy.

For specialized zones, including TOD, TND, PUDs and form-based districts, design guidance in the regulations is intended to create a specific type of place with a defined

on street design standards and transportation (bicycle parking standards are included in a separate section on parking).

As noted with the examples above, some municipalities go beyond roadway classification to categorize streets into broader “typologies” that account for nonmotorized road users (pedestrians, bicyclists, and transit) as well as land-use context and environmental factors. These typologies can be part of a separate design manual (as was done for Austin) or codified in the zoning regulations (as was done in Sarasota County). In either case, the typologies lay the foundation for considering which CS design elements are desirable in each context. New York City’s *Street Design Manual* includes the following common street typologies:

- General Streets are the most prevalent street design and can be tailored to serve both local and through street contexts. This design frequently emphasizes motor vehicle access and movement, but the street may also include dedicated facilities

- Pedestrian Streets usually involve the full-time restriction of vehicle access to a street, though delivery access may be allowed in off-hours. Bicyclists can either be allowed to ride through or be required to dismount and walk.

- A Transit Street exists for exclusive or near-exclusive surface transit (bus) use, or where transit operations are given priority.

Even the best conceived CS designs are hampered if land development doesn’t do its part. The *Model Design Manual for Living Streets*, published in 2011 by Los Angeles County, includes the following land-development design principles to facilitate the successful application of complete streets:

- The distribution of land uses should be designed to allow everyday destinations (e.g., schools, parks, and retail shops) to be located within a comfortable walking distance of most residences.

- All buildings should contribute to the character of the streetscape, face the street with attractive entrances that welcome pedestrians, and have windows that overlook the street to create a sense of security.

- The setback between buildings and the sidewalk should be designed to enhance the pedestrian experience, whether setbacks are attractive landscaped yards that provide privacy for building occupants or shop fronts at the sidewalk that display merchandise to passing pedestrians. In no cases should cars, parked or moving, be placed between the sidewalk and the buildings.

- Off-street parking and service access and their driveways should be designed to disrupt the pedestrian experience as little as possible.

- The mix and intensity of land uses should be designed to support and be supported by efficient transit systems whenever possible.

INCENTIVES FOR COMPLETING THE STREETS

Any discussion of zoning must include not only how to require developers to provide desired site design and function, but how to encourage them to do so. In an ideal world, the most successful developments are, from a community-form perspective, always those where a

JURISDICTION	DISTRICT TYPE	STREET DESIGN PROVISIONS OVERVIEW
Seattle	Pedestrian overlay	Section 23.34.086 of Seattle’s Land Use Code provides for a ‘P’ designation as an overlay to a number of commercial zones with the intent to “preserve or encourage an intensely retail and pedestrian-oriented shopping district where non-auto modes of transportation to and within the district are strongly favored.” Design criteria include the use of building setback areas for sidewalks, lighting, and other pedestrian safety features.
Austin, Texas	TND	Chapter 25-3 of Austin’s Land Development includes standards for TND. The regulations refer to the Traditional Neighborhood District Criteria Manual for guidance on innovative street design. This manual includes six street types with associated sketches of preferred design as well as separate specifications for pedestrian paths.
Aurora, Colorado	TOD	Section 146-728 of Aurora’s zoning code addresses TOD District development standards, including those for pedestrian-friendly streets. It refers to the urban street standards in Section 126-36-5 of the city’s code, which specifies street design standards, including layout, according to street typology.
Sarasota County, Florida	Form-based code	Sarasota County’s Village, Hamlet and Settlement Area regulations include 14 acceptable street typologies, with three-dimensional sketches of acceptable street cross-sections and specified widths for sidewalks, planting strips, parking, and travel lanes (§11.2.8).

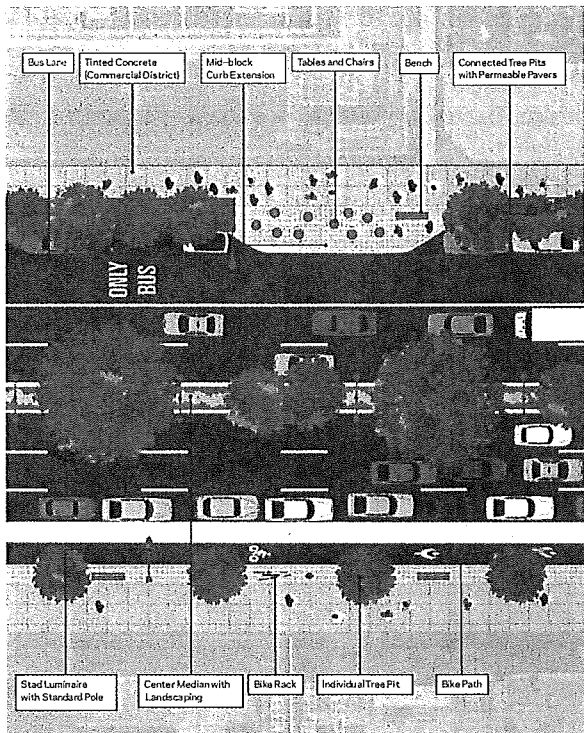
character, where travel by auto is intended to be balanced with other transportation modes. The table above provides a sampling of special zone types and how street design requirements have been used to promote complete streets.

Alternately, communities may elect to create a stand-alone section on CS design within an article or chapter of design standards or so-called “supplemental regulations.” Although few communities have done this, the compendium *21st Century Land Development Code* offers a comprehensive model zoning subsection (Section 5.23)

for other users, such as pedestrians and bicyclists.

- Boulevards are wide streets with multiple roadways and medians and an emphasis on greening and design quality. The medians sometimes include pedestrian and bicycle paths.

- Slow Streets are local streets that make extensive use of traffic calming measures to discourage vehicular through traffic, reduce vehicle speeds, green and beautify the streetscape, and create a comfortable environment for bicycling and walking.



④ The graphic-rich New York City *Street Design Manual* shows potential appropriate complete streets elements by street typology.

mutually beneficial site design is achieved as a public-private partnership between the developer and the zoning authority. There are several ways a developer can be encouraged to contribute to completing the streets including

- expedited permitting processes;
- easing of other requirements—such as parking reductions if elements to complete adjacent streets are constructed;
- tax abatement for construction of improvements; and
- public-private partnerships for maintaining CS elements once constructed.

Finally, as with any addition to a set of zoning regulations, new language for completing the streets must be correlated, reconciled, and cross-referenced to other design requirements. For example, parking provisions that allow for shared parking within walking distance of a use should be cross-referenced with design guidelines for sidewalks to note that sidewalks should be located and designed with connectivity in mind to facilitate use of off-site spaces.

CONCLUDING THOUGHTS

Beyond ensuring that developers provide CS elements within a site, zoning authorities can

also both require and encourage sites to be designed to integrate well with a network of public complete streets. While there are limited examples out there today of communities that have done this through their development regulations, it is a worthwhile objective that, hopefully, will be pursued more in the future. The goal is not only connectivity and multimodal access both within and among developments, but to create lasting partnerships between the private development community and local governments for providing complete public streets.

As with all zoning provisions, the impacts of CS standards will be most apparent in the long term. That is, the pace of private development is uneven and as such, only contributes to the evolution of community character, including

the street network, over the course of many years. Furthermore, zoning regulations are just one of a range of tools that communities can use to achieve their mobility goals. Yet, as a community evolves, over time the contributions of private land development to the overall public realm, including complete streets, do add up incrementally and can become a substantive factor in enhancing mobility and access. The ultimate challenge is to take a truly context-sensitive look at

each place where complete streets would be applied, identify the role that public agencies and private developers can and should play, and then craft CS policies accompanied by a practical program, including targeted zoning provisions, to see them implemented.

REFERENCES

- ◆ Active Transportation Alliance. 2013. "Active Transportation Policy." Available at www.atpolicy.org.
- ◆ Charlotte (North Carolina) Department of Transportation, City of. 2007. *Urban Street Design Guidelines Policy Summary*.
- ◆ Duncan Associates. 2013. See www.impactfees.com.
- ◆ Fitzgerald & Halliday, Inc. et al. 2010. *City of New Haven Complete Streets Design Manual*. New Haven, Connecticut: City of New Haven.
- ◆ Frelich, Robert H. and Mark White. 2008. *21st Century Land Development Code*. Chicago: American Planning Association.
- ◆ New York Department of Transportation, City of. 2009. *Street Design Manual*.
- ◆ Parolek, Daniel G., Karen Parolek, and Paul C. Crawford. 2008. *Form-Based Codes*. Hoboken, New Jersey: John Wiley & Sons, Inc.
- ◆ Ryan Snyder Associates et al. 2011. *Model Design Manual for Living Streets*. Los Angeles: County of Los Angeles.
- ◆ Massachusetts Executive Office of Energy and Environmental Affairs, Commonwealth of. 2012. *Smart Growth /Smart Energy Toolkit*. Available at www.mass.gov/envir/smart_growth_toolkit.
- ◆ Smart Growth America. 2013. *National Complete Streets Coalition*, www.smartgrowthamerica.org/complete-streets.

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PRACTICE RURAL PROTECTION

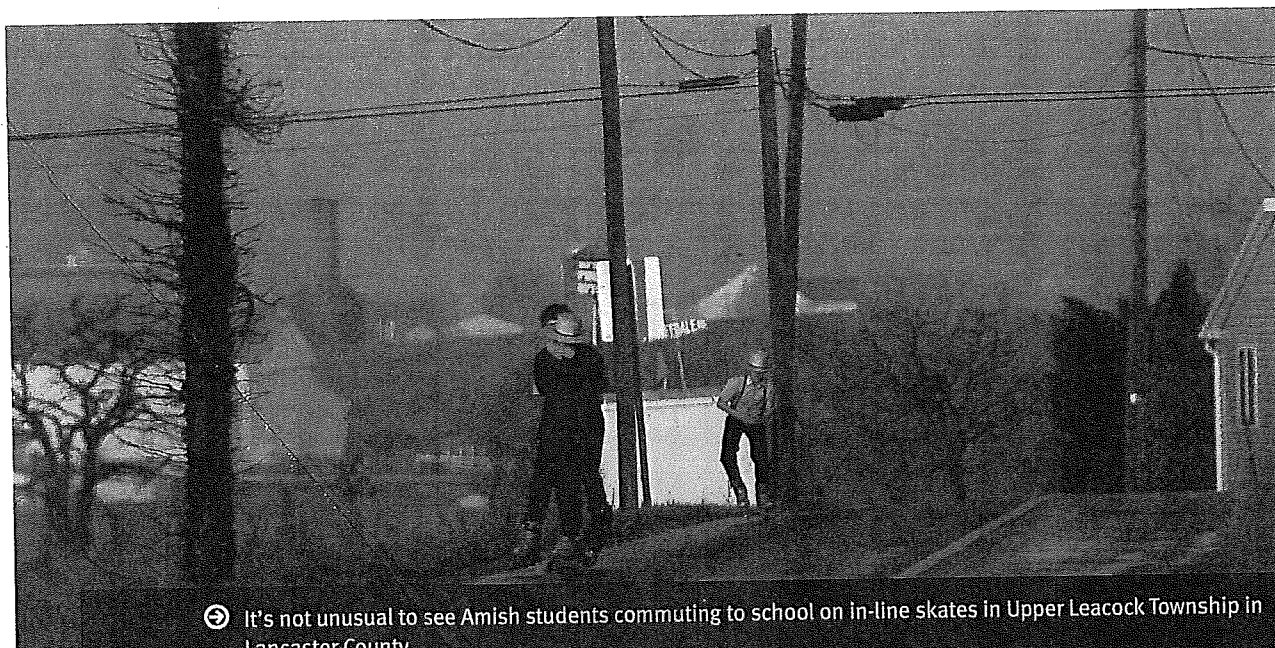


Planning Outside the Growth Boundary

By Dean S. Severson, AICP

What is a rural area, and how do you know when you get there? Planners have attempted to define and label rural in a number of ways.

All photos courtesy Lancaster County Planning Commission



⊕ It's not unusual to see Amish students commuting to school on in-line skates in Upper Leacock Township in Lancaster County.

One of the most common is to indirectly define these areas as “not urban.” Implicit in this indirect definition is that rural areas are those places beyond the suburbs that we haven’t subjected to close scrutiny. These areas have been called the urban fringe, exurbia, or even the hinterlands.

Lancaster County, Pennsylvania, has adopted a strategy intended to define the rural character of the county and to sustain and connect the rural community, resources, and economy. The rural strategy is based on three basic principles: minimize the amount of new residential development and employment growth and direct appropriate forms of development to existing rural centers; maintain the viability of the traditional rural economy; and protect rural resources.

The key to this strategy is the creation of designated rural areas, which are equivalent to and complement the county’s designated growth areas where future growth is to be directed and managed.

The following sections will detail the policies and implementing actions Lancaster County has adopted, as well as provide examples from around the country of other places that have also adopted a more fine-grained approach to rural planning.

RURAL AREA PLANNING IN LANCASTER COUNTY, PENNSYLVANIA

Lancaster County has long been a leader in agricultural production. The value of agricultural products produced in the county is the highest among all nonirrigated counties in the United States, and its total output would

place it among the top 15 states in many agricultural categories. This productivity, combined with the county’s large population of Amish and other Plain Sect communities, creates an instantly identifiable image of Lancaster County.

What’s not so readily apparent to county visitors is the more intricate, varied, and interconnected rural landscape supporting these agricultural activities. There are numerous unincorporated small towns, some dating back to the Revolutionary War, that were initially laid out as railroad stops, mill locations, or markets for the surrounding farms. The county also has exceptional resource areas, admittedly greatly reduced over the last three centuries, reflecting the original Penn’s Woods. Postwar residential subdivisions and rural economic centers dot the landscape as well.

ASK THE AUTHOR JOIN US ONLINE!

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

About the Author

Dean S. Severson, AICP, is a principal agricultural and rural planning analyst for the Lancaster County (Pennsylvania) Planning Commission. He has spoken at APA national and chapter conferences on a variety of rural planning issues. Severson is also a member of APA's Small Town and Rural Planning division. He holds a bachelor's degree in agricultural economics and master's degree in urban and regional planning, both from the University of Wisconsin at Madison.

It is in this context that the Lancaster County Planning Commission (LCPC) created its Rural Strategy in an update to its comprehensive plan in 2006. The goals of the Rural Strategy are to protect natural and agricultural resources, focus growth in rural centers, and support the rural economy.

The county was among the first in Pennsylvania to adopt a growth management strategy in the early 1990s focusing on the adoption of urban growth boundaries (UGBs) centered on the City of Lancaster, the incorporated boroughs, and suburbanizing portions of incorporated townships. These early growth management efforts did not focus on areas outside of the UGBs.

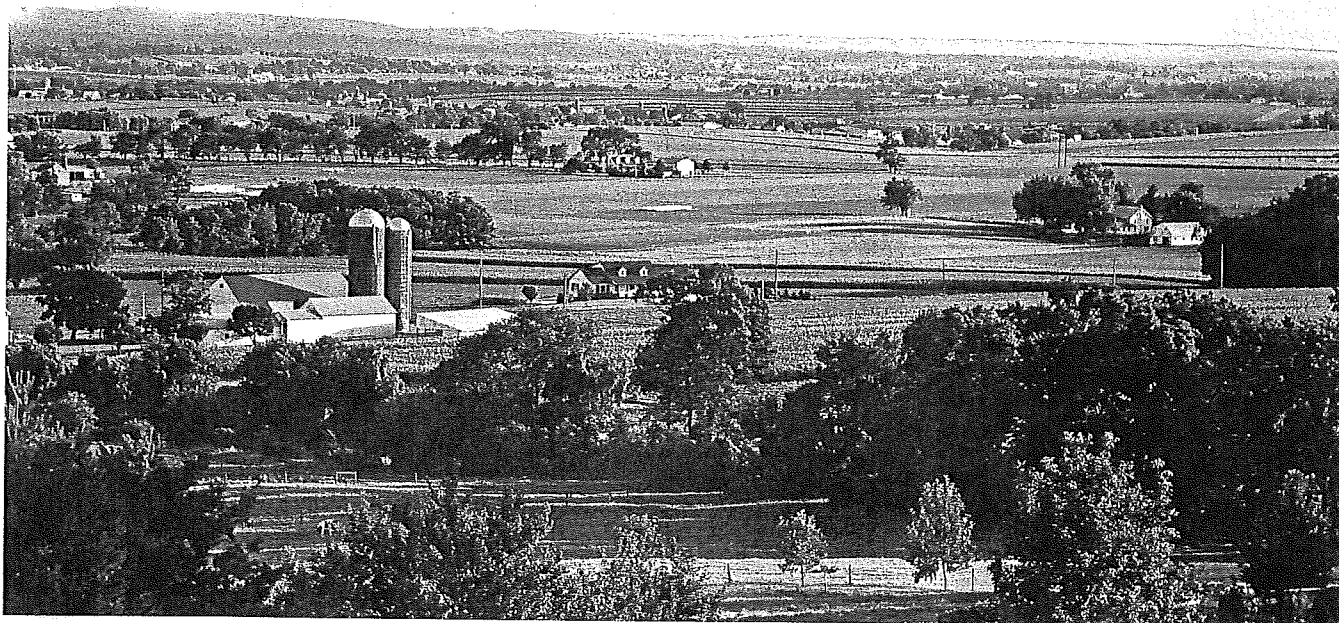
The updated comprehensive plan recognizes the need to look closer at the other side of the land-use coin and calls for the creation of both Designated Growth Areas (DGAs) and Designated Rural Areas (DRAs). DGAs are the successors to the UGBs, but DRAs are a new concept that formally recognizes rural areas as worthy of planning attention. These new designations are intended to address a concern often expressed by the public that planners only look at rural areas, and particularly farmlands, as holding areas for future expansions of the DGAs. Designating an area of a municipality for long-term rural use, whether agricultural, resource, or rural center, connotes a sense of permanence in both policies and actions.

DESIGNATED RURAL AREAS

In order to implement the vision for the county's rural areas, the LCPC has established a three-step planning process for each component of the DRA—agriculture, natural lands, and rural centers—to be implemented by the municipal planning partners. In Pennsylvania, local municipalities are enabled to adopt their own land-use regulations, and all 60 of the county's municipalities have adopted a local zoning ordinance, while 41 have adopted a municipal subdivision and land-development ordinance.

AGRICULTURAL AREAS

The first step is to identify agricultural resources with GIS mapping. Because much of



➡ Approximately 75 percent of Lancaster County has soil classified as prime farmland or farmland of statewide importance.

Lancaster County contains prime agricultural soils, this cannot be the sole determining factor for an Agricultural Area designation. Other factors considered during the analysis include the size of farms in the study area and whether or not these farms are included in a block of currently farmed parcels, permanently preserved for agricultural use through conservation easements, or included in the locally designated Agricultural Security Area.

Lancaster County's Agricultural Preserve Board and the private, nonprofit Lancaster Farmland Trust have jointly permanently preserved over 90,000 acres of farmland, often in large contiguous blocks. These preserved farms have been mapped and form much of the foundation of Agricultural Areas at the municipal level.

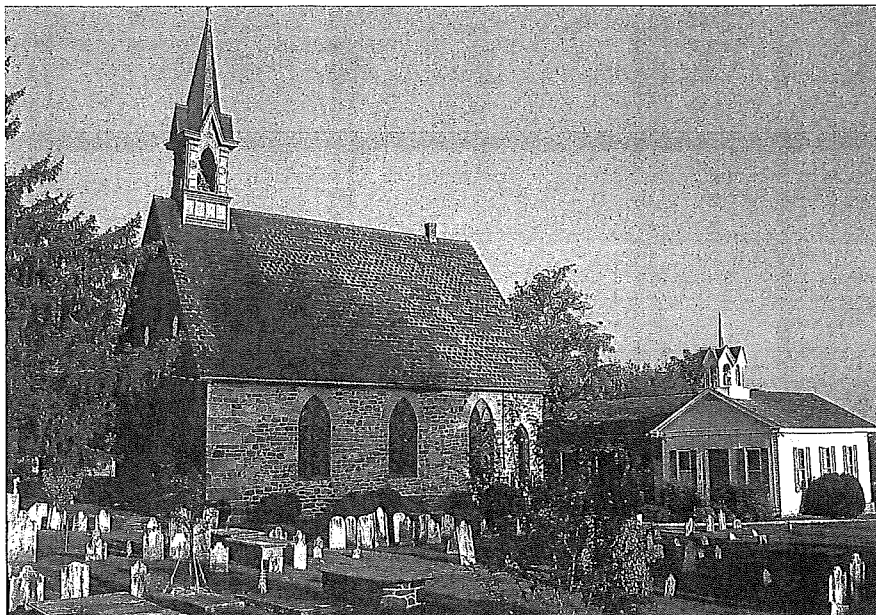
Other resources that should be considered are the presence of agricultural support businesses that can be identified through economic census data and local land-use inventories. The goal is to identify an area where the long-term sustainability of agriculture as a thriving economic enterprise can be maintained.

Natural Areas

Delineation of Natural Areas at the municipal level in Lancaster County has been greatly assisted by the creation of the county's first green infrastructure plan, Greenscapes. This element of the county's comprehensive plan seeks to establish a network of natural areas, conservation lands, and working landscapes. The Natural Areas component of the DRA, like the Agricultural Areas, looks to identify and protect large blocks of resource lands while accommodating appropriate forms of rural development at appropriate scales.

A vital part of Greenscapes is the Natural Heritage Inventory of Lancaster County completed at the same time. The inventory is based primarily on a "hubs and corridors strategy" identifying the highest priority natural habitats in the county and the greenways that connect them. Greenscapes includes a goal to preserve the

- Many rural centers in Lancaster County also include agricultural-support businesses, such as this blacksmith in unincorporated Churchtown.



- Many rural centers in Lancaster County include historic resources such as the Bangor Episcopal Church in unincorporated Churchtown, listed on National Register of Historic Places in 1978.

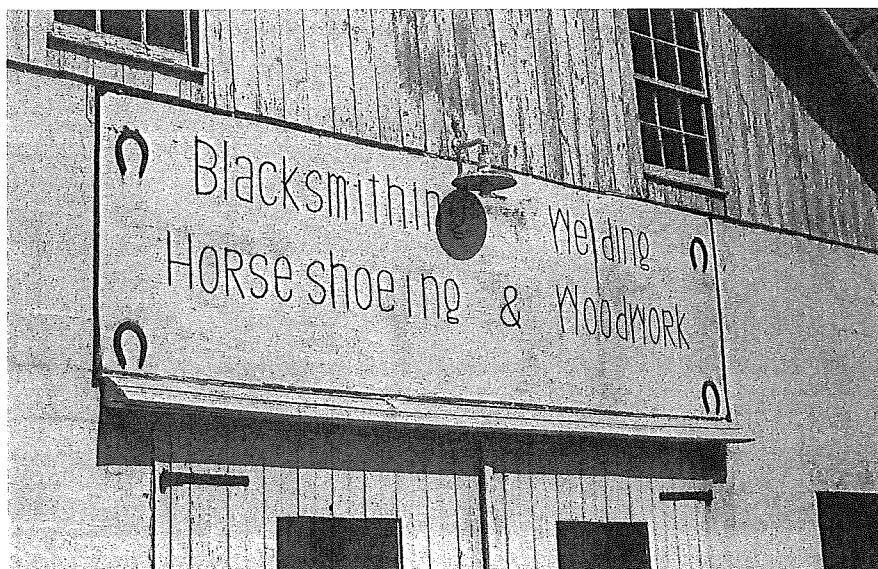
most exceptional natural resources in the county, including large forest blocks, high-quality streams and riparian buffers, and unique geologic features, as well as supporting natural features such as wetlands, floodplains, and groundwater and wellhead protection zones.

Rural Centers

Rural Centers are an important part of the heritage and identity of Lancaster County. These are primarily unincorporated small

towns, centered around mills, railroad stops, and post offices, which were some of the earliest areas of permanent European development in the county. Many of these communities still exist today.

The county's comprehensive plan identifies four types of Rural Centers. The first are villages, communities with well-defined edges typically consisting of 50 or more dwellings. Villages are usually designated as Village Growth Areas (VGAs) by the local municipality and the county and may be



suitable for additional development if public sewer service and water supply are available. However, the county's comprehensive plan calls for 85 percent of new dwellings and 66 percent of new employment in the county to be located in the county's Urban Growth Areas (which includes the City of Lancaster and the 19 incorporated boroughs). Therefore, VGAs are only intended to capture a portion of the development that would otherwise occur in rural areas and are not meant to spur new areas of rural residential growth.

Crossroads communities are, like villages, historical in character but smaller than villages and are not usually appropriate for additional growth. The final two types of

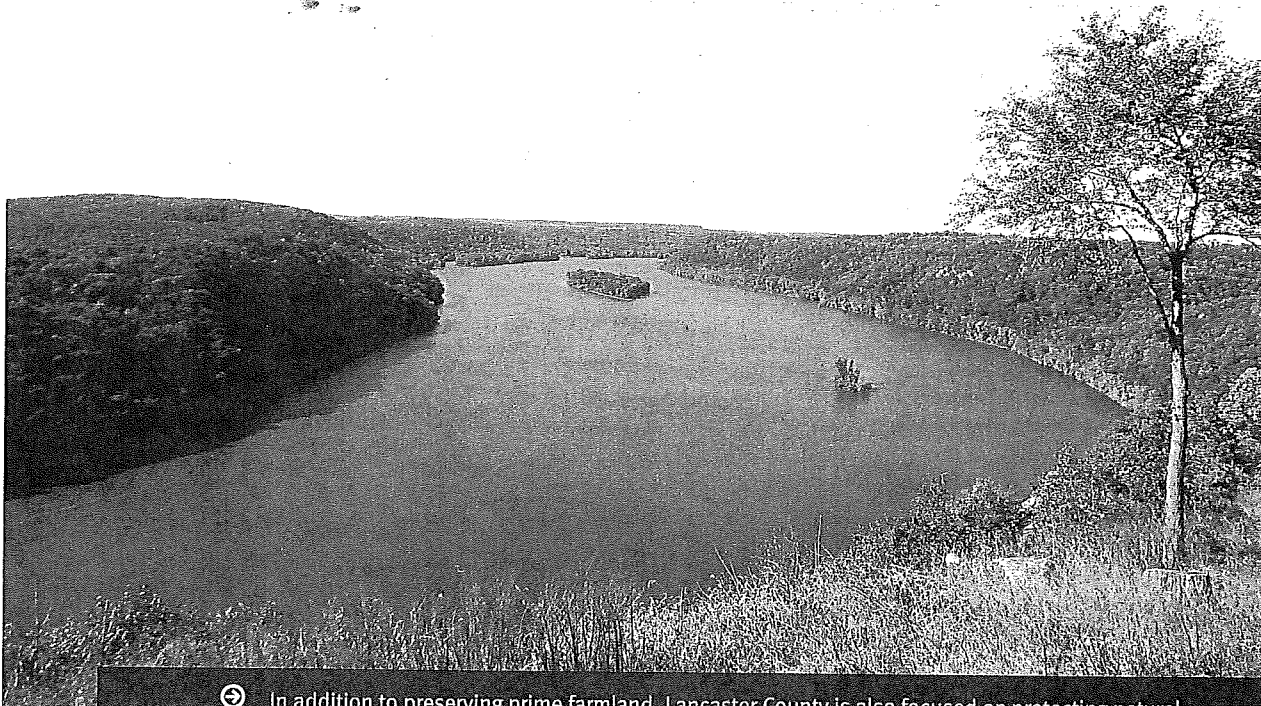
Designated Rural Area Adoption

Once a community's rural resources have been identified and delineated, the second step is to formally adopt a DRA. The DRA concept, while similar to a future land-use designation found in all comprehensive plans, is intended to convey a longer-term perspective for rural land use. There is a sense of permanence to the rural resource and historical development patterns that won't be affected with the next update of the comprehensive plan. Ultimately, the intent is to assure citizens that agricultural and natural resources aren't on hold until something better comes along.

However, this doesn't mean that a community can't include areas for future

IMPLEMENTATION OF THE DESIGNATED RURAL AREA

Once the resources in the DRA have been identified, delineated, and adopted by a municipality as part of its comprehensive plan update, the next step is to take action on policies that will sustain and support these resources. The Lancaster County Planning Commission has created a series of implementing tools to provide guidance to municipal planning commissions and governing bodies. These tools have been placed on the commission's website (www.co.lancaster.pa.us/planning) and have also been distributed via CD-ROM to each of our municipal planning commissions with a sampling of model ordinances, com-



➡ In addition to preserving prime farmland, Lancaster County is also focused on protecting natural resource areas, such as the forests along the Susquehanna River.

Rural Centers are rural neighborhoods and rural business areas. Typically, these areas have been developed post-World War II, prior to effective planning and zoning controls. The rural strategy for these areas is generally to acknowledge the development that has occurred and to permit some limited additional development to occur only on undeveloped infill lots. Once again, the intent of these areas is not to attract additional rural residential and business development but to acknowledge their existence and plan for any utility or infrastructure needs.

development in their DRA. These areas may lack a concentration of higher-value natural or agricultural resources. They may be located next to an existing DGA and be a logical place if future expansion of the DGA is warranted. Alternatively, lands located next to rural centers may be appropriate to accommodate some of the future residential needs of the DRA. The undesignated area may also be determined to be appropriate for expansion of neighboring farm uses. At present, however, the preferred future use is undetermined.

prehensive plan elements, and links to the website.

Two examples of local planning assistance prepared by the LCPC are (1) the Natural Resource Protection Standards and Model Conservation Zoning District and (2) Planning Strategies for Lancaster County's Rural Centers. The protection standards and model zoning district are a direct outgrowth of Greenscapes discussed above. Once a municipality has identified the hubs and corridors of natural resources within its community, the model ordinance provides defin-

The overarching goal is to protect Lancaster County's individual resources in addition to entire landscapes through a holistic approach to conservation.

ing criteria, performance standards, and mitigation standards for each of the specific resources. The overarching goal is to protect Lancaster County's individual resources in addition to entire landscapes through a holistic approach to conservation.

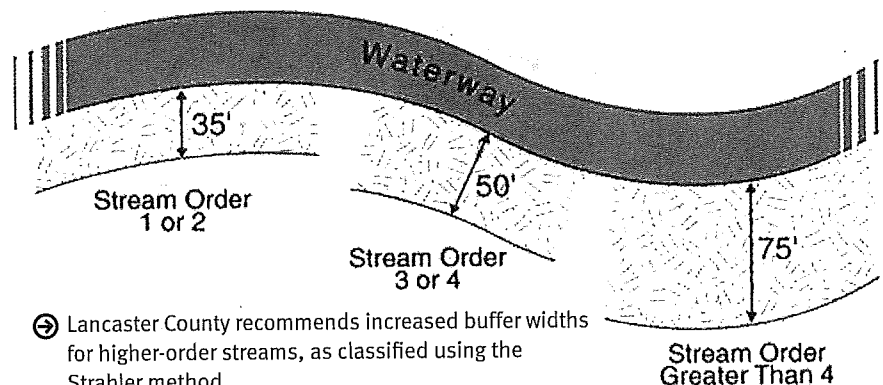
The protection standards and model zoning district go far beyond what is typically included within municipal zoning ordinances, which primarily address federally designated floodplains, wetlands, and areas with steep slopes. The guide also includes recommended protections for forest blocks and interior forests, areas with karst topography, riparian corridors, and unique geologic features.

As an example, the guidelines use the Strahler method to categorize streams. First-order streams are the smallest streams that typically feed into larger streams. First-order streams have no tributaries or branches. When two first-order streams merge, a second-order stream is created. Any stream ordered higher than six is considered a river. Streams ordered one and two together represent the headwaters of the stream. The recommended protected riparian corridor widths are based on the stream order (see illustration). Riparian corridors shall, at a minimum, encompass the entire 100-year floodplain and any wetland areas.

The Rural Centers guide was created to help local communities define, plan for, and better regulate the historical unincorporated communities within their municipal boundaries. One of the unique characteristics of Lancaster County is that, by and large, these rural communities are still recognizable places. Too often in communities across the nation these places have been swallowed up in the ever-expanding creep of highway commercial development.

The first part of the guide helps local communities research why a place came into being and investigate the spatial form of its early development. The second—and perhaps most important—part of the guide as-

sists with a community inventory. Municipal officials and citizens are advised to form teams and walk the streets observing the development pattern. A community inventory cheat sheet is included in the guide for team members to check boxes and write notes while they are walking. The guide also includes an identification guide to illustrate key concepts, such as good and bad examples of on-street parking, a strong and poor gateway presence, and complete or incomplete sidewalk connections. The guide



recommends that team members take time to sit down for coffee or lunch immediately following the walking inventory to compare notes. This allows team members a chance to discuss the findings of the walking tour while it is still fresh in their minds.

The final step in the creation of the rural center guide is to take all of the assessment information gathered in the second step and answer some basic questions: Do we want our rural center to grow? If so, should it expand outward or only through infill and redevelopment? Questions for municipalities with older small towns include the following: Do we have the infrastructure to permit additional development? Do we already have existing problems with failing on-lot sewer systems or inadequate well water quantity? Finally, what will the new

development look like? For instance, if the original form of the rural center is characterized by one-third- or one-quarter-acre lots with houses built up to the road, the municipality may wish to use architectural form or lot dimensional standards in conjunction with lot size requirements to maintain the distinct character of the town. The municipality should only permit commercial and industrial uses that serve the needs of the surrounding community. Because these rural centers are often located on roads that have evolved into major thoroughfares, the municipality should avoid permitting highway strip nonresidential uses that detract from the local orientation of the rural center. In addition, the municipality needs to coordinate the delineation of the rural center with planning for existing or future infrastructure needs. In many areas of the country, rural centers are characterized by older homes with older, often deficient on-lot sewage disposal systems on lots too small to adequately provide an alternative.

Too often in the past, rural communities have adopted "off the shelf" zoning ordinances and other land-use regulations that were written primarily for post-World War II rural subdivisions. The building setback and density requirements, street widths, and accessory building standards bear little resemblance to the actual communities that were built prior to the adoption of zoning ordinances. Communities have to identify the specific elements of the community they have and ensure they don't get a community they don't want.

OTHER EXAMPLES OF RURAL AREA PLANNING

The state of Washington's Growth Management Act (GMA) has also focused on providing direction for counties in plan-

ning for existing rural areas with more intensive development, such as unincorporated hamlets and villages, shoreline developments, and resorts built or vested prior to the adoption of comprehensive plans prepared under the GMA. Aptly titled Limited Areas of More Intensive Rural Development (LAMIRDs) generally allow a greater amount of rural development than is ordinarily permitted outside of planned growth areas. The GMA states that measures controlling rural development should, among other objectives, be visually compatible with the surrounding rural area, reduce sprawling, low-density development, and protect critical resource areas.

However, many counties in Washington, as elsewhere in the United States, have areas of existing rural residential development and rural nonresidential land uses that play an important role in the local economy. Therefore, the GMA permits LAMIRDs in three separate scenarios. The first is for the infill, development, or redevelopment of existing commercial, industrial, residential, or mixed use areas. The other two instances are for the intensification or expansion of residential, tourism, or nonresidential uses on existing lots. For instance, LAMIRD designation allows rural businesses to expand on existing lots.

King County, Washington, has established a Rural Economic Strategies (RES) program to support rural businesses that are compatible with the rural character of the region. They have created six rural economic clusters and recommended specific strategies to strengthen each cluster's economic base. These clusters are agriculture, forestry, home-based businesses, tourism and recreation, rural towns and neighborhoods, and rural cities. Recommended strategies include reviewing county regulations and procedures governing agriculture-related businesses, exploring options to prepare business plans for farm and forest businesses, and creating a model to promote tours of working farms, heritage sites, and habitat restoration sites.

Scott County, Minnesota, has also faced the question of defining what is rural. Its comprehensive plan identified roughly one-quarter of the county's land base as permanently rural. County planners and the Center for Rural Design at the University of Minnesota then engaged the public in a series of public meetings using visual preference surveys and roundtable discussions to create a more fine-grained description of the elements of a rural landscape. A rural charac-

ter map was then created to identify four rural character areas: mixed land rural residential, natural land cover residential, lake country residential, and farm country. Finally, these maps were used, along with visual preference surveying, to garner the community's feelings on the appropriate types and patterns of development in each of these rural character areas as well as how planning and design guidelines could be useful in directing development in these areas.

CONCLUDING THOUGHTS

The rural areas of your community should not be viewed simply as "those areas outside of where we plan to grow." Too often in the past planners have principally focused on houses, industry, and civic institutions within adopted growth boundaries and viewed the areas outside the growth line as static, monolithic areas of natural resources and agriculture. Even worse, they looked at these places as merely holding areas until development arrived. The following points should be considered by communities as they plan for their rural areas' community character and economic health:

Too often, planners
have looked at rural
areas as merely
holding areas until
development arrived.

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Identify the specific components of your rural areas. What is the form and character of existing villages as well as postwar residential development? Identify all of the small businesses and the associated tax base and employment that exist in your community. Inventory all of the various farm-support businesses in your community. Work with a local university or state geographic information office to map all of the natural resources in your community. Assess the agricultural economy in your community: What is the average size of farms? What are they growing? What is the average age of farmers in your community?

Craft plans and land-use regulations that reflect and recognize the unique development patterns of your rural area. Don't borrow someone else's suburban residential zoning regulations or economic development plan. Engage your citizens in identifying how your community first came about and how it evolved to what it is today. Obviously, a town founded as a mill center in the 1800s is most likely no longer serving that function. However, if it was laid out in a linear pattern parallel to a major stream, future development should reflect this pattern.

Foster existing economic activities that benefit and are compatible with the local community. Washington's LAMIRD provisions illustrate the importance of locally based commerce and industry. In Lancaster County, many of the farm-based businesses operated by the county's Plain Sect Amish and Mennonite farmers provide goods and services used by their Plain neighbors. Examples include blacksmiths, farm equipment manufacturing, and small machine repair.

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HOW DOES YOUR COMMUNITY
MANAGE GROWTH IN RURAL
AREAS?

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