

Zoning Bulletin

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Variance/Nonconforming Use— Applicant seeks variance for expansion of nonconforming use

Project opponents maintain a more strict use variance standard applies, rather than a dimensional variance standard

Citation: *Bernotas v. Zoning Hearing Bd. of City of Bethlehem, 2013 WL 2450160 (Pa. Commw. Ct. 2013)*

Contributors

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PENNSYLVANIA (06/07/13)—This case addressed the issue of whether an applicant established entitlement to a variance for its requested expansion of a nonconforming use. The case involved the evaluation of whether a use variance standard or a dimensional variance standard applied to the requested expansion of a nonconforming use.

The Background/Facts: Ghassan G. Elias (“Elias”) owned property (the “Property”) in the City of Bethlehem, Pennsylvania (the “City”). There were three buildings on the Property: a main building, and two outbuildings. Since 2006, Elias operated a farmers’ market/grocery store, known as Elias Market, in the main building on the Property. The Elias Market was a preexisting nonconforming use under the City’s Zoning Ordinance (the “Ordinance”).

Prior to Elias’ purchase of the Property, the former owner’s expanded the nonconforming use on the Property by 50% after obtaining special exceptions, pursuant to § 1323.04 of the Ordinance.

Section 1323.04(a) provided that the total building area or total land area occupied by a nonconforming use or structure shall not be increased by greater than 50% beyond the area that existed at the time the use or structure first became nonconforming.

In 2009, Elias sought a variance from the § 1323.04(a) of the Ordinance. Elias proposed to construct an enclosed loading dock, an enclosed ramp, and a warehouse on the lot. Those improvements would increase the existing nonconforming use by another 50% from 14,436 to 19,279 square feet. Because the proposed construction would also increase the total building coverage on the lot to 24.32%, Elias also requested a variance from the 15% maximum building coverage for the R-R zoning district where his property was located.

The City zoning officer denied Elias’ variance requests. Elias appealed. The City’s Zoning Hearing Board (the “Board”) granted the requested variances. The Board concluded that Elias established unnecessary hardship resulting from the unique conditions of the property. The Board found that Elias’ Property was a corner lot and suffered from “severe elevation changes due mainly to the excavation of [the adjacent road].” The Board further found that: the existing loading dock was narrow, steep, insufficient and unusable in the inclement weather; there was no room in the main building for use of forklifts; the proposed loading dock and ramp would enhance the employees’ safety and provide tractor trailers with better access to Elias Market; the proposed warehouse would provide Elias Market with more storage space without increasing the size of the store; the expansion would not adversely impact the neighborhood; and the proposed structures would reduce “eye pollution,” noises, and the number of deliveries made to the store and eliminate an access to the lot from the adjacent road.

Adjacent landowners (the “Objectors”) appealed the Board’s decision. The trial court affirmed the grant of the variances. Among other things,

the trial court concluded that the Board had properly applied a more relaxed dimensional variance standard to Elias' application (rather than a nonconforming use standard). The court also concluded that Elias met all criteria required for the variances.

The Objectors again appealed.

DECISION: Affirmed.

The Commonwealth Court of Pennsylvania agreed that the dimensional variance standard, rather than the nonconforming use standard, applied to Elias' application for variances. The court also agreed that Elias met all criteria required for the variances.

In so holding, the court explained that, pursuant to § 910.2(a) of the Pennsylvania Municipalities Planning Code ("MPC") and § 1325.06(a) of the City's Zoning Ordinance, one seeking a variance must: establish that the zoning ordinance imposes unnecessary hardship resulting from unique physical conditions of the property; a variance is necessary to enable a reasonable use of the property; the asserted hardship was not self-inflicted; a grant of variance will not alter the essential character of the neighborhood, substantially impair appropriate use or development of adjacent properties, or be detrimental to the public welfare; and the requested variance represents a minimum variance and a least possible modification of the regulation that will afford relief.

Here, the court found that a dimensional variance standard applied because Elias was asking only for a "reasonable adjustment of the zoning regulations in order to utilize the [P]roperty in a manner consistent with the applicable regulations." The court explained that, in considering a dimensional variance request, multiple factors may be considered, including: "the economic detriment to the applicant if the variance was denied[;] the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements[;] and the characteristics of the surrounding neighborhood."

The Objectors had not disputed that the relaxed dimensional variance standard applied to the requested variance from the 15% maximum building coverage. However, the Objectors had argued that the Board should have applied the more strict use variance standard to the requested variance from § 1323.04(a) of the Ordinance limiting an expansion of nonconforming use by up to 50%. The court disagreed. It found that the proposed loading dock, ramp, and warehouse would increase the size, extent, and scope of the nonconforming use but would not create a new principle use on the lot. It also found that those structures were incidental and secondary to the principle nonconforming use of the property as a farmers' market/grocery store and constituted accessory structures. Because the proposal would only increase the nonconforming use without creating a new use on the lot, the court concluded that the requested variances had to be evaluated under a dimensional variance standard.

In holding that Elias met all of the criteria for the variances, the court

noted that an applicant seeking a variance to expand a nonconforming use must still establish unnecessary hardship resulting from unique physical conditions of the property and satisfy all the other criteria in § 910.2(a) of the MPC and § 1325.06(c) of the Ordinance. The court also noted that Elias had a “vested constitutional right to a natural expansion of a nonconforming use”—as balanced against the impacts of the proposed expansion on the surrounding area and public interest.

The court found the evidence in the record supported the Board’s finding that: asserted hardship resulted from the unique physical conditions of the property; the requested expansion of the nonconforming use was necessary for a reasonable use of the property; the new proposed structures were necessary to improve and modernize the nonconforming use; and the proposed expansion would not adversely impact the neighborhood. The court concluded that the fact that the proposed expansion was sizable did not render the expansion unreasonable *per se*. Rather, the court found the evidence established that the requested variances represented a reasonable adjustment of the zoning standards necessary to allow a reasonable use of the property without affecting the public health, safety and welfare.

See also: *Hertzberg v. Zoning Bd. of Adjustment of City of Pittsburgh*, 554 Pa. 249, 721 A.2d 43 (1998).

See also: *Jenkintown Towing Service v. Zoning Hearing Bd. of Upper Moreland Tp.*, 67 Pa. Commw. 183, 446 A.2d 716 (1982).

See also: *Silver v. Zoning Bd. of Adjustment*, 435 Pa. 99, 255 A.2d 506 (1969).

See also: *In re Gilfillan’s Permit*, 291 Pa. 358, 140 A. 136 (1927).

Nonconforming Use—City says property use is nonconforming and illegal

Property owner argues city’s tax assessment of property based on nonconforming use precludes enforcement of zoning laws

Citation: *Cigarrilha v. City of Providence*, 64 A.3d 1208 (R.I. 2013)

RHODE ISLAND (05/15/13)—This case addressed the issue of whether a use was grandfathered as a preexisting legal nonconforming. It also addressed whether a city’s assessment of property taxes upon property based on a nonconforming use precluded enforcement of the zoning laws by operation of equitable estoppel or by operation of laches.

The Background/Facts: Cecilia and Manuel Cigarrilha (the “Cigarrilhas”) owned real property (the “Property”) in Providence, Rhode Island (the “City”). The dwelling units at the Property were constructed in 1911. In 1923, the City adopted its first zoning ordinance. Under the zoning ordinance, any uses established prior to the enactment of that ordinance were deemed to be grandfathered unless abandoned.

Pursuant to the City zoning ordinance, the Cigarrilhas’ Property was zoned Residential R-2. That zone allowed for single-family dwelling units and two-family dwelling units. In 2008, the City discovered that the Cigarrilhas’ Property was being used as a three-family dwelling, and therefore was not in compliance with the ordinance.

The Cigarrilhas maintained that their Property was grandfathered as a legal nonconforming use. The Cigarrilhas appealed to the City’s zoning board of appeal (the “Board”).

The Board also determined that using the Property as a three-family dwelling was illegal.

The Cigarrilhas brought a legal action, appealing the Board’s decision. They asked the court to declare that their use of the Property as a three-family dwelling was a legal nonconforming use. In support of their arguments, the Cigarrilhas presented tax assessment records from the 1940s through the present. The Property had been taxed as a three-family dwelling. The Cigarrilhas argued that the doctrines of equitable estoppel and/or laches precluded the City from enforcing its codes.

The trial justice found that the Cigarrilhas had failed to meet their burden of proving that the Property was used as a three-family dwelling prior to the enactment of the City’s first zoning ordinance in 1923. It also ruled that the Cigarrilhas had failed to establish that either equitable estoppel or the equitable doctrine of laches precluded that City from enforcing its zoning ordinance.

Cigarrilhas appealed.

DECISION: Affirmed.

The Supreme Court of Rhode Island also held that the Cigarrilhas had failed to prove that the property was in use as a three-family residence before the enactment of the ordinance in 1923. The court found that all evidence in the record, including the tax assessment records, postdated 1923—the year the ordinance was enacted. Accordingly, the court concluded that the Property did not qualify for legal nonconforming use.

The Cigarrilhas had argued that because the City had benefited from taxing the Property as a three-family dwelling “for an excess of seven decades,” the doctrine of equitable estoppel applied, precluding enforcement of the zoning laws.

The court explained that for equitable estoppel to be potentially applicable, the Cigarrilhas had to show: (1) an affirmative representation or equivalent conduct on the part of the City which was directed to the

Cigarrilhas for the purpose of inducing the Cigarrilhas to act or fail to act in reliance thereon; and (2) that such representation or conduct in fact did induce the Cigarrilhas to act or fail to act to their injury.

Here, the court found no evidence in the record that the City acted or made any representation which induced the Cigarrilhas to act. The tax assessments alone did not show any conduct on behalf of the City that would lead to reliance that injured the Cigarrilhas. Moreover, reliance on the taxes assessed did not result in the equities being balanced in the Cigarrilhas' favor. The Cigarrilhas had benefited from additional rental income, thus negating the injury requirement of equitable estoppel, concluded the court.

The Cigarrilhas had also contended that the equitable doctrine of laches applied to shield them from the City's efforts at enforcement of its ordinances. Here, for the doctrine of laches to apply, the court explained, the Cigarrilhas would have had to prove: (1) there had been negligence that led to "a delay in the prosecution of the case"; and (2) that delay had prejudiced the Cigarrilhas.

The Cigarrilhas had argued that the City had negligently sat on its rights for over 70 years—in taxing the Cigarrilhas as a three-family dwelling unit and not enforcing the ordinance's use restrictions. "To hold [the Cigarrilhas] responsible to try to prove something that occurred more than 70 years ago while the City refused to enforce its own rights, whatever they might be, demand[ed] the use of the concept of laches," argued the Cigarrilhas. The court disagreed. It held that the trial justice was not "clearly wrong" when it found that the City had not "acted negligently" due to the fact that the City took the appropriate steps against the Property in taxing its actual use and in promptly enforcing its codes once it learned of the violations.

See also: *Lichtenstein v. Parness*, 81 R.I. 135, 99 A.2d 3 (1953).

See also: *School Committee of City of Cranston v. Bergin-Andrews*, 984 A.2d 629, 251 Ed. Law Rep. 829 (R.I. 2009).

Comprehensive Plan—City approves planned unit development

Development opponents contend proposal is
irreconcilable with City's comprehensive plan

Citation: *Durant v. District of Columbia Zoning Com'n*, 2013 WL 2102501 (D.C. 2013)

DISTRICT OF COLUMBIA (05/16/13)—This case addressed the is-

sue of whether a planned unit development approval was invalid on its face as irreconcilable with the District's comprehensive plan.

The Background/Facts: In November 2010, 901 Monroe Street LLC (the "Developer") submitted a planned unit development ("PUD") application to the District of Columbia Zoning Commission (the "Zoning Commission"). The Developer proposed to transform a 60,000 square foot parcel into a mixed-use commercial and residential project. Simultaneously, the Developer asked that the entire parcel be rezoned to C-2-B—allowing for "community business centers" of "medium-high density."

At the time of the PUD application, the property was primarily authorized for residential use. The zoning regulations designated a portion of the property R-2 residential, and another portion C-1 commercial. The Future Land Use Map ("FLUM") approved one part of the property for mixed-use moderate-density uses, another part for moderate-density residential uses, and a third part for low-density residential uses. The Generalized Policy Map ("GPM") also contemplated low-density residential use in the area, treating the property as a Neighborhood Conservation Area.

A group of area residents who lived within 200 feet of the proposed development opposed the PUD application (the "Opponents"). Most significantly, the Opponents asserted that the proposal was inconsistent with the District of Columbia's Comprehensive Plan. Specifically, they claimed that the proposed project was contrary to the Comprehensive Plan's Land Use, Upper Northeast Area, and Urban Design Elements. They also argued that the proposal was inconsistent with the FLUM.

Ultimately, the Zoning Commission unanimously approved the Developer's application. The Commission concluded that the proposal would not, as a whole, be inconsistent with the Comprehensive Plan. In particular, the Zoning Commission noted that the Upper Northeast Element of the Comprehensive Plan encouraged moderate-density mixed-use development, and that current zoning was inconsistent with that goal. The requested rezoning, the Zoning Commission found, would bring the property in line. As to the Land Use Element of the Comprehensive Plan, the Commission found that the Developer's proposal would advance a land use policy of using Metro stations as development anchors because the proposal was the area's "most realistic development opportunity." Viewing the proposed development in the context of the Comprehensive Plan "as a whole," the Commission found it to be consistent with the FLUM.

The Opponents appealed the PUD application approval. They raised two primary arguments: (1) on its face, the Developer's proposal was irreconcilable with the Comprehensive Plan, and the Commission therefore had no authority to approve the developer's application; and (2) even if the Developer's proposal was consistent with the Plan, the Zoning Com-

mission failed to make adequate findings as to several material contested issues.

DECISION: Remanded.

The District of Columbia Court of Appeals held that the PUD approval was not invalid on its face as irreconcilable with the Comprehensive Plan. In so holding, the court explained that the Zoning Commission was responsible for balancing the Comprehensive Plan's occasionally competing policies and goals, subject only to deferential review by the court. The court noted that, even if the PUD proposal conflicted with one or more individual policies associated with the Comprehensive Plan, that did not, in and of itself, preclude the Zoning Commission from concluding that the action would be consistent with the Comprehensive Plan as a whole.

A Comprehensive Plan, said the court, "is not a code of prohibitions": "it is an interpretive guide," which a zoning commission must consider holistically. It provides a broad "statement of policy to guide future public decision[-] making," and except where specifically provided, it is not "binding"; it is only an interpretive tool. "Its discrete elements 'guide[,] but do not direct' a zoning commission's action," and it "do[es] not impose specific implementation techniques," stated the court. Thus, even if some individual policies are facially at odds with a particular zoning action, that is not necessarily dispositive; the zoning commission must still determine whether a proposed action would be consistent with the Comprehensive Plan as a whole.

Here, however, the court also agreed with the Opponents that the Zoning Commission had failed to resolve certain material issues. The court found that the Zoning Commission had failed to address or explain its resolution of three contested issues. In light of that failure, the court concluded that a remand for further consideration was required to resolve those issues.

See also: *Tenley and Cleveland Park Emergency Committee v. District of Columbia Bd. of Zoning Adjustment*, 550 A.2d 331 (D.C. 1988).

Residential Facilities—City board classifies homeless shelter as “transient hotel,” thus an allowed use in zoning district

Shelter opponents argue classification is improper and proposed use is actually prohibited

Citation: *Chelsea Business & Property Owners' Ass'n, LLC v. City of New York*, 2013 WL 2396026 (N.Y. App. Div. 1st Dep't 2013)

NEW YORK (06/04/13)—This case addressed the issue of whether a city's board rationally determined that a proposed homeless shelter met the zoning code's definition of “transient hotel.”

The Background/Facts: Bowery Residents' Committee, Inc. (“BRC”) sought to convert a 12-story building in the Borough of Manhattan in the City of New York (the “City”). In the 100,000-square-foot facility, BRC planned to house a 32-bed detoxification unit, a 96-bed reception center, and a 200-bed homeless shelter (the “homeless shelter”).

BRC applied to the New York City Department of Buildings (“DOB”) for all necessary approvals and permits for the proposed homeless shelter. The DOB granted the approvals and permits.

Thereafter, the Chelsea Business & Property Owners' Association, LLC; doing business as the Chelsea Flatiron Coalition (the “Chelsea Coalition”), challenged the DOB's determinations. The building for BRC's proposed homeless shelter was located in an M1-6 light manufacturing zoning district in the City. The DOB had classified BRC's proposed homeless shelter as a “transient hotel,” which was a permitted use in the M1-6 zoning district. The Chelsea Coalition argued that classification was improper. It argued that the BRC's proposed homeless shelter should have been classified as a “non-profit institution with sleeping accommodations” or a “health related facility” under the City's Zoning Resolution—both of which uses were prohibited in the M1-6 district.

The Board of Standards and Appeals of the City of New York (the “BSA”) affirmed the DOB's determinations.

The Chelsea Coalition appealed.

The supreme court denied Chelsea Coalitions' petition and dismissed the proceeding.

The Chelsea Coalition again appealed.

DECISION: Affirmed.

The Supreme Court, Appellate Division, First Department, New York, first noted that the BSA and DOB were responsible for administering and enforcing the zoning resolution. The court said that “their interpretation must therefore be given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute.”

The court held that the BSA had “rationally determined that the definition of ‘transient hotel’ in . . . the Zoning Resolution [was] clear and unambiguous and that the proposed use of the building [as a homeless shelter] [met] the three criteria of the definition.” Specifically, the court found that BRC’s proposed homeless shelter: (1) provided sleeping accommodations used primarily for transient occupancy; (2) had a common entrance to serve the sleeping accommodations; and (3) provided 24-hour desk service, housekeeping, telephone, and linen laundering.

Case Note:

The Chelsea Coalition had also argued that the City should have submitted the proposed homeless shelter to a Uniform Land Use Review Procedure (“ULURP”) review. The court held that ULURP was not required because: (1) the City did not have a lease or the functional equivalent of a lease of the building; and (2) the contract between the BRC and the City’s Department of Homeless Services was not shown to be part of an actual housing and urban renewal plan.

Case Note:

The Chelsea Coalition had further contended that BRC’s homeless shelter operated in violation of the City’s Administrative Code. The Administrative Code stipulated that “[n]o shelter for adults shall be operated with a census of more than [200] persons.” The court said that, even assuming a census in excess of 200 persons, the building was permitted as a grandfathered shelter under the “Camp LaGuardia” exception to the Administrative Code’s 200-bed limit. Under that Administrative Code exception, the Camp LaGuardia Shelter operating with a census of 1,017 persons can be replaced with two shelters each with a maximum census of 400 persons.

Zoning News from Around the Nation

FLORIDA

Governor Rick Scott recently signed into law legislation that “applies

retroactively and prohibits referendums on development issues unless a city's charter expressly grants citizens the right to appeal amendments made to comprehensive plans that affect more than five parcels."

Source: *Sun Sentinel*; www.sun-sentinel.com

IOWA

Cedar Rapids recently became the sixth Iowa city to approve an ordinance that bans short-term loan businesses from certain areas.

Source: *Newton Daily News*; <http://www.newtondailynews.com>

MASSACHUSETTS

The state House of Representatives has passed a \$1.4 billion Housing Bond Authorization Bill, which includes an amendment that would "prohibit any 40B development from being built in an economic opportunity area within a city of town where the town has a tax increment financing, or TIF, agreement." Essentially, the amendment would prohibit developers from using Chapter 40B to overrule local zoning laws if a TIF agreement is in place. The reported purpose of the amendment is to "empower[] communities to accommodate affordable housing while also promoting economic growth." The bill now awaits Senate consideration.

Source: *Norwood Bulletin*; <http://www.wickedlocal.com/norwood/>

Quincy's city council has "approved a new zoning law that aims to keep medical marijuana dispensaries away from homes, schools and bars." The new ordinance "bans the cultivation or sale of medical marijuana within 1,500 linear feet, or five football fields, of a residential district, school, child care center, liquor-selling establishment and other marijuana dispensaries." The ordinance now awaits approval by the mayor.

Source: *Patriot Ledger*; www.patriotledger.com

NEW YORK

Recently, a state judge issued a temporary restraining order "barring the expansion of a group of related recycling and trucking businesses that Smithtown officials say are violating the town zoning code." The town claims the businesses are operating on land that is predominantly zoned for residential housing.

Source: *Newsday*; www.newsday.com

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Validity of Zoning Regulation/ Procedure—Prior to enacting zoning amendment prohibiting nonconforming use, city notifies interested parties by newspaper posting

Affected property owner claims individual

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notice was required, and charges that city violated its due process rights

Citation: *Edelhertz v. City of Middletown, New York*, 714 F.3d 749 (2d Cir. 2013)

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

SECOND CIRCUIT (05/08/13)—This case addresses the issue of whether municipal amendment of zoning laws without individual notification to affected property owners violates procedural due process.

The Background/Facts: Since the mid-1990's, the Melvyn Edelhertz and Helaine Edelhertz Revocable Living Trust ("Edelhertz") owned a nonowner occupied, multidwelling building (the "Property") in an R-1 zoning district in the City of Middletown, New York (the "City"). In August 2010, Edelhertz entered into a contract to sell the Property to Composite, LLC. Due diligence related to the sale of the property revealed that, in July 2009, the City had enacted a zoning amendment (the "Zoning Amendment") aimed at eliminating nonowner occupied multiple dwellings in various zoning districts in the City, including the R-1 zone. Prior to enactment, the City had given notice of the proposed enactment of the Zoning Amendment to any interested person through a "Public Hearing Notice" published in the legal classified advertisements of the local paper. Pursuant to the Zoning Amendment, Edelhertz's property was now a legal nonconforming use, which, by July 2014, would become a prohibited and unlawful nonconforming use. Composite eventually withdrew its offer to purchase the Property.

Edelhertz brought a legal action against the City. Edelhertz alleged that the City's action in adopting the Zoning Amendment was adjudicative because it was "based on a host of targeted facts" and was "retrospective in nature looking back over several years of examined activity." As an adjudicative action, Edelhertz maintained that the City was required to provide interested parties (namely all affected multiple dwelling owners) with individual notice (by mail) as to the proposed adoption of the Zoning Amendment. Edelhertz alleged that the City's failure to provide Edelhertz with such individual notice violated Edelhertz's procedural due process rights guaranteed by the 14th Amendment to the U.S. Constitution.

The district court disagreed with Edelhertz. It found that the City's proposed enactment of the Zoning Amendment was a legislative action that did not entitle Edelhertz to due process protection of individual notice prior to the enactment.

Edelhertz appealed.

DECISION: Judgment of district court affirmed.

The United States Court of Appeals, Second Circuit, affirmed the

district court's decision for substantially the same reasons cited by the district court. The Court of Appeals adopted the district court's opinion.

The court explained that to determine whether a procedural due process violation has occurred, courts must engage in a two-step analysis: (1) determine whether there exists a property interest of which a person has been deprived; and (2) if so, determine if the procedures followed by the state were constitutionally sufficient.

Under New York law, further explained the court, a nonconforming use that predates the enactment of a restrictive zoning ordinance is a vested right and is entitled to constitutional protection.

Here, the court found it undisputed that Edelhertz had a vested property right in the nonconforming use of its property as a nonowner occupied multiple dwelling. Although it was unclear when the Property became a nonconforming use, the court found it clear that a nonowner occupied multiple dwelling was a nonconforming use in the City's R-1 zone, and that Edelhertz had maintained the property as such since obtaining title to it in 1993. Moreover, Edelhertz's nonconforming use remained in effect upon enactment of the Zoning Amendment, which mandated its discontinuance within five years. Thus, concluded the court, Edelhertz did have a vested property right in the maintenance of the Property as a nonconforming use.

The court, however, also concluded that Edelhertz's property interest had not been deprived here by the type of notice given by the City prior to the Zoning Amendment. The court explained before a deprivation of a property interest occurs, the Due Process Clause requires, at a minimum, that the government provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." "However, due process protections are not required when the government takes action that is legislative rather than adjudicative." As such, procedural due process claims "must be dismissed when they challenge purely legislative action."

The court explained that in the Second Circuit (governing Connecticut, New York and Vermont), "the test for determining whether official action is adjudicative or legislative focuses on the function performed by the decisionmaker, not on the method of selecting the decisionmaker, or on the form in which the decision is announced." Action is adjudicative when it is: (1) based on "facts about the parties and their activities, businesses, and properties"; and (2) "designed to adjudicate disputed facts in particular cases." Action is legislative when it: (1) considers "general facts which help the tribunal decide questions of law and policy and discretion"; and (2) has "general application and look[s] to the future." In other words, "[a]djudicative decisions apply a statute or legal standard 'to a given fact situation involving particular individuals,' whereas legislative action entails 'the formulation of a general rule to be applied . . . at a subsequent time.'"

Here, Edelhertz had argue that enactment of the Zoning Amendment was adjudicative because it was “based on a host of targeted facts” and was “retrospective in nature looking back over several years of examined activity”—namely the examination of criminal activity related to multiple dwellings in the City. The court disagreed. It concluded that the City’s decision to enact the Zoning Amendment was “legislative” in character because it was prospective and generally applicable. More specifically, the court found the enactment of the Zoning Amendment: “did not attempt to adjudicate particular facts as to any one [landowner] or group of [landowners]”; nor was it enacted to single out any individual “for special consideration based on [her] own peculiar circumstances.” Rather, found the court, the City, acted in a policy-making capacity, considering facts relating generally to nonowner occupied multiple dwellings in the relevant zoning districts, and finding that nonowner occupied multiple dwellings “generally impaired the orderly development and general welfare of certain zoning districts.”

Since the Due Process Clause did not apply to legislative action, the court determined that Edelhertz’s claim of deprivation of due process failed.

See also: *RR Village Ass’n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 8 Fed. R. Serv. 3d 1056 (2d Cir. 1987).

See also: *Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 1994 A.M.C. 2704 (2d Cir. 1994).

Conformity to Regulations— Adjacent landowner challenges approval of conditional use application

Landowner alleges error in property
identification for hearing notice and improper
calculations related to conditions

Citation: *Northgate Condominium Ass’n, Inc. v. Borough of Hillsdale Planning Bd.*, 2013 WL 1943204 (N.J. 2013)

NEW JERSEY (05/13/13)—This case addressed the issues of: (1) whether a conditional use approval notice that contained an erroneous tax lot designation complied with New Jersey’s Municipal Land Use Law (“MLUL”); and (2) whether a planning board is permitted to round down dwelling units per acre calculations when determining compliance

with New Jersey's Residential Site Improvement Standards (the "RSIS").

The Background/Facts: Caliber Builders, Inc. ("Caliber") sought to develop a 12.5 acre parcel of land, the majority of which was in an R-2 zoning district in the Borough of Hillsdale (the "Borough") (the "Land"). The Land was previously the site of a fruit orchard and was commonly referred to as "Golden Orchards." Caliber's development proposal included thirty-seven age-restricted, single-family houses. Pursuant to the Town's zoning code, single-family detached age-restricted housing developments were permitted in the Borough's R-2 zoning district as a conditional use. Among the numerous conditions that an applicant would need to satisfy in applying for a conditional use permit was that the roadway widths and road improvements in any age-restricted development conform with the RSIS.

The RSIS governs all residential site improvements in New Jersey. Among other things, the RSIS regulates intensity of roadways. The RSIS defines a low intensity development as one that contains "[l]ess than or equal to 4" dwelling units per gross acre. (N.J.A.C. 5:21-4.2(b).) The RSIS defines a medium intensity development as one that contains "[m]ore than 4 and less than or equal to 8" dwelling units per gross acre. (N.J.A.C. 5:21-4.2(b).)

In April 2007, Caliber submitted an application to the Borough Planning Board (the "Board"), seeking a preliminary site plan and conditional use approval for its proposed age-restricted housing development.

Ultimately, the Board voted to approve Caliber's application.

Northgate Condominium Association, Inc. ("Northgate") was a non-profit corporation that managed and operated Northgate Condominiums. Northgate Condominiums were located on land adjacent to the Land on which Caliber proposed development. Northgate objected to Caliber's application. It appealed the Board's decision to approve Caliber's application.

Among other things, Northgate argued that Caliber failed to comply with the notice requirements of the MLUL governing the manner in which property to be developed must be identified. (See N.J.S.A. 40:55D-11.) The relevant section of the MLUL (N.J.S.A. 40:55D-12 and -13) provides that notices must, among other things: "identify the property proposed for development by street address, if any, or by reference to lot and block numbers as shown on the current tax duplicate in the municipal tax assessor's office." Caliber's published notices of hearings related to its application in the local newspaper mis-identified the tax lot numbers for the Land as being Lots 1.0 and 1.02, when they should have been identified as Lot 1.

Northgate also argued that Caliber had failed to demonstrate that its proposed design complied with certain requirements fixed by the RSIS

for internal roadway widths and improvements. (See N.J.A.C. 5:21-4.1, -4.2, -4.5.) When a municipal ordinance requires subdivision or site plan approval, the planning board must evaluate all such applications for approval to ensure compliance with the RSIS. A failure to abide by the requirements of the RSIS is treated as a violation of the MLUL, and violators may be prevented from constructing or occupying a development that does not comply with the requirements of the RSIS. Northgate challenged how the Board calculated the intensity level of the proposed development's roadway. In Northgate's view, the roadway's intensity level dictated the RSIS requirements that were to be applied. Northgate asserted that the Board's calculations were flawed because they were based on the size of the entire parcel rather than the size of the parcel after excluding environmentally sensitive land. Although the land covered 9.79 acres in the Borough, Northgate argued that, after subtracting wetland acreage, the density was 4.36 dwelling units per acre—resulting in a “medium intensity” roadway designation under the RSIS.

Both the trial court and the appellate court affirmed the Board's approval of Caliber's application. As to the notice issue, both courts regarded the error in the notice as a clerical mistake that was of no significant consequence since other property identifying information had also been provided in the notice. As to the RSIS compliance issue, the trial court concluded that the Board could waive compliance. The Appellate Division instead found that the project complied with the RSIS requirement. Significantly, the Appellate Division determined that the Board could round down the dwelling units per acre calculation, thus supporting the designation of the roadway as being of low intensity.

Northgate appealed.

DECISION: Judgment of superior court, appellate division, affirmed as modified.

The Supreme Court of New Jersey held that Caliber's conditional use approval notice that contained the erroneous tax lot designation complied with the MLUL requirements. The court noted that in the notices, Caliber had not only used the lot numbers to identify the Land on which it proposed development, but had also identified the Land by its commonly known name and by reference to the location as being south of a particular road. The court concluded that there had clearly been no confusion about the location of the Land, as: many interested property owners appeared for the hearings; and after the Board published a notice with the accurate lot designation, no new objector stepped forward. The court held that “a minor, clerical deviation that had no potential to mislead any interested member of the public does not fall short of the statutory requirement for describing the property to be developed.” Accordingly, the court concluded that the minor error in Caliber's notice here did not violate the statute nor deprive the Board of jurisdiction to act.

As to Northgate's argument that the RSIS requirements were not met, the court also found that argument unavailing. Again, Northgate had challenged the accuracy of the Board's roadway density calculation, arguing that it should have subtracted two acres of wetland on the Land in making the calculation. However, the court found that nothing in the record supported Northgate's assertion as to the amount of wetlands on the Land.

Also, although unnecessary to the conclusion reached about RSIS compliance, the court did agree with Northgate that the Appellate Division had erred when it had said that the Board could round down the calculated density of Caliber's proposed development. The Supreme Court held that planning boards are not permitted to round down the dwelling units per acre calculation when determining RSIS compliance.

See also: *Pond Run Watershed Ass'n v. Township of Hamilton Zoning Bd. of Adjustment*, 397 N.J. Super. 335, 937 A.2d 334 (App. Div. 2008).

See also: *Perlmart of Lacey, Inc. v. Lacey Tp. Planning Bd.*, 295 N.J. Super. 234, 684 A.2d 1005 (App. Div. 1996).

Regulatory Taking—After encouraging development, county halts project and says it cannot proceed under zoning ordinance

Developer says county actions amount to a regulatory taking, entitling it to just compensation

Citation: *Lockaway Storage v. County of Alameda*, 216 Cal. App. 4th 161, 156 Cal. Rptr. 3d 607 (1st Dist. 2013)

CALIFORNIA (05/09/13)—This case addressed the issue of whether a county's temporary suspension of a development project was a regulatory taking, under the Fifth Amendment to the United States Constitution, entitling the developer to just compensation.

The Background/Facts: Lockaway Storage ("Lockaway") owned an 8.45-acre parcel of land in Alameda County (the "County") (the "Property"). Lockaway had purchased the Property in May 2000, with the intent to implement a 1999 Conditional Use Permit ("CUP") to develop a boat and RV self-storage facility on the Property. The 1999 CUP required that it be implemented within three years of issuance, or it would terminate on September 22, 2002.

Six months after Lockaway's purchase of the property, in November 2000, the County voters enacted Measure D, a growth control initiative. Measure D became effective on December 22, 2000. Among other things, Measure D generally prohibited the development of a storage facility in the area of Lockaway's property, except by public vote. Notably, § 22 of Measure D provided that: (a) Measure D did not "affect existing parcels, development, structures, and uses that are legal at the time it becomes effective"; and (b) Measure D applied to "development or proposed development which ha[d] not received all necessary discretionary County and other approvals and permits prior to the effective date of [Measure D]."

Even after Measure D became effective, Lockaway pursued its plan to develop the Property. Throughout the development process, Lockaway had frequent dialogue with County administrators. County administrators never told Lockaway that Measure D use restrictions applied to the Lockaway Project. In fact, County administrators encouraged the Project and acknowledged that Lockaway had already implemented the 1999 CUP. They also assured Lockaway that if grading and building permits were not issued by the CUP's September 22 expiration date, a formal letter would be prepared stating that the CUP had been implemented. Lockaway obtained its grading permit on September 19. However, the County did not issue a building permit for the Project prior to the September 22, 2002, termination date of the 1999 CUP.

After the CUP expiration date passed, the County changed its position: The County took the position that Measure D applied to the Project because Lockaway had not obtained a building permit and commenced construction prior to Measure D's December 22, 2000, effective date. No mention was made of the possible effect of § 22 on Lockaway's right to proceed with the Project.

Lockaway argued that its right to complete the Project was unaffected by Measure D because the 1999 CUP was implemented before it expired. Under protest, Lockaway applied for a new CUP. The County Board of Zoning Adjustment denied the application on the ground that it was inconsistent with Measure D. The County Board of Supervisors affirmed that decision.

Lockaway then filed suit against the County. Among other things, Lockaway alleged that the County's action amounted to a regulatory taking (i.e., inverse condemnation) under the Fifth Amendment to the United States Constitution, and that Lockaway was entitled to damages for the County's suspension of Lockaway's development Project.

The County argued that the Lockaway Project could not proceed because the 1999 CUP was issued pursuant to a zoning provision which was superseded by Measure D. According to the County, when Measure D took effect in December 2000, the zoning ordinance became ineffective and the 1999 CUP issued pursuant to that ordinance was also ineffective.

Lockaway argued that its Project was exempt from Measure D under § 22 of the ordinance. Lockaway argued that this “grandfather clause” applied to its Project because it had obtained all necessary discretionary approvals from the County prior to Measure D’s effective date. It noted, and the County agreed, that the building permit that had not yet issued prior to the expiration of the 1999 CUP was merely ministerial.

The superior court found that Measure D did not apply to the Lockaway Project because the undisputed facts established that the project was “squarely under the protections of Section 22 of Measure D.” The court found that the County’s application of Measure D was a temporary regulatory taking making it liable in damages to Lockaway on its cause of action for inverse condemnation. The court awarded Lockaway \$504,175 in lost profits and \$324,954 in increased construction costs due to the 30-month delay caused by the County’s application of Measure D to the Project, plus attorney’s fees.

The County appealed. The County argued that § 22’s exemptions were more narrow than the superior court had interpreted, and that, in any case, they did not apply to Lockaway because Lockaway had failed to timely obtain all discretionary approvals. The County further argued that even if Measure D did not prohibit Lockaway from completing its Project, the temporary suspension of the Project did not amount to a constitutional taking as a matter of law.

DECISION: Judgment of superior court affirmed.

The Court of Appeal, First District, Division 3, California, held that Lockaway’s Project was exempt under § 22 of Measure D because the CUP had been implemented and all but the ministerial permits had been obtained. The court also held the County’s temporary suspension of Lockaway’s Project development was a regulatory taking under the Fifth Amendment to the United States Constitution, entitling Lockaway to just compensation.

Looking at the plain language of § 22, the court found that it created an exemption from the restrictions and requirements of Measure D for all existing and unaltered development, or proposed development, provided the developer obtained all discretionary County approvals and permits before December 22, 2000. And, the court found that the County had stipulated to the facts that: the CUP for the Lockaway Project was obtained before Measure D went into effect; the grading permit was issued after Measure D went into effect but was a ministerial permit; and the building permits issued after the CUP’s expiration date were ministerial. Thus, the court concluded that the Lockaway Project was exempt from the use restrictions imposed by Measure D, pursuant to § 22.

In determining that the County’s actions amounted to a regulatory taking the court explained: The Fifth Amendment, which applies to the states via the 14th Amendment, prohibits government from taking private property for public use without just compensation.

“[A] regulation may effect a taking requiring just compensation even if it does not deprive the owner of ‘all economically beneficial use’ of his or her property, depending on the particular circumstances of the case Furthermore, a temporary regulatory taking may require payment of just compensation for the period the taking was in effect.” Thus, “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” A government regulation, such as in this case, which neither causes a property owner to “suffer a permanent physical invasion” of his or her property nor deprives the owner of “all economically beneficial use” of the property, may still amount to a regulatory taking dependent upon the weighing of three primary factors: (1) the “economic impact” of the regulation on the claimant; (2) the extent to which the regulation interferes with “distinct investment-backed expectations”; and (3) the “character of the governmental action.”

Here, the court concluded that the County’s actions amounted to a regulatory taking because: (1) the County’s regulatory action “unreasonably impaired both the value and use” of the Lockaway Property—particularly in light of the fact that Lockaway always intended to develop the Property as a storage facility, had invested substantially in that development with no indication from the County administrators that it could not under Measure D, and would have incurred substantial costs to convert the property to another use; (2) the County’s regulatory action interfered with Lockaway’s reasonable investment backed expectation that its Project could proceed, given that the County had confirmed that Lockaway could rely on the CUP and encouraged the development, until the County changed its position in September 2002; and (3) the County’s “regulatory about face was manifestly unreasonable,” not just because of its “devastating” economic impact on Lockaway, but also because it deprived Lockaway of a “meaningful opportunity to attempt to protect its property rights” given that the change of position came at the expiration of the CUP.

The court concluded that the County’s application of Measure D to shut down the Lockaway Project was a temporary regulatory taking that required the payment of just compensation. The court affirmed the damages and attorney’s fees award.

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

Zoning News from Around the Nation

ARIZONA

State Senators recently approved legislation that “prohibits cities and counties from requiring home builders to establish ‘planned communities’ as a condition of getting the requisite permits and zoning for a new development.” Nothing in the legislation, HB 2518, would preclude a developer from establishing a planned community.

Source: *Maricopa Monitor*; <http://www.trivalleycentral.com>

COLORADO

With medical marijuana close to legalization in Illinois, municipalities are reviewing zoning ordinances “to ensure that there are very specific and comprehensive conditions that would regulate cannabis related facilities.” The “Compassionate Use of Medical Cannabis Pilot Program Act” awaits Governor Pat Quinn’s signature after it was approved by the Illinois House of Representatives on April 17 and the state Senate on May 17. The bill allows qualifying patients with debilitating conditions to use marijuana without subject to arrest, prosecution or denial or rights. It also allows the state to permit up to 60 distribution facilities.

Source: *Chicago Tribune*; <http://www.chicagotribune.com>

MAINE

Recently, the state legislature’s Energy, Utilities and Technology Committee approved legislation (L.D. 616) that would mandate the state’s Land Use Planning Commission establish a process to allow communities to “have a say in the rezoning that was required for wind towers construction” under the state’s Wind Energy Act of 2008. That Act put some communities in “so-called ‘expedited permitting area[s], where wind development was fast-tracked.” The Act removed a required rezoning of an area in the Unorganized Territory (UT) for wind turbine construction and made turbines a “permitted use” that did not require rezoning. Essentially, L.D. 616 would give communities two years to exit the expedited zone.

Source: *St. John Valley Times*; <http://www.sjvalley-times.com>

Zoning Bulletin

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Conditions—Government conditions land-use permits on applicant's funding of offsite mitigation projects on public lands

Applicant says land use permit condition amounts to an unconstitutional taking without just compensation

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Citation: *Koontz v. St. Johns River Water Management Dist.*, 133 S. Ct. 2586, 76 Env't. Rep. Cas. (BNA) 1649 (2013)

The Supreme Court of the United States has appellate jurisdiction over all federal courts and over state court cases involving issues of federal law, and original jurisdiction over a small range of cases.

SUPREME COURT OF THE UNITED STATES (FLORIDA) (06/25/13)—This case addressed the issues of whether a government's demand for property from a land-use permit applicant must meet the requirement that the government's demand have a nexus and rough proportionality to the effects of the proposed land use even when: (1) the government denies the permit; and/or (2) the government's demand is for money.

The Background/Facts: Coy Koontz, Sr. ("Koontz") owned an undeveloped 14.9-acre tract of land in the St. Johns River Management District (the "District") in Florida. In 1994, Koontz decided to develop a 3.7-acre section of the property. Because the portion of property that Koontz proposed to develop was largely classified as wetlands by the state, Koontz was required to comply with Florida's Water Resources Act and Warren S. Henderson Wetlands Protection Act (the "Henderson Act"). Under those state laws, Koontz applied to the District for a Management and Storage of Surface Water ("MSSW") permit and a Wetlands Resource Management ("WRM") permit.

Consistent with the Henderson Act, the District also required that permit applicants wishing to build on wetlands offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere. Koontz offered to mitigate the environmental effects of his development proposal by deeding to the District a conservation easement on 11 acres—nearly three-quarters of his property.

The District rejected Koontz's proposal and informed him that it would approve construction only if he: (1) reduced the size of his development to one acre and, among other things, deeded to the District a conservation easement on the resulting larger remainder of his property (a total of 13.9 acres); or (2) hired contractors to make improvements to District-owned wetlands several miles away.

Believing the District's demands to be excessive in light of the environmental effects his proposal would have caused, Koontz filed suit under a state law (Fla. Stat. § 373.617(2)) that provides money damages for agency action that is an "unreasonable exercise of the state's police power constituting a taking without just compensation." Koontz alleged that the District's denial of land use permits unless he funded the offsite mitigation projects on public lands amounted to a taking without just compensation.

The trial court found the District's actions unlawful because they failed the requirements of *Nollan v. California Coastal Com'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677, 26 Env't. Rep. Cas. (BNA) 1073, 17 Env't. L. Rep. 20918 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374,

114 S. Ct. 2309, 129 L. Ed. 2d 304, 38 Env't. Rep. Cas. (BNA) 1769, 24 Env'tl. L. Rep. 21083 (1994). Those cases held that "the government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a nexus and rough proportionality between the government's demand and the effects of the proposed land use."

The District Court of Appeal affirmed. However, the State Supreme Court reversed on two grounds. It held that the District's demand for property from Koontz did not have to meet the *Nollan* and *Dolan* requirements and have a nexus and rough proportionality to the effects of the proposed land use since: (1) the District denied the permit (unless Koontz met the conditions); and (2) the District's demand was for money (to hire contractors to improve offsite wetlands on public lands).

Koontz appealed. Recognizing that the majority opinion of the Florida Supreme Court rested on a question of federal constitutional law on which the lower courts were divided, the Supreme Court of the United States granted the petition for a writ of certiorari.

DECISION: Reversed, and matter remanded.

The Supreme Court of the United States held that the government's demand for property from a land-use permit applicant must satisfy the *Nollan* and *Dolan* requirements and thus have a nexus and rough proportionality to the effects of the proposed land use even when: (1) the government denies the permit; and (2) the government's demand is for money.

The court explained: The "'unconstitutional conditions doctrine' vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." In the land use context, the unconstitutional conditions doctrine protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits. Pursuant to *Nollan* and *Dolan*, a government's demand for property from a land-use permit applicant is constitutional as long as it has a "nexus and rough proportionality to the effects of the land use." In other words, the government can condition approval of a permit on the dedication of property to the public so long as there is a "nexus" and "rough proportionality" between the property that the government demands and the social costs of the applicant's proposal. Those requirements accommodate two "realities of the permitting process," explained the court: (1) "the broad discretion of a government to deny a permit that is worth far more than property it would like to take"; and (2) the fact that "many proposed land uses threaten to impose costs on the public that dedications of property can offset." Thus, under *Nollan* and *Dolan*, "the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." Accordingly, in this case, any conditions that the District placed

on Koontz's land-use permit applications had to have a "nexus and rough proportionality" to the effects of Koontz's proposed land use.

The District had argued that the *Nollan* and *Dolan* requirements did not have to be met where the government denies a permit because the applicant refuses to turn over property/meet the conditions. The Supreme Court of the United States disagreed. It found that the "principles that undergird *Nollan* and *Dolan* do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so." "Recognizing such a distinction would enable the government to evade the *Nollan/Dolan* limitations simply by phrasing its demands for property as conditions precedent to permit approval," said the court. Thus, the court held that the *Nollan* and *Dolan* standard applies not only when the government approves a land-use permit conditioned on the landowner's conveyance of a property interest (i.e., imposes a condition subsequent), but also when the government denies a permit until the owner meets the condition (i.e., imposes a condition precedent).

Here, found the court, the District's "[e]xtortionate demands for property" in the land-use permitting context ran "afoul of the Takings Clause not because [the District took] property but because [the District] impermissibly burden[ed] [Koontz's] right not to have property taken without just compensation."

The District had also argued that Koontz's claim failed, and there was no unconstitutional taking of property, in the condition the District placed on Koontz's land-use permit applications that Koontz hire contractors to make improvements to District-owned wetlands. The District had contended that condition would have had Koontz spend money rather than give an easement on his land and that an obligation to spend money can never provide the basis for a takings claim. Again, the Supreme Court of the United States disagreed. It held that "so-called 'monetary exactions' "—such as with "in lieu of" fees—must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan* where the monetary obligation burden's the land-use permit applicant's ownership of a specific parcel of land. *Nollan* and *Dolan* must apply where there is a "direct link between the government's demand and a specific parcel of real property," said the court, because that direct link implicates a central concern: "the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property."

Here, the District's land use permit condition that Koontz hire contractors to make improvements to District-owned wetlands several miles away would, found the court, "transfer an interest in property" from Koontz to the District, amounting to a per se taking similar to the taking of an easement or a lien. Accordingly, the District's condition that Koontz hire

contractors to improve District-owned wetlands in order to obtain land-use permits also had to satisfy the *Nollan* and *Dolan* requirements.

See also: *Nollan v. California Coastal Com'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677, 26 Env't. Rep. Cas. (BNA) 1073, 17 Env'tl. L. Rep. 20918 (1987).

See also: *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304, 38 Env't. Rep. Cas. (BNA) 1769, 24 Env'tl. L. Rep. 21083 (1994).

Case Note:

The District had also argued that because it gave Koontz another avenue to obtain permit approval, the court did not have to decide whether its demand for offsite improvements satisfied Nollan and Dolan. The court acknowledged that had Koontz been offered at least one alternative that satisfied Nollan and Dolan, he would not have been subjected to an unconstitutional condition. Here, however, Koontz had sought to develop 3.7 acres, but the District in effect told Koontz that it would not allow him to build on 2.7 of those acres unless he agreed to spend money improving public lands. Koontz claimed that he was wrongfully denied a permit to build on those 2.7 acres. For that reason, the court found that the District's offer to approve a less ambitious building project did not obviate the need to determine whether the demand for offsite mitigation satisfied Nollan and Dolan.

Case Note:

In its decision, the court noted that, while the Nollan and Dolan standard applies not only when the government approves a land-use permit conditioned on the landowner's conveyance of a property interest (i.e., imposes a condition subsequent), but also when the government denies a permit until the owner meets the condition (i.e., imposes a condition precedent), the condition-subsequent and condition-precedent situations differ in an important way. When the government grants a permit subject to the relinquishment of real property, and that condition does not satisfy Nollan and Dolan, then the government has taken the property and must pay just compensation under the Fifth Amendment. However, when the government denies a permit because an owner has refused to accede to that same demand, nothing has actually been taken. The owner is entitled to have the improper condition removed; and he may be entitled to a monetary remedy created by state law for imposing such a condition; but he cannot be entitled to constitutional compensation for a taking of property. Because Koontz brought his claim pursuant to a state law cause of action, the Court had no occasion to discuss what remedies might be available for a Nollan and Dolan unconstitutional conditions violation either here or in other cases.

Case Note:

The District had argued that if monetary exactions are subject to Nollan and Dolan scrutiny, then there would be no principled way of distinguishing impermissible land-use exactions from property taxes. The court disagreed, finding it "beyond dispute that '[t]axes and user fees . . . are not takings.' "

Case Note:

In the case, the dissent had forecasted that the court's decision would "work a revolution in land use law by depriving local governments of the ability to charge reasonable permitting fees" or "unduly limit the discretion of local authorities to implement sensible land use regulations." The majority disagreed, noting that the rule that Nollan and Dolan apply to monetary exactions "has been the settled law in some of our Nation's most populous States for many years, and the protections of those cases are often redundant with the requirements of state law."

Procedure—City council tables resolution authorizing development agreement

Developer argues that action violated its due process rights

Citation: *Northeast Land Development, LLC v. City of Scranton, 2013 WL 2237791 (M.D. Pa. 2013)*

UNITED STATES DISTRICT COURT PENNSYLVANIA (05/21/13)—This case addressed the issue of whether the actions of a city council in tabling a resolution authorizing the city's mayor to enter into a Development Agreement with a landowner—as required for land development, under the city ordinance—violated the landowner's procedural due process rights pursuant to the 14th Amendment of the United States Constitution.

The Background/Facts: In May 2004, Northeast Land Development, LLC ("Northeast") entered into an Agreement for the Sale of Real Estate ("Agreement of Sale") with Lackawanna Energy, Ltd. and Plum Realty, Ltd. for the purchase of a 25-acre parcel of land in the City of Scranton (the "City") (the "Property"). The Property was designated as a Keystone Opportunity Zone ("KOZ"). In a KOZ, there was no or greatly reduced tax burdens for property owners and/or lessees. Northeast sought to purchase the Property to house Phase III of a development project known as "Village at Trip Park."

The land development process in the City involved a multistep process for developers: (1) submit an Application for Subdivision or Land Development; (2) submit a Preliminary Plan, which required the approval of the City Planning Commission and City Engineer; (3) submit a Final Plan for approval by the City Planning Commission; and (4) enter into a Development Agreement with the City.

In October 2004, Northeast submitted to the City for approval a Subdivision Plan for the Property. The proposed development proceeded through step 3 of the development process. In February 2006, a resolution to approve the Phase III Development Agreement was forwarded to the City Council.

Ultimately, the City Council tabled the resolution to approve the Phase III Development Agreement. Northeast alleged that, as a consequence, it was unable to close on the purchase of the Property. Northeast sued, alleging, among other things, that the City violated its procedural due process rights pursuant to the 14th Amendment of the United States Constitution.

On its own, the district court raised an issue for summary judgment: whether the City Council's decision to table the resolution for the land development agreement was a "legislative action" (as opposed to an administrative action), to which no procedural due process rights of Northeast attached. If found to be a legislative activity, then the suit would be dismissed, said the court.

DECISION: Summary judgment entered in favor of City.

The United States District Court, M.D. Pennsylvania, held that the City Council's decision to table the resolution to approve the Phase III Development Agreement was a "legislative action," to which no procedural due process rights of Northeast attached.

In so holding, the court explained that the protections of procedural due process do not extend to legislative actions. On the other hand, adjudicative acts require the provision of procedural due process. The court said that a legislative act is one that "produce[s] policies that a least approximate a fair and equitable distribution of social resources and obligations." Moreover, the court noted that where a rule or action applies to more than a few people that application it is a substantial factor, though not dispositive, weighing in favor of finding the rule or action to be legislative. The court also distinguished adjudicative acts from legislative acts, noting that: adjudicative acts are those that "require[] factual findings on the particular status of a particular individual"; "while legislative decisions are those that 'rest on more general findings requiring analysis and evaluation of factors not uniquely related to any specific individual.' "

Here, the court noted that the City Council's role in voting on a development agreement—or choosing not to vote on that agreement—was the sort of act that has been found to be "in form, quintessentially legislative." The court noted that the City ordinance specifically provided

a “decisive role” for the City Council which required the “exercise of legislative discretion” in determining whether the City would enter into development agreements after all other preliminary prerequisites were met.

Northeast had contended that the action of the City Council in tabling the vote on the Phase III Development Agreement was “targeted at Northeast” and was “therefore too narrowly focused to constitute legislative activity.” The court disagreed. It noted that the reasons cited for tabling the Phase III Development Agreement were: that certain items on a punch list provided to Northeast were not addressed; and the opinion of at least one councilwoman was that support of the project in the KOZ amounted to some form of “corporate welfare” that mired the City in debt. The court found the City Council’s decision to table the Phase III Development Agreement was a legislative action because it affected “far more than just [Northeast].” The court found that it affected the “entire community” in that: the policy considerations related to KOZ developments affected the entire community with regard to taxes, standards of living, and business development; and the Development Agreement implicated the property rights of individual neighbors surrounding the Phase III project. Moreover, said the court, even if the decision to table approval of the Development Agreement was “engendered by concern over [Northeast’s] activities” and directed at Northeast alone, “the City Council’s decision affected the entire community.”

The court concluded that Northeast was not deprived of procedural due process because the City Council’s actions were legislative in nature.

See also: *Rogin v. Bensalem Tp.*, 616 F.2d 680 (3d Cir. 1980).

See also: *L C & S, Inc. v. Warren County Area Plan Com’n*, 244 F.3d 601 (7th Cir. 2001).

Notice—Board fails to provide notice of date of mailing when issuing zoning decision

Applicant contends his appeal period therefore commenced on date he received decision

Citation: *Schmader v. Cranberry Tp. Bd. of Sup’rs*, 67 A.3d 881 (Pa. Commw. Ct. 2013)

PENNSYLVANIA (06/07/13)—This case addressed the issue of whether a recent amendment to § 1002-A(a) of the Pennsylvania Municipalities Planning Code (“MPC”)—which provided that a 30-day appeal period for zoning decisions applied to all cases unless an unconstitutional deprivation of due process would result—effectively relieved an agency

of its obligation to inform a party of the mailing date or otherwise notify a party of the commencement of the appeal period for a zoning decision. The case also addressed the issues of: whether a town zoning board was required to notify the landowner/applicant of the date of commencement of the appeal period for a zoning decision by notifying the landowner/applicant of the actual mailing date of the Board's zoning decision; and whether the Board's failure to provide such notice required the 30-day appeal period be calculated from the date of receipt of the zoning decision by the landowner/applicant.

The Background/Facts: John F. Schmader, Jr. ("Schmader") owned property in Cranberry Township, Pennsylvania (the "Township"). The property was located in an R-1 Residential Zone. At the property, Schmader operated a commercial office.

In October 2011, Schmader received two zoning enforcement orders stating that he was in violation of the Township's Code because he was operating a business on the property, which was not a permitted use or a use allowed by special exception or conditional use in the R-1 district. Schmader was ordered to cease operation of his business on the property.

Schmader appealed to the Township Zoning Hearing Board (the "Board"). In a decision dated March 30, 2012 (the "Board's Decision"), the Board denied Schmader's appeal. It concluded that he was operating a commercial business, which was not permitted by right, special exception, or conditional use in a residential district. The Board also concluded that Schmader had not sought or been granted permission by the Township to conduct his business on the property. The Board's Decision was not accompanied by a transmittal letter or any other document stating the mailing date, or a document notifying Schmader of the commencement of the appeal period.

Schmader received the Board's Decision on April 3, 2012, and filed an appeal in the common pleas court on May 2, 2012. The Cranberry Township Board of Supervisors (the Township) intervened and, along with the Board, filed a joint motion to quash the appeal. They asserted that Schmader's appeal was untimely. They argued that pursuant to § 5572 of the Judicial Code (as amended 42 Pa.C.S. § 5572) and § 1002-A(a) of the Pennsylvania Municipalities Planning Code (MPC) (as amended, 53 P.S. § 11002-A(a)), Schmader was required to file an appeal within 30 days of the March 30, 2011 mailing date of the Board's Decision.

Schmader argued that since the Board failed to notify him of the date of the mailing, the appeal period began on the date of actual notice—April 3, 2012, when he received the Board's Decision. As such, he contended that his appeal was timely filed.

The Court of Common Pleas quashed Schmader's appeal. It pointed to a recent amendment to § 1002-A(a) of the Planning Code. That amendment provided that the 30-day appeal period should apply to all cases unless an unconstitutional deprivation of due process would result. The

Court of Common Pleas noted that Schmader had failed to argue that he suffered an unconstitutional deprivation of due process. The Court of Common Pleas found that the appeal period expired on April 30, 2012, and that therefore Schmader's appeal was untimely.

Schmader appealed.

DECISION: Reversed.

The Commonwealth Court of Pennsylvania held that the Board was required to notify Schmader of the date of commencement of the appeal period.

In so holding, the court rejected the Court of Common Pleas' implicit holding that the amendment to § 1002-A relieved an agency of its obligation to inform a party of the mailing date or otherwise notify a party of the commencement of the appeal period. Rather, the Commonwealth Court of Pennsylvania concluded that the amendment to § 1002-A could "not be construed to completely eradicate an agency's obligation to notify a party of the date of mailing, or in some fashion of the date the appeal period begins." The court affirmed previous judicial decision that it would be "manifestly unjust" to dismiss an appeal where the agency failed to inform the recipient of the mailing date. The court reaffirmed that when the appeal period is triggered by administrative action, the administrative agency has a duty to provide the recipient information essential to calculating the appeal period.

Here, whether the mailing date of the Board's Decision triggered the start of Schmader's appeal period depended on whether, consistent with the applicable statute, the notice sufficiently informed Schmader of the starting date of the appeal period so that Schmader had all the information needed to timely exercise his appeal rights, said the court. Since the Board failed to provide notice to Schmader of the date of the mailing of the Board's Decision, the court concluded that Schmader was justified in filing his appeal within 30 days of receipt of the Board's Decision.

See also: *Schmidt v. Com.*, 495 Pa. 238, 433 A.2d 456 (1981).

See also: *Hanna v. Zoning Bd. of Adjustment of Pittsburgh*, 62 Pa. Commw. 620, 437 A.2d 115 (1981).

Zoning News from Around the Nation

KENTUCKY

The City of Owensboro is considering a new zoning ordinance that would create an entertainment district in its downtown area. Reportedly, the ordinance has been proposed in order to "protect the downtown area from becoming dry if there were a wet-dry election in that precinct."

Source: *14 News*; www.14news.com

NEW MEXICO

The Eddy County Commission has approved an agreement to partner with the City of Carlsbad in “developing the framework for extra-territorial zoning that would include a commission and an autonomous authority governing the [extra-territorial zone].” The proposal for the zone was spurred by the City’s decision to no longer issue building permits and conduct building inspections in the unincorporated areas of the county.

Source: *Carlsbad Current-Argus*; www.currentargus.com

OREGON

The State House of Representatives recently passed a bill legalizing medical marijuana retail establishments. House Bill 3460 was headed to Governor John Kitzhaber’s desk, to be signed into law. The bill “creates a registry of businesses that sell the medical marijuana.” Reportedly, the League of Oregon Cities, which endorsed the bill, noted it does not block municipalities from adopting their own ordinances on medical marijuana outlets.

Source: *The Oregonian*; www.oregonlive.com

WASHINGTON, D.C.

D.C. officials are reportedly working on a proposed zoning law change that would allow developers to “build in high density areas, without having to provide more parking.” Proponents say that the change would let “developers decide if extra parking is worth it” based on the level of car ownership and proximity to high quality transit in a neighborhood. Opponents say it would exacerbate an already “critical parking problem.”

Source: *WJLA*; www.wjla.com

ZONING PRACTICE

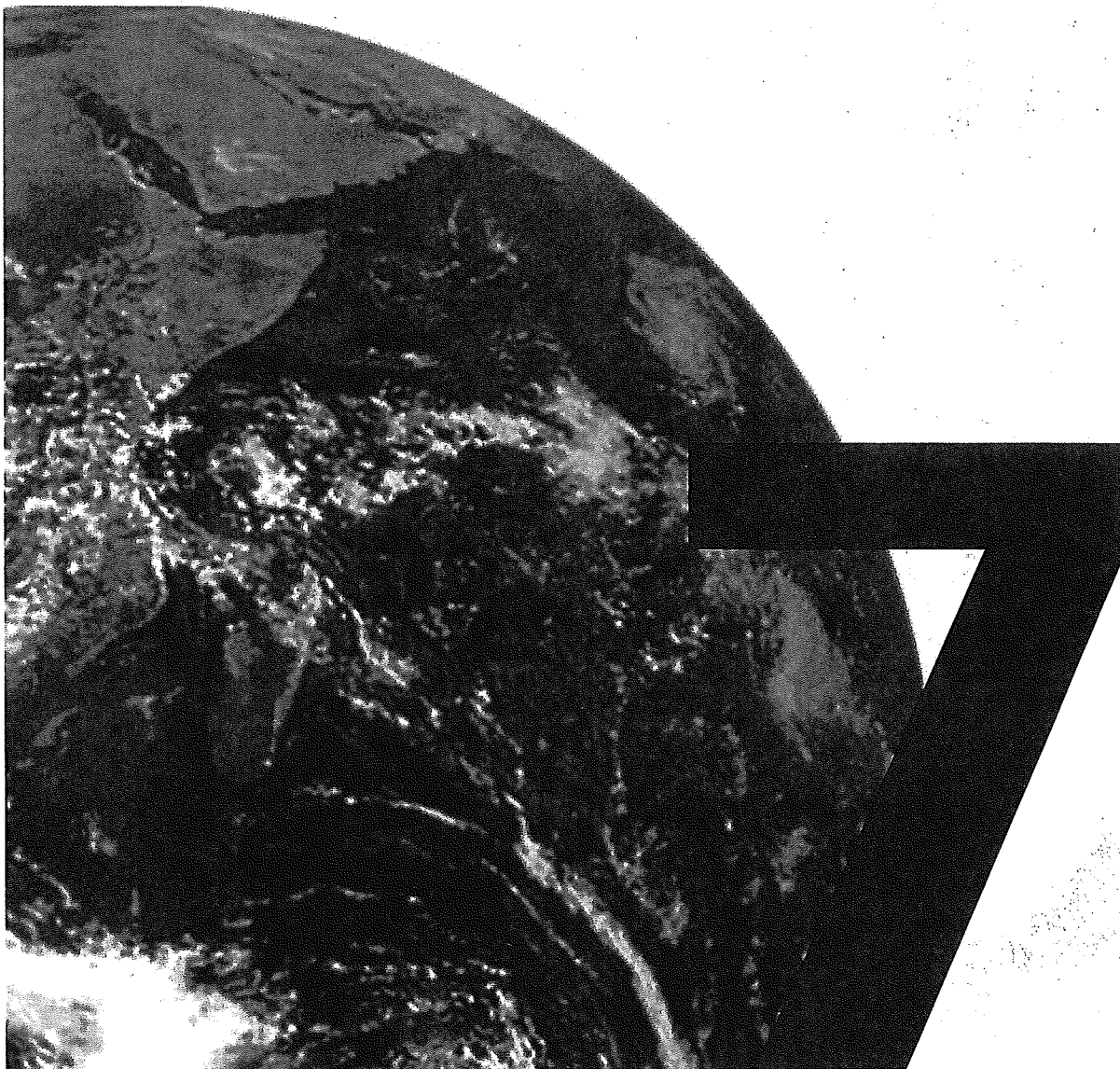
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PRACTICE SUSTAINABLE ZONING



Putting Sustainable Zoning Into Practice

By Elizabeth Garvin, AICP

This trend is partially attributable to recession-related federal budget reductions, but it's also related to increasing citizen pressure to "act locally." Furthermore, topics historically viewed as best handled by the private sector or left to market-based decisions—such as housing mix or new business development—are more frequently the subject of public meetings and local policy.

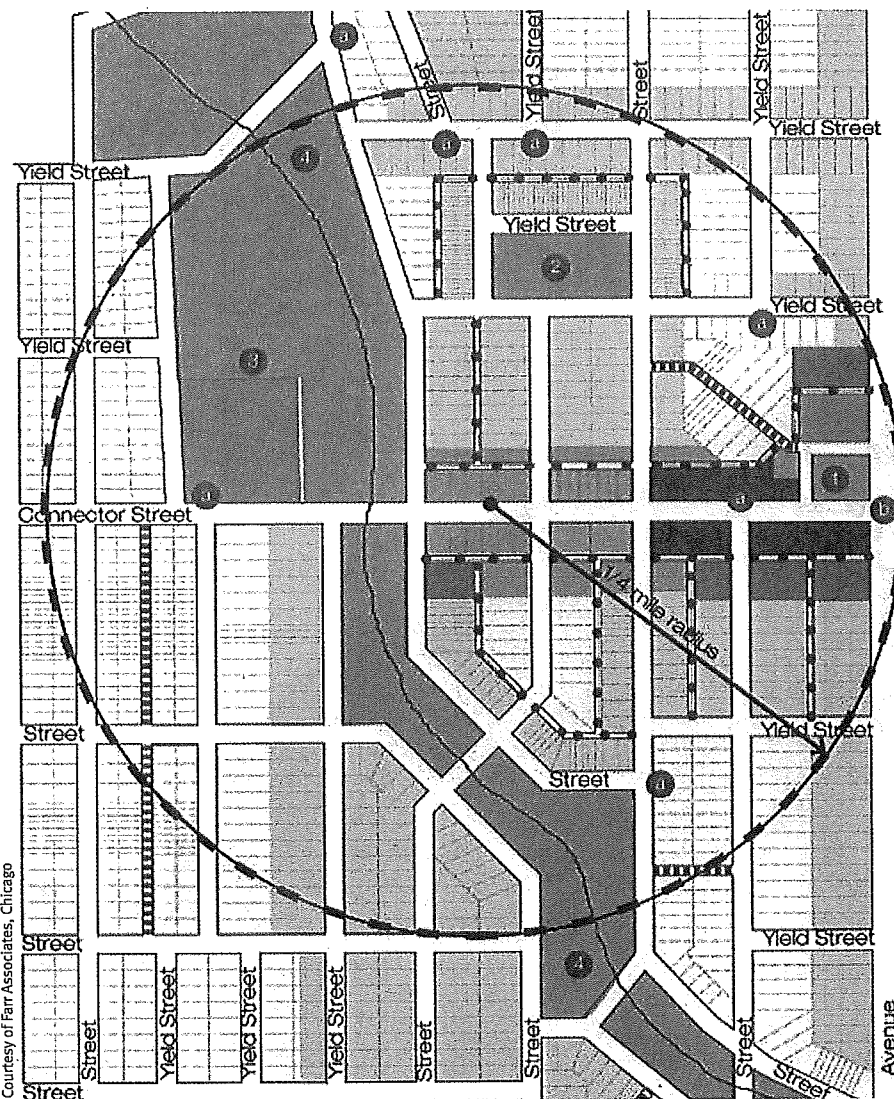
Often, the drive to resolve these issues locally is pushed by residents and businesses who want more sustainable communities; that is, communities that are more resilient in the face of anticipated (and unanticipated) future change. With local budgets and funding sources at a historic low, though, cities and counties are necessarily focused on cost-saving opportunities to make the most of existing facilities and services without committing to expensive new solutions or programs. To meet these demands, many communities are making changes to their local land development regulations so that sustainability is both figuratively and literally built into the process and outcome. To help communities determine where to add sustainable provisions to their regulations, this article provides a survey of current and emerging sustainable zoning provisions available at the local level, with an overview of the purpose and general approach for each category of regulation.

GETTING STARTED

Because there is currently no clear definition or consensus about what constitutes a sustainable approach to zoning, it is important to develop a local definition of sustainability and a policy framework of local preferences that can be used to help guide drafting decisions. In some communities, this is done through a comprehensive sustainability planning process, such as the Miami-Dade County, Florida, GreenPrint or the Fort Collins, Colorado, Action

Plan for Sustainability. In others, it may involve compiling information from a range of existing sources, including regional, comprehensive, climate adaptation, hazard mitigation, and capital improvements plans. Where planning does not precede the creation of new or up-

dated regulations, it is important to establish a sustainability definition and framework through community outreach and the creation of a policy or regulatory framework report. For example, St. Louis County, Missouri, provides an excellent example of blending existing



➔ Form-based codes, corresponding to neighborhood or communitywide regulating plans, are one method for promoting compact, mixed use development patterns through zoning.

ASK THE AUTHOR JOIN US ONLINE!

Go online during the month of July to participate in our "Ask the Author" forum, an interactive feature of Zoning Practice. Elizabeth Garvin, 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

Elizabeth Garvin, AICP, is an attorney with Spencer Fane & Grimshaw LLP in Denver. Garvin has more than 15 years of public- and private-sector experience in land development regulations, urban planning, and economic development. She has prepared code update/revision projects for cities and counties across the country; drafted topic-specific code provisions covering topics such as TOD, sustainability, and signs; created plans for redevelopment projects; prepared regional design standards; organized and undertaken public participation processes; and assisted private clients in obtaining development approvals.

planning with new sustainability policy and outreach in its Green and Growing project.

In the absence of a sustainability plan, an effective method to develop a local definition and framework might include working from a series of policy concepts or discussion prompts. Identifying local sustainability preferences from a cohesive list of issues will help to outline the community's preferred approach to sustainable regulations. For example, the American Planning Association's *Policy Guide for Planning for Sustainability* lists a number of specific policy positions that can serve as the starting point for conversations to establish local priorities, such as whether the community wants to encourage any of the following ideas: (1) alternatives to gas-powered vehicles; (2) alternative renewable energy sources and meaningful energy conservation measures; (3) compact and mixed use development that minimizes the need to drive, reuses existing infill and brownfields sites, and avoids the extension of sprawl; or (4) conservation of undeveloped land, open space, and agricultural land. The U.S. Environmental Protection Agency (EPA) report *Planning for a Sustainable Future* and ICLEI—Local Governments for Sustainability USA's Sustainability Planning Toolkit provide similar guidance.

DRAFTING SUSTAINABLE REGULATIONS

With a local sustainability framework in place, it is time for the community to determine how best to implement sustainable priorities and start drafting. The various types of zoning tools and approaches included in sustainable zoning codes, drawn from both new and more familiar approaches, can be categorized into a number of general topics as described below. For reference purposes, in this article I'll refer to zoning, subdivision, and land development

regulations, ordinances, and bylaws as the local "zoning code" or "code." As necessary, I'll distinguish a separate "building code" from these other development regulations.

COMPACT, MIXED USE DEVELOPMENT PATTERN

Many communities have decided that a good place to start implementing sustainability is by encouraging residents and visitors to get out of their cars and walk. According to the Urban Land Institute (ULI), "the transportation sector is key in climate change" (2010). Transportation, the fastest growing source of emissions, collectively generates approximately one-third of the greenhouse gas emissions in the United States (ULI 2010). Moving to a more compact, mixed use development pattern that brings people and destinations (e.g., workplaces, shops, schools, and places of worship) together to reduce the number of vehicle miles traveled (VMT) is an important step toward slowing the growth of the transportation sector. Recent studies indicate that over time compact development may be able to reduce VMT for both suburban and urban development while maximizing local infrastructure investment by making the most use of infrastructure that is already paid for and in place (ULI 2010).

Communities can adapt existing zoning codes to encourage compact development in a variety of ways, primarily through changes to the zoning districts, development standards (i.e., those standards typically applicable across multiple districts, such as parking or landscaping), and administrative approval processes.

Mixed Use Zoning Districts and Uses

Older, more traditional zoning codes may first need the addition of a new mixed use district

(or series of mixed use districts with differing densities and use mixes) that permit both residential and nonresidential uses in the same structure or in closer horizontal proximity than current regulations would allow. If a community is considering incorporating form-based controls, the new district(s) could also be form-based in nature. While many communities have adopted transit-oriented development or downtown districts that encourage compact, mixed use development, mixed use can be more broadly applied than in these limited settings, and some communities have replaced some or all of their traditional zoning districts with mixed use districts.

In traditionally suburban communities, where the zoning standards reflect large-lot residential development, revisions may also need to be made to the dimensional standards (e.g., lot size, yard setbacks, and impervious coverage) in the existing zoning districts to accommodate development on smaller lots. Updates to dimensional standards should be designed to reduce the required spacing between buildings. Specific revisions may include: (1) increasing permitted residential density or nonresidential floor-area ratio or square footage, (2) reducing or eliminating minimum lot sizes, (3) establishing build-to lines at or near the right-of-way or property line or reducing minimum building setbacks, and (4) allowing increased lot coverage. Revisions may also need to be made to the permitted use table to allow residences above the ground floor in commercial districts, prohibit big-box structures in compact development areas, and restrict auto-oriented and drive-through uses to limit the potential for conflict between cars and pedestrians.

Infill Development Standards

Adding new zoning districts should not be the only change a community makes to encourage compact development. Many zoning codes inhibit the creation of compact development through regulatory provisions that inadvertently limit or restrict small-lot or infill development. This may occur because of existing suburban lot-size or dimension requirements in the zoning districts, but it is reinforced by additional regulations applied to the lot, such as design or development standards. Inflexible minimum landscaping or screening buffers, mandatory on-site open space dedications, building frontage or orientation standards, excessive minimum parking requirements, and prohibitions on narrow streets or driveways can all contribute to the prevention of infill development. Communities that want to encourage compact, mixed use development should identify those development standards that make smaller lot, more compact, or infill development more difficult to design or approve and consider replacing those standards with updated standards designed for compact development. Alternatively, communities can establish a review and approval method that permits the easy substitution of appropriate design for small lots.

Administrative Approvals

Developers want predictability in the development process and a product that does well in the local market. According to the National Association of Home Builders, "if each developer must go through a complex and costly process of obtaining special waivers and approvals, special use permits, or planned unit development approval to achieve compact development, the developer will probably find it makes more business sense to keep building conventional large-lot subdivisions" (2012).

While establishing compact, mixed use zoning districts and updating development standards will eliminate some administrative obstacles, communities can further encourage desirable development by establishing an expedited review process for site plans that meet the new standards. If the community engages the public in the process of creating or updating the zoning districts or development standards, the new districts and standards can be adopted as optionally applicable in designated areas of the community, and development applications that conform to the zoning requirements can be reviewed through an expedited administrative process. Some communities take this even further

and offer an expedited building permit approval process for infill or sustainable development.

RENEWABLE ENERGY AND ENERGY EFFICIENCY

The modern concept of energy efficiency in the United States can be traced the "energy crisis" of 1973. This was triggered by an Organization of the Petroleum Exporting Countries oil embargo that caused fuel shortages and a steep increase in petroleum-based fuel prices and led to a growing realization that available energy sources might not always outpace demand. Over the years, communities and citizens alike have looked for ways to control energy use and encourage renewable energy creation to reduce reliance on the use of fossil fuels. While energy efficiency and production may initially seem better addressed by the purchase of alternative fuel municipal vehicles or construction of commercial wind or

ing use standards, while others define the wind and solar regulations as development standards. Either way, the goal is to adopt a uniform set of regulations and avoid negotiating approvals on a case-by-case basis.

Energy Conservation and Production Development Standards

Most zoning code changes necessary to encourage site and structure energy conservation take place in the development standards. Site design standards can be updated to encourage the use of passive solar energy through better building placement in relationship to the sun (solar orientation) as well as passive cooling through building placement in relationship to the wind along with the preservation or placement of trees and landscaping to enhance shade. Unlike some of the sustainability approaches that work practically



Kevin Canavan/ugh

➡ The LEED Platinum Burnside Rocket building in the Lower Burnside neighborhood of Portland, Oregon, is an example of context-sensitive, small-lot commercial infill.

solar farms, there are actually multiple changes that can be made to zoning codes that will encourage energy efficiency as well as remove barriers to renewable energy production.

Use Definitions and Standards

To encourage the use of renewable energy sources such as wind and solar power generation, these uses should be defined in the code and added to the table of uses in appropriate zoning districts either as primary or accessory uses, as determined by the community. Some communities identify all of the regulations associated with wind and solar power as use regulations and include those with the exist-

everywhere, such as reduced parking requirements, the effectiveness of these approaches will range depending on the availability of the natural resource in the area. For example, solar orientation will probably be more efficient in southern Nevada than in northern Michigan. Before investing in the drafting and public education and outreach required for energy-based regulations, the community should determine which approaches work best locally. The National Renewable Energy Lab (NREL) is an excellent resource for solar and wind energy mapping.

Currently, the most commonly requested small-scale forms of renewable energy production are wind power, solar power, and

geothermal pumps. Updating the code to allow geothermal pumps may be easiest. The type of system permitted in the community should be specified (i.e., open or closed loop); location and setback requirements for above-ground and below-ground components should be identified. Screening requirements should also be established. For a more in-depth discussion of issues related to regulating geothermal pumps, see the May 2010 issue of *Zoning Practice*.

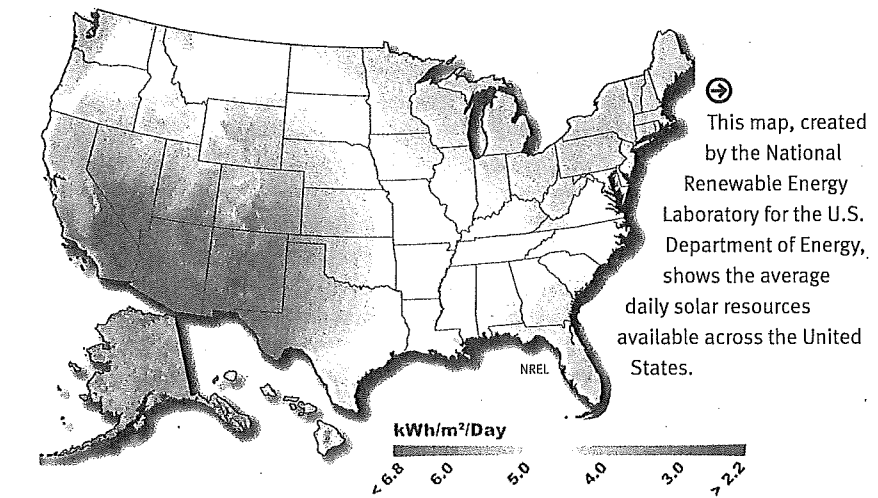
The adoption of wind and solar power regulations draws more attention in some communities when neighboring property owners worry that wind turbines and solar arrays will have an impact on their properties. There are multiple sources of model wind and solar regulations available to local planners, and the big issues to consider for a zoning update include: (1) changing maximum height limits both to allow solar panels on rooftops and to permit wind turbines obstacle-free access to the wind, (2) determining whether wind turbine(s) and solar panels or arrays are a primary or accessory use and whether permitting will be required, and (3) addressing the use of wind and solar systems in conjunction with nonconforming uses. For additional information about regulating wind and solar energy systems, see the July 2008 and November 2010 issues of *Zoning Practice*.

Building Code versus Zoning Code

Another approach to incorporating energy conservation and renewable energy production into the zoning code is to require the construction of solar-ready homes that can be fitted with solar energy generation technology. From a structural perspective, communities can also consider the use of individual building components such as green or cool roofs, shade structures, building insulation and green walls, or a green building rating system such as LEED or Energy Star. When adding these requirements to the zoning code, communities should also examine the potential overlap with existing or proposed building code standards to avoid conflicting regulations and confusion.

STORMWATER MANAGEMENT

In many communities, stormwater management and treatment is overseen by the public works department and is not considered a zoning issue except to the extent that stormwater management infrastructure is shown on final site plans for approval. This approach stems from the National Pollutant Discharge Elimination System permitting framework, established as part of the



1972 Clean Water Act, which identified polluted stormwater as an engineering “problem” best addressed by removing it from a site through a system of sewers and pipes, typically called gray infrastructure, that drained the stormwater to a detention basin or a wastewater treatment plant. As this approach has evolved, both public works and planning officials have moved to a site design model that incorporates green or wet infrastructure. The goal is to provide partial or complete on-site stormwater mitigation that both reduces stormwater runoff and improves the water’s quality, while limiting the size, scope, and public investment in stormwater infrastructure. Incorporating stormwater management into site design also provides quality-of-life benefits such as public spaces and the enhanced aesthetic value of improved landscaping (EPA 2007).

Low Impact and Green Infrastructure Development Standards

The most inclusive approach to establishing on-site stormwater treatment standards is the adoption of low-impact development (LID) and green infrastructure standards. Putting these standards in place and moving to a less engineered stormwater management approach may require a new level of coordination between the local planning and public works departments. A recent trend in addressing this issue is to update the zoning code to incorporate a specific standard for on-site stormwater management, such as “no net increase in stormwater runoff volume, rate, or pollutant loads from new construction and redevelopment that adds more than x amount of impervious surfaces,” and to provide a description of preferred low-impact and green approaches that can be used in the community. Communities then adopt engineering standards and specifica-

tions for the individual techniques and required maintenance as part of the overall local engineering design and review requirements. Given that the sample standard above is fairly strict, it’s important to note that each community will need to determine to what degree it wants to, and is capable of, addressing stormwater on-site. For a more in-depth discussion of how to promote LID and green infrastructure through development regulations, see the September 2012 and 2010 issues of *Zoning Practice*.

Parking and Landscaping Standards

When considering zoning updates for stormwater management, two key related issues for communities to tackle are reducing and redesigning surface parking. This can be done either through specific updates to off-street parking provisions or as part of the overall adoption of LID and green infrastructure development standards. Anecdotally, we know that many parking standards are based on outdated studies, were copied from neighboring communities or older model regulations, or have just been carried forward as long as anybody can remember. This has resulted in the over construction of parking spaces in oversized parking lots. Specific updates should include (1) reductions to required parking ratios, (2) the establishment of a parking maximum (e.g., no more than 110 percent of the minimum requirement), (3) standards for shared parking and including available on-street parking in the total parking count, (4) incentives and requirements to reduce or eliminate impervious surfaces in parking lots, and (5) updated parking lot/landscaping requirements to incorporate green infrastructure that allows stormwater to infiltrate the soil rather than sheet flow across the parking lot. A number of cities,

including Minneapolis, St. Louis, and Washington, D.C., also charge stormwater fees based on how much a property contributes to stormwater runoff (typically through a measurement of impervious surface); the proceeds are generally used for water pollution control efforts.

Communities that want to start slow and build support for LID or green infrastructure may want to first update local landscaping standards. Regional and local sustainable landscaping standards are provided by many state universities across the country and include ideas such as (1) establishing standards that incorporate more native and drought-tolerant landscaping, including replacing all or part of turf grass lawns with groundcovers or low landscaping to reduce the need for fertilizer and pesticide applications that can be washed into waterways; (2) encouraging or requiring the creation of natu-

automobile transportation. Another method is to expand nonautomotive transportation options. In some communities this option is provided through public transit such as commuter rail, light rail, and trolley systems. Not all communities, though, have the funds or the ridership demand to provide a full range of public transit options. These communities still have viable options for multimodal transportation; in many cities and towns, careful site and infrastructure design can be used to move people effectively on foot, on bicycle, and by bus, while reducing greenhouse gas emissions.

Research shows that most people will walk between one-quarter to one-half mile to reach a destination such as work, a park, or a transit stop (Donohue 2011). To encourage people to make this walk or bike ride, it is important to provide a transportation venue

implement a complete streets policy through infrastructure design standards for new development and redevelopment projects. For a more information about the role of the zoning code in promoting complete streets, see the February 2013 issue of *Zoning Practice*.

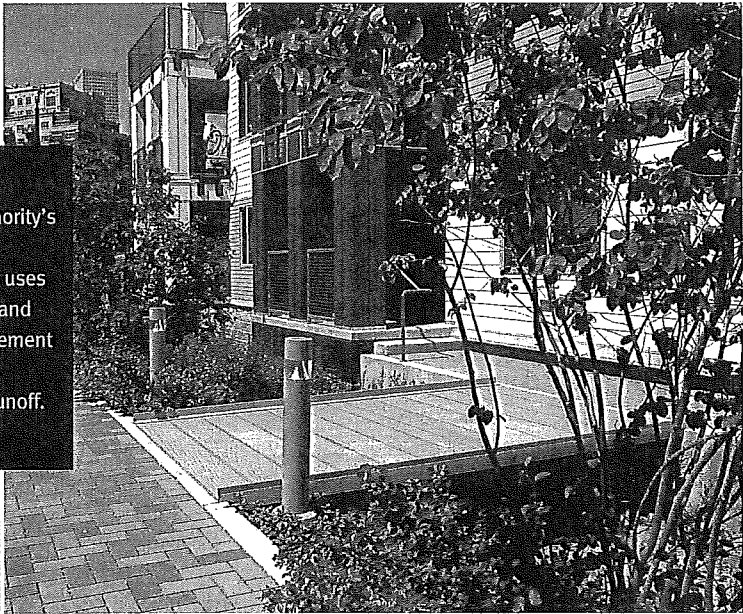
Local zoning codes can also be updated to include development standards that require fully connected sidewalks, bike paths, and trails as well as frontage development standards that require new development or redevelopment to ensure bicycle and pedestrian connections to surrounding properties. In communities with a more suburban layout, zoning codes can require mid-block connections downtown or along corridors with high pedestrian activity and pedestrian connectors from cul-de-sacs to external roads and sidewalks.

NATURAL RESOURCES AND OPEN SPACE

Many of the sustainable zoning tools described in this article are focused on creating sustainability in the built environment. Another important aspect of sustainable design is maintaining and enhancing the natural environment. Parks and open spaces have been shown to enhance surrounding property values, absorb and hold carbon emissions, and help anchor strong neighborhoods (Sherer 2006).

Communities can revise their zoning codes to preserve natural places and encourage the creation of open space in a variety of ways. The site plan review process provides an important avenue for identifying and preserving important local natural resources and environmentally sensitive areas. As part of the site design criteria, the community can identify local natural resource areas or sensitive lands to be protected and request or require that development be designed around that area to the extent possible. Incentives, such as increased density or reduced setbacks elsewhere on the property, can be provided to landowners to further encourage preservation. Many communities use this approach to protect ridgelines and hillsides, along with geologic hazard areas, ecological restoration areas, deserts, streams, and other environmentally sensitive areas.

Additionally, communities can establish standards for new development and redevelopment to provide open spaces, such as parks, trails, or recreation areas, either through private on-site set-asides or public dedication. Park and open space dedication requirements are typically guided by locally created parks master plans or national park level-of-service standards, such



ⓘ The Denver Housing Authority's Park Avenue development uses rain gardens and pervious pavement to decrease stormwater runoff.

Elizabeth Garvin

ral landscape buffers along lakes and streams (riparian buffers) to filter pollutants before they enter the water and help keep the banks stable; (3) designing driveways, sidewalks, and gutters to drain into well-vegetated areas rather than to pavement; and (4) using improved irrigation systems, such as drip and microspray, combined with regulations that prevent street and sidewalk overspray.

TRANSPORTATION

Moving homes closer to activities through compact, mixed use development, as described above, is one important method of minimizing the quantity of greenhouse gases created by

that is safe and easily accessible. Many communities do this through the construction of complete streets—streets that are designed to provide safe access and use for pedestrians, bicyclists, motorists, and public transportation users of all ages. Some communities have approached streets this way for years, while others are new to this design trend that is nationwide and growing. According to the National Complete Streets Coalition, “In total, 466 regional and local jurisdictions, 27 states, the Commonwealth of Puerto Rico, and the District of Columbia have adopted [complete streets] policies or have made written commitment to do so” (2013). The zoning code can help

as those established by the National Recreation and Parks Association (Penbrooke 2007).

THE ADOPTION PROCESS

Once the community has decided which topics or categories of sustainable regulations to consider for inclusion in the zoning code, the project team will need to determine how to organize the regulatory drafting, public review, and adoption. While there are a few ways to organize the drafting and public review process, factoring in the time needed for good public understanding of the draft regulations may be the best way to guide the process. Where the public is already included in the sustainability discussion and is ready for the code changes—typically following the creation of a sustainable plan just prior to

the code update—the updates can be drafted and discussed simultaneously in a single package. This allows a concentrated focus on the current code, minimal redundant research by staff for editing purposes, and a single public review and adoption process. Where, however, a thorough public outreach and educational process might be helpful with both the adoption process and long-term implementation of the changes, it is probably beneficial to take the code edits forward individually by topic and spend the necessary time helping the community understand the importance of each change. Communities may choose to organize individual edits to move into public discussion and adoption as fast as the community deems appropriate. This might range from one proposed topic of revisions at

a time in a rolling process, where review may overlap depending on the length of the public conversation, to one proposed topic of revisions following the adoption of each previous topic.

AND EVERYTHING ELSE

The techniques listed above are not the exclusive means to incorporating sustainable regulations in the local zoning code. Other examples of sustainable regulations from communities across the country include diverse and affordable housing, local food and agriculture, waste reduction and recycling, climate adaptation, and green construction standards. Because sustainable zoning is still relatively new, there will be more concepts added in the future as well as refinements to the approaches already in use.

REFERENCES AND RESOURCES

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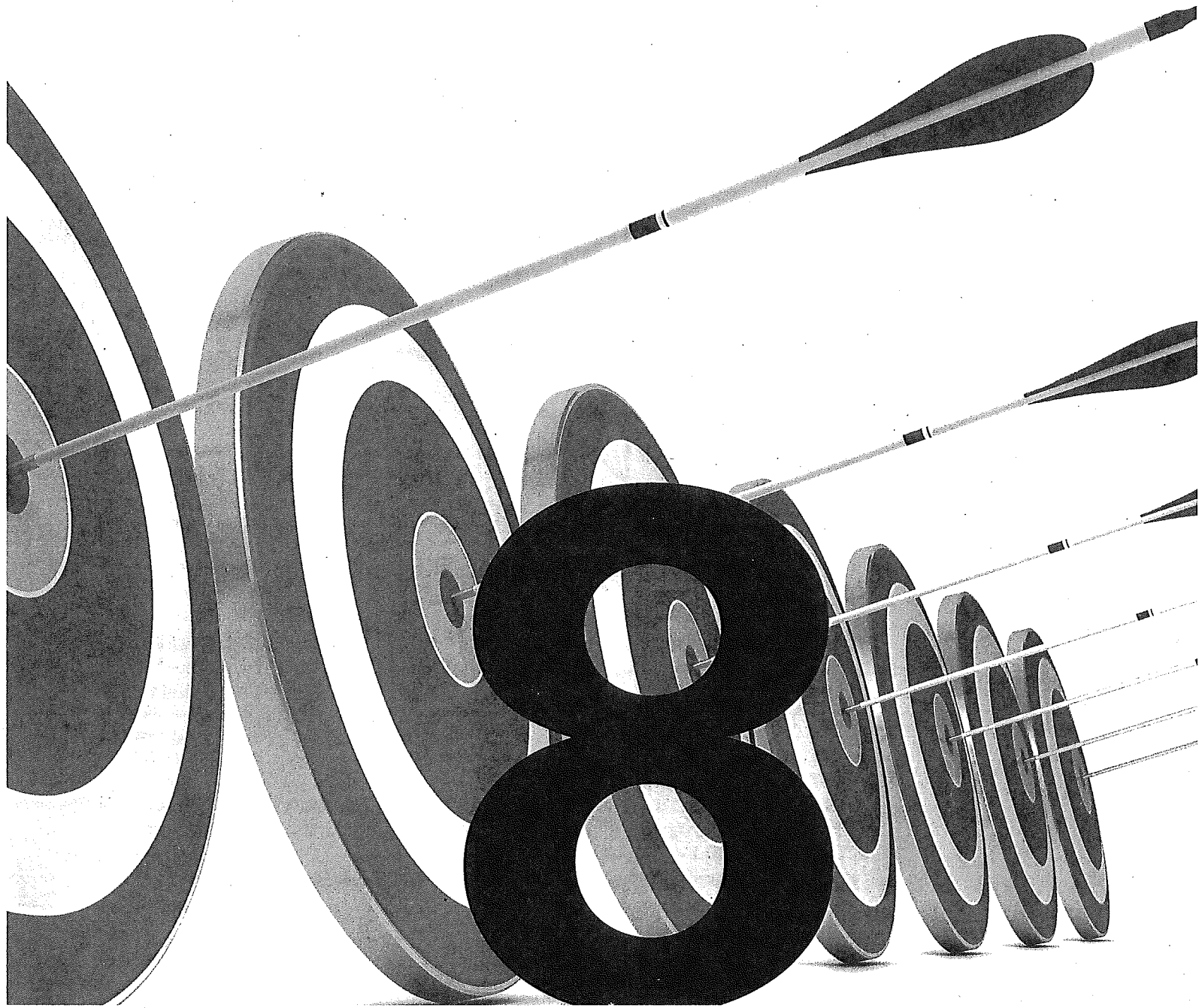
AUGUST 2013



AMERICAN PLANNING ASSOCIATION

➔ ISSUE NUMBER 8

PRACTICE PLANNING PRECISION



Code-Ready Sustainable Planning: Reducing the Gap Between What Plans Say and What Codes Do

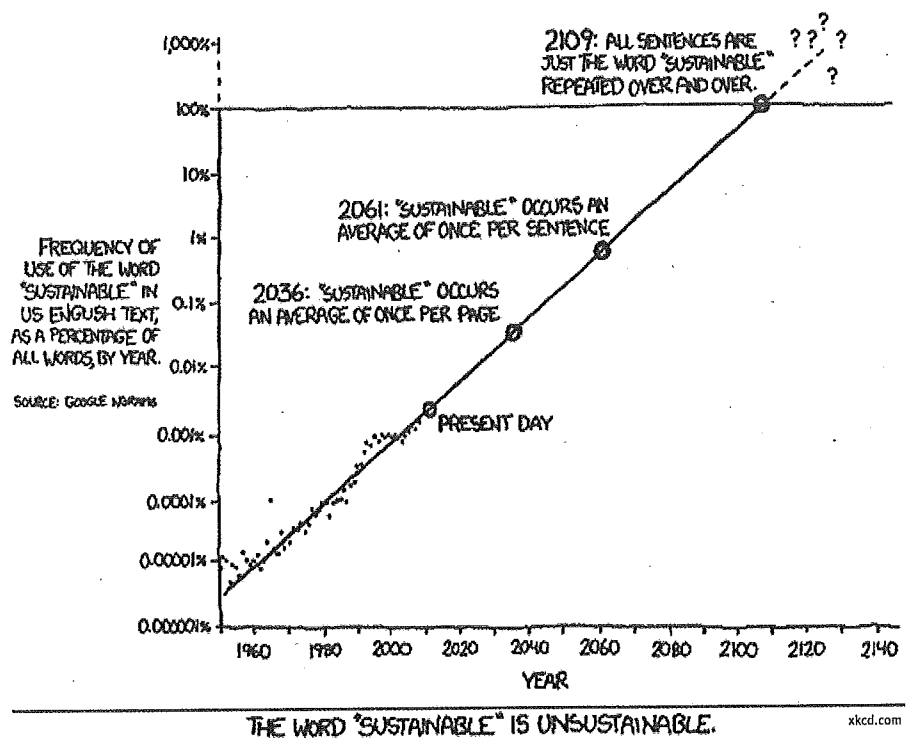
By Douglas Farr

In a time of tight municipal budgets, planning is under pressure to prove that plans produce short- and long-term benefits.

In addition, there are growing expectations that planning has a central role in addressing urgent societal issues related to sustainability, such as active living and obesity, mobility choice and auto dependence, and climate change mitigation, resilience and adaptation. Together these dual trends of low budgets and high expectations exert pressure on the practice of planning to focus on more effective implementation of ever-more-precise outcomes. In order to help planners and code writers respond effectively to these trends, this article focuses on reducing the gap between what plans say and what codes permit and require—the realm in which plan effectiveness often breaks down.

THE CURRENT GAP BETWEEN PLANS AND CODES

The relationship between plans and codes got off to a rough start. Burnham's 1909 Plan of Chicago, long regarded as the model of a comprehensive city plan, referenced neither subdivision nor zoning codes. As most planners know, such codes were first enabled and widely adopted by municipalities long after Burnham's death in 1912. The Burnham plan was widely copied as a model of effective planning despite not relying on codes for its implementation. However, this disconnect between plans and codes was flagged as a concern very early on. Harland Bartholomew, the first full-time planner employed by an American city, was among the first prominent planners to see the benefits of plans-code coordination. As one of the authors of the Standard Zoning Enabling Act (SZA) of 1926 he wrote, "Zoning is an es-



sential part of the city plan and ought never to be considered separately" (Knack et al. 1996).

Despite this vision of a plan-code unity, the final language in the zoning enabling legislation established a relatively weak connection between the emerging fields of planning and zoning: "Such (zoning) regulations shall be made in accordance with a comprehensive plan . . ." In legal terms, "in accordance with" is much less precise and rigorous than a more muscular phrase such as "in strict con-

formity with." Lawsuits brought by real estate interests that were denied permits over the last 90 years have defined the elasticity of the allowable legal gap between plans and codes. Given that this relatively weak language first appeared in the third and final draft of the SZA and that the Standard City Planning Enabling Act wouldn't be written until two years later in 1928, planners should probably be thankful that a legal connection was made between plans and codes at all.

ASK THE AUTHOR JOIN US ONLINE!

Go online during the month of August to participate in our "Ask the Author" forum, an interactive feature of *Zoning Practice*. Douglas Farr 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

Douglas Farr is the founding principal and president of Farr Associates, a Chicago-based firm focused on sustainability in architecture and urban design. He is the author of *Sustainable Urbanism: Urban Design with Nature* (Wiley, November 2007). An architecture graduate of the University of Michigan and Columbia University, Farr is vice chair of the board of the Congress for the New Urbanism and also served as chair of the LEED Neighborhood Development Core Committee (LEED-ND).

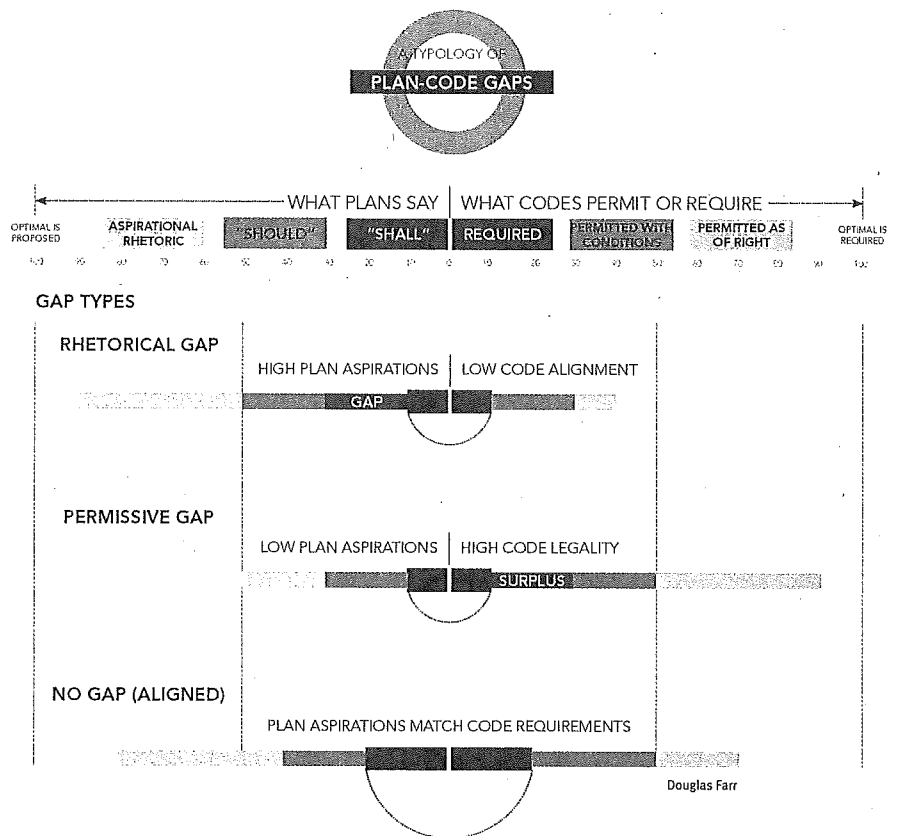
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The Inevitability of a Plan-Code Gap

Given this loose relationship between plans and ordinances and the institutional, political, and professional forces at play, the existence of a gap in what plans say and what codes authorize is inevitable without strategic effort.

While a continuous planning and coding process is an ideal within the land-use arena, this may not be a priority for a municipal government. A code update can often seem like a low priority at a time of layoffs, and spending additional money to develop a better or more complete planning process can also be a hard sell. Some municipalities will wait to learn the results of a plan before budgeting for follow-up work, such as a code update. This can lead to a timing gap between the adoption of a plan and the subsequent code that will implement the plan's policies.

A gap between plans and codes is also inevitable given the complexities and politics associated with regional or citywide master plans and ordinances. Changing codes is a political act that vested interests resistant to change can play to their advantage. Part of what makes powerful political interests effective is the ability to pick their battles and venues. Rather than take a public position in opposition to a popular plan, they may choose to exert influence far from the public eye. Every planner who has developed a plan is familiar with the process of wordsmithing that can go on behind the scenes to satisfy different constituencies. As a consequence, there is often intense pressure to refrain from being specific.



Nevertheless, the profession has driven innovations in land-use planning, mapping, and modeling precision that have made it possible to demand a level of specificity. For example, the U.S. Department of Housing and Urban Development has funded sustainability plans across the country through its Sustainability Communities Initiative that require the tracking of sustainability indicators, and the

California legislature passed AB32 and SB375, two laws that link climate change and land use. These initiatives highlight an increasing demand for strong technical criteria leading to clear outcomes and planning accountability. Only recently, however, have third-party criteria become specific enough to be able to translate sustainability-related words into performance standards suitable for inclusion

in codes and standards. Unfortunately, the application of these emerging tools has not been widely disseminated within the planning profession.

Training Planners to Identify the Plan-Code Gap

This gap between what plans promote versus what codes permit or require can be very hard to detect. In most cases, a word search is of no use in hunting down these disconnects. Consider these real world case studies:

Case Study #1: A suburban comprehensive plan calls for the community to be “safe and walkable,” while the subdivision code requires a minimum street width of 31 feet, a minimum block length of 600 feet, and permits a maximum block length of 1,800 feet. In addition, the residential zoning establishes minimum lot sizes of 8,000 square feet and permits front drive-ways.

Identifying these gaps requires some knowledge about pedestrian safety, street design, and vehicular speed. The severity or lethality of pedestrian-vehicular accidents is proportionate to vehicle speed, with several studies suggesting about a five percent fatality rate at 20 mph and 45 percent at 30 mph (Leaf and Preusser 1999). The minimum street width required in the subdivision code, combined with the presumption that virtually all cars will be parked off-street, invites higher vehicular speeds. Even with a posted speed limit of 20 mph, the speed at which traffic will actually travel based on these design factors, especially if the street is straight, may be closer to 30 mph. Public health research shows that pedestrians strongly prefer to walk in areas with high street connectivity (i.e., shorter block lengths and few dead-end streets) (Brownson et al. 2009). Block lengths of 600 to 1,800 feet do not support a walk-friendly place.

This gap analysis does not end at analyzing street widths and block lengths. Additional information from the zoning and subdivision code including any required parkway widths, minimum sidewalk widths, and the inclusion of on-street parking all affect street design speed, pedestrian safety, and the desire to walk. It is important that planners have a base understanding of how all these elements interact and that they are trained to identify these gaps when they exist.

Case Study #2: A town adopts a complete streets policy that emphasizes the use of streets by bicycles and automobiles. The town also adopts an ordinance governing bicycling.

Identifying this gap requires research. A cursory review via a word search might have concluded that the town had enacted a bicycle ordinance and that no gap existed. However, the first line of the ordinance requires bicyclists to ride on sidewalks and not the roadway, except in business districts or along streets without sidewalks.

Case Study #3: The preamble from a recent comprehensive plan states that one of the primary goals of the plan is to “introduce language to address the trend toward sustainability.” The plan’s objectives and policy statements frequently use soft verbs, such as encourage and promote, without providing specific criteria or metrics.

IMPLEMENTATION METRICS

PLANNING TOPICS	REFERENCE METRICS
Affordability-Comprehensive	H + T Affordability Index
Automobile Independence	Walk Score
Bikability	Bike Score
Complete Neighborhoods	Sustainable Urbanism: Neighborhood Criteria
Reduced Traffic Deaths	Chicago Forward: Department of Transportation Action Agenda
Transit-Support Municipality	Transit Score
Energy Efficient Buildings	Architecture 2030
Vehicle Miles Traveled (VMT) Reduction	Architecture 2030
Affordable Housing	LEED-ND: NPD c4: Mixed Income Diverse Communities: Option 2
Car-Free Housing	Transportation Sustainability Research Center, University of California-Berkely: Car Free Housing Research
Compact Development	LEED-ND: NPD p2: Compact Development
Connected Community	LEED-ND: NPD p3: Connected & Open Community
	LEED-ND: NPD c6: Street Network
LEED-Neighborhood Development	LEED-ND: All NPD Prerequisites
Life-Cycle Housing	LEED-ND: NPD c4: Mixed Income Diverse Communities: Option 1
Mixed Use Development	LEED-ND: NPD c3: Mixed Use Neighborhood Centers
Net-Zero Energy Buildings	Living Building Challenge
Parks, Open Space & Recreation	LEED-ND: NPD c9: Access to Civic & Public Space
Recreational Facilities	LEED-ND: NPD c10: Access to Recreational Facilities
Reduced Auto Dependence	LEED-ND: SLL c3: Locations with Reduced Automobile Dependence
Storm Water Management	LEED-ND: GIB c8: Stormwater Management
Transit-Supportive Development	LEED-ND: NPD p2: Compact Development, Option 1
Density to Support Walk-To Retail	Sustainable Urbanism: Neighborhood Retail Supportive Density
Walkable Streets	LEED-ND: NPD p1: Walkable Streets
Walkability	Hall Walkability Index

The gap here is both passive and glaring. While there is no doubt the author of this plan was well intentioned in wanting to “address” important issues of the day using sustainability language, a plan is a course of action, not simply an introduction of language. Without clear directives for action, there is no plan. If there is no actionable plan, the community will have a big plan-code gap.

STRENGTH OF RECOMMENDATIONS			POLICY OR CODE
Weak		Strong	
POLICY OBJECTIVES			
Max Combined Housing & Transportation Expenses are 50% or less of Income	Max Combined Housing & Transportation Expenses are 50% or less of Income	Max Combined Housing & Transportation Expenses are 45% or less of Income	Policy
Slightly Walkable: 50-69 Score	Highly Walkable: 70-89 Score	Walker's Paradise: 90-100 Score	Policy
Bikeable: 50-69 Score	Highly Bikeable: 70-89 Score	Biker's Paradise: 90-100 Score	Policy
Meets 3 Criteria	Meets 4 Criteria	Meet all 5 Criteria	Policy, Map, & Codes
Goal: Reduce pedestrian & bicycle crash injuries by 50%	Goal: Reduce pedestrian & bicycle crash injuries by 75%	Goal: Zero pedestrian & bicycle deaths	Policy & Subdivision
Good Transit: 50-69 Score	Excellent Transit: 70-89 Score	Rider's Paradise: 90-100 Score	Policy & Map
Building energy use reduced by 50%	Building energy use reduced by 80%	Building energy use reduced by 100%	Policy
VMT reduced by 10%	VMT reduced by 20%	VMT reduced by 35%	Policy
CODE-SPECIFIC PERFORMANCE TARGETS			
1 point: Permit per neighborhood	1 point: Require per neighborhood	2 points: Require per block	Zoning
Permit by Special Permit	Permit by Zone	Permit Citywide	Zoning
1 point: Permit densities citywide	p2: Require densities in some zones	p2: Require densities citywide	Zoning
1 point: Permit street network connectivity level citywide	p3: Require street network connectivity level in some zones	p3: Require street network connectivity level citywide	Subdivision
	c6: Achieve 1 point	c6: Achieve 2 points	Subdivision
Permit citywide	Require in certain zones	Require citywide	Subdivision & Zoning
1 point: Permit diverse housing types per neighborhood	1 point: Require diverse housing types per neighborhood	2 points: Require diverse housing types per block	Zoning
Permit minimum 7 "diverse uses" per neighborhood	Permit minimum 11 "diverse uses" per neighborhood	Require minimum 4 "diverse uses" per neighborhood	Zoning Code & Map
Comply with current IECC EE Code	Require buildings be Net-Zero Ready (Austin, TX)	Require Living Building Challenge Net-Zero certification	Building Code
Require 1 point citywide	Require 1 point in certain zones	Require 1 point citywide	Policy, Map, & Codes
Require 1 point citywide	Require 1 point in certain zones	Require 1 point citywide	Policy, Map, & Codes
1 point: Eliminate parking minimums	5 points: Permit car-free housing	7 points: Require car-free housing	Policy, Map, & Codes
1 point: Require rainfall retention on site	3 points: Require rainfall retention on site	4 points: Require rainfall retention on site	Codes & Public Works
Permit in transit corridors	p2: Require in transit corridors	p2: Require citywide	Policy, Map, & Codes
Permit 1,000 dwelling units within 5 minute walk	Require 500 dwelling units within 5 minute walk	Require 1,000 dwelling units within 5 minute walk	Zoning Code & Map
Permit citywide	Require in certain zones	Require in certain zones	Policy & Map
Score: 30-49 points	Moderate: 50-69 points	Very High: 70 - 100 points	Policy & Map

Douglas Farr

The Plan-Code Gap Devalues Planning

Over the long term, the plan-code gap erodes confidence in the effectiveness of planning. Municipalities prepare plans to address specific opportunities or concerns and to move

their communities forward. The failure to execute on high priority goals and objectives may well result in reduced economic productivity and community well-being. In addition, community members who participate in a master-planning process have a rea-

sonable expectation that the plan will be implemented as written. A delayed or poor implementation devalues their investment of time and energy. Such an outcome further undermines the perceived effectiveness of planning, making planning harder to "sell" and appears to work against many of the aspirational principles of the American Institute of Certified Planners Code of Ethics. Taken together, the plan-code gap should be of great concern to the planning profession and the goal of reducing the gap and increasing plan effectiveness should be the focus of leading practitioners.

Illustrating Plan-Code Gap Types

The graphic on page 3 illustrates a typology of plan-code gaps using three prototypes: the rhetorical, the permissive, and the aligned. While a municipality can have elements of all three types across its regulatory portfolio, this article proposes that the aligned type should be the ideal.

The rhetorical type occurs when a plan uses aspirational language that is not translated into developmental regulations. A symptom of this type is the use of buzz words such as green, sustainable, or walkable that are not translated into performance criteria and only weakly linked to implementation. To non-planners this approach appears to overpromise benefits and under-deliver on results, reinforcing the idea that planning is "pie-in-the-sky" and ultimately ineffective.

The permissive type refers to a laissez-faire-based local planning system where plans are nonexistent or obsolete. The threat posed by this typology is its permissiveness in permitting long-lived and irreversible development practices that are decidedly not in the public's interest, such as a strict separation of land uses and automobile-oriented street and lot designs. This approach can resonate with constituencies who may see all government strictures or interventions as bad.

The aligned type seeks to match plan recommendations with specific development regulations. Using this

RESOURCES

- ◆ Brownson, Ross C., Christine M. Hoehner, Kristen Day, Ann Forsyth, and James F. Sallis. 2009. "Measuring the Built Environment for Physical Activity: State of the Science." *American Journal of Preventive Medicine*, 36(4): 99–123. Available at www.ncbi.nlm.nih.gov/pmc/articles/PMC2844244.
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- ◆ Knack, Ruth, Stuart Meck, and Israel Stollman. 1996. "The Real Story Behind the Standard Planning and Zoning Acts of the 1920s." *Land Use Law and Zoning Digest*, February. Available at www.planning.org/growingsmart/pdf/LULZDFeb96.pdf.
- ◆ Hall Planning and Engineering, Inc. 2012. "HPE's Walkability Index." Available at www.hpe-inc.com/walkability-index.html.
- ◆ Leaf, W.A., and D.F. Preusser. 1999. *Literature Review on Vehicle Travel Speeds and Pedestrian Injuries*. Washington, D.C.: U.S. Department of Transportation. Available at www.nhtsa.gov/people/injury/research/pub/hs809012.html.
- ◆ U.S. Green Building Council. 2009. "LEED for Neighborhood Development." Available at www.usgbc.org/neighborhoods.
- ◆ Walk Score: www.walkscore.com.
- ◆ Walk Score. 2013. "Get Your Bike Score." Available at www.walkscore.com/bike.
- ◆ Walk Score. 2013. "Get Your Transit Score." Available at www.walkscore.com/transit.

To increase effectiveness, planners can focus on the part they have the greatest control over—the planning process—to increase the depth of support for implementing an ambitious plan.

approach, an objective should appear in the implementation section of a plan only if the planning process has revealed ample support for its implementation, which is a model of planning effectiveness. Specific objectives that fail to garner support may appear as initiatives lacking support.

THE TWO PARTS OF CODE-READY SUSTAINABLE PLANNING

Code-ready sustainable planning is made up of two parts: high performance planning and code-specific recommendations.

High-performance planning describes a planning process rooted in evidence-based sustainability metrics. Given that recent research documents how our land-development patterns contribute to physical activity levels, pedestrian and bike safety, housing and transportation affordability, and climate resiliency, high-performance planning is necessary to quickly increase the planning profession's effectiveness in a time of tight budgets and sometimes strident opposition.

Code-specific recommendations are plan policies and action items written in language strong and precise enough to guide the development of regulatory provisions that will help achieve the plan's goals and objectives. In other words, code-specific recommendations provide clarity about how a particular recommendation will be implemented.

PUTTING CODE-READY SUSTAINABLE PLANNING INTO PRACTICE

In *The Seven Habits of Highly Effective People*, author Steven Covey wrote that in order to be effective, one must "begin with the end in mind." An aspirational "end" to a planning effort can seem hard to attain given the fragmentation in how plans and their implementation are authorized and governed. In order to

increase effectiveness, planners can focus on the part they have the greatest control over—the planning process—to increase the depth of support for implementing an ambitious plan. In this effort, the green building industry may have experience of value to planners.

Use High-Performance Sustainable Planning Criteria

For more than 15 years, the green building movement has applied this "end-in-mind" thinking to the design of sustainable buildings in an approach called "integrated design." This approach has many parallels with the high-performance approach to planning proposed herein. An integrated design approach brings together everyone who will eventually have the responsibility for implementing the plan early in the process. The facilitators present, debate, and commit to a menu of strategic choices, along with their costs and benefits. Think of these as a project's bones. In integrated building design it usually refers to structural or mechanical systems. The analog in planning is a two-stage process: the first involving big policy decisions and the second, the level of performance to be written into code. To illustrate how this approach can work, the table on pages 4 and 5 provides an initial listing of policy objectives and code-specific performance targets.

This table is divided into aspirational policy objectives and code-specific performance targets. Both objectives and targets are proposed at three levels of aspiration: weak, moderate, and strong. In setting up this hierarchy, the expectation is not that municipalities will opt to adopt a strong policy on every topic but rather that the planning process will identify those measures for which the community is most strongly committed. Any municipality that adopts policies from these ambitious targets is likely to earn positive recognition for doing so.

The policy objectives at the top of the chart can be used to structure the visioning phase of any land-use planning process. Many of the references in the table are provided by third-party websites that are currently used to market real estate but, paradoxically, are not conventionally used to plan land use and development. While some communities may have the capacity to develop their own transparent measurement systems and reference targets, many others will not. While these third-party metrics may not be perfect, the fact that they are already in widespread use and freely available to anyone with Internet access makes their performance targets attractive options for policy objectives. However, because these scoring systems have proprietary methodologies that may change without warning, their scores are not suitable to serve as code references.

The policy objectives have a one-to-many relationship with the code-ready references below. For instance, increasing walkability must be approached comprehensively through path and street design, urban design, and the location and clustering of destinations.

Focus on the Strength of Plan Recommendation Language

When it comes to writing recommendations or action items, planners often try to capture one of two sentiments: the consensus of all the parties to the planning process or the lowest level of unanimous agreement of the governing body. This tricky balancing act produces recommendations ranging from those that say and do a lot to those that say and do little or nothing. A plan's action items create the most value when they spur tangible action. The following list of plan recommendation approaches is ordered from weakest to strongest:

1. Mentioning a topic or action (i.e., "a shout-out")
2. Using soft verbs such as *promote* (i.e., non-specific support for action)
3. To allow an action (i.e., permission to take a specific action)
4. To offer incentives for an action (i.e., rewarding a specific action)

5. A firm requirement or mandate (i.e., requiring a specific action)

A Litmus Test for Code-Ready Sustainable Planning

Leading planners may already prepare plans following an approach similar to that described herein. How does the high-performance planning proposed herein differ from good planning? In order to make a market for this high-value approach to planning it needs to draw attention to points of distinction. To facilitate demand, the following checklist can serve as a litmus test for high-performance planning. (Note that this list can be used to help write RFQs and RFPs in exchange for describing the project using the term Code-Ready Sustainable Planning.)

1. During the data collection phase, audit local policy, codes, and public works practices against the policy objectives and code-specific performance targets above (and additional issues of local concern) to identify barriers to adopting these approaches.
2. Throughout the planning process convene all of the parties who will be involved in approving or implementing the recommendations of the plan.
3. At the beginning of the planning process, convene a long-format meeting to
 - introduce high-performance planning and illustrate the idea that a given topic can be effectively addressed with different levels of rigor;
 - introduce code-specific language and present each of the code-specific performance targets along with a best understanding of the order-of-magnitude costs and benefits of each target; and
 - poll the community and stakeholders on each topic to identify information gaps, new topics of local concern, and issues for which there is consensus.
4. Repeat item three above until each topic has arrived at consensus. This may take place later in the same meeting or in a future meeting. (The consensus on a given topic may be that there is no support for a high-performance outcome, in which case the plan should document this outcome.)

5. Prepare studies to test and demonstrate what results these policies achieve on the ground and what level of sustainable performance targets they can achieve.
6. Convene a long-format meeting to review these design and performance alternatives and to arrive at consensus on the level of regulatory performance to be recommended.
7. Draft recommendations that link to specific policy or regulatory actions, organized according to the authority charged with implementing them. Avoid informational recommendations and those using soft verbs.
8. Conduct a broad plan-adoption process so that each authority asked to take action on the plan votes separately to implement their designated responsibilities.

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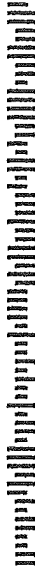
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RAMSEY MN 55303-5137

788 S3 P6



REC'D AUG 21 2013

ARE YOUR PLAN OBJECTIVES
PRECISE ENOUGH TO GUIDE
SPECIFIC ZONING PROVISIONS?

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