QUINLAN™ October 25, 2013 | Volume 7 | Issue 20

Zoning Bulletin

in this issue:

WEST®

Mat #41330021

Use/Adult Entertainment—Theater shows one adult film annually

Theater is found guilty of a criminal zoning violation of a city ordinance prohibiting adult amusement establishments

Citation: *State, City of Albuquerque v. Pangaea Cinema LLC, 2013 WL 4857693 (N.M. 2013)*

Contributors

Corey E. Burnham-Howard

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

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

WEST®

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

NEW MEXICO (09/12/13)—This case addressed the issue of whether an art-house theater that showed one adult film annually was an "adult amusement establishment" within the meaning of the city zoning ordinance that prohibited adult amusement establishments in the zone in which the theater operated.

The Background/Facts: Pangaea Cinema, LLC (the "Guild") did business as the Guild Cinema in the Nob Hill area of Albuquerque (the "City"). The area in which the Guild operated was zoned C-2, or "Community Commercial." The cinema was an art-house theater that usually showed nonpornographic independent films. However, on one November weekend in 2008, the Guild hosted an erotic film festival called "Pornotopia." During the festival, the Guild featured at least one erotic or pornographic film.

Under the City's zoning ordinance, "adult amusement establishments" were not permitted in the C-2 zone. The ordinance defined "adult amusement establishments" as: "[a]n establishment such as [a] . . . theater . . . that provides amusement or entertainment featuring . . . films, motion pictures . . . or other visual representations or recordings characterized or distinguished by an emphasis on . . . specified anatomical areas or . . . specified sexual activities."

Zoning enforcement inspectors characterized the pornographic film that was featured at the Guild as having an "emphasis on . . . specified anatomical areas or . . . specified sexual activities." Based on such a screening, the City determined that the Guild was operating as an adult amusement establishment in an area that was not zoned for adult entertainment.

In December 2008, the State of New Mexico and the City of Albuquerque charged the Guild with a criminal zoning violation in metropolitan court. (For clarity, the prosecuting body is referred to as the "City.") The metropolitan court found the Guild guilty. The Guild appealed. The district court held that the Guild had committed a zoning violation and that the zoning ordinances were constitutional as they applied to the Guild. The district court also imposed a criminal fine of $500. The court of appeals affirmed the Guild's conviction.

The Guild appealed. On appeal, the Guild argued that its conviction violated its state and federal constitutional rights to free speech.

DECISION: Judgment of court of appeals reversed and vacated.

The Supreme Court of New Mexico held that the Guild did not commit a zoning violation because it was not an "adult amusement establishment" within the meaning of the ordinance, as the term "adult amusement establishment" did not include theaters that rarely or only occasionally featured adult entertainment.

In so holding, the court explained that "[c]ities are generally allowed

to impose different zoning requirements on adult theaters than on mainstream theaters." Also, "[e]ven though such zoning ordinances categorize theaters based on the content they exhibit, courts may analyze the ordinances as content-neutral time, place, and manner restrictions." This is based on the concept that the "zoning restrictions target not the content of the films shown, but rather the 'secondary effects' caused by the accumulation of adult amusement establishments in a city." Negative "secondary effects" that zoning restriction seek to avoid, noted the court, include things such as: "an undesirable quantity and quality of transients"; adversely affected property values; an increase in crime, especially prostitution; and adverse effects on neighborhoods.

Since such zoning ordinances are treated by the courts as time, place, and manner restrictions, the court explained that they are valid if: (1) they are content neutral; (2) "they are narrowly tailored to serve a significant governmental interest"; and (3) "they leave open ample alternative channels for communication of the information."

Here, the court noted that the City's ordinance was similar to others that have been upheld as constitutional. Nevertheless, here, the Guild was not challenging the constitutionality of the ordinance generally, but only as it applied to the Guild. On that point, the court found that the Guild was not an adult theater "in function or appearance." Rather, the court found that the Guild was an ordinary-looking art-house theater. Nothing about the Guild appeared "to be seedy, unsavory, or likely to drive down property values." It was undisputed that Pornotopia did not, in fact, result in any negative secondary effects in the Nob Hill neighborhood.

While the City ordinance did not specify exactly how many pornographic films a theater must show to qualify it as an "adult amusement establishment," the court found it could "say with confidence, however, that the ordinance [did] not reach the type of very occasional showing at issue in this case." Further, noted the court, " '[z]oning rules generally only apply to the regular use of a building,' not occasional deviations from those uses." "One weekend of erotic films per year does not an adult theater make," said the court.

Having found that the Guild was not an "adult amusement establishment" under the ordinance, the court concluded that the Guild did not commit a zoning violation when it screened one pornographic film in an area that was not zoned for adult entertainment.

See also: *Tollis, Inc. v. San Bernardino County, 827 F.2d 1329 (9th Cir. 1987)*, modification on other grounds recognized by *Alameda Books, Inc. v. City of Los Angeles, 222 F.3d 719 (9th Cir. 2000)*, reversed on other grounds by *Alameda Books*, 535 U.S. at 429 (plurality opinion).

See also: *People v. Superior Court (Lucero), 49 Cal. 3d 14, 259 Cal. Rptr. 740, 774 P.2d 769, 775, 10 A.L.R.5th 1037 (1989).*

See also: *Executive Arts Studio, Inc. v. City of Grand Rapids, 391 F.3d 783, 796, 2004 FED App. 0425P (6th Cir. 2004).*

See also: *Pensack v. City and County of Denver, 630 F. Supp. 177, 181 (D. Colo. 1986).*

Compare: *BZAPS, Inc. v. City of Mankato, 268 F.3d 603, 607 (8th Cir. 2001)* (upholding city's application of adult zoning ordinance to a single adult amusement performance).

Case Note:

Although the court's reading of the City ordinance eliminated the need for the court to address the constitutional questions of whether the ordinance infringed on the Guild's free speech rights, the court did note that: "[c]ourts have expressed the concern that when municipalities include ordinary, generally non-adult amusement businesses in the sweep of their 'erogenous zoning' ordinances, they risk losing their focus on secondary effects, and may instead unconstitutionally target the content of the adult entertainment." The court noted that several courts have held that it would be unconstitutional for a municipality to place zoning restrictions on businesses that occasionally feature adult entertainment. Still, also noted the court, "[n]ot all courts that have considered the issue agree that it is unconstitutional to zone a business as 'adult' based on a single or occasional instance of adult entertainment."

Proceedings/Telecommunications Act—City denies cell phone tower construction permits in letters that do not detail reasons for denials

Mobile phone service provider contends failure to detail reasons in denial letters violates the Telecommunications Act

Citation: *T-Mobile South, LLC v. City of Milton, Ga., 2013 WL 4750549 (11th Cir. 2013)*

The Eleventh Circuit has jurisdiction over Alabama, Florida, and Georgia.

ELEVENTH CIRCUIT (GEORGIA) (09/05/13)—This case addressed the issue of whether a federal Telecommunications Act provision that requires cell phone tower construction permit denials to be "in writing" requires the decisions to be in a "separate writing," as opposed to simply the writing of the hearing transcript or minutes.

The Background/Facts: T-Mobile South, LLC ("T-Mobile") wanted to build three cell phone towers in Milton, Georgia (the "City") so that it could provide reliable in-home cell phone service for its existing customers in that area. Each of the three properties where T-Mobile wanted to locate its towers was zoned "agricultural." The City zoning regulations required T-Mobile to get a use permit in order to build the towers in the "agricultural" zone. Accordingly, in November 2009, T-Mobile applied to the City for use permits to construct the three towers.

At the conclusion of public hearings on the permit applications, the planning committee voted to recommend denial of the permits. The City Council denied two of the permit applications and conditionally approved the third. The City sent three separate letters to T-Mobile notifying it of the City's decisions. One letter was sent for each application. Two of the letters denying the applications for use permits did not recite the reasons why those applications were denied. Each one simply stated that the application was denied. A third letter informed T-Mobile that one of its applications had been approved subject to several conditions.

T-Mobile then filed a lawsuit against the City. It alleged violations of the federal Telecommunications Act of 1996 (the "Act") and sought injunctive relief. The lawsuit challenged the denial of the applications for two of the cell phone tower construction permits. It also challenged the conditional approval of the third application on the theory that the conditions put on approval effectively made it a denial. T-Mobile claimed that the City's action on each of the three permit applications violated provisions of the Act, including the provision that denials of applications be "in writing and supported by substantial evidence contained in a written record" (47 U.S.C.A. § 332(c)(7)(B)(iii)). Specifically, T-Mobile maintained that the writing requirement of the statute could only be satisfied if the decision was announced or reflected in a written document that contained a statement of reasons and that was separate from any hearing transcript or minutes of a meeting or hearing. Since, the City's denial and conditional approval letters did not detail reasons for the decision in writing, T-Mobile contended that they violated the Act's writing requirement.

The district court agreed. It entered an order concluding that the City had not met the writing requirement of § 332(c)(7)(B)(iii) with its denials of the permit applications for two of the proposed locations

"[b]ecause [the City's] written decisions did not include any reasoning." The court also concluded that the conditional approval of the application for the third proposed location was effectively a denial, which also failed to satisfy the writing requirement because it did not set forth any reasons for imposing the conditions it listed. The court remanded the matter.

Postremand, the City sent letters detailing the reasons for its two denials and one conditional approval.

T-Mobile then asked the court to reconsider the matter. It argued that remanding the matter to the City violated the Telecommunication Act's requirement that these cases be decided on an expedited basis. T-Mobile argued that a permanent injunction requiring the City to grant the permit applications was the only proper remedy for a violation of the § 332(c)(7)(B)(iii) writing requirement.

The court agreed. It concluded that an injunction requiring approval of the applications was the proper remedy for a violation of the Telecommunication Act's writing requirement.

The City appealed.

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

The United States Court of Appeals, Eleventh Circuit, found that the City's reasons for its denials and conditional approvals of T-Mobile's application were "detailed in the 181-page transcript of the [C]ity [C]ouncil's hearings on the applications and in the sixty-five pages of minutes of the Council's meeting and those hearings." Interpreting the words of the Telecommunications Act provision—that denials of cell tower construction permit applications be "in writing"—the court found it was "sufficient" for the decision to be "contained in a different written document or documents that the applicant is given or has access to"; it need not be detailed in a "separate writing" or in a "writing separate from the transcript of the hearing and the minutes of the meeting in which the hearing was held" or "in a single writing that itself contains all of the grounds and explanations for the decision." Rather, held the court, all of the written documents should be considered collectively, in deciding if the decision, whatever it must include, is in writing. Thus, here, the written documents available to T-Mobile collectively satisfied the writing requirement of the Telecommunications Act, § 332(c)(7)(B)(iii). Those documents included: transcripts of the planning commission's hearings (one on each application), which included the recommendations the planning commission made and the reasons it made them; transcripts of the City Council's hearings (one on each application) recounting the motions that were made and the reasons that were given for denying or conditionally approving each of the applications; and the letters the City sent to T-Mobile stating that

two of the permit applications were denied and that one was approved subject to listed conditions; and the detailed minutes of the City Council hearings, recounting all of the reasons for the action on each application along with the relevant discussion.

See also: *AT & T Wireless PCS, Inc. v. City Council of City of Virginia Beach, 155 F.3d 423 (4th Cir. 1998) (rejected by, PrimeCo Personal Communications, L.P. v. Village of Fox Lake, 26 F. Supp. 2d 1052 (N.D. Ill. 1998))* (similarly holding that a writing requirement was satisfied by a two-page summary of the minutes of a city council hearing along with a letter denying the application).

But compare: *Southwestern Bell Mobile Systems, Inc. v. Todd, 244 F.3d 51, 31 Envtl. L. Rep. 20578 (1st Cir. 2001)* (requiring "a written denial separate from the written record" and one containing sufficient explanation of the reasons to allow "meaningful judicial review," but finding that a zoning board's "short written decision" was enough even though it contained "little explanation and few facts"); *New Par v. City of Saginaw, 301 F.3d 390, 2002 FED App. 0276P (6th Cir. 2002)* (requiring that the written decision be separate from the record, describe the reasons for the denial, and contain a sufficient explanation to allow a court to evaluate it against the evidence in the record); *Omnipoint Holdings, Inc. v. City of Southfield, 355 F.3d 601 (6th Cir. 2004)* (distinguishing the *Todd* decision, which involved a zoning board decision, and holding that a formal city council resolution stating the reasons for denial of the application satisfied the writing requirement); *MetroPCS, Inc. v. City and County of San Francisco, 400 F.3d 715 (9th Cir. 2005)* (requiring a written denial separate from the written record with sufficient explanation to allow for judicial review, and holding that a five-page written decision separate from the record, which summarized the facts, recounted the proceedings, articulated the reasons, and explained the evidentiary basis for the denial, was sufficient); *Helcher v. Dearborn County, 595 F.3d 710, 64 A.L.R. Fed. 2d 661 (7th Cir. 2010)* (requiring "a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons," without mentioning whether the written explanation had to be separate from the record, but holding that the 17-page minutes of a zoning board of appeals' meeting met that requirement).

Moratorium—Municipality approves subdivision plat and subsequently enforces sewer connection moratorium against property

Developer contends property's approval for subdivision exempts it from the moratorium, per state statutory law

Citation: *City of Lorena v. BMTP Holdings, L.P., 56 Tex. Sup. Ct. J. 1115, 2013 WL 4730647 (Tex. 2013)*

TEXAS (08/30/13)—This case addressed the issue of whether property approved for subdivision is exempt from any development moratorium based on shortages of public facilities, under Texas statutory law, Local Government Code Chapter 212, or whether exemption is only available to properties approved for construction.

The Background/Facts: BMTP Holdings, L.P. ("BMTP") was a residential real estate developer operating in the City of Lorena, Texas (the "City"). As a developer, BMTP did not construct residences. Rather, it obtained municipal approval of plats to divide property into residential lots and build community infrastructure such as roads, storm drains, curbs, and taps into the municipality's sewer system. BMTP then would sell the subdivided property to builders who would obtain municipal permits and construct houses on the lots. Prior to 2003, BMTP began subdividing the property at issue for a residential subdivision named South Meadows Estates.

In January 2006, the City Council approved the final plat for the final phase (phase five) of South Meadows Estates. The City Manager then executed the plat, indicating the City's acceptance of it and its eligibility for filing with the county clerk's office. In the spring of 2006, BMTP began building the infrastructure for the fifth phase of the development, which it completed in May 2006.

On June 5, 2006, upon engineers' determination that the City's sewage system was over capacity, the City enacted a 120-day moratorium on sewer tap permits. That moratorium was extended seven times. In November 2008, a new, and virtually similar, moratorium was enacted.

The City informed BMTP that it intended to enforce the moratorium against seven remaining unsold lots in South Meadows Estates. BMTP asserted that the City had already approved the plats for the seven lots, thus exempting them by law from any moratorium.

Section 212.135 of the Texas Local Government Code provides that "[a] moratorium is justified by demonstrating a need to prevent the shortage of essential public facilities. The municipality must issue written findings based on reasonably reliable information." One such required finding is "a summary of: . . . evidence demonstrating that the moratorium is reasonably limited to . . . property that has not been approved for development because of the insufficiency of existing essential public facilities." (§ 212.135(b)(2)(B).)

Disputing what constituted "development" exempt from moratorium, the City responded that the seven lots would not be exempted because the City had only approved the lots for subdivision, not construction.

BMTP filed a legal action. It asked the court to declare that the moratorium could not be enforced against its remaining seven lots.

Finding there were no material facts in dispute, and deciding the matter on the law alone, the trial court granted summary judgment to the City.

BMTP appealed, and the court of appeals reversed. The court of appeals held that § 212.135 of the Local Government Code prohibits municipalities from enforcing moratoria against approved development. Also, the court of appeals held that development, as defined by Chapter 212 of the Local Government Code, was defined as subdivision or construction.

The City appealed.

DECISION: Judgment of court of appeals affirmed.

The Supreme Court of Texas also held that development, as defined by Chapter 212 of the Local Government Code, was defined as subdivision or construction. Thus, it concluded that a property need not be approved for both the subdivision and construction aspects of development to be insulated from moratoria regarding shortages of essential public facilities; it is insulated from such subsequent moratoria when the municipality approves either subdivision or construction. (Tex. Loc. Gov't Code §§ 212.131(3), 212.135(b)(2)(B).)

In so holding, the court gave "effect to the statute's plain language." Again, Chapter 212 of Texas' Local Government Code allows municipalities to enact temporary moratoria on "property development" if they can demonstrate the moratoria are needed to prevent a shortage of essential public facilities. That right, however, is subject to certain limitations. One limitation is that a municipality may not enact such a moratorium unless it contains a summary of evidence showing that it is limited to property that has not been approved for development. The statute defines development as: "the construction . . . of residential or commercial buildings or the subdivision . . . of residential or commercial property."

The City contended that because development is defined as subdivision "or" construction, municipalities could place a moratorium on construction for property they have approved for subdivision.

The Supreme Court of Texas disagreed. It noted that the Legislature's use of the disjunctive word "or" is significant when interpreting statutes. Here, it found that by using the word "or" in defining "development," the Legislature indicated that these distinct aspects (i.e., subdivision and construction) were brought within the singular scope of the term development. Thus, the court concluded that, under the plain language of the statute, subdivision constitutes development; and thus, a moratorium may not affect property previously approved for subdivision (or construction).

Here, the court found that the City had approved BMTP's final plat in January 2006—almost two years before it passed the November 2008 moratorium at issue and four months before it passed any moratorium (i.e., the June 2006 moratorium). The court concluded that because the City approved the residential subdivision for the seven lots at issue, the property constituted approved development under Chapter 212, and, accordingly, the moratorium could not validly apply against BMTP's seven lots.

See also: *State ex rel. State Dept. of Highways and Public Transp. v. Gonzalez, 82 S.W.3d 322 (Tex. 2002).*

See also: *Spradlin v. Jim Walter Homes, Inc., 34 S.W.3d 578 (Tex. 2000).*

Case Note:

BMTP had also brought a claim for inverse condemnation. It asserted that the wrongful application of the moratorium amounted to a regulatory taking. The court found that factual disputes persisted that the trial court had to first resolve with respect to the extent of the moratorium's interference with BMTP's use and enjoyment of its property before a court could determine if a taking had occurred.

Zoning News from Around the Nation

ARIZONA

"Concluding state legislators likely violated the Arizona Constitution, the Attorney General's Office has agreed not to enforce some new laws governing homeowner associations. . . . [T]he state agreed to accept a court order that eight separate provisions of SB 1454 were

enacted illegally and are void. These include language that was designed to prohibit cities and counties from requiring developers to establish planned communities as a condition of getting the necessary zoning or permits." The remainder of the measure, which makes various changes in general election laws, will take effect as scheduled.

Source: *Maricopa Monitor;* *www.trivalleycentral.com/maricopa_monitor/*

MISSOURI

The Webster Groves City Council "approved imposing a moratorium of up to six months on the issuing of permits for the development, construction or placement of wireless communications infrastructure, including wireless cell towers, within the city." Reportedly, the City Council determined that "[t]he moratorium was needed to allow the city time to study whether to update its own laws regarding wireless communications infrastructure, in light of new state laws that were to have become effective Aug. 28." Those new laws would have regulated municipal ability to enforce zoning and other regulations regarding wireless communications facilities. However, in response to a lawsuit by some cities, a preliminary injunction has been issued that has temporarily delayed the new laws from becoming effective.

Source: *Webster Kirkwood Times;* *www.websterkirkwoodtimes.com*

PENNSYLVANIA

State Senator Larry Farnese has introduced legislation aimed at protecting neighborhood organizations and community groups from Strategic Lawsuits Against Public Participation ("SLAPPs"). According to Farnese's office, 27 states have thus far adopted anti-SLAPP legislation. Pennsylvania passed a limited SLAPP measure in 2000, but the law only applies to environmental law and regulatory processes.

Source: *The Pennsylvania Record;* *http://pennrecord.com*

A Pennsylvania state representative recently announced that "she intends to introduce legislation eliminating the controversial prohibitions on local regulation of fracking that are currently embroiled in a constitutional challenge in front of the state's high court."

Source: *Law 360;* *www.law360.com*

QUINLAN™ November 10, 2013 | Volume 7 | Issue 21

Zoning Bulletin

in this issue:

WEST®

Mat #41330022

Proceedings/Telecommunications Act—City denies cell phone tower application in three-sentence letter

Mobile phone service provider contends failure to detail reasons in denial letter violates the Telecommunications Act

Citation: *T-Mobile South, LLC v. City of Roswell, Ga., 2013 WL 5434710 (11th Cir. 2013)*

Contributors

Corey E. Burnham-Howard

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

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

WEST®

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

The Eleventh Circuit has jurisdiction over Alabama, Florida, and Georgia.

ELEVENTH CIRCUIT (GEORGIA) (10/01/13)—This case addressed the issue of whether a city's three-sentence denial of a mobile phone service provider's request for a permit complied with the "in-writing" requirement of the federal Telecommunications Act provision that requires cell phone tower construction permit denials to be "in writing" and supported by substantial effort contained in a written record.

The Background/Facts: T-Mobile South, LLC ("T-Mobile") submitted an application to construct a 108-foot-tall cell tower on a specific property in Roswell, Georgia (the "City"). The City's Planning and Zoning Division (the "Planning Department") concluded that all ordinance requirements for construction of the cell tower were met. The Planning Department recommended that the Mayor and the City Council approve the application, subject to certain conditions. On April 12, 2010, a public hearing was held on T-Mobile's application. After hearing much opposition to the application, the City Council members concluded that the proposed cell tower would be "incompatible with the natural setting and surrounding structures, particularly due to the proposed tower's height being greater than the surrounding trees." The City Council passed a motion to deny the application.

Two days later, the Planning Department sent a letter to T-Mobile. The letter was three sentences long. It provided as follows:

> Please be advised the City of Roswell Mayor and City Council denied the request from T-Mobile for a 108' mono-pine alternative tower structure during their April 12, 2010 hearing. The minutes from the aforementioned hearing may be obtained from the city clerk. Please contact Sue Creel or Betsy Branch at [phone number].

A month later, T-Mobile filed a legal action against the City. It alleged that the City's denial of its cell tower application was not "in writing" and supported by substantial evidence in the record and would effectively prohibit the provision of wireless service in violation of the federal Telecommunications Act of 1996 ("TCA"). T-Mobile also sought an injunction, asking the court to order the City to grant it the requested permit.

Finding there were no material issues of fact in dispute and deciding the matter on the law alone, the district court issued summary judgment in favor of T-Mobile. The court held that the City's short denial letter failed to satisfy the "in writing" requirement contained in 47 U.S.C.A. § 332(c)(7)(B)(iii) of the TCA.

Section 332(c)(7)(B)(iii) requires that a state or local government's decision denying a request for a permit to erect a cell tower be "in writing and supported by substantial evidence contained in a written record."

The district court held that the "in writing" requirement necessitated that the City provide a separate written document delineating the specific reasons for its decision.

The City appealed. On appeal, the City contended that its denial of T-Mobile's application satisfied the "in writing" requirement in § 332(c)(7)(B)(iii) because the City's decision was reduced in writing in numerous forms, including the denial letter, the hearing minutes, and the hearing transcript.

DECISION: Judgment of district court reversed and matter remanded.

The Court of Appeal, Second District, Division 1, California, agreed with the City. Reiterating its holding in its recent decision in *T-Mobile South, LLC v. City of Milton, Ga., 58 Communications Reg. (P & F) 1590, 2013 WL 4750549 (11th Cir. 2013)* (which was summarized in the previous issue of this *Zoning Law Bulletin*), the court adopted a plain reading of § 332(c)(7)(B)(iii). The court stated that the "in-writing" requirement does not require a municipal decision be "in a separate writing" or in a "writing separate from the transcript of the hearing and the minutes of the meeting in which the hearing was held" or "in a single writing that itself contains all of the grounds and explanations for the decision." Rather, the court found that "to the extent that the decision must contain grounds or reasons or explanations, it is sufficient if those are contained in a different written document or documents that the applicant is given or has access to."

Here, the court found that the collective "writings" that T-Mobile had access to satisfied the writing requirement of § 332(c)(7)(B)(iii). Those collective documents included: (1) the letter explicitly denying T-Mobile's request; (2) the minutes summarizing the April 12, 2010 hearing and recounting the reasons for the denial; and (3) a verbatim transcript of the April 12, 2010 hearing during which the City Council denied the request.

See also: *T-Mobile South, LLC v. City of Milton, Ga., 58 Communications Reg. (P & F) 1590, 2013 WL 4750549 (11th Cir. 2013).*

Case Note:

In reaching its decision, the court rejected the "pragmatic" reading of the "in writing" requirement employed by the district court in the instant case and by several of its sister circuits. Those courts have required that a written denial must be "separate from the written record" and "must contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." See, e.g., Southwestern Bell Mobile Systems, Inc. v. Todd, 244 F.3d 51, 60, 31 Envtl. L. Rep. 20578 (1st Cir. 2001); New Par v. City of Saginaw, 301 F.3d 390, 395-96, 2002 FED App. 0276P (6th Cir. 2002); MetroPCS, Inc. v. City and County of San Francisco, 400 F.3d 715, 721-23 (9th Cir. 2005).

Rezoning—State council on affordable housing issues third-round rules, providing growth share approach to meeting affordable housing objectives

Opponents contend growth share approach conflicts with state's Fair Housing Act approach to affordable housing

Citation: *In re Adoption of N.J.A.C. 5:96, 2013 WL 5356807 (N.J. 2013)*

NEW JERSEY (09/26/13)—This case addressed the issue of whether the growth share approach adopted in the New Jersey Council on Affordable Housing's third-round substantive rules for calculating affordable housing needs and criteria for satisfaction of needs was permissible and valid or was invalid and in conflict with the New Jersey Fair Housing Act.

The Background/Facts: In what is known as its *Mount Laurel* decisions, the New Jersey Supreme Court has recognized a constitutional obligation that municipalities, in the exercise of their delegated power to zone, "afford [ ] a realistic opportunity for the construction of [their] fair share of the present and prospective regional need for low and moderate income housing." In the absence of a legislative response to the constitutional imperative set forth in the court's *Mount Laurel I* decision, the court, in its *Mount Laurel II* decision, fashioned "a remedy that was necessary to meet the urgency of the problem." The court imposed definitive quantitative obligations to be fulfilled within fixed periods. That remedy "was designed to curb exclusionary zoning practices and to foster development of affordable housing for low- and moderate-income individuals."

Then, in 1985, the New Jersey Legislature enacted the Fair Housing Act ("FHA"). (See N.J.S.A. 52:27D-302.) The FHA set forth particularized means by which municipalities could satisfy their obligation, mirroring the judicially crafted remedy. Further, the FHA created the Council on Affordable Housing ("COAH"), and provided it with rule making and adjudicatory powers to execute the provision of affordable housing. (N.J.S.A. 52:27D-305.) The FHA directed COAH to develop criteria establishing municipal determinations of present and prospective fair share of housing that would result in firm, fair share allocations. (N.J.S.A. 52:27D-307.)

In December 2004, and as revised and adopted in October 2008, COAH promulgated its third round of substantive rules for calculating affordable

housing needs and the criteria for the satisfaction of such needs (the "Third Round Rules"). Among other things, in the Third Round Rules, COAH proposed a new approach—a "growth share" methodology—for assessing prospective need in the allocation of a municipality's fair share of the region's need for affordable housing. This growth share approach tied a municipality's affordable housing obligation to its own *actual* rate of growth. Thus, under the growth share methodology, a municipality's constitutional obligation "would be a simple . . . alloca[tion of] a share of whatever growth *actually* occurs to low-and moderate-housing." Municipalities would accrue affordable housing obligations as a percentage of the residential and nonresidential growth that occurred within its borders.

The New Jersey Builders Association and affordable housing advocacy organizations, among others, (the "Opponents") challenged the validity of COAH's Third Round Rules. They maintained that the growth share approach in the Third Round Rules was inconsistent with the *Mount Laurel* directives and the FHA. They argued that the Third Round Rules were inconsistent with the FHA's command to COAH "to develop criteria establishing municipal determinations of present and prospective fair share of housing that results in *firm*, fair share allocations."

The Superior Court, Appellate Division agreed with the Opponents. The Appellate Division expressed doubt about whether any growth share methodology adopted by COAH could be compatible with the *Mount Laurel II* remedy that "appears to militate against the use of" a growth share approach for determining a municipality's affordable housing obligation. The Appellate Division invalidated a substantial portion of the Third Round Rules, including the growth share methodology used by COAH. It remanded the matter to COAH to promulgate a new set of rules.

COAH appealed.

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

The Supreme Court of New Jersey recognized that its judicial remedy imposed in its *Mount Laurel* decisions reflected the conditions of the time, 30 years ago, and emphasized that that remedy "should not now be viewed as a constitutional straightjacket to legislative innovation." Nevertheless, the court also found that the growth share methodology of the Third Round Rules conflicted with the FHA and were therefore invalid.

The court explained that, under the Third Round Rules' growth share methodology, even if a municipality were allocated a large projected growth share obligation—based on COAH projections, if the municipality's actual growth fell below that rate, its growth share obligation would be reduced to reflect that slowed residential and job growth. The court found that result was: facially inconsistent with the FHA's command to COAH "to develop criteria establishing municipal determinations of present and prospective fair share of housing that results in firm, fair share al-

locations" (N.J.S.A. 52:27D-307), against which the municipality's housing element may be designed (N.J.S.A. 52:27D-310), and reviewed for substantive certification purposes (N.J.S.A. 52:27D-313, -314).

The court further explained that the FHA "sets forth the framework of a remedy that precludes COAH from taking the liberty to fashion a new growth share methodology" that: (1) "allows for the devising of residential and commercial affordable housing ratios for projected need that are not tied to a regional need for affordable housing"; and (2) "leaves open-ended how or whether projected need for a housing region will be fulfilled." The court found that the FHA was "replete with references tying affordable housing obligations to a region, not obligations formed on a statewide basis." Also, the court found the FHA "requires a specifically allotted number of units for satisfaction of both present and prospective need based on a housing region."

In sum, the court found that the FHA's language was an impediment to COAH's "unilateral decision to devise a wholly new approach to determining fair share." The court said that "COAH may implement the FHA's scheme, not come up with a wholly new one."

Finding the COAH regulations were not severable, the court found them wholly invalid, and affirmed the Appellate Division's remand to COAH for a "new adoption of regulations to govern the third round municipal obligations consistent with the strictures of the FHA."

See also: *Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158, 456 A.2d 390 (1983).*

See also: *Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp., 67 N.J. 151, 336 A.2d 713 (1975).*

Case Note:

The court also found the Third Round Rules' growth share methodology was "at odds with the remedy adopted in Mount Laurel II, which imposed definitive quantitative obligations to be fulfilled within fixed periods" because it was not: premised on region-specific housing data evidencing the region's need; or structured to establish a firm obligation in respect of prospective affordable housing need. Still, the court went on to recognize that "the judicial remedy that was fashioned [in the Mount Laurel decisions] based on a record created thirty years ago should not be viewed as the only one that presently can secure satisfaction of the constitutional obligation to curb exclusionary zoning and promote the development of affordable housing in the housing regions of this state." The court stated that, "[a]ssuming that ordered development will continue to be used as a tool in the delivery of affordable housing, the [New Jersey] Legislature should determine how best to utilize that means in the promotion of affordable housing suited for the needs of housing regions" by revising the FHA.

More specifically, the court stated that "the Legislature has to enact an alterna-

tive remedy—such as some version of the one proposed by COAH in the Third Round Rules—in order for that remedy [(i.e., such as a growth share approach)] to be statutorily permissible."

Conditions on approval—planning board approves preliminary plat

Planning Board then imposes additional requirements in conditional final plat approval

Citation: *Nickart Realty Corp. v. Southold Town Planning Bd., 109 A.D.3d 930, 2013 WL 5226146 (2d Dep't 2013)*

NEW YORK (09/18/13)—This case addressed the issue of whether a planning board could impose additional requirements after granting conditional preliminary approval.

The Background/Facts: Nickart Realty Corp. ("Nickart") owned a parcel of property in the Town of Southold (the "Town") in Suffolk County (the "County"). Nickart sought to subdivide the parcel into two lots and build a single-family dwelling on each. Nickart submitted to the Town's Planning Board a subdivision plan. That subdivision plan expressly referenced the grant of a variance Nickart had received from the County Department of Health Services ("DHS"). That DHS variance permitted Nickart to install a private on-site sewage system. That variance was based, in part, on the transfer, from another parcel of real property to the Nickart parcel, of a type of development right known as a "sanitary flow credit."

In April 2010, the Planning Board granted conditional preliminary approval of Nickart's subdivision plan. In June, 2010, the Planning Board deemed substantially complete Nickart's application for final plat approval. However, in July, 2010, the Planning Board adopted a resolution granting a "conditional" final plat approval, requiring, for the first time, that Nickart submit proof of either: (1) its compliance with chapter 117 of the Town's Code, which places strict limits of sanitary-flow-credit development rights; or (2) approval by the DHS for the two-lot subdivision that was not dependent on a transfer of a sanitary flow credit.

Thereafter, Nickart commenced a legal action. It asked the court to declare that the Planning Board's resolution granting a "conditional" final plat approval was invalid insofar as it imposed the new condition.

The supreme court agreed with Nickart.

The Planning Board appealed.

DECISION: Judgment of Supreme Court, Suffolk County, affirmed.

The Supreme Court, Appellate Division, Second Department, New

York, held that although the Planning Board's approval of the preliminary plat in April 2010, did not guarantee approval of the final version, "a planning board may not, in the absence of significant new information, deny final approval if a property owner implements the modifications or conditions required by a preliminary approval."

Here, the court found that the Planning Board had "long known that the [DHS's] approval of a [County] Sanitary Code variance was based on the transfer of sanitary flow credits." In fact, the Planning Board had specifically referenced that transfer in its April 2010 conditional preliminary approval. The court concluded that, inasmuch as no significant new information came to light after the Planning Board gave its approval to the preliminary plat, its imposition of additional requirements in the conditional final approval was arbitrary and capricious.

See also: *Long Island Pine Barrens Soc., Inc. v. Planning Bd. of Town of Brookhaven, 78 N.Y.2d 608, 578 N.Y.S.2d 466, 585 N.E.2d 778 (1991).*

See also: *Bagga v. Stanco, 90 A.D.3d 919, 934 N.Y.S.2d 493 (2d Dep't 2011).*

Rezoning—City denies application for certificate of appropriateness after more than 60 days

Applicant argues a certificate of appropriateness is a "written request relating to zoning" that requires a 60-day approval or denial per statute

Citation: *500, LLC v. City of Minneapolis, 2013 WL 5348308 (Minn. 2013)*

MINNESOTA (09/25/13)—This case addressed the issue of whether an application for a certificate of appropriateness is "a written request relating to zoning," under Minnesota statutory law (Minn. Stat. § 15.99, subd. 2(a)), such that the municipalities evaluating a certificate of appropriateness must comply with the statutory 60-day time line for responding to such "written requests relating to zoning."

The Background/Facts: 500, LLC ("500 LLC") was a real-estate firm that owned a vacant four-story building (the "property") located in Minneapolis, Minnesota (the "City"). 500 LLC sought to develop the property into an office building. 500 LLC sought site plan approval from the City. The City Council approved 500 LLC's site plan application.

However, before the City Council reviewed 500 LLC's site plan ap-

plication, the Minneapolis Heritage Preservation Commission (the "Commission") nominated the property for designation as a local historic landmark. The Commission's action placed the property under "interim protection," which prohibits "destruction or inappropriate alteration [of a nominated property] during the designation process" in the absence of a "certificate of appropriateness."

On May 6, 2009, 500 LLC submitted an application for a certificate of appropriateness to the Commission. Following a public hearing and a series of administrative appeals, the City Council denied the application for a certificate of appropriateness on July 31, 2009. Approximately 10 months later, the City Council approved a resolution designating the property as a local historic landmark. The designation became final and effective on June 5, 2010.

In October 2010, 500 LLC brought a legal action against the City. Among other things, 500 LLC alleged that the City violated Minnesota statutory law—Minn. Stat. § 15.99, subd. 2(a)—because it failed to approve or deny the application for a certificate of appropriateness within 60 days.

Section § 15.99, subd. 2(a), states in relevant part as follows:

> [A]n agency must approve or deny within 60 days a written request relating to zoning . . . for a permit, license, or other governmental approval of an action. Failure of an agency to deny a request within 60 days is approval of the request.

500 LLC maintained that its application for a certificate of appropriateness was "a written request relating to zoning." As such, it further alleged that the City's failure to approve or deny the application resulted in its automatic approval at the end of the 60-day period. 500 LLC asked the court to declare that, therefore, its "application for [a] Certificate of Appropriateness [was] approved and granted by operation of law."

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the district court granted summary judgment to the City. In so holding, the court concluded that Minn. Stat. § 15.99, subd. 2(a), did not apply to an application for a certificate of appropriateness because "decisions regarding historic preservation are not brought into or linked in logical or natural association with actual zoning decisions."

500 LLC appealed. The court of appeals affirmed. The court of appeals reasoned that a "written request relating to zoning" is "a request to conduct a specific use of land within the framework of the regulatory structure relating to zoning or, in other words, a zoning application." Because an application for a certificate of appropriateness was a request to "make alterations to the property," not to conduct a specific use of the land, the court concluded that an "application for a certificate of appropriateness [was] not a request relating to zoning."

500 LLC appealed. On appeal, the parties agreed that an application for

a certificate of appropriateness was a "written request." However, the parties disagreed as to whether an application for a certificate of appropriateness "relat[es] to zoning" under Minn. Stat. § 15.99, subd. 2(a), and is therefore subject to the 60-day time line for approval or denial.

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

The Supreme Court of Minnesota held that an application for a certificate of appropriateness is a "written request relating to zoning," and is therefore subject to the 60-day review limitation.

Looking at the plain language of the statute (§ 15.99, subd. 2(a)) and the definitions of the phrase "relating to" and the term "zoning," the court interpreted the phrase "a written request relating to zoning" to refer to: "a written request that has a connection, association, or logical relationship to the regulation of building development or the uses of property."

The court noted that: "[i]f a written request has such a connection, association, or logical relationship, then the 60-day time limit in. § 15.99, subd. 2(a), applies."

In so holding, the court rejected the City's argument that a "written request relating to zoning" referred only to those requests that were explicitly authorized by an applicable zoning ordinance or statute. The court said the City's interpretation ignored the phrase "relating to" and added words of limitation (i.e., authorized by statutes or ordinances) that were not in. § 15.99, subd. 2(a).

Having interpreted the meaning of "a written request relating to zoning," the court went on to conclude that an application for a certificate of appropriateness is a written request related to zoning under Minn. Stat. § 15.99, subd. 2(a). The court reached that conclusion upon finding that: (1) heritage-preservation proceedings have a connection, association, or logical relationship to zoning, and certificates of appropriateness involve a particular property and affect specific property rights; (2) Minnesota's historic-preservation-enabling laws recognize a connection, association, or logical relationship between heritage preservation and zoning, and a municipality's powers in historic-preservation matters extend to zoning; and (3) the City's heritage-preservation ordinances identify a connection, association, or logical relationship between an application for certificate of appropriateness and zoning.

Finally, since the City had conceded that it failed to approve or deny 500 LLC's application for a certificate of appropriateness within 60 days, the court reversed the grant of summary judgment to the City; it remanded the matter for further proceedings consistent with its opinion.

See also: *In re Denial of Eller Media Company's Applications for Outdoor Advertising Device Permits in City of Mounds View, 664 N.W.2d 1 (Minn. 2003).*

See also: *Calm Waters, LLC v. Kanabec County Bd. of Com'rs, 756 N.W.2d 716 (Minn. 2008).*

Zoning News from Around the Nation

CALIFORNIA

Two Los Angeles City Council members have introduced a zoning amendment proposal "that would outlaw fracking and related methods such as 'acidizing.' " The proposal has been referred to the City Council's Planning and Land Use Management Committee for review and public hearings.

Source: *Los Angeles Times; www.latimes.com*

The California State Senate has passed a bill, AB 1229, that would "ensure that local governments can require affordable housing set-asides in new developments, if they choose." Reportedly, the bill is intended to address "uncertainty and confusion created by a 2009 appellate court ruling that the state's rent control law, the Costa-Hawkins Act, prohibits such programs for rental housing." The bill now awaits Governor Brown's signature or veto.

Source: *http://sdgln.com/news*

MASSACHUSETTS

The City of Worcester's Planning Board has advanced to the City Council proposed zoning rules for siting medical marijuana dispensaries in the city. Reportedly, two board members support limiting medical marijuana dispensaries to areas zoned for business-general, manufacturing-general and institutional-hospital uses, two other board members favor expanding it to also include areas zoned for light manufacturing. The City Council can accept, amend or reject the board's recommendations. In Massachusetts, "[w]ithout local zoning restrictions, medical marijuana dispensaries could locate anywhere in the city, except for within 500 feet of a school, day care center or facility where children congregate."

Source: *Worcester Telegram & Gazette; www.telegram.com*

RHODE ISLAND

The City of Pawtucket is considering an ordinance that would residents to raise chickens and honeybees. The proposed ordinance would allow one hen per 800 square feet of land, with a maximum of six chickens per lot. It would permit honeybees only on lots of at least 7,000 square feet.

Source: *Providence Journal; www.providencejournal.com*

QUINLAN™ November 25, 2013 | Volume 7 | Issue 22

Zoning Bulletin

in this issue:

WEST®

Mat #41330023

Discrimination—City enacts ordinance that prohibits group homes in residential areas

Group home operators allege ordinance illegally discriminates against them

Citation: *Pacific Shores Properties, LLC v. City of Newport Beach, 2013 WL 5289100 (9th Cir. 2013)*

Contributors

Corey E. Burnham-Howard

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

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

WEST®

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

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

NINTH CIRCUIT (CALIFORNIA) (09/20/13)—This case addressed the issue of whether the only way a plaintiff (i.e., the party bringing the lawsuit) in an antidiscrimination zoning case may survive summary judgment and bring the case to trial is to identify similarly situated individuals who were treated better than themselves, or whether there are other ways they may demonstrate that intentional discrimination has occurred, such as through direct or circumstantial evidence.

The Background/Facts: In 2008, the City of Newport Beach, California, (the "City") enacted an ordinance (the "Ordinance") which had the practical effect of prohibiting new group homes from opening in most residential zones. Group homes are facilities in which recovering alcoholics and drug users live communally and mutually support each other's recovery. Under the Ordinance, even in the few areas where they were permitted to open, new group homes were required to submit to a permit process. Existing group homes also had to undergo the same permit process in order to continue their operations.

Prior to the Ordinance's enactment, the City treated group homes as "single housekeeping units." "Single housekeeping units" were generally permitted to locate in all residential zones without any special permit. The Ordinance's "key innovation" was to amend the definition of "single housekeeping unit" to exclude group homes. This was accomplished in two critical ways: the amended definition added the requirements that (1) a single housekeeping unit must have a single, written lease; and (2) the residents themselves must decide who will be a member of the household. As a result of those amendments, group homes no longer qualified as "single housekeeping units" because the residents did not sign written leases and were chosen by staff (instead of by each other) to ensure the maintenance of a sober environment. Instead, the Ordinance regulated group homes as "residential care facilities" (i.e., facilities in which disabled individuals reside together but not as a "single housekeeping unit"). As "residential care facilities," group homes faced significant restrictions, including on location.

Three group homes operators, as well as several individuals, including a group home owner and former residents of a group home (collectively, the "Group Homes"), sued the City. They alleged that the Ordinance discriminated against them as facilities that provide housing opportunities for disabled individuals recovering from addiction. They alleged that the Ordinance was discriminatory in violation of, among other things, the federal Fair Housing Act ("FHA") and the Americans with Disabilities Act ("ADA").

The FHA renders it unlawful "[t]o discriminate in the sale or rental,

or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap[.]" (42 U.S.C.A. § 3604(f)(1).) Persons recovering from drug and/or alcohol addiction are considered disabled under the FHA and therefore protected from housing discrimination. (See 42 U.S.C.A. § 3602(h).) Group homes such as the ones that were at issue here are "dwellings" under the FHA (42 U.S.C.A. § 3602(b)), and therefore the FHA prohibits discriminatory actions that adversely affect the availability of such group homes. Moreover, it is well established that zoning practices that discriminate against disabled individuals can be discriminatory, and therefore violate § 3604, if they contribute to "mak[ing] unavailable or deny[ing]" housing to those persons.

The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." (42 U.S.C.A. § 12132.) Like the FHA, the ADA's protections extend to persons recovering from drug or alcohol addiction. Also like the FHA, the ADA prohibits governmental entities from discriminating against disabled persons through zoning.

The Group Homes presented evidence that showed that the City's purpose in enacting the Ordinance was to exclude group homes from most residential districts and to bring about the closure of existing group homes in those areas. The evidence also showed that the Ordinance regulated other types of group residential arrangements primarily for the purpose of maintaining a "veneer of neutrality." For example, while the Ordinance facially imposed restrictions on some other types of group living arrangements as well, the City did not impose similar regulations on properties rented to vacationing tourists, which are similar to group homes in regular turnover of occupants.

The district court acknowledged the evidence that the City acted with a discriminatory motive but found that evidence "irrelevant" because, it stated, the City had not treated group homes any worse than certain other group living arrangements. The court also found that the Group Homes failed to create a triable issue of fact as to whether the losses that they claimed their businesses suffered were caused by the enactment or enforcement of the Ordinance. Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the district court issued summary judgment in favor of the City.

The Group Homes appealed.

DECISION: Judgment of district court reversed and matter remanded.

The United States Court of Appeals, Ninth Circuit, held that where, as here, in a zoning-related matter there is direct or circumstantial evi-

dence that the defendant (i.e., here the City) has acted with a discriminatory purpose and has caused harm to members of a protected class (i.e., here "disabled" recovering addicts), such evidence is sufficient to permit the protected individuals to proceed to trial under a disparate treatment theory.

In so holding, the court found that its cases "clearly establish that plaintiffs [(i.e., here the Group Homes)] who allege disparate treatment under statutory anti-discrimination laws need not demonstrate the existence of a similarly situated entity who or which was treated better than the plaintiffs in order to prevail." Instead, said the court, the plaintiff may "simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated" the defendant (i.e., here the City) and that the defendant's actions adversely affected the plaintiff in some way.

The court further explained that having taken the latter "direct or circumstantial evidence" approach, the Group Homes' claim would survive summary judgment and bring the issue to trial if they could show that the City's actions were motivated by a discrimination through evidence of the following factors, among other potential factors: (1) "statistics demonstrating a 'clear pattern unexplainable on grounds other than' discriminatory ones"; (2) "[t]he historical background of the decision"; (3) "[t]he specific sequence of events leading up to the challenged decision"; (4) "the [City's] departures from its normal procedures or substantive conclusions"; and (5) "relevant 'legislative or administrative history.' "

The court found that the Group Homes did establish evidence of those factors. The court found that the Group Homes showed: (1) the legislative history indicated that the Ordinance was enacted for the purpose of eliminating or reducing the number of group homes throughout the City; (2) statistics, provided by the City, indicated the Ordinance had the effect of reducing group home beds by 40%; and (3) evidence that group homes were specifically targeted for enforcement.

The court also held that the Group Homes created a triable issue of fact as to whether the losses that their businesses suffered were caused by the enactment and enforcement of the Ordinance. The court acknowledged that the Group Homes had presented evidence that: they experienced a significant decline in business after the Ordinance's enactment; the publicity surrounding the Ordinance greatly reduced referrals; and current and prospective residents expressed concern about whether the Group Homes would close. Further, the court held that the costs borne by the Group Homes to present their permit applications and the costs spent assuring the public that they were still operating despite the City's efforts to close them were compensable.

The court concluded that the Group Homes had created a triable is-

sue of fact that the Ordinance was enacted in order to discriminate against them on the basis of disability, and that its enactment and enforcement harmed them. The court reversed the district court's dismissal of the Group Homes' claims and remanded the matter.

See also: *Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).*

See also: *Hunter v. Underwood, 471 U.S. 222, 105 S. Ct. 1916, 85 L. Ed. 2d 222 (1985).*

See also: *The Committee Concerning Community Improvement v. City of Modesto, 583 F.3d 690, 703 (9th Cir. 2009).*

Case Note:

In its decision, the court explained that the case "demonstrates why requiring anti-discrimination plaintiffs to prove the existence of a better-treated equity would lead to unacceptable results": "Plaintiffs in anti-discrimination suits would be unable to demonstrate the discriminatory intent of a defendant that openly admitted its intent to discriminate, so long as the defendant (a) relies on a facially neutral law or policy and (b) is willing to 'overdiscriminate' by enforcing the facially neutral law or policy even against similarly-situated individuals who are not members of the disfavored group. Such a rule presents the 'grotesque scenario where a[ ] [defendant] can effectively immunize itself from suit if it is so thorough in its discrimination that all similarly situated [entities] are victimized,' " said the court.

Interpretation of Zoning Ordinance—After zoning enforcement officer issues zoning permit to build on lot, adjacent lot owners appeal

They argue that in issuing the permit the officer misinterpreted the term "separately owned" in the zoning regulation

Citation: *Cockerham v. Zoning Bd. of Appeals of Town of Montville, 146 Conn. App. 355, 2013 WL 5458814 (2013)*

CONNECTICUT (10/08/13)—This case addressed the issue of

which of two plausible interpretations of the term "separately owned"—in zoning regulations providing that nonconforming lots, which could be used for single-family residences, were lots that were separately owned prior to the enactment of the town's zoning regulations—should be applied.

The Background/Facts: In 1961, Michael Donahue and his wife (the "Donahues") purchased the property at 6 Glen Road in Montville, Connecticut (the "Town"). In 1966, the Donahues acquired the adjacent property, 4 Glen Road. Zoning in the Town became effective on December 6, 1966.

Michael Donahue acquired title to both lots from his wife. After he died, and in November 2003, his estate sold 6 Glen Road to Charles Cockerham and Willmeta Cockerham (the "Cockerhams"). At the time, both properties at 6 Glen Road and 4 Glen Road were not in conformance with the existing zoning regulations. Six Glen Road had the required frontage, but lacked the required area. The house was also in violation of the side yard requirements. Four Glen Road did not have the required frontage or the minimum area required in the zone.

In November 2004, John Bialowans purchased the unimproved property at 4 Glen Road. His purchase and sale agreement was contingent upon obtaining building approval from the town. Since 4 Glen Road failed to meet the area or frontage requirement for a buildable lot in the zoning district in which it was located., a zoning permit to construct a single-family detached residence on 4 Glen Road would only issue if the Town's zoning enforcement officer (the "ZEO") determined that the parcel met the definition of a nonconforming lot in the Town's zoning regulations.

Section 4.13.6 of the Town's zoning regulations provided, in relevant part that: "[l]ots for single family detached residences which meet the definition of nonconforming lot in Section 4.13.5 which have a total area or lot frontage less than the minimum required in the district may be used for single family detached residences . . . ." Section 4.13.5 defined "non-conforming lot" as: "a lot which was separately owned prior to the enactment of the Zoning Regulations or any amendment thereto . . . ." Section 1.3 also defined "lot, non-conforming" as "[a] parcel of land owned individually and separately and separated from any adjoining tract of land on the effective date of these regulations which does not meet the dimensional area, width, or design requirements for the zoning district in which it is located." The terms "separately owned" and "owned individually and separately and separated from any adjoining tract of land" were not defined in the regulations.

On April 14, 2005, the Town's ZEO issued the zoning permit for 4 Glen Road.

The Cockerhams appealed the ZEO's issuance of the zoning permit. They argued that the ZEO misinterpreted the applicable zoning regulation and that the permit should not have issued. The Cockerhams argued that the proper interpretation of "separately owned" in the zoning regulations providing for nonconforming lots, which could be used for single-family residences, were lots that were owned by separate people. The Cockerhams pointed to the fact that 6 Glen Road and 4 Glen Road were owned by the same people—the Donahues—prior to the enactment of the zoning regulations in 1966. Accordingly, they argued that the lot at 4 Glen Road did not meet the zoning regulations definition of "separately owned" nonconforming lot on which single-family residences could be built, and that the ZEO wrongfully issued a zoning permit to Bialowans.

The Zoning Board of Appeals (the "Board") disagreed. It agreed with the ZEO's interpretation of "separately owned" nonconforming lots as meaning lots that had separate legal descriptions and had been conveyed by separate deeds.

The Cockerhams again appealed. The superior court dismissed the appeal. Although it found that the term "owned separately" reasonably could have two meanings, it found persuasive and deferred to the interpretation of the regulations upheld by the Board.

The Cockerhams again appealed.

DECISION: Judgment of superior court affirmed.

The Appellate Court of Connecticut agreed with the ZEO/Board's interpretation of the term "separately owned." It held that term "separately owned," in the Town's zoning regulations providing that nonconforming lots, which could be used for single-family residences, were lots that were separately owned prior to enactment of Town's zoning regulations, meant: lots that had separate legal descriptions and had been conveyed by separate deeds.

In so holding, the court noted that when faced with two equally plausible interpretations of regulatory language, the court must give deference to the construction of that language adopted by the agency charged with enforcement of the regulations (i.e., here the ZEO). Moreover, the court found that interpretation was supported by substantial evidence, including evidence that it had been the custom of the Town's ZEO to construe the "separately owned" language to mean separately described by deed. The court found it irrelevant that nearby towns interpreted similar language in their zoning regulations to mean owned by separate people.

See also: *Bank of America v. Zoning Bd. of Appeals of Borough of Fenwick, 46 Conn. L. Rptr. 430, 2008 WL 4378824 (Conn. Super. Ct. 2008).*

See also: *Doyen v. Zoning Bd. of Appeals of Town of Essex, 67 Conn. App. 597, 789 A.2d 478 (2002).*

Proceedings—City approves institutional master plan for college

Abutters appeal, contending approval process was adjudicatory and subject to state constitutional right to independent judges

Citation: *Alford v. Boston Zoning Com'n, 84 Mass. App. Ct. 359, 2013 WL 5526628 (2013)*

MASSACHUSETTS (10/09/13)—This case addressed the issue of whether the City of Boston's Institutional Master Plan ("IMP") review process, which reviews large-scale educational or health care institutions' expansion projects, is adjudicatory and thus subject to Article 29 of the Massachusetts Declaration of Rights, which requires "an impartial interpretation of the laws, and administration of justice" with trial by "judges free, impartial and independent . . . ."

The Background/Facts: In the spring of 2003, Boston College ("BC") embarked on a strategic planning process to redevelop its Chestnut Hill and Brighton campuses in Boston, Massachusetts (the "City"). BC purchased 65 acres of land and set about developing a long-term comprehensive campus plan.

Under art. 80D of the City's zoning code ("art. 80D"), when educational or health care institutions with more than 150,000 square feet seek to expand by more than 20,000 gross square feet, they must file for review an Institutional Master Plan ("IMP") with the Boston Redevelopment Authority ("BRA"). The purpose of the IMP review "is to provide for the well-planned development of Institutional Uses in order to enhance their public service and economic development role in surrounding neighborhoods." (Art. 80D, § 80D-1.)

In June 2008, BC filed its IMP with the BRA. Among other things, the IMP included the following projects: 790 additional beds for on-campus students; a 285,000-square-foot university center; a 350-space addition to an existing garage; and a 500-space parking facility.

In January 2009, the BRA voted to approve the IMP and send it to the City's zoning commission (the "Zoning Commission") for approval. On June 10, 2009, the Zoning Commission adopted the final IMP and the City mayor signed it. The IMP was expected to produce: $1 billion

in planned construction projects; approximately 12,243 jobs; $737 million in labor income for community residents; and a 10-year economic impact of approximately $1.57 billion.

In July 2009, individuals who owned property that abutted the property owned by BC (the "Abutters"), which was the subject of the IMP, filed a complaint in superior court against, among others, the Zoning Commission and the BRA. BC intervened in the action. Among other things, the Abutters argued that Article 29 of the Massachusetts Declaration of Rights ("art. 29") applied to the IMP process because it was an adjudicatory process. They contended that the Zoning Commission violated art. 29.

Article 29 states:

> "[i]t is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit."

Article 29 has been interpreted to extend beyond judges "to all persons authorized to decide the rights of litigants."

The Abutters maintained that IMPs were not a form of zoning amendment, but rather were akin to special permits and variances. As such, they contended that the IMP approval process was adjudicatory, and subject to art. 29's requirements of "impartial and independent" review. The Abutters alleged that, here, the review of BC's IMP violated art. 29 as it was "infected with bias and ex parte communications." They alleged that: (1) a zoning commission member was a lobbyist hired by BC to work on property issues, master planning, and a campus master plan during its IMP approval process; and (2) the BRA, the zoning commission, and BC communicated outside the public meeting process to reach an agreement to approve the IMP.

Eventually, finding no material issues of fact in dispute, and deciding the matter on the law alone, a superior court judge issued summary judgment for the Zoning Commission, BRA and BC. The judge held that the IMP approval process was a legislative act, not an adjudicatory proceeding, and thus art. 29 did not apply.

The Abutters appealed.

DECISION: Judgment of superior court affirmed.

The Appeals Court of Massachusetts held that art. 29 did not apply to the City's IMP approval process.

In so holding, the court disagreed with the Abutters' argument that BC's IMP was similar to the special permit process, which was adjudicatory in nature. The court found that IMPs were "created specifically to address the shortcomings that the special permit process

posed to health care and educational institutions." The court found that IMPs were intentionally distinct from the special permit in an effort to lessen the burden of the land use development process for institutions that often seek development of multiple projects over noncontiguous parcels of land. Further, the court found that"[a]n adjudicatory or quasi judicial format would not have been well adapted functionally to the type of determination" that the Zoning Commission was to make, as "[a] substantial overlap of responsibilities between the Zoning Commission and BRA renders an adjudicatory format impracticable."

Accordingly, the court concluded that the IMP approval process under the City's zoning code was not quasi adjudicatory, and that summary judgment for the BRA, Zoning Commission and BC was properly entered on that basis.

See also: *Mullin v. Planning Bd. of Brewster, 17 Mass. App. Ct. 139, 456 N.E.2d 780 (1983).*

Case Note:

The Abutters had also alleged that the decision of Zoning Commission and BRA, approving BC's IMP, was arbitrary and capricious. The appellate court disagreed. It found that the decision was "made through a process that required communication and input from multiple sectors of state and local government and private parties in an effort to ensure that the amendment comport[ed] to the standards of the [City's] zoning code."

Zoning News from Around the Nation

CALIFORNIA

Under new law, local municipalities now have "the freedom to lower the assessed value of and offer tax breaks for landowners who can commit to using the land for agricultural purposes for a set time." Under the law, aimed at "urban agriculture," "if landowners [of lots of three acres or less] will pledge to grow crops of food on the land for a period of five years, their property will be assessed at a lower rate, thus giving them significant tax benefits."

Source: *EIN News Desk; http://world.einnews.com*

MASSACHUSETTS

Pending in the state House of Representatives is a bill—An Act Promoting the Planning & Development of Sustainable Communities—which would reportedly give "much more control to communi-

ties in developing zoning ordinances that will encourage the development of more pedestrian, transit, and bike-friendly neighborhoods, and more vibrant, thriving, downtown districts."

Source: *Scituate Mariner; www.wickedlocal.com/scituate*

VIRGINIA

In a nonbinding advisory opinion, Attorney General Ken Cuccinelli concluded that "[l]ocal officials would have little influence over uranium mining if Virginia decided to end a decades-long prohibition." If the General Assembly ended the moratorium, Cuccinelli wrote, "a locality's authority related to uranium mining will depend upon federal and state law in effect at that time, including the enabling legislation for uranium mining enacted by the General Assembly." The opinion adds: "If the General Assembly chooses to establish a permitting program for uranium mining and milling operations within the Commonwealth and provides for related regulation, such legislation will affect local government authority to regulate such operations by ordinance." "On the other hand," he wrote, "the General Assembly could enable concurrent regulatory authority to its appropriate agencies and localities, in which case the locality could exercise such authority so long as such exercises do not conflict with federal or state law." "Even if the legislature allowed local zoning ordinances over mining, the local ordinances could 'not be drafted in such a way as to be arbitrary or capricious either in their terms as written or in their application,' " Cuccinelli wrote. "Further, such zoning ordinances could not be so restrictive as to impose a ban on that otherwise legal activity."

Source: *The Roanoke Times; www.roanoke.com*

QUINLAN™ December 10, 2013 | Volume 7 | Issue 23

Zoning Bulletin

in this issue:

WEST®

Mat #41330024

Religious Uses/Civil Rights—Land use regulations that prohibit year-round bible camp on certain property

Religious institution claims those land use regulations violate the federal Religious Land Use and Institutionalized Persons Act

Citation: *Eagle Cove Camp & Conference Center, Inc. v. Town of Woodboro, Wis., 2013 WL 5820289 (7th Cir. 2013)*

The Seventh Circuit has jurisdiction over Illinois, Indiana, and Wisconsin.

Contributors

Corey E. Burnham-Howard

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

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

WEST®

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

SEVENTH CIRCUIT (WIS.) (10/30/13)—This case addressed the issue of whether land use regulations prohibiting a proposed year-round Bible camp on residentially-zoned property violated the Religious Land Use and Institutionalized Persons Act.

The Background/Facts: Eagle Cove Camp & Conference Center ("Eagle Cove") sought to construct a year-round Bible camp on 34 acres of property (the "Property") that it owned on a lake in the Town of Woodboro, Wisconsin ("Woodboro").

The Property was under the zoning authority of Oneida County (the "County"). As of May 2001, Woodboro had voluntarily subjected itself to the County's Zoning and Shoreland Protection Ordinance (the "Ordinance"). According to the Ordinance, religious land uses were permitted throughout the County and Woodboro. Year-round recreational and seasonal camps were permitted on 36% and 72% of the land in the County, respectively. In addition, churches and religious schools were allowed on 60% of the land in the County. Churches and schools were permitted on nearly 43% of the land in Woodboro and campgrounds (religious or secular) on approximately 57%.

A portion of Eagle Cove's Property was zoned Single Family Residential. Another portion of the Property was zoned Residential and Farming.

Eagle Cove believed that their religion mandated that the Bible camp be on the Property. Eagle Cove also believed that they had to operate the Bible camp on a year-round basis. Since the zoning of their Property did not allow for a year-round Bible camp, Eagle Cove petitioned for rezoning of the Property. The County denied the rezoning petition on the grounds that it would conflict with the majority single-family usage around the lake.

Eagle Cove then sought a conditional use permit ("CUP"). The county denied the CUP because the proposed Bible camp did not conform to the goals in the district and was incompatible with the single-family residential use of the land adjacent to the Property.

Eagle cove ultimately filed an action in court in which it asserted, among other things, that the land use regulations of Woodboro and the County deprived Eagle Cove of its rights set forth under various provisions of the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA").

More specifically, Eagle Cove argued that Woodboro had violated RLUIPA's total exclusion provision. That provision prohibits governmental land use regulations from totally excluding religious assemblies from a jurisdiction. (42 U.S.C.A. § 2000cc(b)(3)(A).) Eagle Cove argued that by excluding religious recreational camps within its borders, Woodboro violated this provision.

Eagle Cove also sought relief under RLUIPA's substantial burden provision. Eagle Cove alleged that the County imposed a substantial burden on the exercise of religious rights without having a compelling reason for doing so. (42 U.S.C.A. § 2000cc(a).)

Eagle Cove further argued that the Ordinance violated the equal terms provision of RLUIPA, which prevents governmental land use regulations that treat religious institutions on less than equal terms with similarly situated institutions that do not have a religious affiliation. (42 U.S.C.A. § 2000cc(b)(1).)

Finding there were no material issues of fact in dispute and deciding the matter on the law alone, the court granted summary judgment in favor of the County and Woodboro. The court found that the County and Woodboro did not unreasonably limit religious assemblies in their respective jurisdictions, but rather, Eagle Cove's insistence on locating the year-round camp on the subject property impeded the exercise of their religious beliefs.

Eagle Cove appealed.

DECISION: Judgment of district court affirmed.

The United States Court of Appeals, Seventh Circuit, agreed that the land use regulations did not violate RLUIPA.

The court found that Eagle Cove's argument that Woodboro violated RLUIPA's total exclusion provision by totally excluding religious recreational camps from within its borders failed. The court noted that Woodboro had relinquished its jurisdiction over land use regulations to the County, and that there was ample evidence to suggest that operating a year-round Bible camp would be possible in many parts of the County.

The court also found that, contrary to Eagle Cove's claims, the County did not impose a substantial burden on Eagle Cove's religious rights. The court noted again that there were numerous locations within the County for Eagle Cove to place its Bible camp. Nevertheless, Eagle Cove had insisted that the camp must be built on the subject Property. The court thus found that it was not the land use regulations that created the substantial burden, but rather Eagle Cove's insistence that the expansive, year-round Bible camp be placed on the subject property. The zoning regulations did not seek to inhibit Eagle Cove's religious activity, said the court. Rather, they merely encouraged an area of quiet seclusion for families around the lake.

Finally, the court also found that the Ordinance did not violate RLUIPA's equal terms provision. The court found that the Ordinance did not treat religious land uses, in particular year-round Bible camps, less favorably than their secular counterparts. While the Single Family Residential zoning district, wherein the Subject property lay, permitted certain religious and secular assemblies, recreational camps were prohibited outright, regardless of affiliation.

See also: *Vision Church v. Village of Long Grove, 468 F.3d 975 (7th Cir. 2006).*

See also: *Petra Presbyterian Church v. Village of Northbrook, 489 F.3d 846 (7th Cir. 2007).*

Case Note:

Eagle Cove had also contended that Article 1, § 18 of the Wisconsin Constitution offered it protection from the land use regulations. Article 1, § 18 provides for freedom to worship, and Wisconsin applies a compelling state interest/least restrictive alternative test when a claim is brought challenging a state law that violates an organization or individual's freedom of conscience. The test requires that the organization prove it has a sincere religious belief and that such belief is burdened by the state law at issue. The burden is then shifted to the state to rebut the claim by showing a compelling state interest that cannot be served by a less restrictive alternative. The court found that,

even accepting that Eagle Cove had a sincere belief and that it was burdened by the Ordinance, the County had demonstrated that it had a compelling state interest in preserving the rural nature around the lake achieved by the least restrictive means possible (a neutral zoning ordinance). The court concluded that the Ordinance was generally applicable to all residents and therefore a "normally acceptable" law under which religious organizations could be subject.

Nonconforming Uses—City denies property owner's request for building permit

City says nonconforming use had been abandoned

Citation: *TKO Realty, LLC v. Zoning Hearing Bd. of City of Scranton, 2013 WL 5658780 (Pa. Commw. Ct. 2013)*

PENNSYLVANIA (10/18/13)—This case addressed the issue of whether the use of a certain property as a three-unit dwelling was a lawfully nonconforming use and whether that use had been abandoned. More generally, the cases addresses what constitutes abandonment of a nonconforming use.

The Background/Facts: TKO Realty, LLC ("TKO") owned property in the City of Scranton, Pennsylvania (the "City"). The property was zoned R1-A and permitted single-family or twin semi-detached homes. The structure on the property was condemned on October 6, 2008, and purchased by TKO on May 28, 2009.

TKO sought to rehabilitate the structure on the property into a three-unit dwelling. TKO applied for a building permit and to register the structure as a three-unit dwelling under the City Rental Registration Ordinance. The City zoning officer refused the request, and TKO appealed to the City's Zoning Hearing Board (the "ZHB").

TKO maintained that the use of the property as a multiunit dwelling was a legally nonconforming use. TKO presented tax assessment information showing a "multi-dwelling" on the property, and a 1960 tax assessment card showing the property as a "three-family" dwelling. Moreover, TKO presented evidence that the property had, since at least 1960, continued to be assessed and taxed as a three-unit dwelling to date.

The ZHB denied TKO's request. The ZHB found that the use of the property as a multiunit dwelling had been abandoned and that it was vacant and condemned for more than six months.

TKO appealed.

DECISION: Judgment of court of common pleas reversed.

The Commonwealth Court of Pennsylvania held that use of TKO's property as a three-unit dwelling was a lawfully nonconforming use, which had not been abandoned.

The City had maintained that TKO never established a lawful nonconforming use because it failed to seek a certificate of nonconformance from the City zoning officer or register in accordance with a City ordinance. The City argued that TKO had the burden of proving that since 1993 (the date of the present ordinance), the property had been used as a three-unit dwelling. Although TKO presented tax assessment information showing a "multi-dwelling" on the property, and a 1960 tax assessment card showing the property as a "three-family" dwelling, the City argued that TKO failed to present testimony from any neighbors or tenants that the property had been used as a three-unit dwelling since 1993. Moreover, the City argued that TKO and its predecessors did not register the units under the City's Rental Registration Ordinance and did not seek a written statement of nonconformity from the zoning officer, as required by the ordinance.

The court, however, disagreed with the City. Instead, it found that TKO had proven that since at least 1960, the property has been used as a legal three-unit dwelling and that the use became nonconforming as of 1965. Since use of the property as a three-unit dwelling predated the enactment of the prohibitory zoning restrictions, the court concluded it was a lawful nonconforming use.

Moreover, although TKO did not seek a certificate of nonconformance from the zoning officer, the court said that "[t]he mere absence of a certificate does not deprive the landowner of his right to continue a lawful nonconforming use." Similarly, said the court, the failure to register in accordance with the Registration Rental Ordinance, a nonzoning ordinance, could not deprive a property owner of the right to continue the use.

The court also agreed with TKO that the nonconforming use was not abandoned. The court explained that continuation of a legal nonconforming use "runs with the land, so long as the use is not abandoned." To show abandonment of the use, the court said that the City had to prove both that the landowner intended to abandon the use and that the use was actually abandoned.

The City had argued that a zoning ordinance may establish a presumption of intent to abandon by incorporating a discontinuation provision. A discontinuation provision provides that the lapse of a designated period of time is sufficient to establish the intent to abandon a nonconforming use. Here, a City zoning ordinance did provide a discontinuation provision, providing that the lapse of six months established intent to abandon a nonconforming use.

The court acknowledged that the use of TKO's property had been vacant and condemned for more than six months. Still, although the City showed intent to abandon, the court found that there no actual abandonment occurred. The prior owner of the Property involuntarily vacated the structure due to foreclosure, and the City thereafter condemned it. The court said that where discontinuance of a use occurs because of events beyond the owner's control, such as financial inability, there is no actual abandonment. Moreover, the court said that failure to register a nonconforming use does not constitute an abandonment of that use.

Accordingly, because TKO had established a legal three-unit nonconforming use and there was no actual abandonment of that use, the court reversed the trial court's order affirming the ZHB's decision to deny TKO's requested building permit.

See also: *DoMiJo, LLC v. McLain, 41 A.3d 967 (Pa. Commw. Ct. 2012).*

See also: *Zitelli v. Zoning Hearing Bd. of Borough of Munhall, 850 A.2d 769 (Pa. Commw. Ct. 2004).*

See also: *Metzger v. Bensalem Tp. Zoning Hearing Bd., 165 Pa. Commw. 351, 645 A.2d 369 (1994).*

Time for Proceedings—Developer challenges city requirement that it set aside units as below market rate housing and pay cash to city fund

City and developer dispute whether the statute of limitations of the Mitigation Fee Act or Subdivision Map Act apply to developer's challenge

Citation: *Sterling Park, L.P. v. City of Palo Alto, 163 Cal. Rptr. 3d 2, 310 P.3d 925 (Cal. 2013)*

CALIFORNIA (10/17/13)—This case addressed the issue of whether California's Mitigation Fee Act—and its statute of limitations— applied to a case in which a developer challenged a city requirement that the developer set aside a certain number of units as below market rate housing and make a substantial cash payment to a city fund, or whether the Subdivision Map Act—under which the developer failed to meet the statute of limitations for bringing such an action—applied.

The Background/Facts: Sterling Park, L.P. and Classic Communities, Inc. (collectively, "Sterling Park") owned two lots in the City of Palo Alto (the "City"). Sterling Park planned to demolish existing commercial improvements and construct 96 residential condominiums on the site. The proposed development was subject to the City's below market rate housing program, and thus required Sterling Park to provide at least 20% of all units as below market rate units. Under the program, the City could accept a cash payment to the City's housing development fund in lieu of providing below market rate units or land.

In 2005, Sterling Park submitted its initial application for project approval. In a letter dated June 16, 2006, the City stated the terms of an agreement between Sterling Park and the City's planning staff under which Sterling Park agreed to provide 10 below market rate units on the project site and pay in-lieu fees of 5.3488% of the actual selling price or fair market value of the market rate units, whichever was higher. Classic Communities, Inc.'s vice president executed the letter on June 19, 2006. On that date, the city council approved the project.

Over a year later, when the new units were being finished, the City began requesting conveyance of the below-market-rate designated homes. On July

13, 2009, Sterling Park submitted a "notice of protest" to the City, claiming the prior agreements were signed under duress and arguing that the below market rate requirements were invalid. When the City failed to respond to the protest, Sterling Park filed an action in court on October 5, 2009. Sterling Park sought an injunction and a judicial declaration that the below market rate requirements were invalid and "the City may not lawfully impose such [below market rate] affordable housing fees or exactions as a condition of providing building permits or other approvals for the Project." Sterling Park cited California's Mitigation Fee Act, section 66020, which provides that "[a]ny party may protest the imposition of any fees, dedications, reservations, or other exactions imposed on a development project . . . by a local agency by [meeting certain requirements]."

The City asked the court to find there were no material issues of fact in dispute and to issue summary judgment in its favor on the law alone. The City argued that Sterling Park's action was untimely under section 66499.37 of California's Subdivision Map Act. Section 66499.37 provides that "[a]ny action or proceeding to attack, review, set aside, void, or annul the decision of an advisory agency, appeal board, or legislative body concerning a subdivision, or any of the proceedings, acts, or determinations taken, done, or made prior to the decision, or to determine the reasonableness, legality, or validity of any condition attached thereto, . . . shall not be maintained by any person unless the action or proceeding is commenced and service of summons effected within 90 days after the date of the decision."

It was undisputed that section 66499.37 of the Subdivision Map Act was broad enough to apply here. It was also undisputed that Sterling Park's action would be untimely under section 66499.37 because it was commenced more than 90 days after the decision being challenged. However, Sterling Park argued that section 66020 of the Mitigation Fee Act, and its 180-day statute of limitations, governed the case. It further argued that the action was timely under that statute because the City never provided the statutorily required notice to Sterling Park at the time of approval of the project or imposition of the fees—as required by section 66020.

The trial court agreed with the City and granted its motion for summary judgment in the City's favor.

Sterling Park appealed. The Court of Appeal also held that section 66020 of the Mitigation Fee Act did not apply to the case and that the action was untimely under section 66499.37 of the Subdivision Map Act.

Sterling Park again appealed.

DECISION: Judgment of Court of Appeal reversed, and matter remanded.

The Supreme Court of California held that section 66020 of the Mitigation Fee Act, and its statute of limitations, applied.

In so holding, the court explained that when section 66020 of the Mitigation Fee Act does apply, its time limits govern the case, not those of the more general section 66499.37 of the Subdivision Map Act. In determining that section 66020 applied, the court noted that it would apply if the requirements at issue were "any fees, dedications, reservations, or other exactions" under sec-

tion 66020. Looking to the plain meaning and legislative purpose of section 66020, the court found that "other exactions" included actions that divest the developer of money or a possessory interest in property, but not restrictions on the manner in which a developer may use its property. The court said that section 66499.37 governed the latter.

The court concluded that the requirement that Sterling Park set aside 10 of 96 condominium units as below market rate housing was an exaction such that the 180-day Mitigation Fee Act statute of limitations on "exactions" imposed on a development, rather than 90-day Subdivision Map Act statute of limitations regarding the validity of a condition attached to an agency or appeal board decision, governed Sterling Park's challenge to the requirement. The court also found that the imposition of the in-lieu fees was similar to a "fee," and the requirement that Sterling Park sell units below market rate was similar to a "fee, dedication, or reservation" under section 66020.

See also: *Fogarty v. City of Chico, 148 Cal. App. 4th 537, 55 Cal. Rptr. 3d 795 (3d Dist. 2007).*

See also: *Williams Communications, LLC v. City of Riverside, 114 Cal. App. 4th 642, 8 Cal. Rptr. 3d 96 (4th Dist. 2003).*

Case Note:

In this case, the Supreme Court of California disapproved the holding in Trinity Park, L.P. v. City of Sunnyvale, 193 Cal. App. 4th 1014, 124 Cal. Rptr. 3d 26 (6th Dist. 2011) (disapproved of by, Sterling Park, L.P. v. City of Palo Alto, 163 Cal. Rptr. 3d 2, 310 P.3d 925 (Cal. 2013)), to the extent that it was inconsistent with the opinion in this case.

Jurisdiction—Lakefront property owner seeks to build new dock on lake

Property owner says town lacks jurisdiction over construction since state owns the land under the navigable water

Citation: *Hart Family, LLC v. Town of Lake George, 2013 WL 5745757 (N.Y. App. Div. 3d Dep't 2013)*

NEW YORK (10/24/13)—This case addressed the issue of whether a municipality had jurisdiction over, and thus the authority to grant or deny an application for construction in, a lake where the state owned the land under the navigable waters in its sovereign capacity.

The Background/Facts: Hart Family, LLC (the "Harts") owned Lot 9 in the Trinity Rock Estates subdivision in the Town of Lake George, New York

(the "Town"). Lot 9 had approximately 200 feet of shorefront on Lake George. When the subdivision was established in 1925, easements were granted to numerous other lot owners permitting them to launch and store boats and to swim on Lot No. 9's shorefront. Those easements were subject to the Harts' right to maintain and erect shorefront structures and docks that do not "occupy or obstruct more of the [shorefront] . . . than is occupied or obstructed by the present dock." The dock in existence when the easements were granted was approximately 75 feet wide and was later destroyed by storms. The Harts replaced that dock with two docks that extended from a concrete bulkhead on the shore into the lake in a "U" configuration about 21 feet wide.

In October 2008, the Harts were granted a permit by the Lake George Park Commission to construct a new E-shaped dock with an open-sided boat cover and sundeck that incorporated the existing northernmost pier, replaced the southernmost pier and measured 31 feet wide.

In relation to the planned construction of the new dock, the Harts applied for site plan approval from the Town Planning Board (the "Board"). The Board ultimately denied the application, citing health and safety concerns, among other things.

Thereafter, the Harts brought a legal action in court. They sought to annul the Board's determination on the sole ground that it lacked jurisdiction to review or deny the proposed site plan. The Harts contended that because the state owned land under navigable waters, including Lake George, the state's exclusive authority preempted the Town's local land use laws governing construction in the lake's navigable waters—including construction of the proposed dock.

The supreme court agreed with the Harts, and ruled in their favor.

The Town appealed. The Town first argued that the Harts had waived their jurisdictional challenge by not raising it during the administrative process. The Town also maintained that the state had delegated authority to regulate docks in Lake George to the Town pursuant to state Navigation Law § 46-a. In the alternative, the Town argued that it had authority to regulate construction of the dock pursuant to the State Uniform Fire Prevention and Building Code, which includes structures in navigable waters.

DECISION: Judgment of supreme court affirmed.

The Supreme Court, Appellate Division, Third Department, New York, first held that the Harts had not waived their jurisdictional challenge to the Board's authority. Although the issue of jurisdiction had not been discussed during the Board meetings and public hearing related to the Hart's site plan approval application, the court found that the issue of the Hart's site plan being beyond the Town's authority was "actually raised" in correspondence between the parties attorneys. In any case, the court explained that "a defect in subject matter jurisdiction may be raised at any time by any party or by the court itself, and subject matter jurisdiction cannot be created through waiver, estoppel, laches or consent." Accordingly, the court concluded that the Harts had not waived their jurisdictional challenge by submitting their site plan to the Board for review.

Next, the court agreed with the Harts that the Board lacked jurisdiction to

grant or deny the Harts' site plan application. The court explained that when the state owns land under navigable waters in its sovereign capacity, its exclusive authority preempts local land use laws and extends beyond the regulation of navigation "to every form of regulation in the public interest." Here, the court found that the state held title to the lands under Lake George in its sovereign capacity and, thus, had sole jurisdiction over construction in the lake's navigable waters provided it had not delegated this authority to the Town.

The Town had argued that the state had, in fact, delegated that authority to it. However, the court found otherwise. The court found that the Town was not included among the local governments enumerated in Navigation Law § 46-a (2) (which delegates to municipalities that border or encompass waters owned by the state, the authority to regulate the manner of construction and location of structures those waters). The court also found no such delegation in any other source.

Given that the state had not delegated authority to the Town to regulate or review the Harts' construction of a dock within Lake George, the court concluded that the supreme court had properly annulled the Board's determination.

See also: *Town of Carmel v. Melchner, 105 A.D.3d 82, 962 N.Y.S.2d 205 (2d Dep't 2013).*

See also: *Town of North Elba v. Grimditch, 98 A.D.3d 183, 948 N.Y.S.2d 137 (3d Dep't 2012).*

Zoning News from Around the Nation

ARIZONA

A superior court judge has granted a pretrial verdict in favor of White Mountain Health Center, a prospective medical marijuana dispensary, overturning Maricopa County's zoning ordinance for medical marijuana dispensaries. Reportedly, the judge ruled that the ordinance appeared to be a "transparent attempt" to keep the businesses out of unincorporated areas of the county. The judge acknowledged that the county has zoning powers to protect public health, safety, and welfare, but said the county was not permitted under the Arizona Medical Marijuana Act to use those powers to categorically prohibit dispensaries.

Source: *ABC 15; www.abc15.com*

MICHIGAN

Wyoming City is asking the Michigan Supreme Court to overturn an appeals court decision that found the City's zoning ordinance prohibiting marijuana production in nearly all cases ran against the voter-approved Medical Marijuana Act that allowed limited production and use of marijuana. The City has argued that the Michigan Medical Marijuana Act makes no specific provision saying it overrules local zoning ordinances and therefore, cities can enforce rules that regulate marijuana.

Source: *mLive; www.mlive.com*

WASHINGTON

The Seattle City Council has approved a zoning ordinance, regulating marijuana businesses. The ordinance confines such businesses to industrial land and some commercial areas, and sets the maximum size for marijuana growing operations at 20,000 square feet in some areas.

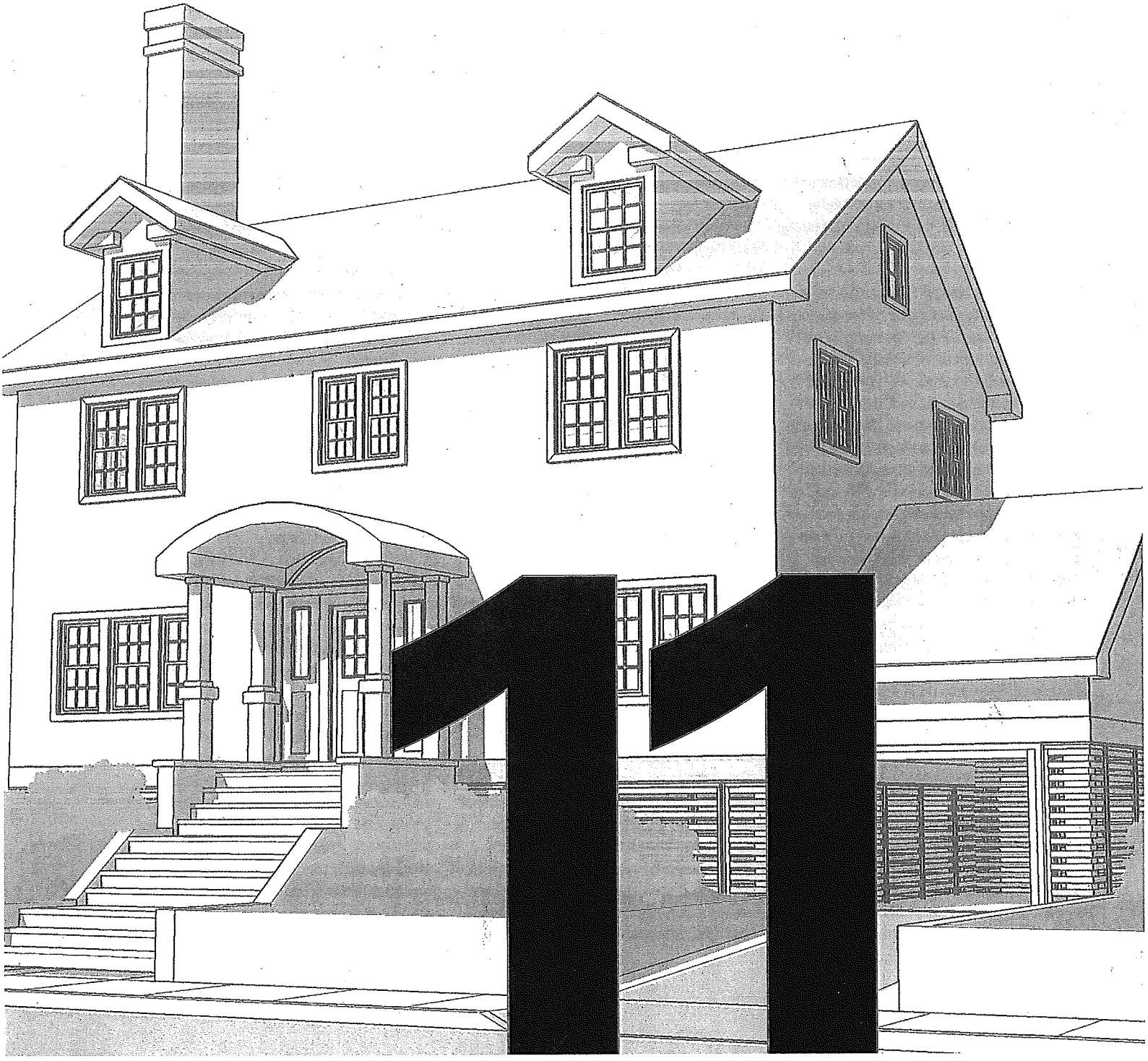
Source: *Kiro TV; www.kirotv.com*

ZONING PRACTICE NOVEMBER 2013

AMERICAN PLANNING ASSOCIATION

ISSUE NUMBER 11

PRACTICE ADAPTIVE DESIGN



High and Dry on the Waterfront

By James C. Schwab, AICP

Just north of New York City, in Rockland County, New York, on the western side of the Hudson River, sits the village of Piermont on a little more than one square mile of land, with about 2,500 people. Within that village lives Klaus Jacob, a seismologist at Columbia University's Lamont-Doherty Earth Observatory, who helped generate remarkably accurate estimates of the likely loss from an event like Hurricane Sandy.

What is equally remarkable is what happened to his home in Piermont. Taking a hint from Hurricane Irene in 2011, Jacob, who had already raised his house in 2003, wanted to avert damage by raising it higher above the base flood elevation established by the Federal Emergency Management Agency (FEMA) before Sandy hit. He soon learned that the town had a 22-foot height limit in its zoning regulations. His eight-foot-high top floor would exceed that limit if he elevated the house, and he chose not to give up the attic. Instead, he and his wife did what they could to elevate their kitchen appliances, including the stove, within the existing structure. That saved some of their property from the flooding from Sandy, but the existing zoning kept them from saving more. For a scientist who had worked with New York planners to estimate correctly the impact of Sandy, this outcome was, to say the least, a bit ironic.

In a YouTube video produced after the storm by the university's Earth Institute, Jacob notes that Sandy produced flooding one to two feet above the 100-year floodplain, "affecting a lot more people than those that normally get flood insurance, including myself." The result in Piermont, he says, was a "microcosm of what happened in New York City."

WHERE TO DRAW THE LINE

Questions such as those that faced Jacob become more likely after almost every natural disaster that involves flooding, whether from hurricane storm surges or from torrential downpours overloading rivers and streams. Those events trigger a process within FEMA's National Flood Insurance Program (NFIP) to reassess existing flood maps based on new flood data, resulting in Advisory Base Flood Elevations (ABFEs) that establish new benchmarks for how high the 100-year flood will rise in specific locations. That base flood elevation is actually the level at which there is deemed a one percent annual chance of a flood occurring. It is a product of engineering calculations taking into account the historic experience with flooding in a community at the time the map is produced. The problem is that such maps are not static. They are influenced over time by the amount of development and impervious surface allowed into the floodplain and even the overall watershed. In the case of New York City, the maps that existed prior to Sandy dated from 1983. The city was well aware that they were outdated and was concerned about their accuracy before the storm.

FEMA released the new ABFEs for New York and New Jersey in February 2013. There are two primary consequences of these maps. The first is a change in flood insurance rates for properties previously located beyond the base flood elevation that now find themselves within the 100-year floodplain. In some cases, that may trigger requirements for flood insurance that did not previously apply to those properties; in others, it may simply mean that flood insurance becomes more expensive. The second consequence is that NFIP regulations require some form of mitigation for properties in the floodplain that are substantially damaged; that is, those that have suffered damage exceeding 50 percent of market value. Mitigation can take a number of forms: wet or dry floodproofing, elevation, and buyouts are the most common. As a result of ABFEs including additional properties within the newly mapped floodplain, the owners are unable to rebuild without taking some appropriate action to reduce risk.

The scope of damage from Sandy gives some indication of the size of the rebuilding challenges that face these communities. According to the National Hurricane Center, Sandy damaged or destroyed nearly 650,000 homes in an arc ranging from Rhode Island to Maryland. It also killed 147 people in New York, New Jersey, and Connecticut.

In New York City, 218,000 residents live within currently mapped floodplains. The city has 520 miles of waterfront, much of it devoted to industrial and commercial uses; it is by far the largest shoreline of any city in the U.S. Approximately 90,000 buildings in New York City were in areas flooded by Hurricane Sandy, and 84 percent of those were built before FEMA produced its first flood insurance rate maps (FIRMs) for the city in 1983. New York thus has a great deal of property that is not compliant with current standards, much of which faces significant costs to upgrade to current codes. Moreover, in an urban area as dense as New York, relocating structures is often simply not an option. Other strategies are needed. The city's study of its urban design options, *Designing for Flood Risk*, notes that 98 percent

ASK THE AUTHOR JOIN US ONLINE!

Go online during the month of November to participate in our "Ask the Author" forum, an interactive feature of Zoning Practice. *James C. Schwab, 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

James C. Schwab, AICP, is a senior research associate for the American Planning Association and the manager of APA's Hazards Planning Research Center. He is also coeditor of *Zoning Practice*.

of the buildings destroyed by Sandy, and 94 percent of those severely structurally damaged, were built before 1983.

Thus, the new ABFEs were no small deal for New York. They are laden with physical and economic implications for both property owners and the city itself. The city planning department notes that typical FEMA requirements are based on assumptions that apply to less dense communities with a wider range of options for reorienting land use. As a result, city officials decided even before Sandy that they needed to develop options that would be more applicable to denser urban areas. The city's search for such options also led to another study, funded by HUD and released in June 2013, *Urban Waterfront Adaptive Strategies*. One hope behind these efforts is that they will prove useful not only to New York itself, but to numerous other similarly dense cities across the country.

ADD A DOSE OF REFORM

Communities affected by Sandy face not only the immediate consequences of remapping, but the initial impact of the Flood Insurance Reform Act of 2012, also known as Biggert-Waters, after its two prime sponsors in the U.S. House of Representatives.

Passed a few months before Sandy, Biggert-Waters sought to remedy the long-term insolvency of the NFIP by amending its rate formulas as well as some of its regulations. Historically, the NFIP has offered subsidized, or non-actuarial, rates for flood insurance on properties built before FIRMs were established in any given area. The earliest maps were issued in 1974. Hurricane Katrina left the NFIP laden with nearly $18 billion in debt. By 2012, Congress had decided that reforming the rate structure was the most viable path to solvency for the program. Moreover, critics had argued for years that subsidized rates disguised the actual level of risk associated with many properties, effectively sending ratepayers the wrong signals, according to Samantha A. Medlock, policy counsel for the Association of State Floodplain Managers.

In New York State, just over 75 percent of the 176,000 policies in force are pre-FIRM, with 65 percent paying subsidized rates. As a result of the new law, property owners will see increases of 25 percent yearly until their policies catch up with actuarially established rates, which can be as high as $1,410 yearly for homes at base flood elevation (BFE), and $9,500 for those four feet below BFE, depending on the value of the home. Combine the impact of the new ABFEs with that of Biggert-Waters, and the stage is set for property owners experiencing increases of hundreds of dollars annually in insurance premiums. For instance, according to Medlock, owners of pre-FIRM homes in A zones (see box) could now pay between $1,050 and $2,750, compared to $230 to $540 for homes built at least two feet above BFE, an elevation difference known as freeboard. Freeboard is defined as some safety factor, usually expressed in feet, that is required by state or local government above the BFE defined by FEMA. In other words, local zoning or building regulations might require that a building's ground floor be at least one or two feet above BFE. At the same time, some remedies, such as elevation, that would lower premiums, may become far more economically advantageous in the face of such cost increases. The annualized difference, spread over a number

FEMA FLOOD ZONE DEFINITIONS

The FEMA Map Service Center offers the following definitions on the FEMA website for A, V, and X zones:

A Zone: Areas with a one percent annual chance of flooding and a 26 percent chance of flooding over the life of a 30-year mortgage. Because detailed analyses are not performed for such areas, no depths or base flood elevations are shown within these zones.

V Zone: Coastal areas with a one percent or greater chance of flooding and an additional hazard associated with storm waves. These areas have a 26 percent chance of flooding over the life of a 30-year mortgage. No base flood elevations are shown within these zones.

X Zone (if shaded on map): Area of moderate flood hazard, usually the area between the limits of the 100-year and 500-year floods. Are also used to designate base floodplains of lesser hazards, such as areas protected by levees from 100-year flood, or shallow flooding areas with average depths of less than one foot or drainage areas less than one square mile.

Unshaded X Zones extend beyond the 500-year floodplain, but may still be capable of flooding in extreme events.

of years, could in many cases support the cost of elevating the home to achieve the premium reduction.

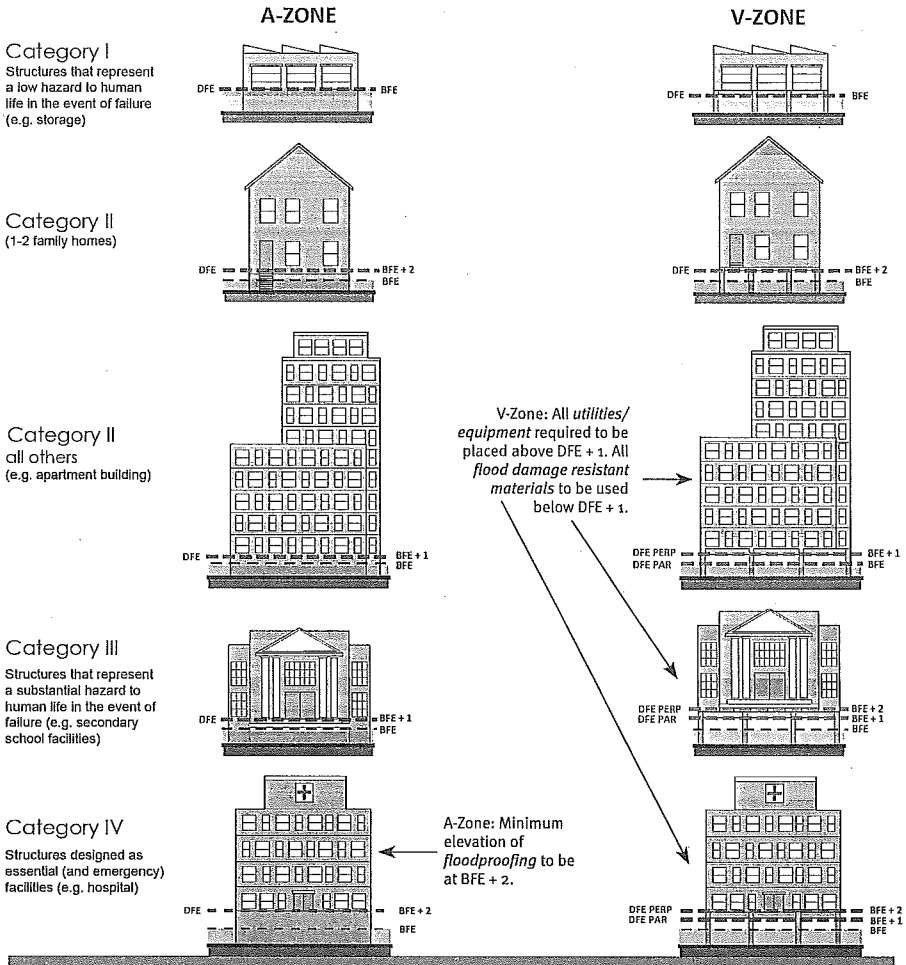
Another provision of Biggert-Waters could also have profound impacts on some urban neighborhoods in flood-prone areas. Once a pre-FIRM property is sold, or its flood insurance has lapsed, the subsidized rates disappear and actuarial rates apply with no transition period. This could well increase the difficulty of selling such properties by making them less attractive.

While the Northeast is the first region to feel the full impact of the Biggert-Waters reforms, it will not be the last. The changes will take effect nationwide, and with each major flood disaster, new ABFEs will compound that impact. What happens now in New York and New Jersey is merely a harbinger of changes to come elsewhere.

RESPONDING TO THE CHALLENGE

New York City officials have unquestionably responded with the most aggressive search for solutions. This effort is driven in large part by the challenge posed by dense urban development and the need to maintain the vibrancy of waterfront neighborhoods in the face of the changes that will inevitably be generated by both the remapping and flood insurance reform. Unlike some coastal communities, New York cannot simply elevate or relocate all its waterfront properties to escape the implications of these changes. In many cases, the neighborhoods would become physically unattractive and economically nonviable as a result. For high rises and many other multistory buildings, elevation is not a viable option; wet or dry floodproofing is more likely (see box).

The first problem facing many home owners in New York City under the new flood maps was the same one facing Klaus Jacob in his modest home in Piermont—the inability under existing zoning to elevate their homes because of height restrictions. Confronted with new flood insurance rates and unable to make adjustments that would reverse those increases, such property owners are caught between a federal rock and a locally regulated hard place. In a city known for high rises, however, planners wasted little time in confronting this dilemma. By January 31, 2013, Mayor Michael Bloomberg signed Executive Order No. 230, suspending the height limits for home owners seeking to comply with NFIP rules. Since then, the planning department has developed a text amendment for the city council to codify the needed changes, while also addressing other issues such as low-grade parking and streetscape mitigations, and took these out for public review at 41 community boards in areas affected by flooding, emphasizing in part how these changes would help residents lower their flood insurance premiums. The community boards offered nearly unanimous approval. The city planning commission approved the changes



Reprinted with permission from the City of New York

From *Designing for Flood Risk*, this diagram illustrates how New York has differentiated required freeboard (in feet) for various building categories in both A and V flood zones.

TYPES OF FLOODPROOFING

There are basically two kinds of floodproofing: wet and dry. Both are workable options for protecting buildings and contents from flooding, but by design they have very different implications for building use:

Wet floodproofing allows water to enter and leave a structure without the use of mechanical equipment. This cannot work with basements because water would accumulate below the base flood elevation without a means of release. The idea is to equalize water pressure inside and outside through openings in the walls. This effectively renders lower levels unusable for most purposes, as living and working space needs to be above the area where wet floodproofing is used.

Dry floodproofing uses water barriers such as sealant, aquarium glass, or other flood shields to protect a lower level from infiltration by water during a flood. In some cases, this may include the use of removable panels on windows that can be put in place during a flood emergency but otherwise kept in storage. This thus allows the use of floodproofed basements and other below-grade structures and retains building access at street grade, though such access can pose problems during a flood and thus is not allowed in entirely residential buildings.

in September, and city council approval was expected by the end of October (as this issue was going to press).

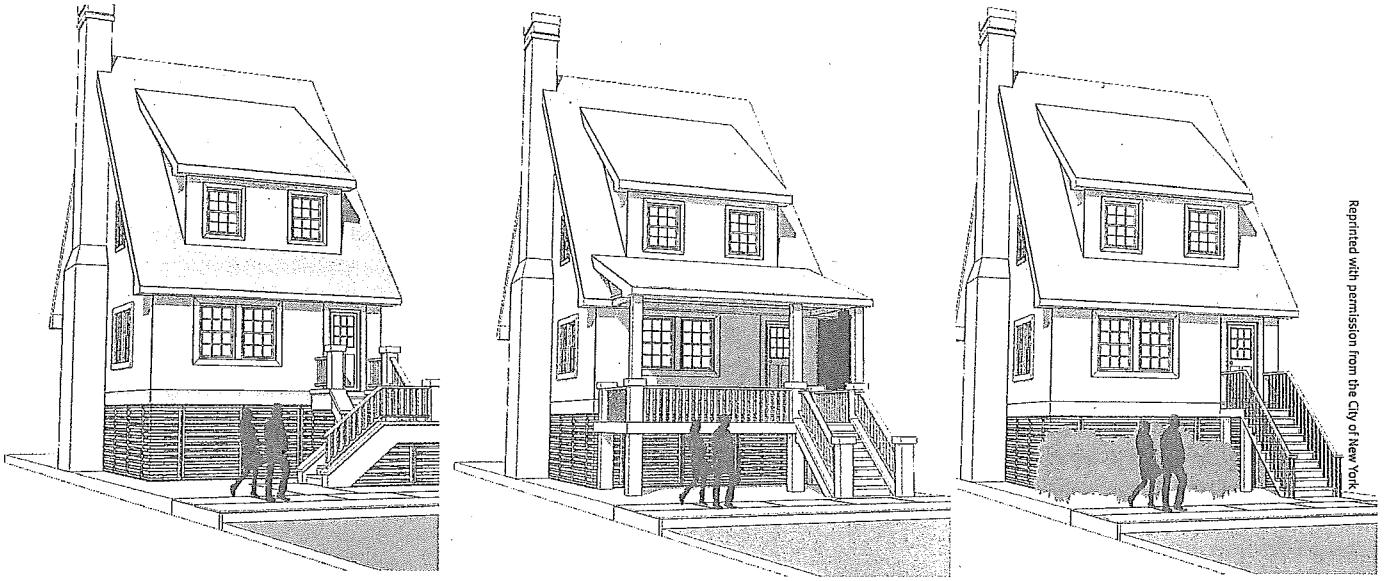
The diagram on page 4 helps to illustrate how New York has chosen to regulate buildings according to both building type and the flood zone in which they are located with respect to its "design flood elevation," defined as the base flood elevation (BFE) plus the required freeboard. Adding one or two feet is a common approach, but New York, with a more complicated development environment, breaks out freeboard requirements by building category.

The issue in New York, however, is more than simply changing the text in the zoning code. The larger issue is that of preserving the quality of the urban fabric by encouraging the kinds of creative design changes in buildings and streetscapes that could maintain the character of waterfront urban neighborhoods. For flood protection, it may be important to elevate living or working space to design flood elevations. New buildings can do this by using street-level space for parking or building lobbies, or by building atop a berm that lifts the building's base above flood level. For instance, some buildings in Baltimore's Inner Harbor use the ground level for an open lobby while placing retail space on the second floor.

Building elevations that simply create blank walls at street level, however, create serious problems for the atmosphere of such a neighborhood or commercial district. New York City needed to make clear that there were better alternatives that could succeed in a dense urban environment, and to explore those options, it had already launched before Hurricane Sandy the studies that produced *Designing for Flood Risk* and *Urban Waterfront Adaptive Strategies*.

"Because of the coastal flood risks New York City faces and changes to the National Flood Insurance Program," City Planning Commissioner Amanda M. Burden, FAICP, explains, "our communities are faced with the need to rebuild and retrofit buildings to withstand the next severe storm. Before Hurricane Sandy, we began our *Designing for Flood Risk* study to articulate principles for resilient buildings and neighborhoods that not only can withstand flooding, but also support lively and pedestrian-friendly streets. This study was crucial to our ability to quickly craft thoughtful zoning changes following the storm to promote flood-resistant construction along with vibrant streetscapes and walkable neighborhoods. We believe these lessons can be applied more broadly to the region and to other coastal communities seeking to foster livable, walkable neighborhoods."

One issue, complicated somewhat by compliance with the Americans with Disabilities Act (ADA), is that of stairways. Ramps are viable in larger buildings but can be problematic for closely built multistory housing, at the same time that elevators at floodable levels are equally problematic. Yet stairways and other design elements can be used, as the diagram above illustrates, to mitigate at least some of the more troubling visual impacts of elevating the living space in single-family homes. Shrubbery, for instance, can soften the otherwise harsh blankness of the empty space beneath elevated ground floors. In new buildings, setbacks from the streetscape, not normally encouraged in a dense urban environment, may provide the needed space to accommodate various access features including ramps and steps while protecting living or working space from flooding. In retail or office locations where only modest elevation is needed, however, the design flood elevation may keep window space at eye level while allowing access through a short series of indoor steps, with a short, solid wall at street level.



Architectural elements can be used to mitigate the visual effects of elevated first floors on the streetscape. (From *Designing for Flood Risk*.)

SMALL BUT DENSE

One common reaction outside New York to almost any land-use regulations in New York is that the city is unique and that little that it does applies elsewhere. While that may often be the case in certain respects, what New York is doing with regard to flood risk may actually prove to be of considerable value for many other smaller cities facing similar design challenges. Density is not unique to New York, nor is the question of maintaining a walkable, visually attractive urban environment in flood-prone areas near waterfronts, whether they are harbors, inlets, rivers, or lakes. New Jersey, for instance, is full of smaller municipalities with comparable densities. What New York is trying to accomplish in response to Sandy may prove useful.

Hoboken, for example, is a city of about 50,000 people living in little more than one and

Reprinted with permission from the City of New York

Elevated retail use in Soho, New York City (from *Designing for Flood Risk*).

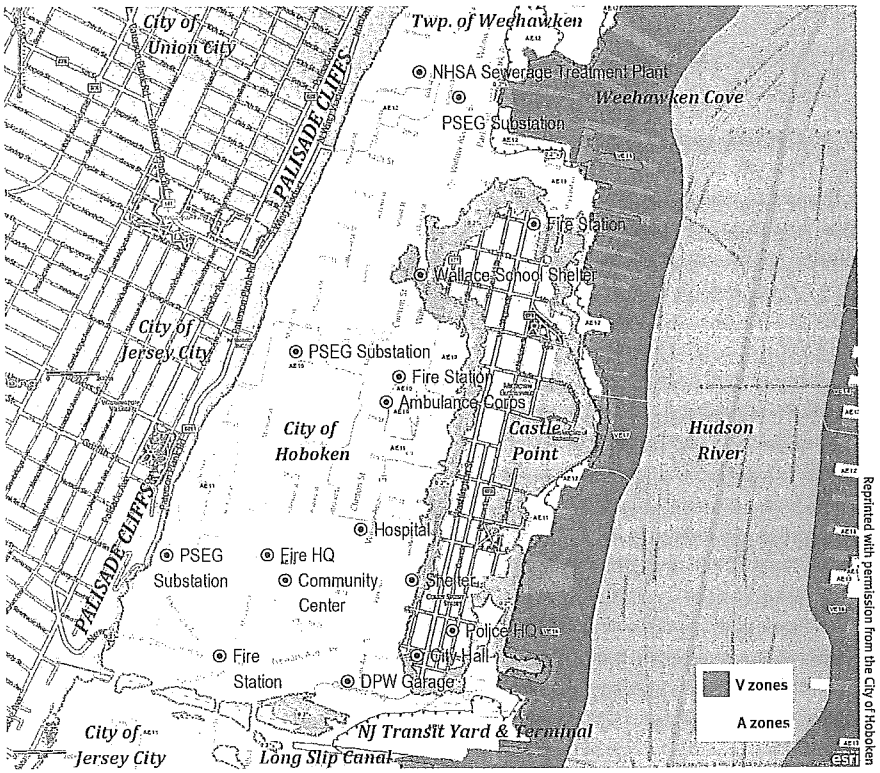
a quarter square miles. Numerous smaller villages along the New Jersey Shore, including most of those on the barrier islands, have little or no land outside the coastal floodplain. There is not much room to move, so it becomes important to use the available land wisely. The volume of damage from Sandy in many of these communities suggests that has not always happened.

Hoboken, however, is anxious to fix those problems. With 521 acres, or nearly 64 percent, of its upland space in the A zone, and 60.5 acres in the V zone, Hoboken faces serious constraints in trying to develop on high ground. The V zone is the area not only affected by coastal wave action in addition to still-water flooding. Another 62.5 acres lie in the X zone, defined as the area between the 100-year and 500-year floodplain boundaries.

In September, the city council undertook consideration of proposed amendments to the city's flood damage protection ordinance. A cover letter from community development director Brandy Forbes, AICP, indicated the city is pursuing qualifications in the NFIP's Community Rating System, which allows communities to accumulate points for activities beyond basic NFIP requirements as a means of lowering flood insurance premiums. Each of nine steps in the program can lower rates by five percent. The new ordinance included adoption of the most recent FIRMs for Hoboken, replacing earlier maps from 2006, themselves much more recent than those in New York. According to Stephen Marks, AICP, the city's assistant business administrator, the city's goal was to act on the ordinance before the first anniversary of Hurricane Sandy, October 29.

The new changes included a reduction in required lot size for variances from a half-acre to 10,000 square feet, better reflecting typical infill lot sizes in the city's dense environment. The ordinance also empowers the newly designated floodplain administrator (formerly "construction official") to "review all development permits in the coastal high hazard area of the area of special flood hazard to determine if the proposed development alters the natural coastline so as to increase potential flood damage," as well as to review plans for walls enclosing space below the base flood level. Another new section details freeboard requirements in special flood hazard areas, ranging from one foot for residential structures (except those in V zones, requiring two feet), up to three feet in V zones for buildings handling, storing, using, or disposing of hazardous materials. The ordinance also requires "attendant utilities and sanitary facilities" in new residential construction to be located above the BFE plus the required freeboard.

Looking forward, however, the city has additional issues to consider. The urban design retrofit considerations that have consumed a good deal of planning attention in New York are likely to get serious consideration over the coming year, according to Marks. The city's Department of Administration, using a $200,000 grant from the New Jersey Department of Com-



Reprinted with permission from the City of Hoboken

FEMA's preliminary floodmap for Hoboken, issued in June 2013, shows V zones in the dark shaded areas and A zones in the light shaded area, along with the locations of critical community facilities.

FREEBOARD REQUIREMENTS FOR AREAS OF SPECIAL FLOOD HAZARD

Building Type	Zones			
	X	A	Coastal A	V
Residential structures	+1'	+1'	+1'	+2'
Building and other structures with school or day care facilities, and other nonresidential structures not itemized below	+1'	+1'	+2'	+2'
Essential facilities including, but not limited to: fire, rescue, ambulance, and police stations and emergency vehicle garages; buildings designated as emergency shelters; other facilities required for emergency response; hospitals and other health care facilities having surgery or emergency treatment facilities; power generating stations and other public utility facilities	+1'	+2'	+2'	+3'
Buildings and other facilities that manufacture, process, handle, store, use, or dispose of hazardous materials	+1'	+2'	+2'	+3'
Temporary structures	n/a	+1'	+2'	n/a

Hoboken's proposed Flood Damage Prevention Ordinance amendments include this new table detailing freeboard requirements based on flood zone and structure type.

munity Affairs, released a request for proposals in October, seeking multidisciplinary consultant teams to develop a series of plans. The package includes development of new community design standards, a hazard mitigation plan, an open space, recreation, and historic preservation plan, and new codes, ordinances, and standards, with an eye toward the sorts of design guidelines that would help Hoboken address those questions.

FACING THE FUTURE

Sandy was not an anomaly, any more than Ike or Katrina or countless other storms and floods have been anomalies. It was a signal that planners need to anticipate such challenges as their communities continue to reinvent themselves in the quest for economic resilience and an urban quality of life. Combining flood protection with an attractive urban environment will require creative design solutions, particularly in an era when climate change may raise the stakes for waterfront neighborhoods and commercial districts. Finding the kinds of adaptive solutions that New York is trying to define in the wake of Sandy is a matter not only of survival, but of restoring value to the urban core.

That said, other cities may well have to undertake exercises similar to that in New York, yet unique to their own history and circumstances. With growing numbers of Americans moving to coastal areas, those cities will need to determine how best to maintain the attractions of the urban shoreline while adequately protecting those areas from coastal storms and flooding. This is no small issue for the future of American urban planning. With hundreds of billions of dollars of urban real estate at stake, it may well become one of the most important.

FURTHER READING ON SANDY AND FLOOD RISK DESIGN

- Hurricane Sandy Rebuilding Task Force. 2013. *Hurricane Sandy Rebuilding Strategy.* Available at http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2013/HUDNo.13-125.
- New York Department of City Planning, City of. 2013. *Designing for Flood Risk.* New York: NYC Planning. Available at www.nyc.gov/designingforfloodrisk.
- New York Department of City Planning, City of. 2013. *Urban Waterfront Adaptive Strategies.* New York: NYC Planning. Available at www.nyc.gov/uwas.

Landscaping can help mitigate the visual effects of a home that has elevated its first floor as a flood protection measure. Cover image reprinted with permission from the City of New York; design concept by Lisa Barton.

VOL. 30, NO. 11

Zoning Practice is a monthly publication of the American Planning Association. Subscriptions are available for $95 (U.S.) and $120 (foreign). W. Paul Farmer, FAICP, Chief Executive Officer; David Rouse, AICP, Managing Director of Research and Advisory Services.

Zoning Practice (ISSN 1548–0135) is produced at APA. Jim Schwab, AICP, and David Morley, AICP, Editors; Julie Von Bergen, Assistant Editor; Lisa Barton, Design and Production.

Missing and damaged print issues: Contact Customer Service, American Planning Association, 205 N. Michigan Ave., Suite 1200, Chicago, IL 60601 (312-431-9100 or customerservice@planning.org) within 90 days of the publication date. Include the name of the publication, year, volume and issue number or month, and your name, mailing address, and membership number if applicable.

ZONING PRACTICE
AMERICAN PLANNING ASSOCIATION

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

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

RECD NOV 4 # 2013

**********AUTO**3-DIGIT 553
Tim Gladhill
City of Ramsey
7550 Sunwood Dr NW
Ramsey MN 55303-5137

13
145

DOES YOUR ZONING PROMOTE FLOOD RESILIENCY THROUGH DESIGN?

11

ZONING PRACTICE DECEMBER 2013

AMERICAN PLANNING ASSOCIATION

ISSUE NUMBER 12

PRACTICE SHOOTING RANGES

Don't Shoot from the Hip: Plan and Regulate Shooting Ranges

By Erica S. Rocha and Dwight Merriam, FAICP

Planners are caught in the middle of a standoff between gun enthusiasts who value gun clubs and shooting ranges and others, particularly residential neighbors, who consider the clubs and ranges to be a nuisance, or worse, a risk to their safety.

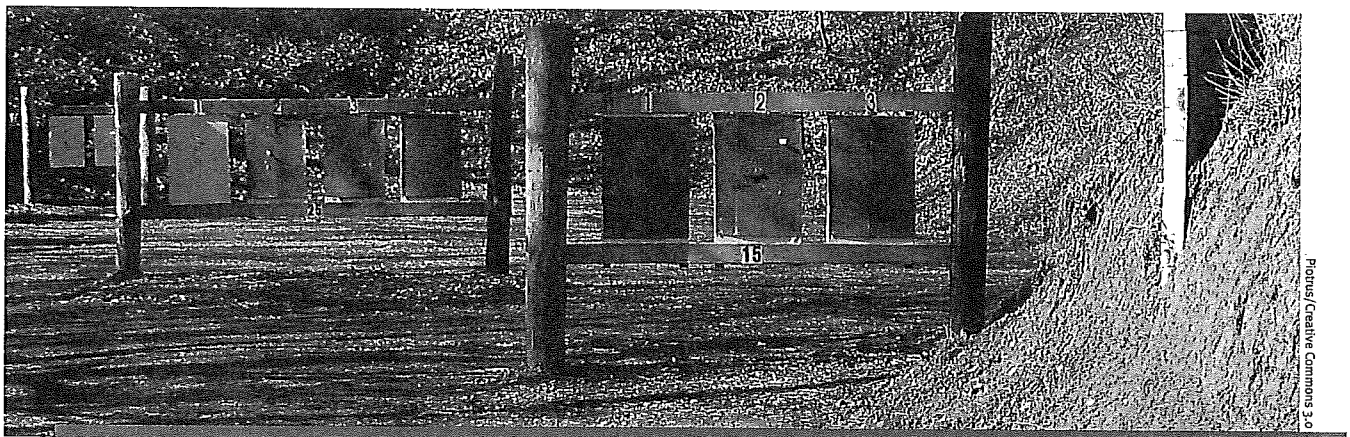
There is an important role for good planning and regulation here, one that can help all concerned find a middle ground that ends the cross fire.

Many shooting ranges and gun clubs either predate zoning or were established as as-of-right uses. In some cases, residential uses crept up on a range or club over time, in what is sometimes characterized as "coming to the nuisance," creating a standoff between those who engage in shooting sports and neighbors who find the off-site impacts intolerable. Zoning is rooted in nuisance avoidance, although we have lost sight of that today in the evolved world of transit-oriented development, new urbanism, and form-based codes. We need only look back to the very first zoning case to make its way to the U.S. Supreme Court, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926), to be reminded of that core principle of zoning with Justice George Sutherland's oft-quoted observation: "A nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard." Planning almost always works best when there is market failure, where natural forces do not efficiently and effectively allocate land use for the benefit of people today and generations not yet born. Zoning and similar land-use regulations earn their keep when they prevent nuisances. Good planning and regulation of shooting ranges and gun clubs can virtually immunize your community from conflict controversy.

GUNS BLAZING

More than 34 million Americans participate in target and sport shooting at shooting ranges and gun clubs across the country (Responsive Management 2010). Outdoor sport shooting is an American tradition, and sporting ranges have existed in the United States for over a century. Shooting ranges provide a venue for games and training using rifles, pistols, and shotguns and various types of targets. Participants generally use rifles and pistols to shoot at paper targets or at metallic silhouettes shaped like animals and shotguns to shoot at clay discs that are launched into the air to simulate bird targets (Cotter 2003). In recent years, however, the traditional American shooting range has undergone a dramatic transformation.

As gun control measures continue to stir debate in America, business is booming for target and sport shooting facilities (Smith 2013). Some ranges have become more community minded and family focused, hosting blood drives, Toys for Tots collections, and "ladies' nights," where women can learn to shoot (Weeks 2013). Other ranges have set their sights on unique (if not eyebrow-raising) ways to capitalize on the growing demand for target and sport shooting. One range in



Photus/Creative Commons 3.0

Paper targets as seen from the firing line at an outdoor shooting range near Pittsburgh.

ASK THE AUTHOR JOIN US ONLINE!

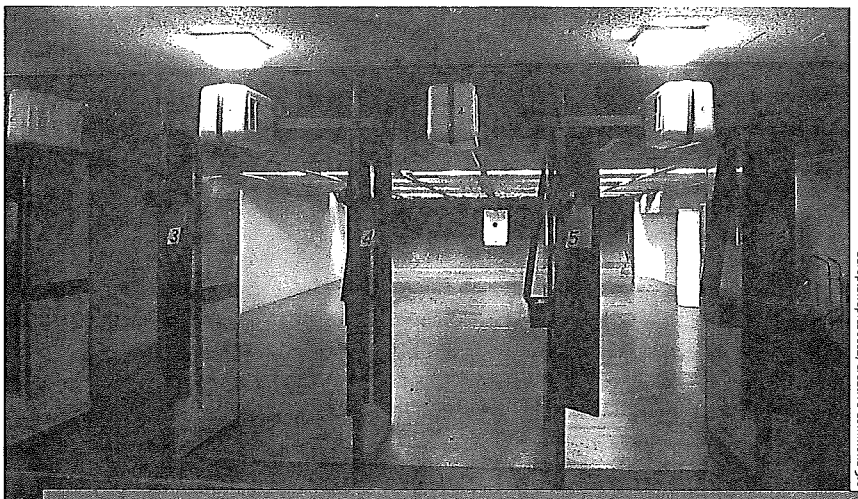
Go online during the month of December to participate in our "Ask the Author" forum, an interactive feature of Zoning Practice. *Erica S. Roche and Dwight Merriam, FAICP, will be available to answer questions about this article. Go to the APA website at www.planning.org and follow the links to the Ask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

About the Authors

Erica S. Rocha is a second-year law student at Quinnipiac University School of Law in Hamden, Connecticut. She is the 2013 Moot Court Honor Society Intramural Competition Final Bench Winner and Best Oral Advocate.

Dwight Merriam, FAICP, founded Robinson & Cole's Land Use Group in 1978. He is past president of the American Institute of Certified Planners and received his masters of Regional Planning from the University of North Carolina and his Juris Doctor from Yale.

Special thanks to Attorney Anastasia V. Petukhova, LLM University of Connecticut School of Law (2013), for her substantial contributions to the research while an intern at Robinson & Cole LLP.



aeroplanepics2012/Creative Commons 3.0

The view from behind the firing line at an indoor shooting range.

Arizona offers a "Bullets and Burgers Experience," which includes a scenic drive through the desert, shooting a .50 caliber sniper rifle, blasting away with a M249 SAW machine gun, and eating a "world famous cheeseburger." Las Vegas, home to the nation's loosest gun laws, now hosts six machine-gun shooting ranges and offers a variety of shooting packages, such as the kid's package, the mob package, and a zombie apocalypse package (Hernandez 2012).

Despite their popularity, shooting rages across the nation face sharp opposition due to safety, noise, and environmental concerns. Many shooting ranges are no longer isolated in rural environments. As human populations move and expand into the countryside, shooting ranges have acquired new neighbors—many of whom find living near shooting ranges to be noisy and dangerous. Legal, regulatory, and public perception concerns are forcing range operators to take a proactive approach to minimize the potential for adverse impacts. The following sections provide an overview of the most common types of shooting ranges, the main issues and concerns associated with shooting ranges, and planning and regulatory considerations for local governments.

THE SHOOTING SCENE TODAY

Shooting ranges may be public or private, indoor or outdoor. The range operators or owners appoint range masters to oversee the operations and ensure that gun safety rules are followed. Range masters must complete a training process and become certified by the National Rifle Association (NRA).

Currently, there are about 9,000 non-military outdoor ranges in the United States (Kardous and Afunah 2012). Outdoor ranges are built in large, open areas and require less cleaning and maintenance than indoor ranges. However, outdoor ranges also allow for lead and noise to disperse more widely. Outdoor ranges are specially designed to prevent bullets from escaping the range or ricocheting back at shooters. Many ranges are backed by sandbagged barriers, berms, and baffles, which help protect against injury of people and damage to property. These barriers also allow for systematic recovery of lead projectiles (Luke 1996). Indoor shooting ranges typically include rifle and handgun ranges.

Indoor ranges are popular because they offer protection from inclement weather and can be operated under controlled environmental conditions. Environmental and occupational controls are necessary to protect the health of shooters and range personnel from effects of airborne lead and noise (Kardous and Afunah 2012).

PLANNING CONSIDERATIONS AND BEST PRACTICES

As a result of urban expansion into rural areas, some long-established gun clubs and shooting ranges are finding themselves increasingly closer to, if not abutting, residential neighborhoods. Careful planning and government regulation can take certain steps to ensure that shooting ranges are good neighbors. Local governments that are interested in regulating shooting rages should take a realistic approach to addressing noise, safety, and environmental issues.

Shooting Range Protection Statutes

The most common complaint about shooting ranges is noise, and local governments often

regulate the duration and amplitude of sounds emitted from a location. In an effort to protect shooting ranges from nuisance actions and closure, many states have enacted statutes completely barring noise-related nuisance causes of action against shooting ranges. Other states have exempted outdoor shooting ranges from local noise-control laws (Cotter 1999).

A minority of states do not provide absolute immunity from legal action based on noise. For example, the Minnesota Shooting Range Protection Act (MSRPA) requires shooting ranges to comply with state-established performance and safety standards in order to qualify for protection; however, local governments can only close a range if it constitutes a "clear and immediate safety hazard." The MSRPA establishes a noise standard of 63 decibels (natural background noise is about 35 decibels) measured on the A-weighted fast response mode scale. This statute also creates a 750-foot "mitigation area" from the perimeter of a shooting range's property onto adjoining lands. The mitigation area is highly restricted and no changes or improvements can be made within the area without approval of the governing body. Range operators are also required to pay for any mitigation devices required to keep the range in compliance with local ordinances and statutory performance standards (Remakel 2008).

Where state and municipal regulations coexist, preemption may become an issue. Such an issue was raised in Florida, when the attorney general released an advisory legal opinion stating that counties may impose *existing* zoning and land-use regulations upon the siting of proposed sports shooting ranges but not any newly created or amended regulations. The provisions of the Florida statute are specific to the regulation of the use of firearms and ammunition at sport shooting and training ranges but do not address the actual siting of such facilities. The attorney general's plain-meaning interpretation of the statute enables municipalities to exert some control over zoning and land-use regulation of a proposed shooting range (McCollum 2008).

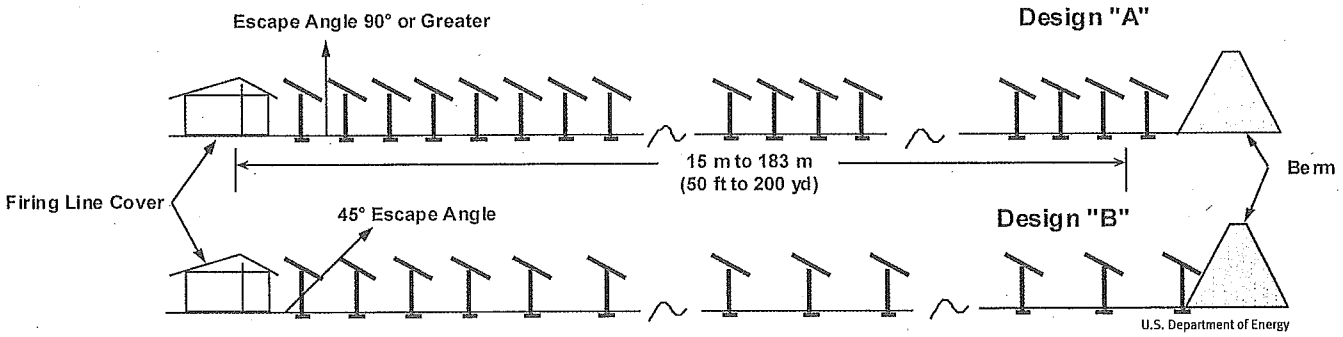
The state of Ohio brought an action against shooting range operators to prevent them from using a portion of their land as a shooting range because of noise and stray bullets. The state alleged that the range obstructed the reasonable use and enjoyment of neighboring properties. Despite overwhelming witness testimony regarding noise and bullets landing on or lodging in nearby properties, the court held that so long as the range substantially complied with shooting range rules, the operators had statutory immunity from legal action (*State ex rel. Fischer v. Hall, Court of Appeals of Ohio*, 6th Dist., Aug. 6, 2004).

Site Planning and Operational Considerations

Planners and local officials should refer to NRA guidelines when considering new regulations for shooting ranges. The NRA recommends a reasonable hours-of-operation schedule to minimize disruption of the surrounding community. Specific suggestions include delaying opening on weekend mornings, offering discounted rates during the least disruptive hours, limiting the use of louder firearms to predetermined times or by appointment, and holding special high-use events during cooler times of the year when fewer people are outdoors and less likely to be disturbed (NRA 2012).

Planners and local officials should also consider natural topography when evaluating appropriate locations for new ranges. For example, valleys and forested hillsides are better at containing sound than hilltops and grassy or bare rocky hillsides, and sound tends to carry long distances over water. Ranges should be oriented so that shooting is away from sound-sensitive areas and residential neighborhoods (NRA 2012).

For indoor ranges, there are various acoustical methods available to control and reduce the sound produced by gunfire. Exposed walls, overhead baffles, safety ceilings, and range floors can be treated with special noise-abatement materials and panels so that they absorb the reverberation of gunfire. By decreasing noise levels within the gun range, the overall safety of the range is improved because members and employees are protected from hearing loss. Moreover, these soundproofing measures improve community relations because less sound leaks from the building (NRA 2012).



Evenly spaced overhead baffles prevent direct fire from exiting a shooting range.

Safety concerns are the most publicized and most serious concerns regarding shooting ranges. Stray bullets that end up near homes present an obvious and major problem for gun ranges. These types of incidents receive a lot of media attention and result in severe limitations or closures for gun ranges. Aside from deaths caused by suicides or intentional killings, deaths caused by stray bullets from shooting ranges are extremely rare (though not unprecedented). In 2010, a stray bullet from an unpermitted backyard range in Burlington, Vermont, hit and killed a St. Michael's College professor. The shooter was convicted of voluntary manslaughter and sentenced to two years in prison (Curran 2012).

Home owners have successfully litigated against shooting ranges where they can show that the range's safety conditions are inadequate. Home owners who lived about a half-mile from a rifle and pistol range in Scituate, Massachusetts, were able to close down and receive damages from the range after proving that four bullets that struck their homes in a five-year period came from the club. The court

held that the existing safety conditions at the club were not adequate to protect the home owners from an unreasonably high risk of injury due to escaping bullets (*Norton v. Scituate Rod & Gun Club, Inc.*, 2012 WL 2335299 (Mass. Super. Apr. 12, 2012)).

One gun club in Michigan recently unveiled a new plan to improve safety after it closed for two years when stray bullets flew into a nearby neighborhood and hit an outdoor worker. The gun club is seeking a special use permit, so it can build a baffle system with a "no-blue sky configuration." This configuration works like a series of window openings. Since the shooter can only see through the openings, he cannot shoot into the sky. This way, errant rounds cannot escape the perimeters of the range (WZZM 13 2013).

Planners and local officials should be aware of the available safety measures to ensure containment of bullets within a shooting range. The most basic and most important safety considerations include control of muzzle direction and direction of fire, prohibition of alcohol and drug use on the premises, coordination of fire and cease-fire when multiple shooters are practicing, and active supervision of minors. Structurally, shooting ranges should be equipped with adequate side berms and backstops in order to prevent stray bullets from escaping the range. It may be necessary to install overhead baffles or guards to ensure that bullets cannot escape (NRA 2012).

Environmental Considerations

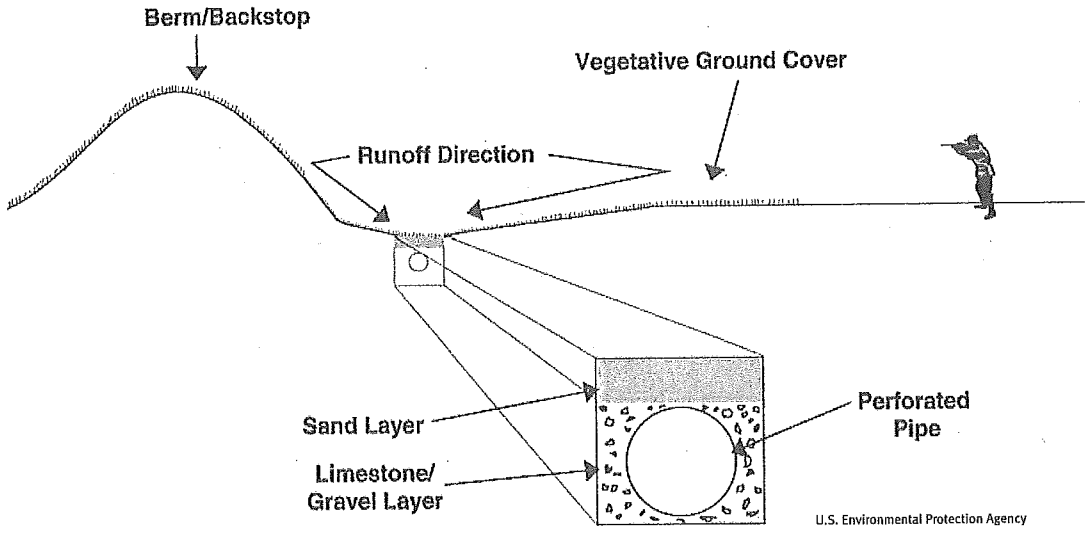
The primary environmental concern related to shooting ranges is the potential for lead contamination. According to a study by the U.S. Environmental Protection Agency (EPA) from the late 1990s, lead leaching from outdoor firing ranges was among the biggest sources of lead in the environment (EPA 2005). The fundamental issue is that when it rains, lead on the ground dissolves and can run into nearby water sources or penetrate the soil and contaminate groundwater. This problem is exacerbated by the sheer size of shooting ranges. The wide distribution of shot that occurs at outdoor shooting ranges results in a relatively large area of the range that can facilitate lead dissolving into surface and groundwater (NSSF 1997). The EPA, the Centers for Disease Control and Prevention, and a large number of states have identified human exposure to all forms of lead as a major health concern in the United States (EPA 2005).

The EPA recommends a four-step approach to lead management: (1) control and contain lead bullets and bullet fragments; (2) prevent migration of lead to the subsurface and surrounding surface water bodies; (3) removal and recycle of lead; and (4) document activities and keep records (EPA 2005).

Local governments can require that a lead-management program be established that makes sense for the individual range's characteristics. To best manage lead, many shooting range owners and environmental agencies recommend periodic lead recovery and recycling. From a design standpoint, it makes most sense to position shooters or targets so that shot-fall areas overlap and concentrate the shot, therefore decreasing the area to be recovered. Range owners and operators should keep a record of the number of rounds shot annually so that lead recovery contractors can know the approximate amount of lead present. Recovery lead should not be stored or accumulated on the premises, but sent to a recycler as soon as possible. The most efficient and cost-effective approach involves addressing the site-specific soil conditions. In some areas, adding lime or phosphate in order to balance out the pH level of the soil can help prevent solubility of lead in water. Adding layers of clay to the soil can act as barriers to control mobility of lead (NSSF 1997).

Since the mid-1980s, citizen groups have rallied against the improper management of lead projectiles. These groups have brought several lawsuits against range owners and have urged federal and state agencies to take action against owners and operators of outdoor shooting ranges. Federal courts have supported claims that require range owners and operators to clean up lead-contaminated areas. However, courts have generally protected ranges that have received approval from or follow practices suggested by environmental agencies (*Simsbury-Avon Preservation Society LLC et al. v. Metacon Club Inc.*, (D. Conn. June 14, 2004); *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009); *T&B Ltd. Inc. v. City of Chicago*, 369 F.Supp.2d 989 (N.D. Illinois, Eastern Division 2005)).

In response to environmental concerns, many shooting ranges now use steel shot alternatives. Although more expensive and ballistically different than lead, steel is considered the most viable alternative shot material available today for shotgun target shooting. These alternatives do not fragment and are



A filter bed that collects and filters stormwater runoff is an example of a best management practice for limiting lead contamination at a shooting range.

far less toxic than lead bullets. The transition to steel alternatives dates back to 1991 when federal wildlife authorities ordered steel pellets to replace lead birdshot in waterfowl hunting (Ravindran 2013). In 2013, California lawmakers passed a bill banning lead from bullets in order to protect condors, whose main cause of death is lead poisoning from ammunition and "gut piles" left behind by hunters who clean carcasses in the field (Bernstein 2013).

PLANNING HELPS

Good planning is often the key to ensuring that shooting ranges find locations that meet the demands of shooting sports enthusiasts while avoiding conflicts with other land uses. Planners may benefit by getting out ahead of potential conflicts in making a preliminary assessment of what sites might be acceptable and what areas should be excluded from consideration. Even if planners do not take the initiative to make preliminary site assessments, they will ultimately be required to react to development proposals. Site location is especially important when considering how to minimize adverse environmental and noise impacts. The technical process of selecting an outdoor shooting range site involves screening a site's particular environmental and engineering suitability. First, exclude clearly inappropriate sites, like those that require shooting over or into wetlands, water, and sensitive wildlife areas. Next, evaluate sites based on their environmental characteristics and consider soil type, topography, and drainage. Additional considerations include distance to sound-sensitive areas and natural features that minimize sound. The result could be a map of potentially suitable sites.

FROM PLANNING TO APPROVAL

Local governments have choices when it comes to how much discretion to exercise in the land-use approval process for shooting ranges. There is no constitutional right to have a place to shoot and thus no heightened scrutiny in any review as you might have with a First Amendment free speech or free exercise of religion land use. For shooting ranges, you have no greater burden than the usual rational relationship—as you might have for a car wash or funeral home. Because ranges involve a number of site-specific issues and the potential for serious off-site impacts, few communities permit these uses as-of-right in any zoning district.

More commonly, local governments permit shooting ranges as conditional uses (sometimes called a special exception or special permit use) in one or more zoning districts, requiring approval through a discretionary site-specific review. This approach is appropriate for a use that might be fine in one location in a zone but not on another site in the same zone (e.g., near a school or cluster of homes). Conditions and review criteria for shooting ranges may address minimum land area, site design, lighting, sound limits, testing, hours of operations, and the like.

Given that there are numerous technical aspects of design, as noted above, expert testimony can be helpful in decision making. Some states allow local governments to require that applicants pay for the cost of expert review. Performance standards and periodic reports on operations may help prevent adverse off-site impacts.

COMMUNITIES WITH USE-SPECIFIC STANDARDS FOR SHOOTING RANGES

- Blue Earth County, Minnesota (§24-303(I)): www.municode.com/Library/MN/Blue_Earth_County
- Cowlitz County, Washington (§10.22.01 et seq.): www.codepublishing.com/wa/cowlitzcounty
- Germantown, New York (Zoning & & Subdivision Law §VI.P): http://germantownny.org/wp-content/uploads/2012/12/Adopted-Germantown-Zoning-and-Subdivision-Law.pdf
- Martin County, Florida (Land Development Regulations §§3.99 & 3.99.1): www.municode.com/Library/FL/Martin_County
- Pitt County, North Carolina (Planning & Development Services Ordinance No. 9): www.pittcountync.gov/bcc/ordinance/planning/9.pdf
- Texarkana, Arkansas (§28-21(c)): www.municode.com/Library/AR/Texarkana

Communities looking for additional discretion in the approval process may consider adopting an overlay district with special development or performance standards for shooting ranges. This overlay may be mapped to specific areas of the jurisdiction at the time of initial adoption, or it may be a floating overlay, meaning it is only mapped in coordination with local legislative body approval of a rezoning application for a particular parcel.

Some communities exercise maximum discretion by requiring potential range owners or operators to apply for a base-district rezoning to a special or planned development district. For example, Fort Worth, Texas, uses this approach for shooting ranges (§4-305.C.3). Requiring special or planned development district approval has a number of advantages for all concerned.

Because this approach involves a legislative map amendment, it is easier for the local government to defend its decision. In most states the procedural due process requirement for legislative actions is less than that for an administrative action, such as a conditional use, or a quasi-judicial action, such as a variance.

The applicant provides a conceptual site plan with the map amendment petition, which allows both the government and the neighbors to review and suggest modifications to the project. Because the extent of engineering and design for the conceptual site plan is quite limited, the applicant may be more willing to adjust the plan in order to secure approval.

Once the conceptual site plan is ready for approval and all of the modifications that are needed by the stakeholders have been incorporated, the floating zone is approved to descend and apply to the site. At this point the applicant has a vested right in the map change and approved conceptual plan and can then finance the expensive final engineering and architectural design. In most cases, the details of the plan become the standards for that particular special development district.

Once a site has been approved, local planners need to consider what conditions might be placed on the approval to maintain the range so that it can peacefully exist within a community. The state of Florida recommends that range operators develop a community relations plan, which describes exactly how positive relationships with the surrounding neighborhoods and communities will be established and maintained (Florida DEP 2004). A key component of this plan should be a noise management plan that describes exactly how the impacts of sound and noise potential will be addressed and mitigated.

Finally, planners and local officials may wish to require an environmental plan, which can help evaluate current lead deposits and address cleanup, containment, and recycling issues (Cotter 2003). The plan should delineate exactly what combination of practices will be

REFERENCES AND RESOURCES

- Berstein, Lenny. October 2013. "With a Ban on Lead in Hunters' Bullets, California Hopes to Protect Condors." *Washington Post*, October 20. Available at www.washingtonpost.com/national/health-science/with-ban-on-lead-in-hunters-bullets-california-hopes-to-protect-condors/2013/10/20/2e375388-3829-11e3-ae46-e4248e75c8ea_story.html.
- Connecticut General Assembly, 2010. "Shooting Range Safety Standards in Other States" OLR Research Report.
- Cotter, David G. 1999. "Outdoor Sport Shooting Ranges: An Endangered Species Deserving of Protection" *Thomas M. Cooley Law Review*, 16: 164–200.
- Cotter, David G. 2003. "Outdoor Sport Shooting Ranges Under the Environmental Gun—the Final Assault or Merely a Manageable Dilemma?" *Thomas M. Cooley Law Review*, 20: 453–459.
- Curran, John. 2012. "Vt. Man Gets Jail in Prof's Stray Bullet Death." *Seattle Times*, June 10. Available at http://seattletimes.com/html/nationworld/2012084006_apusprofessorsshooting.html.
- Hernandez, Daniel. 2012. "Vegas gun ranges target thrill-seeking tourists with ever bigger weapons." *The Guardian*, November 30. Available at www.theguardian.com/world/2012/nov/30/las-vegas-machine-gun-shooting-ranges.
- Kardous, Chucri A,. and Susan Afunah. 2012. "Reducing Exposure to Lead and Noise at Outdoor Firing Ranges." Workplace Solutions from the National Institute for Occupational Safety and Health, DHHS (NIOSH) Publication No. 2013–104. Available at www.cdc.gov/niosh/docs/wp-solutions/2013-104/pdfs/2013-104.pdf.
- Luke, David. 1996. "Baffles, Berms and Backstops." Third National Shooting Range Symposium, June 23–25. Available at http://nssf.org/ranges/RangeResources/library/detail.cfm?filename=facility_mngmnt/design/baffles_berms.htm&CAT=Facility%20Management.
- McCollum, Bill. 2008. "Advisory Legal Opinion--AGO 2008-34." Florida Office of the Attorney General, June 25. Available at www.myfloridalegal.com/ago.nsf/Opinions/9828840C127F03948525747300 6CADD5.
- National Rifle Association (NRA). 2012. *The Range Source Book: A Guide to Planning and Construction*. Washington, D.C.: National Rifle Association. Available at http://rangeservices.nra.org/sourcebook.aspx.
- National Shooting Sports Foundation (NSSF). 1997. *Environmental Aspects of Construction and Management of Outdoor Shooting Ranges*. Available at www.doi.gov/greening/links/upload/EAofCMofOSR.PDF.
- Ravindran, Sandeep. 2013. "Banning Lead Ammunition Could Give Condors a Chance." *National Geographic*, October 14. Available at http://news.nationalgeographic.com/news/2013/10/131014-lead-ammunition-ban-condor-california-science.
- Remakel, John A. 2008. "A Minnesota Armistice? The Enactment and Implementation of the Minnesota Shooting Range Protection Act." *Hamline Law Review*, 31: 197–232.
- Responsive Management. 2010. Sport Shooting Participation in the United States in 2009. Conducted for the National Shooting Sports Foundation. Available at www.nssf.org/pdf/research/excerptnssf-shooting-participation-report.pdf.
- Smith, Kelly. 2013. "Growing Interest in Guns Crowds Gun Ranges." *Star Tribune*, July 20. Available at www.startribune.com/local/west/216245721.html.
- U.S. Environmental Protection Agency (U.S. EPA). 2005. *Best Management Practices for Lead at Outdoor Shooting Ranges*. Available at www2.epa.gov/sites/production/files/documents/epa_bmp.pdf.
- Weeks, Linton. 2013. "Are Shooting Ranges the New Bowling Alleys?" NPR, January 31. Available at www.npr.org/2013/01/31/170391799/are-shooting-ranges-the-new-bowling-alleys.
- WZZM 13. 2013. "Gun Club Unveils Plans to Prevent Stray Bullets." October 7. Available at www.wzzm13.com/news/regional/270087/5/Gun-club-unveils-plans-to-prevent-stray-bullets.

used to achieve optimal lead management. Soil erosion management and wildlife habitat preservation should also be elements of the plan. Although there may be initial increases in cost due to purchasing steel shot alternatives and investing in routine cleanup practices, ranges will be avoiding the long-term costs of litigation and risk of closure.

REACHING THE RIGHT RESULT

Shooting ranges can peacefully coexist in most communities, providing training and sporting opportunities for gun enthusiasts while eliminating virtually all adverse impacts. Planners who take the initiative and plan for shooting ranges and gun clubs, and arm themselves with good regulations, can succeed in providing for such uses while protecting the public. Finally, discretionary review processes can provide a forum for a dialogue that results in a consensus about proper facility design, operations, and environmental protections.

Cover image by Piotrus/ Creative Commons 3.0; design concept by Lisa Barton.

VOL. 30, NO. 12

Zoning Practice is a monthly publication of the American Planning Association. Subscriptions are available for $95 (U.S.) and $120 (foreign). W. Paul Farmer, FAICP, Chief Executive Officer; David Rouse, AICP, Managing Director of Research and Advisory Services.

Zoning Practice (ISSN 1548–0135) is produced at APA. Jim Schwab, AICP, and David Morley, AICP, Editors; Julie Von Bergen, Assistant Editor; Lisa Barton, Design and Production.

Missing and damaged print issues: Contact Customer Service, American Planning Association, 205 N. Michigan Ave., Suite 1200, Chicago, IL 60601 (312-431-9100 or customerservice@planning.org) within 90 days of the publication date. Include the name of the publication, year, volume and issue number or month, and your name, mailing address, and membership number if applicable.

Printed on recycled paper, including 50-70% recycled fiber and 10% postconsumer waste.

NON-PROFIT ORG
U.S. POSTAGE
PAID
APPLETON, WI
PERMIT NO. 39

ZONING PRACTICE
AMERICAN PLANNING ASSOCIATION

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

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

RECD FEB 18 2013

**********AUTO**3-DIGIT 553
Tim Gladhill
7550 Sunwood Dr NW
Ramsey MN 55303-5137

13
147

HOW DOES YOUR COMMUNITY REGULATE SHOOTING RANGES?

12