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# Zoning Bulletin

## in this issue:

Review of Enforcement of Regulations—Landowner Seeks Declaration on Backyard Internment from Court 2

Telecommunications—Township Denies Wireless Communications Carrier's Application to Construct Tower 5

Proceedings—After Planning and Zoning Commission Recommends Approval of Zoning Request, Board of Aldermen Does Not Notify Applicant of Related Hearing 8

Use/Interpretation—Retail Store Owner Seeks to Install Gasoline Filling Station as Accessory Use 10

Zoning News from Around the Nation 12

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# Review of Enforcement of Regulations—Landowner Seeks Declaration on Backyard Internment from Court

## Town argues court lacks jurisdiction as landowner failed to appeal letter of zoning enforcement officer

Contributors

Corey E. Burnham-Howard



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Citation: *Piquet v. Town of Chester, 306 Conn. 173, 2012 WL 3600314 (2012)*

CONNECTICUT (08/29/12)—This case addresses the following issue: when does a letter from a town's zoning enforcement officer constitute a "decision" from which a landowner can appeal? In other words, the case addressed: "what constitutes an appealable decision of a zoning compliance officer?"

**The Background/Facts:** Elise Piquet ("Piquet") owned property in Chester, Connecticut (the "Town"). After her husband died, she interred her husband's remains in the backyard of her property under the supervision of a licensed funeral director. Thereafter, the Town's zoning compliance officer (the "ZCO") issued a cease and desist order with regard to the burial for violation of the Town's zoning regulations. Piquet appealed from the cease and desist order, seeking a variance. A month later, on September 16, 2005, the ZCO informed Piquet by letter (the "September letter") that the burial was not permitted as a principal use or a special principal use in the residential district where Piquet's property was located. In the September letter, the ZCO also withdrew the cease and desist order for the purpose of allowing Piquet to remedy the violation. Piquet then informed the board of appeals (the "Board") that she was withdrawing her objection to the cease and desist order, without prejudice.

Two years later, Piquet commenced an action in trial court against the Town and the Town's planning and zoning commission (hereinafter, collectively, the "Town"). She asked the court to declare that she had the right to use her property for the internment of her husband's remains and, upon her death, for the internment of her remains as well.

The trial court issued judgment in favor of the Town.

Piquet appealed. The Appellate Court found that Piquet withdrew her variance application and did not otherwise appeal from the cease and desist order or the ZCO's September letter. The Appellate Court concluded that the trial court did not have subject matter jurisdiction over Piquet's action because Piquet had failed to exhaust her administrative remedies by not appealing to the Board.

Piquet again appealed. The Supreme Court of Connecticut certified Piquet's appeal, limited to the issue of whether the trial court lacked subject matter jurisdiction over Piquet's action because Piquet had failed to exhaust her administrative remedies.

On appeal, Piquet claimed that the Appellate Court incorrectly concluded that she should have appealed to the Board prior to filing her legal action. Among other things, she argued that there was no decision of the ZCO from which she could appeal since the ZCO had withdrawn the cease and desist order. Both Connecticut General Statutes § 8-7 and § 140G.1 of the Town's zoning regulations provided that the Board

had authority to hear appeals of "any order, requirement or decision" made by the ZCO.

In response, the Town maintained that the cease and desist order and the September letter issued by the ZCO to Piquet represented decisions from which Piquet properly could have appealed to the Board.

**DECISION: Affirmed.**

The Supreme Court of Connecticut held that the ZCO's September letter to Piquet was a decision from which Piquet could have appealed. The court agreed with the Appellate Court that the trial court lacked subject matter jurisdiction because Piquet had failed to exhaust her administrative remedies prior to filing the declaratory judgment action in court.

Rejecting Piquet's assertions, the court concluded that the ZCO's September letter constituted a decision from which Piquet could appeal to the Board. In so concluding, the court addressed, as a matter of first impression (i.e., the first time that court heard the specific issue): "what constitutes an appealable decision of a zoning compliance officer."

The court held that:

> when a landowner receives notice from a zoning compliance officer that the landowner's existing use of his or her property is in violation of applicable zoning ordinances or regulations, that interpretation constitutes a decision from which the landowner can appeal to the local zoning board of appeals pursuant to [CGS] § 8-7 and, when applicable, pursuant to local zoning regulations. Put differently, when a landowner obtains a clear and definite interpretation of zoning regulations applicable to the landowner's current use of his or her property, the landowner properly may appeal that interpretation to the local zoning board of appeals. Conversely, when a zoning enforcement officer provides an interpretation that is contingent on future events, that interpretation will not be appealable, and the landowner must await a subsequent, final determination following that interpretation—e.g., the issuance of a certificate of zoning compliance—in order to appeal to the local zoning board of appeals.

The court further clarified that: "when a zoning enforcement officer issues a letter notifying a landowner that he or she is in violation of the applicable zoning regulations, the landowner may appeal that interpretation regardless of whether the letter is accompanied by a cease and desist order or other remedial action."

See also: *Stepney, LLC v. Town of Fairfield, 263 Conn. 558, 563, 821 A.2d 725 (2003).*

See also: *Holt v. Zoning Bd. of Appeals of Town of Stonington, 114 Conn. App. 13, 968 A.2d 946 (2009).*

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***Case Note:***

*Piquet had also argued that an appeal to the Board would have been futile, as*

 

*would excuse her from failing to exhaust administrative remedies. The court rejected this argument, finding Piquet failed to establish that claim.*

# Telecommunications—Township Denies Wireless Communications Carrier's Application to Construct Tower

## Communications carrier alleges denial violates the federal Telecommunications Act

Citation: *T-Mobile Cent., LLC v. Charter Tp. of West Bloomfield, 2012 WL 3570666 (6th Cir. 2012)*

*The Sixth Circuit has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee.*

SIXTH CIRCUIT (MICHIGAN) (08/21/12)—This case addressed the issues of: (1) whether a township's reasons for denying a wireless communications carrier's application were not supported by substantial evidence in violation of the federal Telecommunications Act; and (2) whether a township's denial of a wireless communications carrier's application prohibited or had the effect of prohibiting the provision of personal wireless services, in violation of the federal Telecommunications Act. In addressing this second issue, the case addresses, as matters of first impression for the Sixth Circuit (i.e., the first time the Sixth Circuit has addressed these issues): (1) whether the denial of a single application from a wireless communications carrier can constitute an effective prohibition; and (2) whether the "significant gap" in service needed to establish an effective prohibition on the provision of personal wireless services focuses on the coverage of the applicant provider or whether service by any other provider is sufficient.

**The Background/Facts:** T-Mobile Central, LLC ("T-Mobile"), a wireless communications carrier in Michigan, identified a gap in coverage in West Bloomfield Township (the "Township") that adversely affected customers in that area. To remedy this gap, T-Mobile sought to construct a new wireless facility. After initially considering several possible sites—none of which T-Mobile claimed were technically feasible or practically available—T-Mobile decided that the best option would be to construct a facility at a utility site on a property owned by Detroit Edison. The facility contained an existing 50-foot pole,

 

which T-Mobile wanted to replace with a 90-foot pole disguised to look like a pine tree with antennas fashioned as branches (a "monopine"). This site was not located within the two cellular tower overlay zones designated in the Township's Zoning Ordinance, where wireless facilities are considered a use permitted by right, subject only to site approval. Therefore, T-Mobile needed to seek special land-use approval and site-plan approval.

On December 17, 2008, T-Mobile filed an application with the Township to obtain special land-use approval for the proposed site. Ultimately, the Township Planning Commission recommended to the Board of Trustees of the Township (the "Board") that T-Mobile's application should be denied. The Board denied T-Mobile's application.

T-Mobile then sought an injunction in district court that would direct the Board to grant its application. Among other things, T-Mobile argued that: (1) the denial of its application was not supported by substantial evidence, in violation of the Telecommunications Act, 47 U.S.C.A. § 332(c)(7)(B)(iii); and (2) the denial of its application had the "effect of prohibiting the provision of personal wireless services" in violation of the Telecommunications Act, 47 U.S.C.A. § 332(c)(7)(B)(i)(II).

The district court held that the Township's grounds for denial were not supported by substantial evidence. The district court also held that T-Mobile could not feasibly locate the facility elsewhere and that the Township had effectively prohibited the provision of wireless services in violation of the federal Telecommunications Act.

The Township appealed.

**DECISION: Affirmed.**

The United States Court of Appeals, Sixth Circuit, first agreed that the Township's grounds for denial of T-Mobile's application were not supported by substantial evidence in violation of the Telecommunications Act, 47 U.S.C.A. § 332(c)(7)(B)(iii).

The court explained that pursuant to 47 U.S.C.A. § 332(c)(7)(B)(iii): "Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." The court explained that there must be substantial evidence "in the context of applicable state and local law." Thus, the nature of the evidence relied on by the local zoning board in its decision must be "substantial evidence" that is "substantiated."

Here, the court found the Township's reasons for denial were not based on substantial evidence in the record. The court found the evidence relied upon by the Board—such as general concerns from a few residents—was merely "alleged," not "substantiated."

 

Next, the court concluded that the Township's denial of T-Mobile's application violated the Telecommunications Act, 47 U.S.C.A. § 332(c)(7)(B)(i)(II), in that it prohibited or had the effect of prohibiting the provision of personal wireless services.

In so concluding, the court adopted the First Circuit's two-part test to consider whether the denial of an application amounts to an effective prohibition. Under the test, the denial of an application amount to an effective prohibition if there is: (1) a "showing of a 'significant gap' in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations."

Addressing the first part of this test, as a matter of first impression, the Sixth Circuit held that the denial of a single application from a wireless communications carrier can constitute an effective prohibition of personal wireless services. Also as a matter of first impression, the Sixth Circuit held that a "significant gap" in service coverage exists if "a provider is prevented from filing a significant gap in its own service coverage." The court provided that such a significant gap in coverage need not be shown by customer complaints, but that evidence such as RF propagation maps and drive test data, along with a report by an RF engineer, are "suitable to support a claim for a substantial gap in coverage."

Looking at the record in the case at hand, the court found that the denial of T-Mobile's application "prevented T-Mobile from filling a significant gap in its own service coverage."

Addressing the second part of the two-part test—whether there were feasible alternative facilities or site locations—the Sixth Circuit adopted the "least intrusive" standard (as opposed to the "no viable alternatives" standard followed by the First and Seventh Circuits): The wireless communications carrier is required to show that "the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sough to serve."

Applying that standard here, the court held that T-Mobile satisfied its burden. "T-Mobile made numerous good-faith efforts to identify and investigate alternative sites that may have been less intrusive on the 'values that the denial sought to serve," found the court.

The court concluded that the Township's decisions in denying T-Mobile's application had "the effect of prohibiting the provision of personal wireless services" and thus violated 47 U.S.C.A. § 332(c)(7)(B)(i)(II).

See also: *MetroPCS, Inc. v. City and County of San Francisco, 400 F.3d 715 (9th Cir. 2005).*

See also: *APT Pittsburgh Ltd. Partnership v. Penn Tp. Butler County of Pennsylvania, 196 F.3d 469 (3d Cir. 1999).*

 

# Proceedings—After Planning and Zoning Commission Recommends Approval of Zoning Request, Board of Aldermen Does Not Notify Applicant of Related Hearing

## Board then denies applicant's zoning request, and applicant claims due process violation

Citation: *McKee v. City of Starkville, 2012 WL 3191986 (Miss. Ct. App. 2012)*

MISSISSIPPI (08/07/12)—This case addressed the issue of whether a party that has not been aggrieved by the recommendation of the city engineer or advisory committee is still entitled to notice of a hearing before the governing body of the city where the party's zoning request is considered.

**The Background/Facts:** George C. McKee ("McKee") owned property in the City of Starkville, Mississippi (the "City"). In order to expand an existing apartment complex McKee owned, McKee sought to rezone.75 acres of his property from R-2 ("single family/duplex") to R-5 ("multi-family/high-density"). He filed an application with the City. The City's Planning and Zoning Commission ("PZC") unanimously recommended approval of McKee's rezoning request to the City's Board of Aldermen (the "Board"). Despite the PZC's recommendation, the Board denied McKee's request based on its belief that McKee had not sufficiently proven a change in the neighborhood's character.

McKee appealed the Board's decision to the Oktibbeha County Circuit Court, which affirmed the Board's decision.

McKee again appealed. Among other things, he argued that his due process rights were violated because he did not have notice of the Board's meeting where his application was denied. The City contended that, based on the plain language of Mississippi Code Annotated § 17-1-17 (Supp.2011), McKee was not entitled to notice of the Board's meeting.

Section 17-1-17 provides, in pertinent part: "any party aggrieved with the recommendation of the city engineer or advisory committee

 

shall be entitled to a public hearing before the governing body of the city, with due notice thereof after publication for the time and as provided in this section."

The City maintained that because the PZC recommended approval of McKee's rezoning application, he was not an aggrieved party and was not entitled to a public hearing before the Board under § 17-1-17.

**DECISION: Reversed, and matter remanded.**

The Court of Appeals of Mississippi held that McKee's due process rights were violated when the Board failed to notify him of the board meeting where it considered, and ultimately denied, his rezoning request.

In so holding, the court noted that: "[w]hile the plain language of [17-1-17] supports the City's position, it produces a result that is inconsistent with . . . existing case law." Pursuant to case law, "in proceedings before city zoning authorities, due process requires notice and 'the opportunity to be heard at all critical stages of the process.' "

The court acknowledged that if the Board had been bound by the PZC's recommendations, then McKee would not have been due notice of the Board's hearing on his zoning request. However, since the Board was not bound by the PZC's recommendation, and the Board could deny McKee's request even where the PZC recommended approval, then McKee was due notice of the hearing, said the court. In other words, held the court: "even where a party has not been aggrieved by the recommendation of the city engineer or advisory committee, he is still entitled to notice of the hearing before the governing body of the city where the rezoning request is considered."

Here, the court concluded that because McKee was not given notice of the Board's meeting where his rezoning request was denied, he was denied due process. Consequently, the court remanded the case to the Board for a properly noticed hearing on McKee's rezoning request.

See also: *Thrash v. Mayor and Com'rs of City of Jackson, 498 So. 2d 801 (Miss. 1986).*

 

# Use/Interpretation—Retail Store Owner Seeks to Install Gasoline Filling Station as Accessory Use

## Township denies request, saying only indoor retail sales are permitted in zoning district

Citation: *In re Costco Wholesale Corp., 2012 WL 3079258 (Pa. Commw. Ct. 2012)*

PENNSYLVANIA (07/31/12)—This case addressed the issue of whether a gasoline filling station was permitted as an accessory use under a township's zoning ordinance, which required accessory uses meet the standards applicable to the permitted use and the standards included being an "indoor facility."

**The Background/Facts:** Costco Wholesale Corporation ("Costco") owned and operated a retail store in the Expressway Corridor Preservation Overlay District ("Overlay District") in Montgomery Township (the "Township"). Costco proposed to install 16 gasoline fueling pumps in the parking lot next to its existing store. It believed gasoline filling stations were permitted as an accessory use under the Township's Zoning Ordinance.

The Township's Zoning Officer informed Costco that the Overlay District permitted indoor retail sales, but not outdoor retail sales, such as gasoline filling stations. The Zoning Officer also rejected Costco's proffered theory that the outdoor sale of gasoline was a use subordinate and customarily incidental to an indoor retail store.

Costco appealed the Zoning Officer's determination to the Zoning Hearing Board (the "Board"). After a hearing, the Board denied Costco's appeal of the Zoning Officer's determination that Costco's proposed gasoline filling station was not authorized in the Overlay District. The Board's decision was based upon its construction of the Zoning Ordinance. It construed the Zoning Ordinance as not permitting gasoline filling stations in the Overlay District. In regard to Costco's argument that the gasoline filling station was a permitted accessory use, the Board explained that accessory uses were permitted where: (1) the use was subordinate to the permitted Overlay District use; (2) the use was customarily incidental to the permitted Overlay District use; and (3) the use complied "with the standards applicable to the permitted use to which they are accessory." Here, the Board reasoned that the "standard" applicable to the permitted use of retail sales was that the sales be conducted in an "indoor" facility. Because

 

the sale of gasoline would take place outdoors, that use would not comply with the standard for a permitted retail use, concluded the Board.

Costco appealed to the trial court. The trial court affirmed. Agreeing with the Board's interpretation of the Ordinance, the trial court found that the Ordinance required a proposed accessory use to comply with the standards applicable to the permitted use to which it was accessory. The trial court held that Costco's proposed sale of gasoline did not meet the standard that retail uses be conducted in "indoor facilities" because a gasoline service station is conducted outdoors.

Costco appealed.

**DECISION: Affirmed.**

The Commonwealth Court of Pennsylvania held that the sale of gasoline was not a permitted accessory use under the Ordinance because accessory uses were permitted only when "in compliance with the standards applicable to the permitted use to which they are accessory" and those standards required the use be conducted in "indoor facilities," and gasoline filling stations were an outdoor facility.

Analyzing the Ordinance, the court found that the only "[s]tandard retail uses permitted by right" were "[s]hops, stores or other indoor facilities for the retail sale of goods or merchandise to the general public . . . ." The Ordinance provided a "long and varied," "exhaustive" list of examples of retail uses permitted by right. The sale of gasoline was not on that list.

The court noted that "indoor" was not defined in the Ordinance. Looking to the plain meaning of "indoor," the court found it was "something done inside a building." Pumping gasoline, noted the court, does not take place indoors. Moreover, "other indoor facilities" must be interpreted, said the court, to include things of the same type as what is included in the preceding list, i.e., "shops" and "stores." A gasoline filling station is not a "shop" or a "store," said the court. In sum, a gasoline filling station is not a shop, store, or other indoor facility, found the court.

Costco had argued, however, that some of the retail uses in the Ordinance's list of retail uses permitted by right took place outside—such as "drive-through" windows. The trial court had explained that the drive-through window of a restaurant was more indoors than outdoors, and the appellate court found its reasoning to be logical.

The court concluded by acknowledging that, logically, Costco's proposed gasoline filling station appeared to be "a natural adjunct to its retail store." Still, the court found it clear that a gasoline filling station was an outdoor facility, and thus did not meet the standard for retail stores (i.e., an "indoor facility") permitted by right under the Ordinance.

Because accessory uses were permitted only when "in compliance with the standards applicable to the permitted use to which they are accessory," the sale of gasoline was an impermissible use under the Ordinance, held the court.

See also: *Independent Oil and Gas Ass'n of Pennsylvania v. Board of Assessment Appeals of Fayette County, 572 Pa. 240, 814 A.2d 180, 184, 158 O.G.R. 1019 (2002).*

# Zoning News from Around the Nation

## NATIONWIDE

Funded by a $1.5 million grant from the National Institutes of Health, researchers at the University of Illinois at Chicago plan to study links between zoning laws and increases in physical activity. The university has said that the study "is one of the first to look at the relationships between land use as dictated by zoning laws and its influence on physical activity among adults." According to the university, researchers have found communities in 36 states that are using zoning laws to make changes intended to increase activity and exercise.

Source: *St. Louis Post-Dispatch; www.stltoday.com*

## ARIZONA

State and county prosecutors are challenging Arizona's medical marijuana program. They are reportedly asking a court to rule that the voter-approved law is illegal on grounds that it conflicts with federal drug law. The case pending in Maricopa County Superior Court involves a company applying to operate a medical marijuana dispensary in Sun City. White Mountain Health Center Inc. sued when county officials would not provide zoning clearances needed under the medical marijuana law. Prosecutors are not asking the court to dismiss White Mountain's lawsuit on grounds that Arizona's law is illegal.

Source: *The Republic; www.therepublic.com*

## PENNSYLVANIA

The City of Philadelphia recently switched over to a new zoning code, "culminating a four-year effort to simplify the development process and upgrade the city's housing stock for modern tastes." A new 384-page manual now replaces the previous zoning regulations that had been in use since 1962.

Source: *Philadelphia Inquirer; http://articles.philly.com*

 

QUINLAN™ October 10, 2012 | Volume 6 | Issue 19

# Zoning Bulletin

## in this issue:

Standing—Through enactment of ordinances, city rezones property from residential to industrial 2

Use Subject to Regulation—Private sanitary landfill's request for rezoning is denied 5

Validity of Zoning Regulations—County's adequate public facilities ordinance effectively conditions residential development approval on fee payment 7

Preexisting Use—County rezones property to agricultural, prohibiting uses such as mining 9

Zoning News from Around the Nation 11

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# Standing—Through enactment of ordinances, city rezones property from residential to industrial

## Adjacent property owners in foreign municipality challenge the constitutionality of the ordinances

Citation: *Moore v. Middletown, 2012-Ohio-3897, 2012 WL 3734455 (Ohio 2012)*

OHIO (08/30/12)—This case addressed the issue of whether property owners whose property is adjacent to property rezoned by a foreign municipality have legal standing (i.e., the legal right to bring the action)to bring a

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declaratory-judgment action and/or a mandamus action to challenge the constitutionality of a zoning action.

**The Background/Facts:** In August 2008, certain property in Middletown, Ohio—known as the "Martin-Blake" property—was rezoned, through the enactment of two ordinances (the "ordinances"). The property was rezoned from low-density residential use to general industrial.

Lori A. and Matthew E. Moore (the "Moores") owned property in Monroe, Ohio, which was adjacent to the Martin-Blake property in Middletown, Ohio. Following enactment of the ordinances, the Moores sued the City of Middletown (the "City"). The Moores sought both a declaratory judgment and a writ of mandamus. In the declaratory judgment action, they asked the court to declare that the ordinances were arbitrary, capricious, and unconstitutional and in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and the Ohio Constitution, Article I, § 16. In their request for a writ of mandamus, they claimed that the City's action constituted a taking of their private property and unlawfully deprived them of "property rights consistent with their investment backed expectations," and entitled them to compensation for the taking.

The City moved to dismiss the case. Among other things, it asserted that the Moores lacked standing (i.e., the legal right) to bring their claims.

On the issue of standing, the trial court ruled that the Moores had standing to bring a declaratory-judgment action because they were persons affected by the City's ordinances—no matter that their property was in a different municipality. The trial court also ruled that the Moores lacked standing to bring the mandamus action because "even if there had been a taking, mandamus to appropriate the land was unavailable as a matter of law because Middletown could not appropriate land outside its jurisdictional limits." Ultimately, the trial court, dismissed the case, finding the Moores failed to state a claim upon which relief could be granted.

The Moores appealed. The court of appeals affirmed the trial court's ruling. However, in so doing, it held that the Moores lacked standing to bring their claims, but did not distinguish between the declaratory judgment and mandamus claims. The court held that a nonresident contiguous property owner has no standing to bring an action against an adjacent political subdivision seeking compensation for rezoning property located solely within the political subdivision's boundaries.

The Moores again appealed.

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

The Supreme Court of Ohio concluded that the Moores lacked standing to bring their partial takings claim seeking mandamus relief, but had standing to bring their declaratory judgment action.

The court concluded that the Moores lacked standing to bring the mandamus action because they could not establish that their mandamus claim would provide them with redress for any injury they suffered. This was because Ohio law holds that a municipality has no authority to appropriate property outside its jurisdictional limits (i.e., mandamus would not lie to compel the City to appropriate property in Monroe, where the Moores lived).

In finding that the Moores had standing to bring the declaratory judgment action, the court held that: "[P]roperty owners whose property is adjacent to property rezoned by a foreign municipality may use a declaratory-judgment action to challenge the constitutionality of the zoning action if the owner pleads that he has suffered an injury caused by the rezoning that is likely to be redressed." In so holding, the court pointed to the fact that Ohio's Revised Code broadly authorizes plaintiffs to bring actions for a declaration of "rights, status, and other legal relations whether or not further relief is or could be claimed." (R.C. 2721.02.) In other words, property owners whose property rights are directly affected by a statute or ordinance are "entitled to obtain a declaratory determination as to the validity of the statute or ordinance." Declaratory relief would be available to the Moores if they could show that: (1) a real controversy existed between them and the City; (2) the controversy was justiciable; and (3) speedy relief was necessary to preserve the rights of the parties.

Here, the court found that the Moores' allegations of the declaratory judgment complaint based on equal protection and due process theories pleaded a real, justiciable controversy over zoning regulations enacted by the City that affected the Moores' rights. Thus, the court concluded that the Moores had standing to challenge, in a declaratory judgment action, the constitutionality of the City's ordinances. (The court made no opinion on the merit of the Moores' claims.)

See also: *Clifton v. Blanchester, 131 Ohio St. 3d 287, 2012-Ohio-780, 964 N.E.2d 414 (2012).*

See also: *Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 104 A.2d 441 (1954).*

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*Case Note:*

*In its decision, the court made clear that a property owner does not always lack standing to bring a mandamus claim against a municipality when the affected property is outside the municipality's corporate limits.*

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*Case Note:*

*Also in its decision, the court expressly "decline[d] to limit standing to residents of the municipality that zoned or rezoned the land."*

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# Use Subject to Regulation—Private sanitary landfill's request for rezoning is denied

## Landfill owner then argues landfill is a public utility exempt from local zoning regulation

Citation: *Rumpke Sanitary Landfill, Inc. v. Colerain Twp., 2012-Ohio-3914, 2012 WL 3848391 (Ohio 2012)*

OHIO (09/05/12)—This case addressed the issue of whether a private sanitary landfill is a public utility that is exempt from local zoning regulations pursuant to state law.

**The Background/Facts:** Rumpke Sanitary Landfill, Inc. ("Rumpke") operated a sanitary landfill in Colerain Township in Hamilton County, Ohio (the "Township"). In March 2006, Rumpke applied to change the existing zoning of its property so that it could expand its landfill. The Hamilton County Regional Planning Commission recommended the rezoning requested by Rumpke. However, the Township's Zoning Commission recommended that the Township Board of Trustees (hereinafter, the Township and the Township Board of Trustees are collectively referred to as the "Township") deny the proposed rezoning. Following public hearings, the Township denied Rumpke's application.

Rumpke then filed a legal complaint against the Township. Among other things, Rumpke asked the court to declare that Rumpke's private sanitary landfill was a "public utility" exempt from zoning under Ohio statutory law, R.C. 519.211. That statute sets forth limitations on zoning powers. It exempts from local zoning restrictions, public utilities, "whether publicly or privately owned," or the use of land by any public utility, for the operation of its business. The statute does not define "public utility."

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the trial court granted summary judgment in favor of Rumpke. It held that Rumpke's sanitary landfill was a "public utility, not subject to the zoning restrictions of [the Township]."

The Township appealed. And, the First District Court of Appeals also declared that Rumpke was a public utility for the purposes of R.C. 519.211.

The Township again appealed.

**DECISION: Judgment of court of appeals reversed.**

The Supreme Court of Ohio held that "a private sanitary landfill is not a public utility and is therefore subject to township zoning regulations." More specifically, the court held that "a privately owned sanitary landfill cannot be a common-law public utility exempt from township zoning when there is no public regulation or oversight of its rates and charges, no statutory or regulatory requirement that all solid waste delivered to the landfill be accepted for disposal, and no right of the public to demand and receive its services."

In so holding, since R.C. 519.211 did not define "public utility," the court

 

looked to case law for guidance as to what constitutes a "public utility" for the purposes of R.C. 519.211. The court found that to qualify as a "public utility" under R.C. 519.211, and thus be exempt from the local zoning restrictions, an entity must: (1) provide a "public service"; and (2) the nature of its operation must be a matter of "public concern." When analyzing whether an entity provides a "public-service," the court looks to whether there: "is a devotion of an essential good or service to the general public which has a legal right to demand or receive this good or service." In other words, "the entity must provide its good or service to the public indiscriminately and reasonably," with an "obligation to provide the good or service which cannot be arbitrarily or unreasonably withdrawn." As for the public-concern factor, there must be an "indiscriminate treatment of that portion of the public which needs and pays for the vital good or service offered by the entity." When determining whether an enterprise conducts itself in such a way as to become a matter of public concern, the court looks to factors such as: the good or service provided; competition in the local marketplace; and regulation by governmental authority.

Analyzing Rumpke under these factors, the court concluded that Rumpke was not a public utility because there was a lack of governmental regulation over the public service and public concern factors. Although Rumpke was subject to environmental regulations, the court found that there was a lack of governmental control over the public-service and public-concern factors. With regard to the public service factor, the lack of other governmental regulation meant that Rumpke had full discretion in determining to whom it provided service and how or when that service was provided. There was no assurance or guarantee that Rumpke would provide its services to the public indiscriminately and reasonably, nor was there anything preventing Rumpke from arbitrarily or unreasonably withdrawing its services. Furthermore, as a private company, Rumpke had the ability to set its own rates without any governmental oversight. With regard to the public concern factor, Rumpke did occupy a monopolistic position in the marketplace and provided an essential service. However, no governmental body regulated Rumpke's rates or methods, allowing Rumpke to treat discriminately and arbitrarily the portion of the public to whom it provides its services.

See also: *Marano v. Gibbs, 45 Ohio St. 3d 310, 544 N.E.2d 635, 107 Pub. Util. Rep. 4th (PUR) 558 (1989).*

See also: *A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees, 64 Ohio St. 3d 385, 1992-Ohio-23, 596 N.E.2d 423 (1992).*

# Validity of Zoning Regulations—County's adequate public facilities ordinance effectively conditions residential development approval on fee payment

## Developer challenges ordinance, arguing county lacked authority to adopt ordinance pursuant to its general zoning powers

Citation: *Lanvale Properties, LLC v. County of Cabarrus, 2012 WL 3854857 (N.C. 2012)*

NORTH CAROLINA (08/24/12)—This case addressed the issue of whether a county in North Carolina had the authority, pursuant to its general zoning powers, or, in the alternative, a 2004 law enacted by the General Assembly, to adopt an adequate public facilities ordinance ("APFO") that effectively conditioned approval of new residential construction projects on developers paying a fee to subsidize new school construction to prevent overcrowding in the county's public schools.

**The Background/Facts:** Concerned about the effect of explosive population growth on its ability to provide adequate public facilities for its citizens, the Cabarrus County Board of Commissioners (the "Board") adopted an initial APFO in January 1998. On August 20, 2007 the Board adopted a revised APFO. The revised APFO was added as a new chapter to the zoning ordinance of Cabarrus County (the "County"). The APFO effectively linked residential development approval to the availability of space for students in the County's public schools. Under the APFO, if there was sufficient unused student capacity to support a proposed development, the Board was required to approve the development without additional APFO conditions. However, if available student capacity was insufficient to support the development, the Board could either deny the developer's application or approve it subject to several "conditions that reduce[d] or mitigate[d] the impacts of the proposed development." Included among those conditions was: entering into a consent agreement involving a monetary contribution; the donation of land; or construction of a school. In practice, those referenced "monetary contributions" were adequate public facilities fees, which became known as "voluntary mitigation payments" ("VMPs"). In 2008 the Board increased the VMP to: $8,617.00 per single family unit; $4,571.00 per townhouse; and $4,153.00 per multifamily unit.

Lanvale Properties, LLC ("Lanvale") planned to construct a residential development on fifty-four acres located within the territorial jurisdiction of the City of Locust ("Locust"). Most of that site was in the County. Lanvale alleged that the County refused to issue a building permit for its development until it complied with the APFO. On April 4, 2008, Lanvale filed a declaratory

 

action against the County. It asked the court to declare that the APFO was invalid on various statutory and constitutional grounds. Among other things, Lanvale argued that the County lacked the authority, under the enabling statutes that provided its general zoning powers, to adopt the APFO.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the trial court issued summary judgment in favor of Lanvale. The court concluded that the County did not have inherent authority to enact its APFO pursuant to North Carolina's general zoning or subdivision statutes.

The County appealed. The Court of Appeals affirmed, agreeing with the trial court.

The County petitioned for discretionary review. Among other things, the County argued that the County was authorized to adopt the APFO pursuant to its "general zoning power" under §§ 153A-340(a) and 153A-341 of the North Carolina General Statutes. Section 153A-121(a) gives counties the general authority to adopt zoning ordinances. Section 153A-340(a) provides that county zoning ordinances may regulate: the height and size of structures, the percentage of lots that may be occupied; the size of yards, courts and other open spaces; the density of population; and the location and use of buildings, structures and land. Section 153A-341 describes the "public purpose" that zoning regulations may address, including to "facilitate the efficient and adequate provision of. . . schools." The County had contended that although §§ 153A-340(a) and 153A-341 did not expressly authorize the County's APFO, they conveyed implied authority for the APFO.

The County had also argued that, in the alternative, the General Assembly's Session Law 2004-39 authorized the County to "adopt and enforce" the APFO as an exception to the general zoning and subdivision-regulation statutes. The Session Law provided: ". . . the County of Cabarrus or any municipality therein may enforce, within its jurisdiction, any provision of the school adequacy review performed under the Cabarrus County Subdivision Regulations, including approval of a method to address any inadequacy that may be identified as part of that review."

**DECISION: Judgment of court of appeals affirmed.**

The Supreme Court of North Carolina held that the enabling statutes that allowed the County to enact its zoning ordinances did not give the County implied authority to enact the APFO.

In so holding, the court disagreed with the County's contention that §§ 153A-340(a) and 153A-341 conveyed implied authority for the APFO. The court found that the plain language of these enabling statutes did not give the County implied authority to enact its APFO. While § 153A-340(a) authorized the County to divide land into zoning districts and define permitted and prohibited land uses within particular zoning districts, the APFO did none of that. Instead, the APFO linked County approval of residential developments to the availability of space for students in the County's public schools. In short, the court found that the County's APFO could not be classified as a zoning ordinance, authorized under statutes enabling county zoning powers, because "the APFO simply [did] not 'zone.' " As a result, the County could "not rely upon its general zoning authority to enact its APFO."

 

The court also rejected the County's argument that it was authorized to "adopt and enforce" the APFO under Session Law 2004-39. The court found the Session Law did not include the word "adopt." And the court found the Session Law was actually an effort to address confusion between the County and several municipalities regarding enforcement of the APFO. Further, the court found that the General Assembly already had rejected requests by another county to authorize imposition of school impact fees when the Session Law was enacted.

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***Case Note:***

*In its decision, the court also observed that the APFO's revenue generation characteristics conflicted with North Carolina's "current approach to funding public education." The court noted that the General Assembly has authorized counties to obtain revenue for public schools and other services from various sources, leaving the burden of funding public schools spread among a large number of individuals, including county residents and those traveling through or doing business in that county. Conversely, the court observed that the APFO concentrated the majority of the financial burden for school construction on residential developers. "Without expressing an opinion on the policy merits of APFOs," the court "stress[ed] that absent specific authority from the General Assembly, APFOs that effectively require developers to pay an adequate public facilities fee to obtain development approval are invalid as a matter of law."*

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# Preexisting Use—County rezones property to agricultural, prohibiting uses such as mining

## Despite not actively mining the rezoned property, property owner argues its actions established a preexisting use for mining

Citation: *Ready Mix, USA, LLC v. Jefferson County, 2012 WL 3757025 (Tenn. 2012)*

TENNESSEE (08/30/12)—This case addressed the issue of whether a property owner's activities established a preexisting use for mine operations on land, thus qualifying the use of the property for mining for protection under the state's "grandfather" statute—which permits a preexisting nonconforming business to continue to operate despite a zone change.

**The Background/Facts:** In 1971, American Smelting and Refining Company ("ASARCO") acquired approximately 300 acres of land (the "Property") in Jefferson County, Tennessee (the "County"). At that time, the future aggregate mineral reserves on the Property were estimated at 149 to 150 mil-

 

lion tons in weight. Also at that time, no zoning regulations existed in the County. Prior to ASARCO's ownership, various companies had used the Property for both subsurface and surface mining. ASARCO did not engage in any active mining operations on the Property.

In July 1998, American Limestone Company ("ALC"), which was a subsidiary of ASARCO, acquired the Property from ASARCO and immediately began to develop it with the intent to mine and quarry the aggregates, including gravel and crushed stone.

On August 17, 1998, the County Commission passed an ordinance which zoned the Property as agricultural, prohibiting any type of surface mining or quarrying on the Property. ALC continued its operations, however, and did not receive a stop work order until December 9, 1998.

In August 1999, ALC filed a declaratory judgment action against the County. It asked the court to set aside the stop work order. It argued that it had established a preexisting use on the property pursuant to Tennessee Code Annotated § 13-7-208. At the time the County adopted the ordinance, § 13-7-208, a "grandfathering" statute, allowed businesses to continue established operations regardless of any prohibitions in a new zoning classification.

During the course of the litigation, Ready Mix, USA, LLC ("Ready Mix") because a successor entity of ALC and the record owner of the Property.

The trial court eventually concluded that ALC had established a nonconforming use entitled to protection § 13-7-208.

The County appealed.

The Court of Appeals reversed the trial court and dismissed the action, holding that ALC/Ready Mix had failed to exhaust its administrative remedies.

Ready Mix appealed.

**DECISION: Judgment of court of appeals reversed.**

After first determining that ALC/Ready Mix was not required to exhaust administrative remedies prior to bringing the declaratory judgment action, the Supreme Court of Tennessee held that ALC's activities established a preexisting use for mining operations for the purposes of grandfather protection under § 13-7-208.

In so holding, the court explained that in order to invoke the protections of § 13-7-208(b), ALC/Ready Mix had to establish: (1) that there had been a change in zoning (either adoption of zoning where none existed previously, or an alteration in zoning restrictions); (2) that the use to which they put their land was permitted prior to the zoning change; (3) that the business was operating when the change in zoning took effect; and (4) that the current business was the same business that was being conducted when the change in zoning occurred.

Here, the court focused its analysis on whether ALC's business was in "operation" at the time of the zoning change. "Mere preparation" of the property for operations would not be enough to establish a preexisting nonconforming use, said the court. Normally, for establishment of operation of a business there had to be "substantial steps in ... construction" and "substantial liabilities" incurred. However, the court acknowledged that mining and quarry-

 

ing involved a unique land use, to which many other jurisdictions applied the "diminishing assets doctrine." That doctrine provides "that reserves yet to be mined, quarried, or excavated are nonetheless preexisting uses in the event of a more restrictive zoning change." Still, here, the court was "neither prepared to adopt the diminishing assets doctrine in these circumstances nor hold that merely owning property with proven reserves and a history of mining is enough to establish a preexisting use." Instead, the court held that "the evidence of reserves and the nature of the mining industry are appropriate considerations in the factual determination of whether activities prior to a zoning change are sufficient to establish operations and, therefore, invoke the protections of the statute."

The court looked at the record, and found that it established that ALC had: applied for permits necessary for quarrying activities; scouted and cleared the Property; moved equipment onto the Property; and completed a blast shot on the Property, expending approximately $80,000 to $100,000. The court concluded that these measures by the company were "substantial steps" in construction of mining operations. And the court found ALC's actions aimed at turning the Property into an active mine illustrated a commitment or devotion of the Property towards mining. The combination of the measures taken by the ALC, the proven reserves, and the mining history on the property, lead the court to conclude that ALC's mining business was "in operation" at the time the County passed its zoning ordinance. As such, ALC/Ready Mix's mining operations were entitled to the protections of § 13-7-208; it could continue those operations despite the County zoning change.

See also: *Smith County Regional Planning Com'n v. Hiwassee Village Mobile Home Park, LLC, 304 S.W.3d 302 (Tenn. 2010).*

See also: *Rutherford v. Murray, 2004 WL 1870066 (Tenn. Ct. App. 2004).*

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***Case Note:***

*In finding that ALC/Ready Mix was not required to exhaust administrative remedies prior to bringing the declaratory judgment action, the court noted that ALC had presented a challenge to the applicability of the zoning ordinance. The court said that an administrative appeal to the board of zoning appeals "would have afforded no review" over that issue. It was a question of law, which did not require the exhaustion of administrative remedies.*

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# Zoning News from Around the Nation

## MARYLAND

Under the new Sustainable Growth and Agricultural Preservation Act, which was passed this year by the Maryland General Assembly, by December 31, 2012, Harford County "must create a map with four land use tiers, which are based on specific criteria and identify where major and minor subdivisions can be established, as well as what type of sewage systems can serve them." In

Tier 4, which reportedly covers 175,000 acres, the Harford County will no longer be allowed to have major subdivisions, or anything larger than five lots. Reportedly, "[t]he bill is meant to reduce the impacts of large residential subdivisions with septic systems on farms, forest lands, streams, rivers and the Chesapeake and Coastal Bays."

Source: *The Baltimore Sun; http://www.baltimoresun.com*

## PENNSYLVANIA

The Luzerne County Council recently "approved a set of resolutions introducing amendments to the county's zoning and subdivision ordinances, which were written to meet new [requirements of the National Flood Insurance Program and the state Flood Plane Management Act]. The updates also include increased zoning fees, which will go up about 4 percent, and subdivision and land development fees, which will increase about 5 percent." Under the new requirements, if municipalities that rely on county zoning and planning fail to adopt the amendments, they will be in jeopardy of losing their eligibility for flood insurance and property owners will be rendered ineligible for federal and state disaster aid. Thus, municipalities in Luzerne County that have their own zoning boards will now have to amend their zoning laws to conform to national flood insurance regulations by November 5, 2012, or risk ineligibility for insurance and disaster aid.

Source: *Citizens Voice; http://citizensvoice.com*

Revenue from Act 13's impact fees is higher than expected. Reportedly, as of early September, $205.9 million is owed and $197.6 million has been paid from natural gas companies. Supporters of Act 13 impact fees say: "At a time when budget shortfalls are stretching state and local governments to their limits, responsible American natural-gas production is helping to support tens of thousands of good jobs and providing enormous, much-needed revenues for critical services." Opponents of gas drilling, on the other hand, said the roughly $200 million " 'doesn't look like that much' if all of the potential impacts of gas drilling are taken into account."

Source: *Philadelphia Inquirer; http://articles.philly.com*

## WASHINGTON

The City of Seattle is reportedly considering legislation that would establish zoning regulations for growing, processing, and dispensing of medical marijuana in Seattle. The regulations would be meant to "better define appropriate operations for dispensaries" who now "operate in a grey area between city, state and federal law." The proposed legislation would "limit the off-site impact of larger-scale cannabis-related activity in zones where they may have increased impacts on neighborhood character or security, specifically those zones with a predominately residential or historic character."

Source: *West Seattle Herald; http://www.westseattleherald.com*

 

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# Zoning Bulletin

## in this issue:


First Amendment—City Council denies tattoo parlor zoning permit 2

Variance—County grants lawn care business three area variances 6

Time for Proceedings—After municipal officials fail to respond to residents' complaints, residents bring legal action 9

Zoning News from Around the Nation 12


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# First Amendment—City Council denies tattoo parlor zoning permit

## Tattoo parlor alleges that the Council's discretionary denial violated its free speech rights

Citation: *Coleman v. City of Mesa, 230 Ariz. 352, 284 P.3d 863 (2012)*

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ARIZONA (09/07/12)— This case involved the "intersection of municipal zoning regulations and the right of tattoo artists to ply their trade." This case addressed the issue of whether, in Arizona, tattooing is a constitutionally protected expression that is entitled to full First Amendment (to the United States Constitution) and Arizona Constitution protection and can be regulated only through reasonable time, place, and manner restrictions.

**The Background/Facts:** Ryan and Laetitia Coleman (the "Colemans") sought to operate a tattoo parlor in the City of Mesa, Arizona (the "City"). Under the City's zoning code, tattoo parlors and other specified businesses (including pawn shops and body piercing salons) were required to obtain a Council Use Permit ("CUP") in order to operate in the City. Under the zoning code, a CUP was a "discretionary authorization" that the City Council could issue if the City Council found the proposed use would be "compatible with surrounding uses."

In July 2008, the Colemans applied for the required CUP. The City Council ultimately denied the CUP. In its denial, the City Council cited concerns that the proposed use was "not appropriate for the location or in the best interest of the neighborhood."

The Colemans sued the City and various city officials (collectively, the "City"). Among other things, the Colemans alleged that the City's denial of the CUP violated their rights to free speech under the federal and Arizona Constitutions. The Colemans maintained that because tattooing was "pure speech" protected under the First Amendment and Arizona Constitution, it could only be regulated by a "reasonable time, place, and manner regulation." They argued that the CUP was not such a regulation, and therefore their free speech rights were being violated.

The City asked the court to dismiss the lawsuit. It argued that the Colemans failed to state a claim upon which relief could be granted. The superior court agreed and granted the motion.

The Colemans appealed; the court of appeals reversed. It held that tattooing was "pure speech entitled to the highest level of protection" by the First Amendment and Article 2, § 67 of Arizona's Constitution. The court of appeals further concluded that the Colemans had "sufficiently alleged claims for violations of their free speech . . . ."

The City petitioned for review.

**DECISION: Judgment of court of appeals vacated; judgment of superior court reversed and remanded.**

As a matter of first impression (i.e., the first time the court ruled on the issue), the Supreme Court of Arizona, agreeing with the Colemans and the court of appeals, held that, in Arizona, tattooing is a constitutionally protected expression that is entitled to full First Amendment protection. The court also held that the process of tattooing is expres-

 

sive activity. Determining that tattooing is protected speech also implied that the business of tattooing is constitutionally protected, said the court. As such, the court concluded that tattooing can be regulated only by content-neutral, generally applicable laws (such as taxes, health regulations, and nuisance ordinances) and through reasonable time, place, and manner regulations.

The City had argued that it did not matter whether tattooing was a constitutionally protected expression because, even if it was, "generally applicable zoning laws may apply to otherwise protected activities without presenting free speech issues." The court was not persuaded. The court noted that the City's zoning ordinance effectively prohibited certain uses, including tattoo parlors, unless the City Council issued a discretionary CUP. The City was not, found the court, attempting to impose a generally applicable law (such as a tax or nuisance prohibition) to the on-going operations of businesses engaged in protected speech. Instead, the City was exercising unfettered discretion to deny permission for businesses engaged in protected speech to operate at all. The court rejected the City's argument that it could exercise such discretion because it had similar discretion to deny permission for other, nonprotected uses. The court said that the fact that a permit scheme may also apply to nonprotected activities did not insulate it from constitutional challenge when applied to protected speech.

Having concluded that tattooing is protected speech, the court next considered whether the Colemans' complaint sufficiently stated a claim for relief based on alleged violations of the First Amendment or Article 2, § 6 of Arizona's Constitution. The Colemans had alleged that the City's CUP process was not a reasonable time, place, and manner regulation of their protected expression. The court explained that for a permit system to qualify as a reasonable time, place, and manner regulation, the scheme: must not be based on the content of the message; must be narrowly tailored to serve a significant governmental interest; and must leave open ample alternatives for communication. The Colemans had alleged that the City's "planning and zoning code approval criteria, facially and as applied by the City Council," did not sufficiently guide or limit the City Council's discretion in rendering decisions. (The City, itself, had asserted that the City Council's determinations on CUPs were discretionary and effectively nonreviewable.) The court concluded that the Colemans had alleged sufficient facts to state a claim on which relief could be granted for violations of the freedom of speech.

See also: *Thomas v. Chicago Park Dist., 534 U.S. 316, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002).*

See also: *Anderson v. City of Hermosa Beach, 621 F.3d 1051, 67 A.L.R.6th 681 (9th Cir. 2010)* (holding that "tattooing is purely expressive activity fully protected by the First Amendment").

 

See also: *Hold Fast Tattoo, LLC v. City of North Chicago, 580 F. Supp. 2d 656 (N.D. Ill. 2008)* (finding that "act of tattooing is one step removed from actual expressive conduct").

See also: *Yurkew v. Sinclair, 495 F. Supp. 1248 (D. Minn. 1980)* (finding process of tattooing is not protected speech); *State ex rel. Medical Licensing Bd. of Indiana v. Brady, 492 N.E.2d 34 (Ind. Ct. App. 1986)*) (same); *State v. White, 348 S.C. 532, 560 S.E.2d 420 (2002)* (same).

See also: *Mastrovincenzo v. City of New York, 435 F.3d 78 (2d Cir. 2006)* (extending First Amendment protections to a particular tattoo artist's work if it has a predominantly expressive purpose, requiring a case-by-case inquiry to determine if tattooing is protected by the First Amendment).

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***Case Note:***

*In its decision, the court noted that courts in other jurisdictions are divided on the issue of whether tattooing should be characterized as purely expressive activity ("pure speech") or instead as conduct with an expressive component. If characterized as purely expressive activity, then tattooing is entitled to full First Amendment protection and can be regulated only through reasonable time, place, and manner restrictions. If, however, tattooing is instead characterized as conduct with an expressive component, it is protected under the First Amendment only if it is "sufficiently imbued with elements of communication," that is, there is "[a]n intent to convey a particularized message" and "the likelihood [is] great that the message [will] be understood" by viewers. If tattooing is characterized as not "sufficiently imbued with elements of communication," then the regulation need only be rationally related to a legitimate governmental interest. Here, the court concluded that the first of these approaches was "most consistent with First Amendment case law and the free speech protections under Arizona's Constitution"—given that tattoos "are generally composed of words, realistic or abstract symbols, or some combination of these items" and "can express a broad range of messages . . . ."*

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***Case Note:***

*In the lawsuit, the Colemans had also alleged that the City's denial of the CUP violated their due process and equal protection rights under the federal and Arizona Constitutions. The court held that the same level of scrutiny applied to those claims as to the First Amendment claim. The court found that the Colemans' complaint sufficiently set forth claims for relief for alleged*

*violations of the Colemans' rights to equal protection and due process.*

# Variance—County grants lawn care business three area variances

## Neighboring property owners charge that self-created business growth cannot constitute unnecessary hardship needed for a variance

Citation: *Hacker v. Sedgwick County, 2012 WL 4039373 (Kan. Ct. App. 2012)*

KANSAS (09/14/12)—This case addressed the issue of whether self-created business growth is an exception to the general rule that unnecessary hardship may not be self-created.

**The Background/Facts:** For over 30 years, the Heins operated a lawn care business from their rural home in Sedgwick County, Kansas (the "County"). The property on which their home and business was located was zoned RR Rural Residential. In 1990, the Heins had obtained two variances that allowed them: to operate within 220 feet of a nearby residence; and to have up to four employees on the property at any given time. In 2010, the Heins filed a petition with the County Board of Zoning Appeals (the "Board") for three area variances, which would: (1) allow up to 20 employees with no more than 15 on site in excess of one hour per day; (2) allow the use for business purposes of existing outbuildings with a combined floor area exceeding 3,000 square feet; and (3) allow outdoor storage closer to the street than the buildings used for the business and closer than 200 feet from property lines. In their petition, the Heins alleged that these variances were necessary because they had "obtained additional customers and changed the way their employees work." Specifically, the Heins stated that more equipment was stored at the property and employees now met at the property and rode together to job sites.

Eventually, the Board granted all three requested variances. In doing so, the Board concluded that all five criteria under Kansas statutory law, K.S.A. 12-759(e)(1), that must be met before a variance can be granted had been met. As to one of those five criteria—whether strict application of the zoning regulation constituted an unnecessary hardship—the Board found that the hardship was not self-created. The Board reasoned that the Heins had a vested property right in their busi-

 

ness and that reasonable growth of an existing business was not a self-created hardship under Kansas case law.

Neighboring property owners filed a petition in district court, challenging the reasonableness of the Board's decision.

The district court found that all three requested variances were the result of the Heins' business growth and that the business growth was the result of the Heins' conscious effort to increase their customer base. Furthermore, the district court found that the Heins grew their business with full knowledge of the zoning regulations under which they were operating. The district court rejected the Board's interpretation of Kansas case law and found that self-created business growth was not a reasonable basis for granting an area variance under K.S.A. 12-759(e)(1). Accordingly, the district court vacated the Board's grant of the three variances.

The Board appealed.

**DECISION: Judgment of district court affirmed.**

Agreeing with the district court, the Court of Appeals of Kansas held that self-created business growth is not an exception to the general rule that unnecessary hardship may not be self-created.

In so holding, the court explained that Kansas law contemplates two types of variances: (1) use variances; and (2) area variances. Here, all three variances sought by the Heins were area variances. Here, the only criterion for granting an area variance that was at issue was the "unnecessary hardship" criteria. Under K.S.A. 12-759(e)(1)(C), a board may grant a variance upon finding: "that the strict application of the provisions of the zoning regulations of which variance is requested will constitute an unnecessary hardship upon the property owner represented in the application." The court further explained that, under Kansas case law: (1) mere economic advantage or disadvantage to the landowner applying for the variance does not in itself constitute unnecessary hardship; (2) unnecessary hardship may be found where strict application of the zoning regulations would result in the complete loss of an existing business at the location in question, but not where strict application would merely prevent increased profitable use of that land; and (3) where a hardship is self-created (such as where the landowner purchased the property with the knowledge of the zoning restrictions), it cannot be deemed to be an unnecessary hardship.

The Board, in issuing the variances, had reasoned that the Heins had a vested property right in their business and that reasonable growth of an existing business was not a self-created hardship. The court disagreed. It found that: (1) the variances requested by the Heins would be economically advantageous to their business because the variances would allow more equipment storage space and more drivers to transport the equipment, which in turn would allow the Heins to serve

 

more customers; and the extent that the Heins would lose existing customers and be required to reconfigure their business operations, could reasonably infer that the Heins would suffer economic disadvantage without the variances; but (2) nonetheless, there was no indication that the Heins would lose their business without the variances, only the business would simply be less profitable; and (3) the Heins hardship was self-created—made necessary by their self-created business growth.

As to that third finding, the court said that "[g]iven that the main purpose underlying self-created business growth is generally to maximize a business' profits, and given that Kansas courts have indicated that mere economic advantage or disadvantage to a landowner is not a sufficient basis for a finding of unnecessary hardship . . . self-created business growth is not an exception to the general rule that unnecessary hardship may not be self-created."

Since the Heins had acknowledged that the requested variances were made necessary by their self-created business growth, the court concluded that the Board's finding of unnecessary hardship was not supported by substantial evidence. The court further concluded that the district court did not err in vacating the variances granted by the Board.

See also: *Stice v. Gribben-Allen Motors, Inc., Parsons, 216 Kan. 744, 534 P.2d 1267 (1975).*

See also: *City of Olathe v. Board of Zoning Appeals, 10 Kan. App. 2d 218, 696 P.2d 409 (1985).*

See also: *City of Merriam v. Board of Zoning Appeals of City of Merriam, 242 Kan. 532, 748 P.2d 883 (1988).*

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***Case Note:***

*As to courts of other jurisdictions that have similarly held that self-created business growth cannot constitute an unnecessary hardship for purposes of a variance, see, e.g., Bowman v. City of York, 240 Neb. 201, 482 N.W.2d 537 (1992) (finding no undue hardship where business sought variance from setback requirement in order to expand its facilities and increase its profits); Ken-Med Associates v. Bd. of Tp. Sup'rs of Kennedy Tp., 900 A.2d 460 (Pa. Commw. Ct. 2006) (holding that "expanding the use of a particular property to maximize profitability is not a sufficient hardship to justify the granting of a variance, because such financial hardship is in the form of a self-inflicted hardship").*

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***Case Note:***

*On appeal, the Board had also challenged the standing (i.e., legal right to*

 

*bring the action) of the neighboring property owners to challenge the Board's decision to grant Heins the requested variances. The court held that the neighbors had standing to appeal the Board's decision as persons "dissatisfied with" the variance decision. In so holding, the court said the "dissatisfied with" standard under K.S.A. 12-759(f) meant the same as the "aggrieved by" standard under K.S.A. 12-760.*

# Time for Proceedings—After municipal officials fail to respond to residents' complaints, residents bring legal action

## Residents argue they could not first exhaust administrative remedies and that justice required an enlargement of time restrictions

Citation: *Mullen v. Ippolito Corp., 428 N.J. Super. 85, 50 A.3d 673 (App. Div. 2012)*

NEW JERSEY (09/10/12)—This case addressed the issue of whether mandamus relief was available to seek enforcement of zoning ordinances where municipal officials failed to respond to complaints of zoning violations, and as such, there was no exhaustion of administrative remedies. The case also addressed whether the failure of municipal officials to respond to complaints of zoning violations warranted the relaxation of time restrictions for actions in lieu of prerogative writs.

**The Background/Facts:** John Mullen and Howard Levine (the "Residents") purchased their beachfront home in the Borough of Point Pleasant Beach, New Jersey (the "Borough"), in 1998. The Residents' residence was adjacent to the Driftwood Motel (the "Driftwood"), which had operated at that location "since at least the 1960's." Both properties were located in an SF-5 zoning district. That zoning district only permitted single-family residences, schools, and public playgrounds and parks. Because the Driftwood Motel existed at that location before the Borough adopted these zoning restrictions, it was considered a preexisting nonconforming use under New Jersey statutory law (N.J.S.A. 40:55D-68).

Over the past 13 years, the Residents observed allegedly unlawful expansions of the Driftwood's: snack bar by 64.5 square feet; impervi-

 

ous concrete patio by 10% of the total lot coverage; number of motel rooms; parking spaces by five spaces; and deck and pool area into the Borough's Boardwalk Right-of-Way. The Residents also observed the construction of outdoor restrooms. The Driftwood did not have any zoning permits authorizing these expansions or additions. The Residents complained of all of these activities to the Borough officials. The Residents also alleged and complained to Borough officials that the Driftwood violated the Borough's parking ordinance in that it had insufficient parking spaces for each rental room, and the Residents alleged and complained to Borough officials that the Driftwood repeatedly violated the Borough's dune ordinance by: allowing motel guests unlimited access to the beach through the dunes; failing to install fencing to protect the dunes; grading the dunes to accommodate a wedding; and hosting "Zumba" exercise classes on the dunes.

The Borough officials failed to take action on any of the Residents' complaints.

Eventually, the Residents brought suit in superior court against the owners of the Driftwood. The Residents also sought declaratory and mandamus relief against the Borough and Borough officers (collectively, the "Borough").

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

The court granted summary judgment in favor of the Borough. It held that the Residents failed to exhaust administrative remedies as required by New Jersey court Rule 4:69-5. The court also found that the Residents' legal action was untimely under Rule 4:69-6(a) because it was commenced more than 45 days after the occurrence of the events from which relief was sought.

The Residents appealed.

**DECISION: Judgment of superior court, law division, reversed and remanded.**

The Superior Court of New Jersey, Appellate Division, held that mandamus relief was available to the Residents to challenge the Driftwood's alleged violations of zoning restrictions through their action against the Borough officials; the Residents were not required to first exhaust administrative appeals because there was no administrative "decision" to appeal.

The court explained that both statutes allowing interested parties to seek review (N.J.S.A. 40:55D-70(a) and N.J.S.A. 40:55D-72(a)) "envision[ed] an administrative officer who is acting in some discrete and ascertainable fashion, putting the interested party on notice that his or her right to seek administrative review has accrued" (i.e., through an

 

order or decision). Here, the court found that the Residents' action was "grounded on the [Borough's] failure to respond to or act upon their numerous complaints of alleged zoning violates by the Driftwood." "If true, [those] allegations" of a history of municipal inaction rendered the Residents "without a realistic alternative form of administrative relief," said the court.

The court further explained that in rare cases, judicial intervention would be warranted only when:

> 1) the party seeking relief shows there has been a clear violation of a municipal ordinance that has especially affected him or her; (2) appropriate municipal action was not taken despite the matter having been duly and sufficiently brought to the attention of the supervising official charged with the public duty of enforcing the ordinance; and (3) the party seeking judicial relief shows the unavailability of an adequate, realistic alternative form of relief."

The court applied those standards to the case at hand, and found they were met—thus warranting judicial intervention. Accordingly, the court allowed the Residents' mandamus action despite any failure to obtain administrative relief (which, it found, was not possible to obtain given the Borough's "negligent indifference" and "willful disregard" of the Residents' complaints).

The court further held that, although the Residents' action was not brought within 45 days of the complained of zoning violations, the circumstances of the case warranted an enlargement of time restrictions under Rule 4:69-6(a).

The court explained that, under Rule 4:69-6(c), a court may enlarge the time restrictions in Rule 4:69-6(a) "where it is manifest that the interest of justice so requires." The court acknowledged that the circumstances of the case did not fit under "traditional categories" where such enlargement has been allowed (i.e., novel constitutional questions; informal or ex parte determinations of legal questions by administrative officials; and important public interests"). Nevertheless, the court determined that this was a case where the circumstances warranted an enlargement of time under Rule 4:69-6(c): Here the facts "raised questions 'concerning both the vindication of [the Residents'] private property rights and the important public interest in ensuring that public officials perform their official duties diligently and with reasonable dispatch.' "

The court reversed the trial court's order granting the Borough's motion for summary judgment, and remanded the matter "for such further proceedings as may be warranted."

See also: *Garrou v. Teaneck Tryon Co., 11 N.J. 294, 94 A.2d 332, 35 A.L.R.2d 1125 (1953).*

See also: *Hopewell Valley Citizens' Group, Inc. v. Berwind Property Group Development Co., L.P., 204 N.J. 569, 10 A.3d 211 (2011).*

 

# Zoning News from Around the Nation

## CALIFORNIA

Recently, the California State Assembly "passed new legislation that would assure legal status for small-scale cottage industries that sell baked goods and other 'non-potentially hazardous' food items produced in home kitchens." The California Homemade Food Act (AB1616), which takes effect in January, allows home cooks to make and sell a wide range of products "without the need to comply with the zoning and regulatory measures that govern larger producers and producers of meat and dairy products specifically omitted from this law."

Source: *yourolivebranch.org; http://news.yourolivebranch.org*

## CONNECTICUT

Effective October 1, 2012, a new state law allows "the medicinal use of marijuana by Connecticut residents 18 or older suffering from cancer, glaucoma, HIV/AIDS, Parkinson's, multiple sclerosis, spinal cord injuries, epilepsy, Crohn's Disease, post-traumatic stress or cachexia (wasting syndrome). It limits the drug's use in public places and in moving vehicles, and around children and teens."

Source: *Norwich Bulletin; www.norwichbulletin.com*

Southington "is the first town in the state to take on the task of passing municipal zoning regulations related to medical marijuana." Among other things, the new regulations: limit the location of medical marijuana production facilities; limit the distribution of marijuana prescriptions to licensed pharmacists within a licensed pharmacy only; and limits by location, pharmacies that can dispense marijuana.

Source: *Southington Patch; http://southington.patch.com*

## PENNSYLVANIA

On October 17, the state supreme court is set to hear an appeal of the Commonwealth Court's decision, which declared the zoning provisions in Act 13 to be unconstitutional.

Source: *Pittsburgh Post-Gazette; www.post-gazette.com*

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# Zoning Bulletin

## in this issue:


Preemption—Town ordinance requires variance for all excavations 2

Validity of Zoning Ordinance—City ordinances rezone properties into manufactured home park districts 4

Rezoning—Conditionally permitted use becomes legal nonconforming use 7

Modification of General Plan—City adopts revised housing element of general plan, identifies needed changes to land use elements for implementation 9

Zoning News from Around the Nation 12


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# Preemption—Town ordinance requires variance for all excavations

## Landowner argues ordinance is preempted by state statute exempting specific types of excavation from permit requirements

Citation: *Town of Carroll v. Rines, 2012 WL 5458213 (N.H. 2012)*

NEW HAMPSHIRE (11/09/12)—This case addressed the issue of whether a state law regulating local excavation, and distinguishing between excavations that require permits and those that do not, preempted a local ordinance requiring a variance for all excavations.

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**The Background/Facts:** William Rines ("Rines") owned two lots in the Town of Carroll, New Hampshire (the "Town"). Rines also controlled another two lots in the Town for excavation purposes. In October 2009, the Town filed an action to enjoin Rines from excavating on all four lots. Eventually, in June 2011, the trial court held a final hearing on the Town's petition. The parties disputed the extent to which Rines was required to obtain a variance pursuant to Section VI of the Town's zoning ordinance.

Section VI of the Town's zoning ordinance required a variance for "excavation, grading, filling or removal of any earth, loam, topsoil, sand, gravel, clay or stone on public or private land in the Town of Carroll."

The trial court found that Rines had engaged in two types of excavation on the two lots: (1) excavation for highway purposes; and (2) excavation for purposes incidental to constructing a building.

Rines had argued that both of those types of excavation were exempt from permitting requirements under state statutory law, RSA Chapter 155-E. RSA Chapter 155-E regulates local excavation, and distinguishes between excavations that require permits and those that do not. (RSA 155-E:2,:2-a.) Excavation for highway purposes and for building construction purposes is exempt from the statute's permitting requirements ("permit-exempt" excavations). (RSA 155-E:2, IV,:2-a, I(a).)

As such, Rines argued that since section VI of the Town's zoning ordinance required a variance for those types of excavation, section VI conflicted with RSA Chapter 155-E. Rines contended that section VI of the ordinance was therefore impliedly preempted by RSA Chapter 155-E. Accordingly, Rines contended that his excavations did not require a variance.

The trial court disagreed with Rines. It held that section VI of the zoning ordinance was not preempted by RSA Chapter 155-E. Because RSA Chapter 155-E did not preempt section VI of the zoning ordinance, the court concluded that Rines could not engage in either type of excavation absent a variance.

Rines appealed.

**DECISION: Reversed, and matter remanded.**

The Supreme Court of New Hampshire disagreed with the trial court; it agreed with Rines' argument.

The court explained that state law impliedly preempts local law when: (1) "the comprehensiveness and detail of the State statutory scheme evinces legislative intent to supersede local legislation"; (2) there is an actual conflict between state law and a municipal ordinance such as when one permits what the other prohibits; and (3) a local ordinance frustrates the statute's purpose.

Thus, further explained the court, section VI of the ordinance would be preempted by RSA Chapter 155E if it: (1) purported to regulate excavations that were permit-exempt pursuant to RSA chapter 155E; and (2) it "frustrated State authority."

As to the first factor, the court noted that RSA Chapter 155E contained only "minimum" requirements for excavations that require a permit. As such, municipalities were not preempted from imposing more stringent regulations upon those types of excavations. However, RSA Chapter 155E did not autho-

 

rize municipalities to burden permit-exempt excavations with their own substantive requirements.

As to the second factor, the court said that regulations that would not frustrate state authority under Chapter 155E included local ordinances that related to "traffic and roads, landscaping and building specifications, snow, garbage, sewage removal, signs, and other related subjects."

Here, the court concluded that by imposing substantive requirements on permit-exempt excavations, section VI of the Town's zoning ordinance frustrated the purpose of RSA Chapter 155E and was thus impliedly preempted.

See also: *Arthur Whitcomb, Inc. v. Town of Carroll, 141 N.H. 402, 686 A.2d 743 (1996).*

See also: *Guildhall Sand & Gravel, LLC v. Town of Goshen, 155 N.H. 762, 764, 929 A.2d 199 (2007).*

# Validity of Zoning Ordinance—City ordinances rezone properties into manufactured home park districts

## Park owners contend ordinances amount to regulatory takings in violation of the federal and state constitutions

Citation: *Laurel Park Community, LLC v. City of Tumwater, 2012 WL 5290306 (9th Cir. 2012)*

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

NINTH CIRCUIT (WASHINGTON) (10/29/12)—This case addressed the issue of whether city zoning ordinances, which rezoned land into manufactured home park districts, and limited the use of property within those districts, amounted to an unconstitutional taking of property under the federal or Washington constitutions. It also addressed whether the ordinances violated property owners' substantive due process rights.

**The Background/Facts:** The City of Tumwater (the "City") enacted two ordinances which created a new Manufactured Home Park ("MHP") land use designation and new Manufactured Home Park zone districts. Included in the new MHP districts were six of the ten existing MHPs in the City.

Prior to enactment of the ordinances, the zoning code permitted a wide range of uses on the properties where the six MHPs were located. The ordinances restricted those uses by, among other things: (1) specifying certain "permitted uses," which were allowed as of right; (2) specifying 11 "conditional uses," where were allowed via a discretionary conditional use permit; and (3) permitting still other uses if specified criteria were met.

The owners of three of the six MHPs in the newly designated MHP districts,

 

along with a nonprofit organization (collectively, the "Owners"), filed an action in federal court. They alleged that enactment of the ordinances violated their constitutional rights under several theories: (1) a federal takings claim (i.e., the City took their property for public use without just compensation in violation of the United States Constitution); (2) a state takings claim (i.e., the City took or damaged their property for public or private use without just compensation in violation of the Washington Constitution); and (3) a state substantive due process claim (i.e., the rezoning of their property into MHP districts was a means that was unnecessary to achieve a public purpose, if any, and was duly oppressive on the Owners).

The City asked the district court to find that there were no material issues of fact in dispute and to issue summary judgment in its favor on the law alone.

The district court granted summary judgment to the City on all claims.

The Owners appealed.

**DECISION: Affirmed.**

The United States Court of Appeals, Ninth Circuit, rejected all of the Owners' claims.

The court held that the Owners' federal takings claim failed because the ordinances did not go "too far" given: (1) there was a minimal economic effect of the ordinances on the Owners; (2) the ordinances did not affect the Owners' "primary expectation"—of operating a manufactured home park; and (3) although the ordinances required the Owners to bear a greater burden than the general public in providing the public benefit of MHPs, the Owners still had the option of discontinuing that use and using the property for another use permitted under the ordinances.

In so holding, the court explained that the Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use, without just compensation."

The Owners had not contended that the ordinances constituted a "per se" taking (i.e., a permanent physical invasion of property, or a deprivation of all economically beneficial use of property). Rather, they had argued that the ordinances constituted a regulatory taking because the ordinances went "too far." While zoning laws do not generally constitute a taking, they will if they go "too far," said the court. Whether a regulation goes "too far," explained the court, depends on three factors: (1) the economic impact of the regulation on the claimant; particularly, (2) the extent to which the regulation has interfered with distinct investment backed expectations; and (3) the character of the governmental action.

Analyzing those three factors, the court first found that the economic impact of the ordinances on the Owners was only a diminishing property value of between 0% (for two of the Owners' properties) and 15% (for one of the Owners' properties). The court said that "[a] small decrease in value, for only one affected property, falls comfortably within the range of permissible land use regulations that fall far short of a constitutional taking." The court also said that "diminution in property value, standing alone, can [not] establish a 'taking.' " In sum, the court concluded that the minimal economic effect of the ordinances did not support the Owners' federal takings claim.

 

Looking at the second factor, the court held that although the ordinances affected one of the Owners' expectations—that at some indefinite time in the future they could convert their properties to some other specific uses—the ordinances did not affect the Owners' "primary expectation"—of operating a manufactured home park. Thus, the court concluded that this factor, too, failed to support a federal takings claim.

As to the third factor—the character of government action— the court explained that the government generally cannot " 'forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." The court agreed with the Owners that the character of the City's action here (in enacting the ordinances and establishing the MHP districts) slightly favored their takings claim: "The intent and effect of the ordinances are to require only [the Owners] and the other affected owners of manufactured home parks to continue to provide the public benefit (manufactured home parks), when the benefit could be distributed more widely (for example, by providing relocation assistance to owners of manufactured homes or a larger MHP zone district)." Still, the court noted that the ordinances did not force the Owners to continue operating their properties as MHPs; the Owners could decide to: close their parks; convert their properties to other allowed uses; or sell the properties. The court found that the ordinances had no effect on those other possible uses.

In conclusion, finding the first two factors weighed strongly against a takings claim and the third factor weighed only slightly in favor of a takings claim, the court concluded that, on their face, the ordinances did not constitute a taking under the United States Constitution.

The court also held that the Owners' state takings claim failed because the ordinances did not destroy or limit any fundamental property right. The Owners had argued that the ordinances destroyed "one of the sticks in the bundle representing a fundamental property right, by depriving the [Owners'] of the right to dispose of their property as they choose and effectively conferring control of that right on the tenants." The court disagreed. It found that while the ordinances restricted to some extent the Owners' ability to use their properties, the ordinances did not at all limit the Owners' ability freely to dispose of the property or convert their properties to one of the many permitted uses under the ordinances. Moreover, the court found that the park residents had "no ability—now or in the future—to require the parks' owners to perform any act [or prohibit any change in use or sale of property]."

And, after applying a three-prong test, the court held that the ordinances did not violate the Owners' substantive due process rights because: (1) the ordinances were aimed at achieving a legitimate public purpose of promoting "high density, single family" development and a "choice in land tenancy"; (2) the ordinances used means that were reasonably necessary to achieve that purpose since (3) the ordinances were not unduly oppressive in that "the amount of harm [was] small or nonexistent" given there was little to no decrease in property values and given the fact that the Owners' were still able to use their properties "as they have been used for decades."

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

 

See also: *Guggenheim v. City of Goleta, 638 F.3d 1111 (9th Cir. 2010), cert. denied, 131 S. Ct. 2455, 179 L. Ed. 2d 1210 (2011).*

See also: *Manufactured Housing Communities of Washington v. State, 142 Wash. 2d 347, 13 P.3d 183 (2000).*

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*Case Note:*

*The Owners brought a facial federal takings claim (i.e., that the ordinances were invalid on their face, not just as applied). The court said that it was not clear that a facial challenge could be made but assumed, without deciding, that it could.*

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# Rezoning—Conditionally permitted use becomes legal nonconforming use

## After conditions of permit are violated, city revokes conditional use permit and terminates nonconforming use

Citation: *White v. City of Elk River, 2012 WL 5289878 (Minn. Ct. App. 2012)*

MINNESOTA (10/29/12)—This case addressed the issue of whether a city could terminate a nonconforming use by revoking a conditional use permit after conditions of the conditional use permit were violated.

**The Background/Facts:** Wapiti Park Campgrounds ("Wapiti Park") operated on approximately 52 acres of property located in Elk River, Minnesota (the "City"). When Wapiti Park opened in 1973, no zoning ordinance governed use of the land. In 1983, the City made campgrounds a conditionally permitted use in the zoning district where Wapiti Park was located. In 1984, the City granted Wapiti Park a conditional use permit with nine conditions, one of which prohibited permanent residents at the campground. In 1988, the City again amended its zoning ordinances, removing campgrounds as a conditionally permitted use in the zoning district in which Wapiti Park was located. As such, Wapiti Park became a legal, nonconforming use.

In 2010, upon the City's investigation of the Wapiti Park property related to an interim-use permit needed for reconstruction of a campground building destroyed by fire, it was discovered that the campground had permanent, year-round residents. The City found that this permanent resident use of the campground violated conditions in the 1984 conditional use permit. Wapiti Park was given several months to show compliance with the conditions of the 1984 conditional use permit. When it failed to do so, the City eventually revoked the 1984 conditional use permit, effective on December 31, 2011.

Wapiti Park sued the city. It asked the district court to find that the

 

campground was a legal, nonconforming use and that the city erroneously revoked its permits.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the district court granted partial summary judgment for Wapiti Park. The court found that: the campground was a legal, nonconforming use; and the City could not eliminate this use by revoking the 1984 conditional use permit.

The City appealed. On appeal, the City contended that because, in 2010, Wapiti Park was no longer in compliance with the 1984 permit conditions (given the campground had year round, permanent residents), the use was no longer "lawful" under state statutory law governing nonconforming uses—Minn. Stat. § 462.357, subdivision 1e(a). As such, the City maintained that Wapiti Park was not allowed to continue the nonconforming use.

**DECISION: Reversed.**

The Court of Appeals of Minnesota agreed with the City.

The Court held that the 1984 conditional use permit did not expire or terminate when Wapiti Park became a nonconforming use in 1988. Rather, the permit remained in effect, and the campground's nonconforming use of the property was only lawful so long as it complied with the permit conditions. The court further held that the City was entitled to revoke the 1984 conditional use permit, and thereby terminate use of the property as a campground, when Wapiti Park continued to violate the conditions of the 1984 conditional use permit.

To address the issue presented, and in so holding, the court looked to the statutory law governing nonconforming uses—Minn. Stat. § 462.357, subdivision 1e(a). Section 462.357, subdivision 1e(a) provides in relevant part:

> Except as otherwise provided by law, any nonconformity, including the lawful use or occupation of land or premises existing at the time of the adoption of an additional control under this chapter, may be continued, including through repair, replacement, restoration, maintenance, or improvement, but not including expansion . . . .

The court concluded that § 462.357, subdivision 1e(a) provided that, to be a protected nonconforming use, the use must have been "lawful" at the time it became nonconforming. The court found that, at the time of the 1988 amendment to the zoning ordinance (which removed campgrounds as conditional uses and resulted in the campground being a nonconforming use), Wapiti Park's use of the property as a campground was only lawful because of the 1984 conditional use permit. Thus, under the plain language of § 462.357, subdivision 1e(a), the court determined that Wapiti Park was only entitled to the protections of § 462.357, subdivision 1e(a) if it remained in compliance with the permit that made it a lawful use in the first place.

Moreover, the court found that Wapiti Park's conditional use permit was still in effect in 2010 because it had never been revoked or otherwise terminated. The court said: "A conditional-use permit does not cease to exist when the use becomes nonconforming. Rather, the nonconforming use is then defined by the conditions contained in the conditional-use permit, and any use outside of the permit parameters may be an unlawful expansion of the

 

nonconforming use. Conditional-use permits are perpetual, and 'shall remain in effect as long as the conditions agreed upon are observed.' " In other words: "[A] conditional-use permit does not cease to exist merely because the use later becomes nonconforming. Rather, the conditionally permitted use is still allowed, so long as the property continues to comply with the original permit conditions."

In summary, the court found that Wapiti Park was still entitled to operate as a campground after it became a nonconforming use, but only if it remained in compliance with the conditions in the 1984 conditional use permit. The court concluded that, when, in 2010, Wapiti Park was no longer in compliance with the permit conditions (because it had permanent residents), the City properly revoked the permit.

See also: *Lam v. City of St. Paul, 714 N.W.2d 740 (Minn. Ct. App. 2006).*

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***Case Note:***

*In its decision, the court said it would be would be inconsistent "to conclude that merely because the [C]ity exercises its broad discretion to amend a zoning ordinance, converting what was a conditionally permitted use into a nonconforming use, it loses the authority to enforce the conditions that it deemed necessary to promote public health, safety, and welfare when it first issued the permit."*

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# Modification of General Plan—City adopts revised housing element of general plan, identifies needed changes to land use elements for implementation

## Concerned residents claim failure to first adopt land use element changes creates an unlawful inconsistency in the general plan

Citation: *Friends of Aviara v. City of Carlsbad, 148 Cal. Rptr. 3d 805 (Cal. App. 4th Dist. 2012)*

CALIFORNIA (11/1/12)—This case addresses the issue of whether the adoption by municipalities of revisions to the housing element of their general plans, which require later modifications to the municipalities' land use element, creates an impermissible conflict between the housing element and the land use element in the general plan.

**The Background/Facts:** California's Housing Element Law declares affordable housing "a priority of the highest order" and requires the general plan of public localities to "include a housing element consisting of several manda-

tory components." Those mandatory components include: identification and analysis of housing needs; identification of adequate sites for housing; a five-year program to implement policies and achieve objectives of the housing element "through the administration of land use and development controls"; and identification of a sufficient number of sites "that will be made available through appropriate zoning and development standards to meet the quantified objectives for housing for all income levels." (Government Code § 65583.)

As required by the Housing Element Law, Government Code § 65583, the City of Carlsbad (the "City") adopted a revised housing element, which identified: an inventory of parcels which would be suitable for low cost housing; and a number of limitations in the land use element of the general plan which the city would change in order to permit the identified parcels to be developed as low cost housing.

Friends of Aviara ("Aviara"), a nonprofit corporation composed of residents concerned about protecting the area near the Batiquitos Lagoon, which is located in the City, filed a timely petition for a writ of mandate. Aviara alleged that the City's adoption of the revision to the housing element of its general plan was unlawful. Aviara said this was because the revision stated that the City would be amending existing land use limitations as they appeared in the land use element of the City's general plan. Aviara alleged that the revision therefore created an improper inconsistency in the general plan.

Government Code § 65300.5 states in pertinent part: "the Legislature intends that the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency." Section 65300.5 has been repeatedly construed as requiring "that the elements of the general plan comprise an integrated internally consistent and compatible statement of policies."

The trial court agreed with Aviara and found the revision as adopted by the City created an impermissible conflict between the housing element and the land use element in the general plan. However, the trial court also found that if the city adopted an appropriate timeline for adoption of the proposed changes, the conflict was permissible.

Aviara appealed. It argued that because the revision to the housing element contained needed, but unadopted, revisions to the land use element, the general plan was unlawfully inconsistent and would remain so notwithstanding adoption of the timeline ordered by the trial court.

**DECISION: Affirmed.**

The Court of Appeal, Fourth District, Division 1, California, agreed with the trial court. It held that the City's introduction of inconsistency into the general plan to satisfy state-mandated housing obligations was not unlawful. The court declared that § 65583, subdivision (c)(7) is a clear exception to the requirement of § 65300.5 that general plans be facially consistent. Under that exception, found the court, in the case of housing, the Legislature has permitted some inconsistency so long as the means of resolving any inconsistency is also set out (i.e., with timelines for adoption of proposed changes to land use elements).

In so holding, the court found that the Government Code "expressly

contemplates that in meeting its housing obligations a municipality will need to alter existing land use regulations, including existing limitations in other elements of an adopted general plan." The court found that "inclusion in the revision of a housing element of proposed changes to other land use regulations in a general plan was expressly contemplated by the Legislature and permitted on the condition the municipality sets forth a timeline for adoption of such proposed changes."

The court pointed to Government Code § 65583, subdivision (c), which requires that a housing element contain:

> A program which sets forth a schedule of actions during the planning period, each with a timeline for implementation. . . that the local government is undertaking or intends to undertake to implement the policies and achieve the goals and objectives of the housing element through the administration of land use and development controls . . . [which, shall, among other things,] [i]nclude an identification of the agencies and officials responsible for the implementation of the various actions *and the means by which consistency will be achieved with other general plan elements and community goals.* (Italics added.) (Section 65583(c)(7).)

The court found that this language in § 65583 subdivision (c) expressly contemplated that existing land use regulations, including other general plan provisions, would, if left unchanged, prevent municipalities from meeting their allocated housing obligations. Moreover, the court found that the requirement that the housing element set forth "the means by which consistency will be achieved with other general plan elements" directly expressed the Legislature's understanding that, as in the case here, policies adopted in a housing element as a method of providing a defined number of housing units would "almost inevitably create inconsistency with land use limitations set forth in other elements of a general plan." Importantly, noted the court, the Legislature's expression of the understanding that inconsistencies would arise, came within the context of a specific provision that required municipalities to set forth a program, including a timeline, for resolving such inconsistencies.

The court further explained: "Although requiring that consistency be achieved, use of the future tense in the statute plainly expresses legislative recognition that inconsistencies will arise and that it may not be possible to resolve them at the time a housing element is adopted or revised." The court found that there was a "clear legislative preference that municipalities promptly adopt housing plans which meet their numerical housing obligations even at the cost of creating temporary inconsistency in general plans." An interpretation such as that presented by Aviara—by which other elements of a general plan must be made consistent with the housing element immediately—would, declared the court: "no doubt delay the adoption of revised housing elements," which would be inconsistent with the express language of the Housing Element Law or the Legislature's urgent concern that municipalities provide adequate housing for the state's citizens.

The court concluded by finding that the trial court acted properly in requiring that the City adopt the timeline required by § 65583, subdivision (c). The trial court was not, as Aviara had argued, required to order that the City vacate its adoption of the revision and wait until the land use elements could be amended before addressing its housing obligations.

See also: *Concerned Citizens of Calaveras County v. Board of Supervisors, 166 Cal. App. 3d 90, 212 Cal. Rptr. 273 (3d Dist. 1985).*

# Zoning News from Around the Nation

## CALIFORNIA

The U.S. Department of Justice has sued the City of San Jacinto, alleging violations of the federal Fair Housing Act and Americans with Disabilities Act. The lawsuit claims the city discriminates against disabled residents by restricting where group homes can operate. The city's residential zoning does not allow group homes anywhere in the city, unless granted a special permit to be in areas zoned for multifamily housing.

Source: *The Press-Enterprise; www.pe.com*

## MASSACHUSETTS

On the November 9 ballot, voters legalized medical marijuana under certain circumstances. This raises zoning issues for municipalities in Massachusetts, which now must zone for and designate appropriate places for the marijuana dispensaries.

Source: *BostInno; http://bostinno.com/*

## NEW JERSEY

The New Jersey Supreme Court recently heard arguments "involving a 29-year-old landmark ruling on affordable housing." Affordable housing advocates are claiming that the state is not complying with the ruling to prevent discrimination against the poor. They are reportedly asking the court to find that "the state Council on Affordable Housing must resume its practice of giving each town a specific obligation on how many units of housing the town must create." Meanwhile, the state and municipalities are asking for simplification of the requirements, with towns providing the opportunity for subsidized homes for low-income people based on how many new market-rate homes and how many jobs are created in their communities.

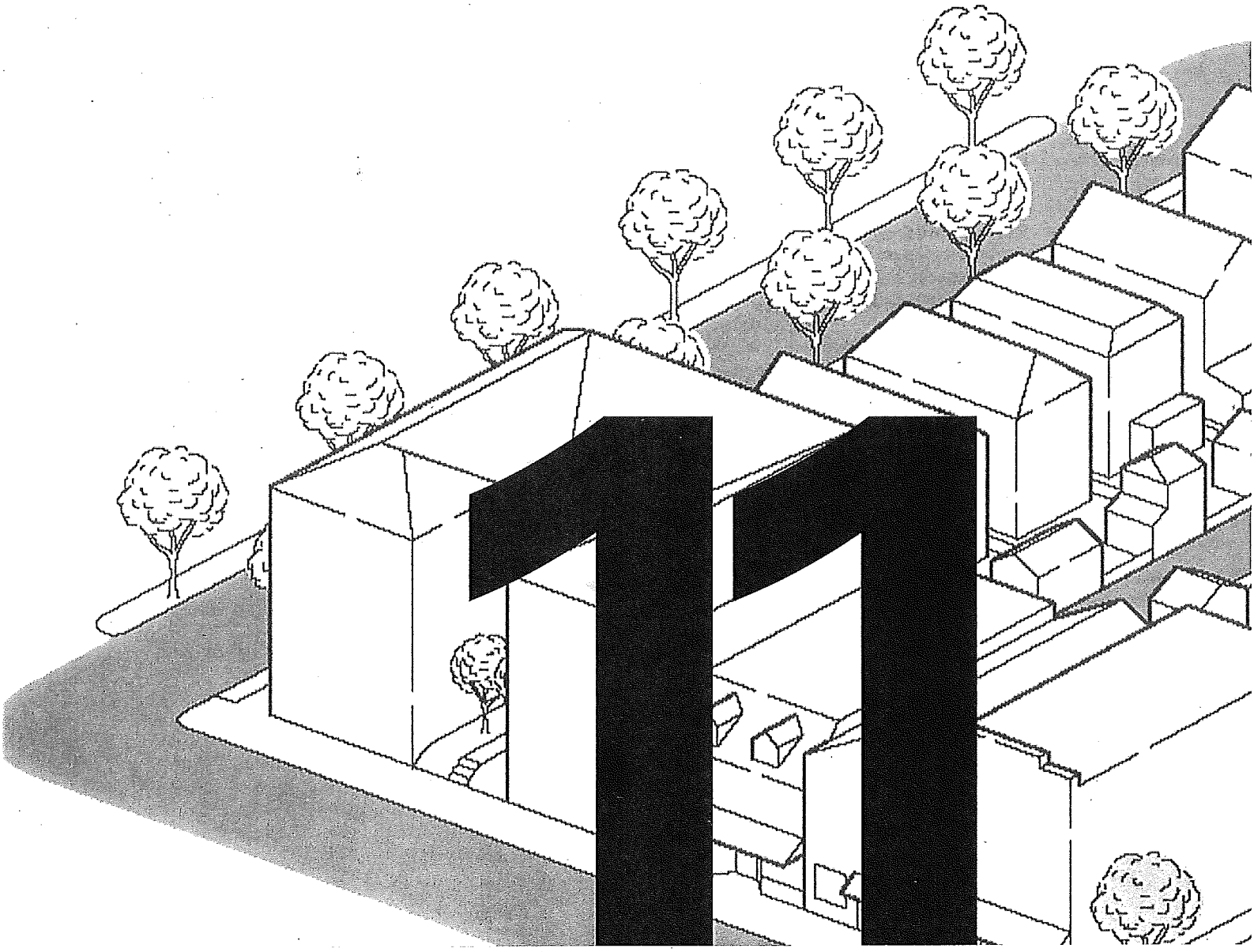
Source: *CBS News Money Watch; http://www.cbsnews.com*

ZONING **PRACTICE** NOVEMBER **2012**

AMERICAN PLANNING ASSOCIATION

**ISSUE NUMBER 11**

# PRACTICE FORM OVER DENSITY



# Beyond the Density Standard

*By Norman Wright, AICP*

Density requirements are a well-intentioned idea with unintended consequences. Fortunately, there are better solutions available.

For decades, cities have used density as one of the principal means for regulating the built environment. In virtually every instance, from rote limits such as units per acre to more elaborate approaches such as floor area ratio, these standards have dictated much more than just the amount of development that can occur on a given acre of land. And for all the attention that has been directed toward land-use requirements, the use of density standards has largely gone unquestioned in general zoning practice.

While the relationship between the absolute separation of land uses and sprawl is well documented, it is important to note that conventional density requirements also contribute to sprawl. When residential development is artificially limited to a finite number of homes per acre, more land is needed to satisfy residential demand and greater subsidies are required to encourage provision of affordable housing in desirable neighborhoods. The good news is that zoning techniques rooted in the form and character of development can address community concerns about compatibility better than simple density limits.

**PERCEPTIONS ABOUT DENSITY**

One of the common motivations for regulating density, especially in residential development, is to preserve or improve an area's "quality of life," a term that changes meaning with every new development proposal. The logic is that the number of units allowed is inversely correlated to the "quality of life" for the surrounding area. As density increases, "quality of life" decreases. This argument is familiar to planners, and it is raised by the public in virtually every apartment building or town house proposal. Communities seldom agree on what "quality of life" is other than to suggest that they know it when they see it. In fact, a community's judgment of new development often hinges on aesthetics. A good example of this comes from a recent case in Iowa City, the home of the University of Iowa.

In early 2012 Iowa City received a development proposal that sparked such a public outcry that the entire zoning ordinance had to be reexamined and parts rewritten in reaction to the protest. The controversy surrounded a pair of four-story structures that would be built in a block of town surrounded by single-family neighborhood. The development would feature a mix of commercial and residential space, and the developer would need to demolish three existing structures (including a restaurant and bookstore) to make way for the new construction.

The proposal complied with all zoning regulations at the time, but the community resisted the change. Petitions were circulated and 4,600 residents signed their disapproval. Specific concerns covered the gamut of common arguments where high-density development is involved. For example, like most high-density housing—especially in a university town—the proposal was for rental housing, and some commenters worried that the lack of home ownership would mean a lack of proper maintenance. There were also concerns over the potential for nuisances such as loud noise and vandalism. Others mentioned the likelihood of parking shortages as more people moved into the area.

Weeks after the initial proposal, these concerns and many more continued to grow and crystallize until the city council decided to review its density regulations. The city declared a 60-day moratorium on all projects related to any proposed zoning change in order to give staff time to evaluate regulatory alternatives. The subject development was initially included in this decision until officials discovered that certain permits had already been issued. Even so, the effort to reexamine the city's attitude toward high-density development was under way.

Two months later the city council voted to make three changes to its zoning ordinance. All three changes were designed to limit the density of future developments like the one proposed. First, the number of unrelated persons allowed to live together in a dwelling unit dropped from five to three. Second, the number of parking spaces required for large apartment buildings increased by an additional space per unit, and third, the number of allowable bedrooms for multifamily uses was lowered to a maximum of three.

While the city adopted these amendments in order to preserve the existing fabric of the neighborhood and minimize nuisances associated with new student housing, density regulations may not be the ideal tool to achieve these goals.

For example, residents in the Iowa City case voiced concern over potential nuisances such as noise, vandalism, and late-night activities. The solution was to lower the number of potential habitants in the area. This action assumes that it is the number of people living in the area that determines the likelihood of nuisances, but a visit to any desolate, blighted neighborhood illustrates how fewer people often leads to more nuisances. Though high-density development may increase the potential for nuisances, the better solution for such problems is likely outside the realm of zoning and is found, instead, in the city's actual nuisance ordinance. A well-crafted and well-enforced nuisance ordinance can eliminate the issues of excessive noise not only for high-density development but for all developments in all parts of the city.

## 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*. Norman Wright, 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**
Norman Wright, AICP, is the director of development services for Columbia, Tennessee. He holds a master's degree in City and Regional Planning from Clemson University. His recent work includes writing the first adopted plan under the Partnership for Sustainable Communities and the first citywide form-based code for a major town in Tennessee. His writings have been published in *Practicing Planner* and *Planning*. The author extends his appreciation to Charles Marohn, Peter Katz, Steven Price, and the firm Moule & Polyzoides for their contributions to this article.

Meanwhile, the other major concern voiced by project opponents related to potential parking shortages—that greater housing density would attract more residents and more demand for parking spaces. The community's opinion was that the proposed development did not have enough parking spaces to serve its clientele and that all parking should be self-contained within the property. Shared parking or on-street parking was apparently not supported by the community. Thus, the solution in Iowa City was to require more parking spaces for multifamily uses. This standard creates a disincentive for future development, but in cases where new development does occur, the existing neighborhood fabric may be disrupted by large parking areas.

### COMPATIBILITY IS THE REAL ISSUE

There was an online petition titled "Save the Red Avocado," a reference to the restaurant that was demolished to make way for the proposed four-story development. The petition is a beautiful, heartfelt entreaty from many residents who love this portion of the city. The second line in the petition's narrative goes to the heart of all anti-density arguments: "The proposed new development building's size, height, and residential density are incompatible with the residential character of the neighborhood."

But in doing so, this same statement points to the real limitations of density regulation. In any instance where the density of a given area is subject to change, the concerns that surround that change are not focused on the plain, numerical shift from three units per acre to five units per acre. They aren't even a concern of multifamily housing versus single-family housing. The true focus of such concerns relate to compatibility, or the perceived impact a proposed change will have on the existing character and form of its surrounding area.

In the December 2010 issue of *Zoning Practice* author Bret C. Keast, AICP, offered the following description of community character: "Community character is based on the relative balance of design elements. This means that, within reason, development may have different uses, mixed housing and building types, varying densities, and different lot and street patterns while being of the same character."

In his article Keast makes a convincing argument that focusing on community character can lead to much greater success in realizing the desired future of a community. As he points out, land use and density do influence traffic, parking, and utility capacity, but these characteristics don't adequately capture the concept of character. Best of all, the concept of "character" and "compatibility" is just as tangible and easily measured as density and land use when proper form-based elements are applied. With such analysis, an area's character can be boiled down to the physical composition of its built environment. Suburban areas can be recognized not solely for the presence of single-family homes on quarter-acre lots, per se, but rather as a collection of buildings set on lots with moderate setbacks, consistent building heights, porches facing the street, and so forth. These physical characteristics are what people use to interpret an area as being a neighborhood versus a downtown. And these characteristics can be defined in

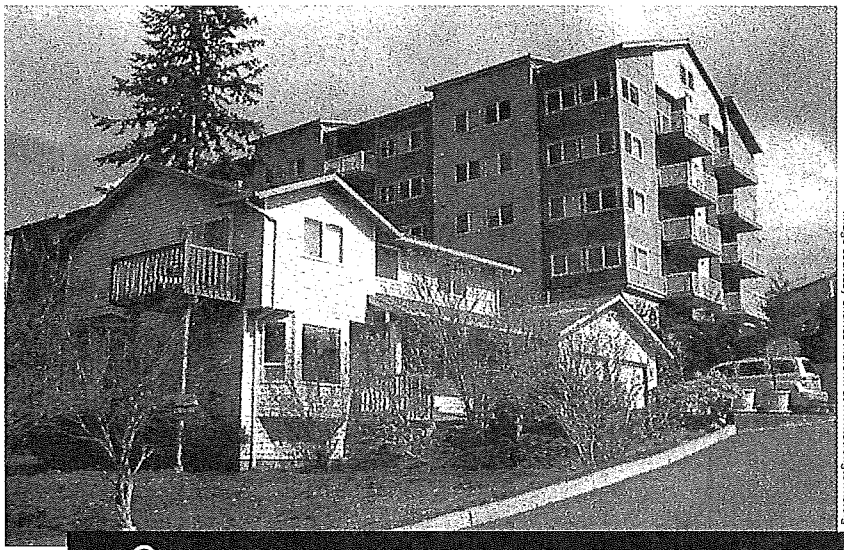


Image courtesy Charles Marohn at www.strongtowns.org

An example where density is the least of the issues at hand. Incompatible development takes many forms, and it is the form itself that makes it so harmful to its surroundings.

clear numerical values, allowing planners and officials to focus on concrete variables instead of wrangling with vague, contextual ideas such as "quality of life."

The citizens of Iowa City, along with countless other cities, would likely agree that their concern is one of community character and compatibility and not solely focused on the number of dwelling units or type of ownership involved. Concerns surrounding traffic, parking, infrastructure, and more are legitimate matters in any proposed development. Nuisance concerns are also prominent and absolutely real. But from all these issues, the central phenomenon that motivates citizens to demand change (and planners to alter their zoning ordinances) is the threat of development that is incompatible to the area.

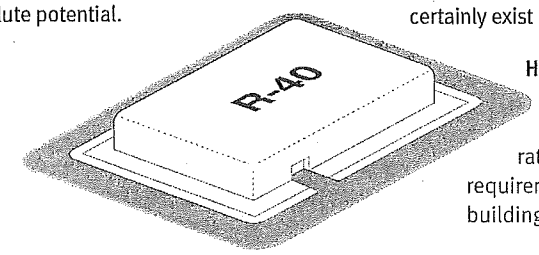
## SOLUTIONS FOR INCOMPATIBLE DEVELOPMENT

For a zoning ordinance to better address incompatible development, the first step is to define the existing character of a given area. For example, Columbia, Tennessee, recently wrote a new zoning ordinance in which all districts are first described by their actual physical form and intensity of use (i.e., level of noise, traffic, hours of operation, etc.). Built from the framework of the rural-to-urban transect, this new set of zoning districts focuses on the physical characteristics that make each environment unique. Each element is selected based on the ability to measure them in exact detail. For example, while a suburban neighborhood might be "quiet" and "safe," the elements that dictate the actual character are form based and include components such as the following:

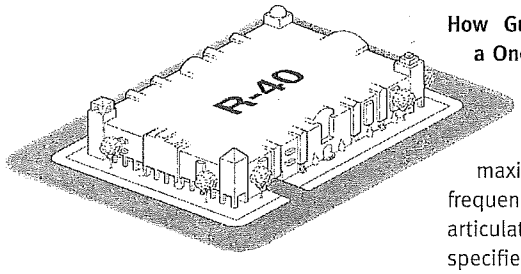
- Setbacks
- Yard types (presence of front, rear, or side yards)
- Building Height
- Block Length
- Lot Coverage
- Frontage Type
- Facade to Lot Frontage Ratio

These measures, which are increasingly common in contemporary zoning ordinances, provide clear, measureable information on the physical traits of any given area. As Dan Parolek, coauthor of the book *Form-Based Codes*, describes, the combination of these numbers constitute the "DNA" of a particular place. Each value is established by measuring the existing features of each zone or "transect." For example, the lot coverage of an urban zone is established by defining the actual lot coverage of the area that will be emulated. This is a critical aspect of form-based standards. The values are not based on vague concepts or arbitrary desires about what looks good. They are instead rooted in plain, detailed numbers based on the ideal environment that the city wants to replicate.

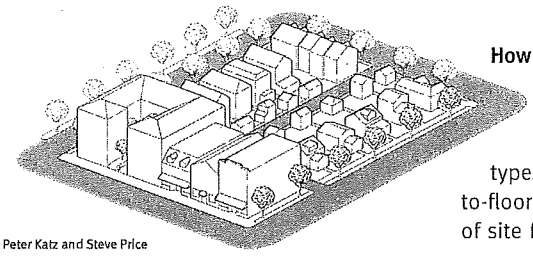
These measures include no mention of density. However, density is impacted, and often controlled, by each of these factors. To extend Parolek's metaphor, our own human DNA doesn't dictate our adult height, but it certainly determines our potential growth. Likewise, the built environment's DNA doesn't dictate density but certainly establishes the absolute potential.




**How Zoning Defines a One-Block Parcel**
Density, use, floor-are ratio, setbacks, parking requirements, and maximum building heights specified




**How Guidelines Define a One-Block Parcel**
Density, use, floor-are ratio, setbacks, parking requirements, maximum building heights, frequency of openings, surface articulation, and landscaping specified



**How a Regulating Plan and Codes Define a One-Block Parcel**
Street and building types, build-to lines, floor-to-floor heights, and percent of site frontage specified

Peter Katz and Steve Price

This notion may seem faulty at first glance. A collection of form-based elements governing setbacks, lot coverage, and building height may not appear to impact density at all, particularly when compared to the ultimate regulation for density potential: the common maximum density standard. Zoning ordinances typically do a terrific job of defining the absolute potential for density by stating that no more than, say, four units per acre may be developed in a given district.

But density aside, what else is known or assured with the future development? The land use is likely restricted, but is there any other regulation that will ensure that the right form of development takes place? For example, if a development is to be single-family residential with a density of four units per acre, it is no exaggeration that a common zoning ordinance would then allow a plain building devoid of any architectural features to be developed so long as it complied with building codes and setbacks. This building would likely be incompatible with the defined character of the area. After all, most single-family residential areas are identified not by the families who live there but by the unique buildings they occupy. These buildings commonly have pitched roofs, front porches, facade widths around 30 to 40 feet, building heights of 25 to 30 feet, side driveways, and rear parking. Variations certainly exist between each individual house but, on the whole, buildings in a neighborhood possess some version of these aesthetic features in a consistent manner. And when one building along the street happens to lack these features, surrounding residents naturally become concerned since the physical character of the area is no longer maintained. In short, it is the lack of these physical features that creates the visual cue that something is amiss. From that initial discovery, discussion often leads to questions about density or land use, but those are secondary to the issue of compatibility.

Without form-based regulations, density standards cannot ensure compatible development. The Iowa City case shows firsthand that a request can meet the zoning

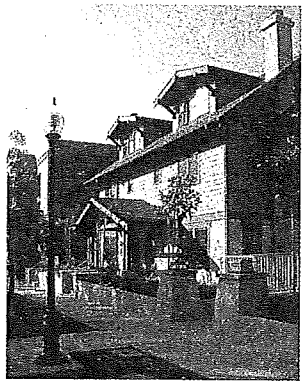
Norman Wright

An image of compatible development as defined by rote density and land-use regulations.

ordinance standard for density and land use and still be unwelcome. But the problems run deeper. Not only does density regulation not ensure compatible development, it often makes great development illegal.

In any scenario where density is completely removed from the picture, form-based elements can provide a more defensible, and understandable, basis for judging good development. A prime example of this is the Mission Meridian South development in South Pasadena, California. Designed by the architectural firm Moule and Polyzoides, the development features 37 dwelling units per acre. If judged solely from a density and land-use perspective, as in any conventional zoning ordinance, this type of development would often be prohibited. Not because of land use (many zoning ordinances embrace mixed use concepts) but because the density appears quite incompatible with its surroundings. Outside of major downtown districts, few ordinances permit 37 dwelling units an acre by right.

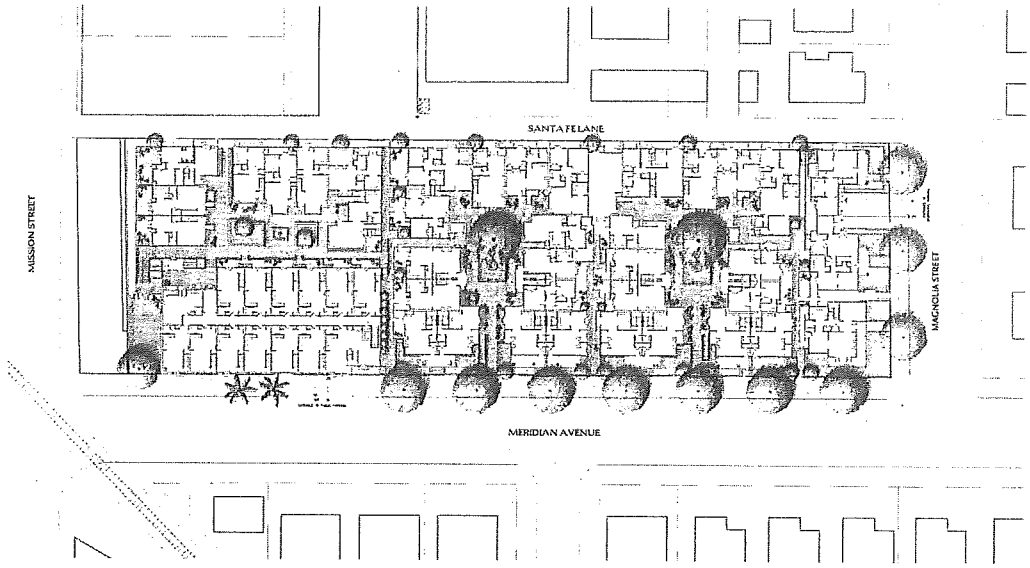
However, with the focus on form alone, this uncommon development is recognized to be fully compatible with the area's character as an urban neighborhood. The scale of development, its footprints and placements, are examples of ways in which the existing form is maintained. There is a great deal of focus on the frontage for the residential buildings. Each frontage features California bungalow architecture with windows, awnings, stoops, and cupolas, all designed to the style of single-family homes. Facade widths and building height, meanwhile, maintain a consistent rhythm that decreases in scale as the development shifts closer to the adjacent blocks of single-family homes.



© Moule & Polyzoides, Architects and Urbanists

When these form-based elements are the focus of a proposed development, the actual density of the site becomes inconsequential. One can't help but imagine that residents of Iowa City would be more welcoming of a project of this density if it was designed with these character elements in mind. The best solutions respect and emulate physical attributes that residents love about their respective neighborhoods.

Real concerns still exist, of course. Aforementioned issues such as traffic, parking, and noise still have potential impacts no matter what type of development is proposed. In these instances, there are better, more direct methods of addressing the issues.




(Center) Street level view of Mission Meridian South's "bungalow" units. Each unit features several dwelling units in a single-family form. (Left) Plan for Mission Meridian South. The image shows a design for attached housing in building footprints that are consistent with the scale of adjacent development.

## TRAFFIC AND DENSITY

Congestion and density are often tied together when examining the impacts of growth—the greater the collective density of an area, the greater number of cars on the road. This is true, but the actual relationship to congestion is quite difficult to measure. The entire science of transportation planning constantly searches for the next best predictive tool to define this relationship. But if the goal is to prevent congestion, zoning ordinances and their density limits are not the best solutions. After all, some of the most congested roadways—commercial highway corridors—are notorious for being devoid of residential development at any density. The problem, then, is not the amount of density in any given area but the design of the road network.

Planners are often fully aware that a network that funnels many small roads into a few major collectors and arterials is the true cause of congestion. Local densities are seldom a contributing factor when regional traffic is diverted onto major highways. These common networks should be redesigned to provide more route options, such as grid networks, rather than propose limited density somewhere along the outer reaches of the highway. And when a solution does involve residential densities in some respect, that solution is often not in limiting density in each development but allowing more through urbanized infill development.

After all, each city has a certain amount of market demand for new housing. If that demand is for 4,000 new homes in a given year, but zoning requires these homes to occupy no more than four units an acre, that leads to 1,000 acres of development, with each house placed increasingly further away from destinations. As these houses are placed further away, their dependence on automobiles and limited road networks becomes greater. This is a prime example of how low and medium density (e.g., two to six units per acre) can exacerbate congestion.

When viewed in light of the long history of sprawl development, density regulation to manage traffic congestion is neither a direct, effective solution for the problem or a sustainable practice when an area experiences demand for more growth.

A 2012 study of the Arizona Department of Transportation finds this very condition to be the source of many traffic issues today. The solution? More grid streets and higher density development of the sort proposed in both the Iowa City development and Mission Meridian South. This finding is supported by a careful analysis of four different areas of development. Each area features differing levels of development density and design, and the result is that the highest density areas featuring the best design actually perform better at mitigating congestion when compared to lower density areas.

**COMPARATIVE CHARACTERISTICS AND PERFORMANCE OF THE FOUR STUDY AREAS**

| | Scottsdale | Bell Road | Central Avenue | Tempe |
|---|---|---|---|---|
| *Land use* | | | | |
| Density | High | Low/Medium | High | Medium/High |
| Mix | Good/Very good | Poor | Fair/Good | Good/Very good |
| Design | Good/Very good | Poor | Good/Very good | Good/Very good |
| *Road network* | | | | |
| Alternate routes | High | Poor | High | Very good |
| Manageable grid | High | Poor | High | Good/Very good |
| *Traffic congestion* | | | | |
| Midday | Moderate | Very high | Moderate | High |
| Peak | Moderate | Severe | Moderate | High |
| *Transit* | | | | |
| Service/Servicability | Good/Good | Low/Poor | Very good | Good/Good |
| Utilization | Good | Low | Very good | Good/Very good |
| *Through traffic* | Moderate | High | Moderate/High | Moderate/High |
| *Internal trip capture* | | | | |
| Work | Moderate | Low | Moderate | Moderate |
| Nonwork | Very High | High | Low | Moderate/High |
| *Average trip length* | | | | |
| Work | Third shortest | Longest | Shortest | Second Shortest |
| Nonwork | Shortest | Longest | Third shortest | Second Shortest |
| *Walkability* | | | | |
| Walk/bike trip rates | Second highest | Lowest | Third highest | Highest |

Arizona Department of Transportation

Summary Chart from Arizona Department of Transportation study "Land Use and Traffic Congestion," March 2012.

## PARKING AND DENSITY

When Iowa City considered the proposal for a new, high-density residential development, opponents raised concerns about a potential parking shortage. This impact can often be very real, but the typical solution is often drafted to the detriment of the community's character. In this respect, there is a fine balance between too much and too little parking. The more parking that a multifamily development is required to build, the larger the parking lots become, creating empty space along street frontages and creating an "island effect" where the multifamily building is often surrounded on all sides by more and more parking. Such requirements often run counter to the established form of an area and add to the incompatibility issue.

Recent publications and advances in parking technology (such as demand pricing for parking meters) indicate that better

Norman Wright

This multifamily development faces single-family homes on the other side of a highway. Poor design creates high degrees of separation between the neighboring areas.

solutions do exist. Unfortunately, many of the best new practices do not necessarily translate into simple changes in a zoning ordinance. Even a straightforward shared parking ordinance requires a comprehensive parking study to be effective. But solutions do exist, and most focus on the actual issue of parking demand, not housing density. Multifamily residents need parking spaces, certainly, but ensuring too many visitor spaces to alleviate any further concerns could lead to even greater issues. Large parking lots, especially in residential settings, create broad, empty gaps in the urban fabric. When multifamily housing is seamlessly integrated into a neighborhood, it is often because the development acquires the same lack of parking and same subdued, consistent building form. Broad expanses of asphalt change that. Large parking lots appear incongruous with the surrounding neighborhoods, so much so that residents often ask for screening and fences, essentially cutting off the multifamily development from the rest of the neighborhood. When a development requires screening, it is an acknowledgment of incompatibility, the very danger that citizens wish to avoid. Furthermore, the desire for larger parking lots runs counter to a neighborhood's character since parking lots require intense lighting at night, leading to nuisance concerns, and reduces or eliminates the iconic lawns that define a neighborhood setting.

## NUISANCES AND DENSITY

As I stated before, no density requirements can replace the effectiveness of the enforcement of a good nuisance ordinance. Nonetheless, planners often face pressure to alter density allowances based on the bad experience of neighbors living close to apartment complexes and other high-density residential areas. When such cases arise, and nuisance issues continue despite the best enforcement efforts, the likely second-best solution is to consider greater screening and buffering requirements. Too often, quality residential developments, no matter the density, are hampered by regulation written in reaction to a few unruly tenants.

## DENSITY AND RURAL AREAS

Finally, though the provided case studies focus mostly on urban and suburban developments, the classic case of rural land being converted into higher density developments cannot be ignored. As stated before, many density requirements are designed to preserve rural land or, at least, prevent the overdevelopment of such land. Overdeveloping rural land has countless impacts on more than just the character of its surroundings. Rural roads can become overrun with new traffic, crucial habitat can be lost, and city resources can be extended beyond budgetary means.

In these instances, though, rote density maximums are still inadequate to address the potential issues for reasons already stated. Thus, physical form and character elements should be combined with other policies. The best possible means of preventing the negative effects of greenfield development is to forego density maximums and focus, instead, on crafting a strong open space protection policies. Crucial habitats and viable agricultural land will be far better protected by policies that require their preservation rather than allow low-density development intrusions. Great examples of sustainable open space protection programs include conservation subdivision ordinances, which dictate the form of lot sizes and their arrangement around crucial natural lands. Notice in this case that "form" deals with something greater than building design. For conservation subdivisions, form is a matter of lot design, showing that form-based standards have a great deal of versatility. It isn't solely a tool for making sure that front porches are provided for each house. It is also a tool to ensure that site plans are designed to meet conservation needs.

## CONCLUSION

The use of density regulations often leads to unintended consequences and is often a symptom of an incomplete zoning ordinance. Density is a very limited tool for long-term, comprehensive planning. When used to address so many of the issues that planners deal with, such as nuisance complaints, traffic and parking concerns, and character compatibility, the consequence is that more effective approaches are ignored. It is important to remember that the underlying issue facing a city's growth and change is not a matter of the number of units allowed on a given acre of land. The true issue, as expressed by citizens of Iowa City and so many others, is one of incompatible development or development that does not respect, conform to, or positively enhance the established character of the places they love.

The result, then, is that the focus on density comes at the cost of less focus on character. When new development fails to respect its surroundings, density is not the primary concern. Incompatible development harms an area—whether it is "high density" or not.

This is to say nothing of the impact density regulations have on housing markets. New studies and publications are showing that areas such as San Francisco and New York City are suffering from distorted housing markets where the demand for more homes is high but the supply is kept deliberately low through density limitations. This phenomenon is still under examination, but the findings from authors such as Matthew Yglesias and Ryan Avent are showing that density regulations carry even deeper impacts that go beyond the scope of this article.

In conclusion, modern zoning practice must acknowledge the limits of density regulation. Whether the goal is to curb traffic congestion or make development more compatible, there is likely a better means to accomplish the goal at hand. The best policies are written to affect the direct relationship between causes and effects. Density is seldom a direct cause of any effect planners hope to manage.

Cover image: Form-based codes control the physical characteristics of development with much greater precision than simple density standards. © Moule & Polyzoides, Architects and Urbanists

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# HOW WELL DOES YOUR ZONING PROTECT COMMUNITY CHARACTER?

# 11

ZONING PRACTICE DECEMBER 2012

AMERICAN PLANNING ASSOCIATION

ISSUE NUMBER 12

# PRACTICE ENERGY EFFICIENCY

12

# Powering Down Zoning Regulations

*By Jeffrey S. Beiswenger, AICP*

Over the past several years there has been a paradigm shift in zoning practice with regard to sustainable planning and development.

Policy makers, civic leaders, planners, architects, builders, and energy companies have started to recognize the link between energy consumption and development regulations. Many outdated zoning codes, in particular, are rife with provisions that lead to more energy consumption than necessary or prevent energy saving development techniques. Conversely, many newer codes already include provisions that promote energy conservation.

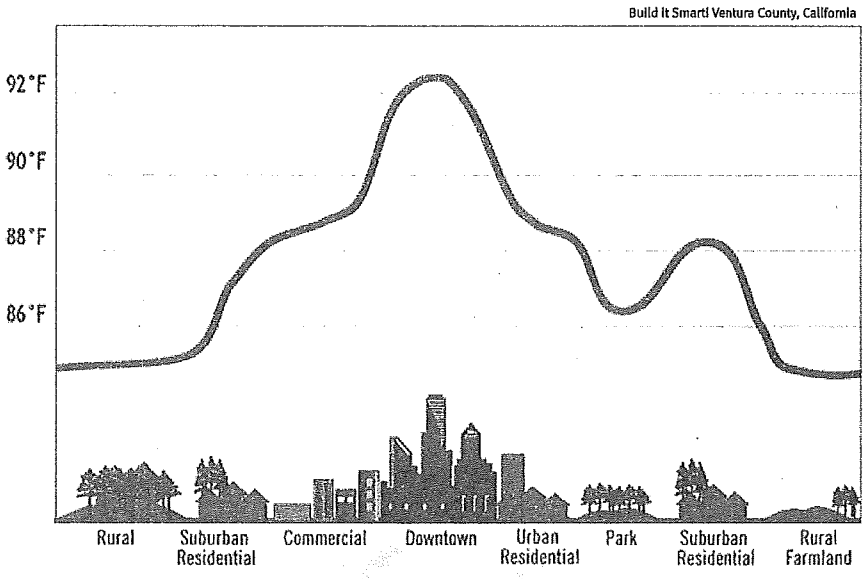
This article explores ways in which energy consumption can be reduced directly or indirectly through zoning and other development regulations. The way that buildings are constructed, neighborhoods are laid out, transportation systems are connected, irrigation systems are designed, parking lots are lit, and even how local produce is grown can help reduce the consumption of electricity and other energy sources. While building codes may be the most direct way to address the energy efficiency of the building envelope, zoning regulations play a particularly important role in accomplishing energy efficiency in the space between buildings. In addition to helping conserve energy, zoning regulations can also play a role in promoting the use of alternative energy sources. Through favorable zoning provisions, communities can facilitate the installation of solar panels, wind turbines, and other renewable energy systems.

## UNDERSTANDING THE HEAT ISLAND EFFECT

In order to understand the full impact that zoning regulations can have on energy efficiency it is important to understand the urban heat island effect. Ambient air temperatures in cities are often higher than in surrounding rural areas due to the presence of large expanses of unshaded building and pavement surfaces exposed to direct sunlight. Pavement surfaces exposed to direct sunlight can be 50 to 90 degrees hotter than the air, driving up the ambient air temperature, while shaded or moist surfaces remain close to air temperature.

Peak demand for electricity generally occurs on hot summer weekday afternoons, when offices and homes are running cooling systems, lights, and appliances. The urban heat island effect increases both overall electricity demand and peak demand. During extreme heat events the resulting demand for cooling can overload systems and require a utility to institute controlled, rolling brownouts or blackouts to avoid power outages.

In some hot cities, shading a building can save $5 to $25 per 100m² of roof area annually. If a city were able to eliminate the heat island effect entirely through extensive tree planting, the corresponding air conditioning savings would provide an additional savings of $5 to $10 per 100m² of roof area (Akbari 2005).




This graphic charts the differential between average late-afternoon temperatures over a range of lands—from undeveloped land to downtown—and shows how parks and open lands moderate high temperatures.

## THE TOP NINE WAYS TO POWER DOWN YOUR ZONING

There are numerous zoning provisions that affect energy efficiency. These provisions may lead to direct energy savings by reducing lighting levels and the use of furnaces, air conditioners, hot water heaters, and water pumps. And they may

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**About the Author**

Jeffrey S. Beiswenger, AICP, is a project manager for PMC, an urban planning and design firm with offices throughout California. He has specialized work experience related to sustainable zoning and development codes and other planning implementation documents. Beiswenger has worked with jurisdictions in 11 states, preparing comprehensive plans, zoning ordinances, development codes, vision plans, master plans, and design guideline documents. He holds a bachelor's degree in architecture from the University of Arizona and a master's degree in urban planning from the University of Illinois at Urbana-Champaign.

affect savings indirectly by improving multimodal transportation systems, facilitating mixed use development, and promoting local food production. Regulations that save energy are too numerous to discuss in full here, so the following are the "Top Nine Ways to Power Down Your Zoning Code."

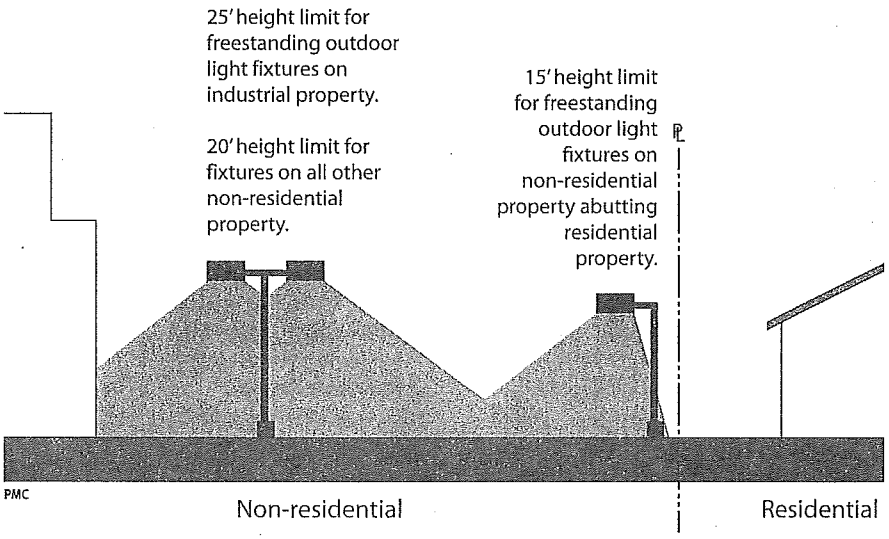
**1. Get Smart with Lighting**

The low-hanging fruit of energy efficiency is lighting. The amount of electricity used for exterior lighting can be greatly reduced by simply directing the light where needed and by matching the lighting intensity to the need.

The most common zoning provisions related to lighting aim to minimize light spill onto adjacent properties by requiring that light is focused downward or "cut off." Codes may also specify a height limit for light poles and set light intensity levels at property lines. Many communities also set minimum light levels for safety and maximum light levels to reduce excessive light. For an example of common energy-saving outdoor lighting provisions, see §9-5A-6 of Lemoore, California's zoning code.

To maximize energy efficiency gains, communities may consider additional measures such as provisions that encourage or require energy-efficient light fixtures or smart lighting technology (e.g., sensors and timers ensuring that lights only turn on when needed).

Some jurisdictions have adopted strict limits on outdoor lighting levels in order to protect astrological observations. For example, Tucson, Arizona, includes strict shielding and curfew requirements in its Outdoor Lighting Code and sets a maximum light budget (in lumens) for every acre of land, based on proximity to the Kitt Peak Observatory and other factors. However, the code does allow for higher light levels for special circumstances (e.g., a limited exemption for athletic fields).




Outdoor lighting provisions that limit fixture height and require shielding help to minimize wasteful light spill.

**2. Avoid Moving Water Around**

Providing households with safe drinking water and wastewater disposal is an energy-intensive process, and this can translate into unnecessary expense at wastewater and water treatment facilities. Reducing water consumption saves energy because less water needs to be treated and pumped to end users. In California the water sector is the largest energy user in the state, estimated to account for 19 percent of the total electricity consumed (much of it for agricultural purposes). Nationwide, four percent of electricity goes to this purpose (NRDC 2009).

Codes can play an important role in water conservation. For example, some municipal codes may still require that building storm gutters be connected directly into underground storm-sewer pipes. Modern zoning codes now include requirements or incentives for Low Impact Development (LID) techniques to reduce the amount of stormwater runoff. These techniques include drainage swales planted with native species and rain gutters that flow into landscaped areas (instead of

storm sewers). Pervious pavement can also be allowed, or even required, for parking areas to promote on-site infiltration. To illustrate, in 2011 Los Angeles adopted an LID ordinance requiring that the first 0.75 inch of rainfall be captured on-site (Ordinance No. 181899). The city also provides information on best practices such as rain barrels, permeable pavement, planters, rain gardens, and dry wells through its Stormwater Program (Los Angeles 2012).

Another approach to encourage the reuse of water is requiring that developers install dual pipe systems to allow for the use of nonpotable water for irrigation purposes. A secondary pipe (sometimes called a purple pipe) is used to transport this water in a parallel system separate from the potable water. For example, Windsor, California, requires the installation of purple pipe for landscape irrigation purposes (§12-7-105).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Requiring bioswales in parking areas helps to decrease the volume of stormwater flowing to water treatment plants.

3. Be Cool

Cooling down buildings, parking areas, and other surfaces that tend to absorb heat from the sun can help reduce energy usage—particularly in climates dependent on air conditioning. Trees, landscaped open space, and landscaped (green) roof areas can help reduce the heat island effect and maximize pervious surfaces in urbanized areas, and zoning codes can play a particularly important role in promoting pervious surfaces.

Trees can play a major role in lowering both site-specific and aggregate ambient air temperatures, and many communities have incorporated tree planting and preservation requirements into their zoning codes. Another effective technique is to require that a certain minimum percentage of a paved parking area is shaded. Rancho Cordova, California, uses this approach (§23.716).

Black asphalt absorbs light (and heat), resulting in 57 percent more electricity use than lighter colored concrete (Adrian and Jabanputra 2005). Requiring highly reflective surfaces (i.e., those with a light color high-albedo index of at least 29) for roofs, parking areas, streets, and other paved areas increases the efficacy of artificial lighting and can reduce heat island effects. California's green building code, CalGreen, includes provisions requiring that buildings and paved areas have a certain solar reflectance to minimize heat gain if they are not shaded (§A5.106.11.2). Austin, Texas, has similar reflectance requirements for flat roofs and also actively encourages the provision of green roofs through code incentives (Austin 2012).

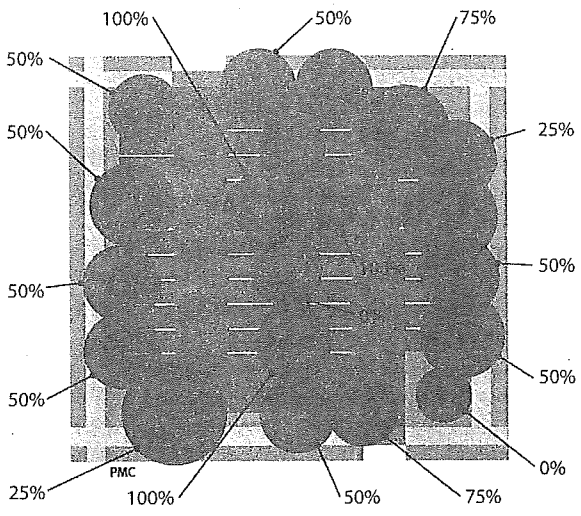
4. Let the Sun Shine

While the previous point focused on how to eliminate solar heat gain to lower air conditioning bills, in certain instances, maximizing solar access increases the opportunity to generate electricity or heat water with a solar energy system. Heating water accounts for 15 to 30 percent of electricity use in homes equipped with electric water heaters, and using a solar water heater can result in a 50 to 80 percent cost savings. Furthermore, many homes have space for a 4kW rooftop solar energy system, which in some circumstances can offset total annual electricity use.

Consequently, some states protect the rights of property owners to receive sunlight. These solar access protections often enable property owners to use solar easements to prevent neighbors from building structures that may block solar panels, garden areas, passive solar heating, or other features that require solar access. A few states even protect solar access without a solar easement. The Database of State Incentives for Renewable Energy includes a state-by-state breakdown of solar rights and access protection laws (www.dsireusa.org).

At the local level, many jurisdictions have a solar access or solar easement provisions in their development regulations. These provisions either enable the recordation of easements or establish a solar envelop by right to ensure that solar systems are not blocked or made less efficient by development on neighboring properties.

Subdivision or zoning provisions can also encourage buildings and neighborhoods to be designed along an east-west access to maximize solar exposure. The percentage of homes that are positioned for optimum solar access could be specified in the code (e.g., 50 percent). This will at least provide the opportunity




Minimum parking lot shade requirements can lessen urban heat island effects.

Notes:
1. This diagram is intended to reflect the manner in which shade is credited under various conditions.
2. Trees may receive 25%, 50%, 75%, or 100% as shown.
3. Shade overlap is not counted twice.

for a certain number of homes within each subdivision the option of installing solar systems in the future.

Beyond just providing for the possibility of future solar systems through solar access and orientation requirements, some jurisdictions are taking the next step of requiring that buildings are prewired (or preplumbed) for solar service. Resources produced by the American Planning Association through its participation in the SunShot Solar Outreach Partnership include examples of all of the strategies discussed above (www.planning.org/research/solar).

5. Reuse Existing Buildings

A common adage in energy conservation circles is that the most energy-efficient (or sustainable) building is the one that you don't build. If the primary goal is to save energy, then a persuasive argument can be made in favor of reusing buildings in more urban settings before constructing new low-density suburban settlements. Allowing a mix of uses within a district or a single building can encourage building reuse by allowing older buildings to be repurposed for new uses.

Many modern zoning codes provide for mixed use districts that allow (or require) combinations of residential, commercial, office, and even light industrial uses. From a utility standpoint, mixed use development maximizes infrastructure efficiency and may even help smooth out peak-period demand. Mixed use districts are often well suited to take advantage of shared parking facilities or available transit service, thereby reducing the need for private off-street parking. Reducing off-street parking can also lessen the impact on the electrical grid since large fields of parking contribute to the heat island effect, spread out the distance between buildings, and increase the distance that electricity has to travel.

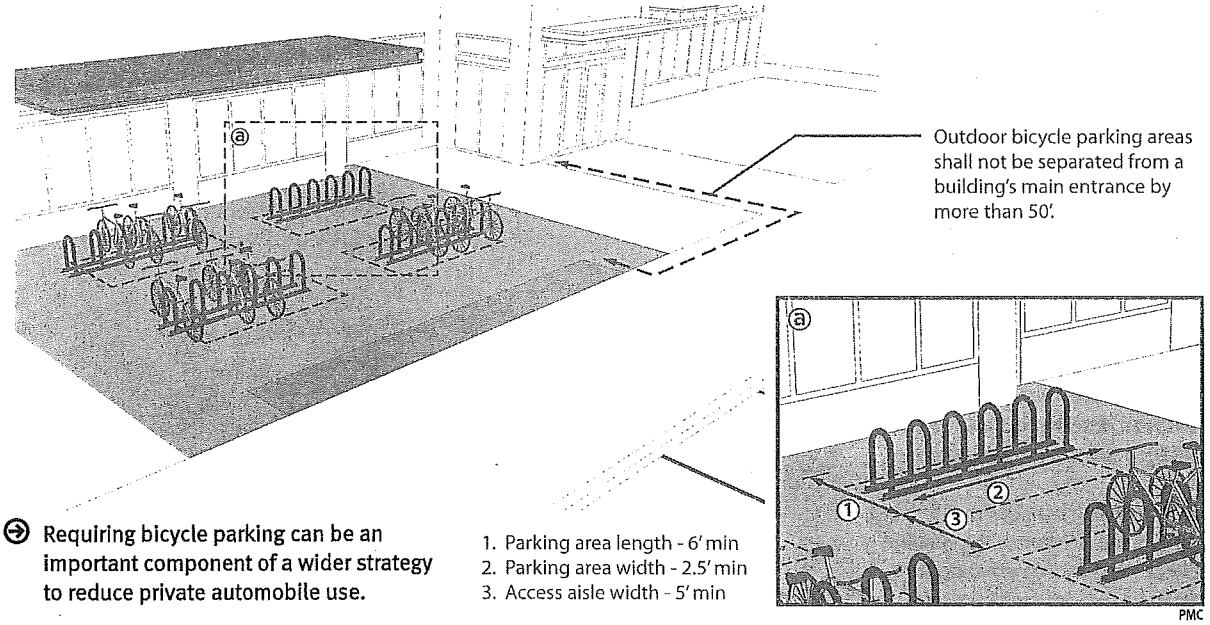
Applying building and zoning codes uniformly throughout the community can lead to the unintended destruction of historic resources. Many older buildings would need to be demolished and replaced in order to comply with strict energy efficiency or minimum off-street parking requirements. For this reason, jurisdictions often exempt downtown and other special areas from off-street parking requirements. Ocala, Florida's parking exempt zone illustrates this approach (§122-981). Similarly, communities may also carve out limited exemptions for historic buildings from energy-efficient building code provisions. For example, Palo Alto, California's green development regulations exempt historic structures from certain requirements (§18.44.10).

6. Reduce Private Automobile Use

While the topic is too large to cover in depth here, the most effective zoning strategy for reducing private automobile use may be mixed use and form-based code provisions aimed at creating more compact, walkable, and transit-friendly areas. Many contemporary zoning codes incentivize or require pedestrian- and transit-oriented development either communitywide or in multiple strategic locations.

In addition to provisions requiring compact, mixed use development in transit-friendly locations, communities can also use zoning to encourage carpooling, car sharing, or the use of more energy efficient vehicles (e.g., motorcycles and electric vehicles). Many communities require bicycle parking in their zoning codes, and these standards are typically based on a ratio related to vehicular parking requirements. CalGreen requires all jurisdictions to provide bicycle parking equivalent to five percent of all vehicle parking spaces (§5.106.4). While carpool spaces have long been required as part of some zoning codes, CalGreen requires parking for "clean air vehicles," which include vanpools, carpools, electric vehicles, and gas-electric hybrids (§5.106.5.2).

Beyond the baseline parking and clean air parking requirements discussed above, communities can also offer off-street parking reductions for sites that provide bicycle lockers, indoor bike rooms, and indoor changing and shower facilities to encourage employees to commute by bicycle. Additionally, communities may consider including separate parking allowances for small vehicles such as motorcycles, mopeds, golf carts, and other energy- (and space-) efficient vehicles.




Requiring bicycle parking can be an important component of a wider strategy to reduce private automobile use.

1. Parking area length - 6' min
2. Parking area width - 2.5' min
3. Access aisle width - 5' min

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A growing number of communities have added zoning provisions in recent years to promote infrastructure for electric vehicles.

**7. Prepare for Electric Vehicles**
Electric vehicles (EVs) are increasing in popularity, although it is too early to tell if they will be produced in significant enough numbers to compete with their gas-powered cousins. EVs present an interesting set of issues for utilities, but with incentives to encourage off-peak charging (e.g., at night) EVs can avoid undue impact on the grid and allow utilities to sell more electricity at off- hours.

Zoning codes typically do not address EV infrastructure. In general EVs are treated the same in zoning codes that any other vehicle. In a typical scenario these spaces would be part of the parking supply and applied toward the required number of parking spaces. If provided, the Americans with Disabilities Act requires one or more EV spaces to be provided as disabled parking.

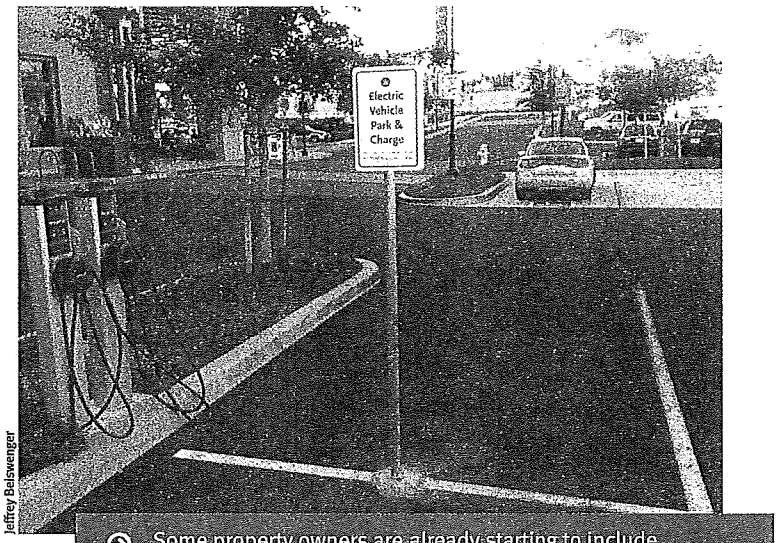
However, a growing number of communities have added zoning provisions in recent years to promote infrastructure for electric vehicles. For example, Sequim, Washington, devotes an entire chapter of its zoning code to EV infrastructure requirements (Chapter 18.50). Sequin does not require the installation of electric vehicle spaces but does include detailed provisions that apply if they are to be installed. Also, CalGreen includes model provisions that could be adopted by jurisdictions to require prewiring for future spaces (§A5.106.5.3).

**8. Set the Bar High**
A variety of project rating systems can be used by local governments to encourage energy efficiency. These systems may either be incorporated into the zoning code as requirements or used to incentivize more sustainable development.

Jurisdictions may encourage developers to build projects that comply with sustainable development rating systems by offering density bonuses or expedited permitting. For example, Rancho Cucamonga, California, recently adopted a rating system based on CalGreen that qualifies energy-efficient residential and nonresidential projects for an expedited permitting process. While developers are always interested in expedited processing times, the desire to implement energy efficiency often comes down to direct financial benefits: Can the homes be sold for more if a solar system is installed? Jennifer Nakamura, senior planner with Rancho Cucamonga, explains that apartment projects can be especially tricky, since reductions in electricity use benefit future tenants and not the developer.

Requiring provisions for more sustainable development—as opposed to simply providing incentives—is also an option. For example, Duarte, California, has adopted an approach that incorporates a wide range of CalGreen provisions directly into a chapter of its zoning code (Chapter 19.52). Different sustainable development provisions apply based on the size of project.

**9. Partner With Your Utilities**
Why would utility companies want less consumption of energy? After all, utilities are in the business of selling the stuff. In some markets utilities may be required to refund profits above a certain amount, so they don't necessarily make more if more energy is sold. In other cases, if a utility brings in less revenue than expected due to reduced electricity use, the state compensates them for the difference. This incentivizes the utility to produce less electricity because they get to pocket the savings and are guaranteed a certain profit. Capacity constraints also play a role and may encourage conservation. Since it is extremely costly to permit, construct, and operate a new power plant, it can be more cost-effective to promote conservation as a way to reduce demand.



Jeffrey Beiswenger

Some property owners are already starting to include electric vehicle spaces with charging stations in their parking lots.

As a consequence, cities and counties throughout the United States have launched energy-efficiency programs in cooperation with local utilities. Christina Prestella, a program manager with Pacific Gas and Electric, explains that local government programs are popular politically since they are viewed as ways to save money and use resources more efficiently. In addition to energy-efficiency programs which provide direct energy savings to existing buildings, utilities are also funding efforts to help local governments craft regulations that apply to new construction activities that will lead to

greater energy efficiency throughout a larger geographic area.

Utility-driven programs typically address the energy efficiency of governmental operations (e.g., water treatment, streetlights, and facilities), assistance to local businesses (e.g., lighting retrofits) and community residents (e.g., weatherproofing). The programs are often funded by the local utility and may use ratepayer fees identified for this purpose.

Forming multijurisdictional partnerships, particularly where large utilities are involved, can be a particularly effective way to achieve energy-efficiency gains. In 2009, the California Public Utilities Commission authorized $32 million for local governments to engage in strategic energy efficiency activities. As part of this effort, Southern California Edison is partnering

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with 27 member agencies of the San Gabriel Valley Council of Governments (SGVCOG) to prepare energy efficiency plans. In early 2012, SGVCOG elicited assistance from the planning consulting firm PMC to develop a toolkit to help jurisdictions adopt regulations that promote energy efficiency. This Model Energy Efficient Code Toolkit will provide a framework to help local governments address energy-efficiency targets, goals, and policies through development regulations. Although certain provisions are calibrated for Southern California, most of the ideas included in the model are applicable in other states and geographies as well. The full toolkit will be available in late January 2013 at www.sgvenergywise.org.

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## CONCLUSIONS

Development regulations clearly offer numerous opportunities to promote energy savings, and given the increasing awareness of energy-related issues in many communities, this may be an ideal time to present needed updates to outdated zoning codes. The strategies discussed above are not intended to be an exhaustive list but only a starting point to stimulate conversation. What is particularly interesting about this subject matter is that it allows consideration of a number of past zoning strategies (e.g., smart growth, form-based codes, performance standards, lighting limits, compact development, etc.) through the lens of energy efficiency.

Finally, planners should consider contacting their local utilities for partnership opportunities. Many utilities are operating at or near capacity and may be looking for creative ways to increase energy efficiency and better serve utility ratepayers.

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# WHAT IS YOUR COMMUNITY DOING TO PROMOTE ENERGY EFFICIENCY THROUGH ZONING?

# 12