

# Zoning Bulletin

## in this issue:

Nonconforming Use—Property owner contends recombination of lots restores lots' previous grandfathered status	2
Telecommunications—Town finds proposed monopine cell tower meets ordinance definition of "Concealed Wireless Communications Facility"	4
Proceedings—City council member appeals land use decision to city council	6
Preemption/Oil and Gas Well Regulation—Energy company argues that city's zoning ordinances are preempted by conflict with state statutory scheme governing oil and gas drilling operations	9
Zoning News from Around the Nation	12



## Nonconforming Use—Property owner contends recombination of lots restores lots' previous grandfathered status

Adjacent property owner contends grandfathered status was lost forever when lots were illegally separated

Citation: *Day v. Town of Phippsburg*, 2015 ME 13, 2015 WL 527846 (Me. 2015)

### Contributors

Corey E. Burnham-Howard

For authorization to photocopy, please contact the **Copyright Clearance Center** at 222 Rosewood Drive, Danvers, MA 01923, USA (978) 750-8400; fax (978) 646-8600 or **West's Copyright Services** at 610 Opperman Drive, Eagan, MN 55123, fax (651) 687-7551. Please outline the specific material involved, the number of copies you wish to distribute and the purpose or format of the use.

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

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

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



THOMSON REUTERS

610 Opperman Drive  
P.O. Box 64526  
St. Paul, MN 55164-0526  
1-800-229-2084

email: [west.customerservice@thomsonreuters.com](mailto:west.customerservice@thomsonreuters.com)

ISSN 0514-7905

©2015 Thomson Reuters

All Rights Reserved

Quinlan™ is a Thomson Reuters brand

MAINE (02/10/15)—This case addressed the issue of whether a property owner's recombination of two nonconforming lots resurrected the grandfathered status that the lots had when they had been merged under common ownership by ordinance.

**The Background/Facts:** In 1956, Joseph Spear ("Spear") acquired lot 114, a beachfront lot in the Town of Phippsburg (the "Town"). In 1987, Spear acquired the adjacent beachfront lot 113. Both lots contained less than 20,000 square feet. In 1989, the Town's Shoreland Zoning Ordinance ("the SZO") required that a beachfront lot consist of at least 40,000 square feet in order to qualify for development. The SZO contained a grandfather clause allowing limited development of a lot that failed to meet the minimum lot-size requirements if the lot: (1) was in existence as of the effective date of the SZO; and (2) was not contiguous with another lot held in common ownership. The SZO also contained a merger clause requiring the combination of lots that were adjacent and held in common ownership at the time of adoption or amendment of the ordinance if all or part of the lots failed to meet minimum lot-size requirements. As a result of that merger clause, lots 113 and 114 (which were contiguous with each other and were commonly owned by Spear) were merged into a single, nonconforming, grandfathered lot in 1989.

Although the merger clause prohibited separation of a merged lot that did not meet minimum lot-size requirements, Spear separated the lots in 1991. Spear conveyed lot 113 to Carol Reece ("Reece") and lot 114 to Mary Kate Izzo ("Izzo").

In 2013, Reece sought to develop lot 113. An adjacent property owner, Jonathan R. Day ("Day"), sued Reece and the Town. Day asked the court to declare that lot 113 was not a grandfathered nonconforming lot within the meaning of the SZO because the lot had lost its grandfathered status by its 1991 separation.

While Day's legal action was pending, Reece acquired lot 114 from Izzo. Reece then argued to the court that any grandfather status lost in the 1991 separation had been restored when the lots returned to common ownership in 2013. The superior court agreed with Reece, concluding that Reece had restored the lots' grandfathered status by recombining them.

Day appealed.

**DECISION: Judgment of superior court vacated.**

The Supreme Judicial Court of Maine held that lots 113 and 114 permanently lost their grandfathered status when they were unlawfully divided in 1991; the grandfather status was not restored by Reece's recombination of the lots.

In so holding, the court interpreted the SZO. The court found the SZO was ambiguous. It found that the SZO's allowance of preexisting nonconformities to "continue" subject to requirements could mean two different things. It could mean, as advocated by Day, that the grandfathered status of the nonconforming lot created by merger in 1989 could be understood to

“continue” to the present only if lots 113 and 114 remained merged at all times since 1989. On the other hand, the grandfathered status of the nonconforming lot created by merger in 1989 could be understood, as advocated by Reece, to “continue” to the present if the lot that existed in 1989 was identical to a lot that existed today.

To resolve that ambiguity, the court considered relevant zoning objectives and purposes. The court concluded that the stricter interpretation of the SZO advocated by Day promoted land use conformities better than the more relaxed interpretation advocated by Reece. Construing the SZO “to preclude a resurrection of the grandfathered status of the again-merged lot would be in harmony with the purpose of grandfathering,” found the court. Grandfathering, noted the court, is designed to protect rights anticipated at the time property is purchased. When Reece acquired lots 113 and 114, each lot was nonconforming and not grandfathered, and thus neither could be developed without a variance. Because Reece did not have the right to develop the lots without a variance when she acquired them, construing the SZO to deny her that right today did not divest her of anything, concluded the court.

See also: *Farley v. Town of Lyman*, 557 A.2d 197 (Me. 1989).

## **Telecommunications—Town finds proposed monopine cell tower meets ordinance definition of “Concealed Wireless Communications Facility”**

Neighboring property owners argue giant monopine was readily identifiable as cell tower, requiring more intensive review

Citation: *Fehrenbacher v. City of Durham*, 2015 WL 426058 (N.C. Ct. App. 2015)

NORTH CAROLINA (02/03/15)—This case addressed the issue of whether a proposed cellular tower to be concealed as a monopine would be “readily identifiable” as a cellular tower under the town zoning ordinance, thus requiring a more intensive permitting process.

**The Background/Facts:** In January 2012, Philip Post & Associates, Inc., acting on behalf of SprintCom, a telecommunications conglomerate (Philip Post and SprintCom are hereafter collectively referred to as “SprintCom”), sought approval from the City of Durham (the “City”) to construct a 120-foot-tall cell tower. The cell tower was to be constructed on a leased portion of a five-acre lot owned by the Greek Orthodox Community of Durham. Also on the property was the St. Barbara Greek Orthodox Church of Durham. The property was in an area zoned Rural/Residential.

The plans for the proposed cell tower utilized a monopine design. Such a design is intended to give the tower the appearance of a tall pine tree. SprintCom maintained that under that design, the cell tower qualified as a "concealed wireless communications facility" ("WCF") under the City's Unified Development Ordinance ("UDO"). As a WCF, the cell tower would be subject only to an administrative site plan approval process.

The UDO defined a WCF as a structure that is "not readily identifiable" as a wireless communications facility and is designed to be compatible with existing and proposed uses on a site. The UDO gave examples of WCFs, including a "tree." The UDO also defined a nonconcealed WCF as "one that is readily identifiable such as a monopole or lattice tower."

In July 2012, the Durham City-County Development Review Board ("DRB") approved SprintCom's application. In doing so, it concluded that the proposed monopine tower qualified as a WCF.

A group of homeowners (the "Homeowners") whose backyards were across the street from the Church property appealed the DRB's decision. They argued that the proposed monopine tower, which would be twice as high as the surrounding trees on the Church property and would have a base five times wider than the diameter of the largest trees present in the area, did not meet the UDO's definition of a concealed WCF. The Homeowners contended that based on its size and visibilities from their homes, the proposed monopine could not possibly meet the UDO's definition of concealed WCF. Thus, since it did not qualify as a WCF, the Homeowners contended that SprintCom needed a minor special use permit for the tower, which required a quasi-judicial evidentiary hearing.

The City's Board of Adjustment disagreed with the Homeowners. It upheld the interpretation that the proposed monopine met the definition of a concealed WCF under the UDO.

The Homeowners again appealed. They argued that the Board of Adjustment's determination that SprintCom's proposed monopine tower qualified as a concealed WCF as defined by the UDO was "both arbitrary and capricious, and erroneous as a matter of law."

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

The Court of Appeals of North Carolina held that SprintCom's proposed WCF met the UDO's definition of concealed WCF, and thus did not require a special use permit.

In so concluding, the court looked at the plain language and intent of the UDO. The court found that the relevant section of the UDO was intended to "incentivize[ ] the construction of concealed WCFs." The court rejected the Homeowners' argument that SprintCom's proposed monopine was "readily identifiable" as a WCF and thus did not meet the UDO definition of "concealed WCF." The court found that just because the monopine tower would be "visible," it did not mean it would be "readily identifiable." Rather, the court found that the monopine would have the appearance of "an unusually tall tree," and that there was no evidence that a typical person's reaction to the site of "an unusually tall tree" would be to conclude it was a WCF.

In any case, the court found that the UDO's plain language made clear that the test was not whether or how quickly an individual would notice the "giant fake pine tree's true nature; rather the test [was] whether SprintCom's proposed monopine design serve[d] a secondary function that help[ed] camouflage the tower's function as a WCF." The court concluded that it did, and thus held that SprintCom's proposed monopine was not readily identifiable as a WCF.

---

*Case Note:*

*The Homeowners had also argued that the proposed monopine was not "aesthetically compatible" with any existing or proposed uses on the Church property, as required by the UDO to qualify as a concealed WCF. The Homeowners noted that natural trees were not "uses." The court acknowledged that trees were not uses, but noted that the UDO also explicitly stated that a concealed WCF may have a secondary function as a tree. Here, the court concluded that SprintCom's proposed monopine tower's secondary function as a tree was "indeed aesthetically compatible with the Church property's existing use as a church in a developing rural residential neighborhood, surrounded by houses and trees."*

---

## **Proceedings—City council member appeals land use decision to city council**

Land use permit applicant contends its due process rights were violated by council member's bias

Citation: *Woody's Group, Inc. v. City of Newport Beach*, 2015 WL 367448 (Cal. App. 4th Dist. 2015)

CALIFORNIA (01/29/15)—This case addressed the issue of whether an applicant for a land use permit is afforded procedural due process when a member of the adjudicatory body considering the permit is, or may be, biased against the applicant. It also addressed the issue of whether this particular city's municipal code allowed an appeal of a planning commission decision by a city council member to the city council.

**The Background/Facts:** Woody's Wharf, owned by Woody's Group Inc. ("Woody's"), is a long-established restaurant overlooking the harbor in the City of Newport Beach (the "City"). Woody's sought and obtained from the City's Planning Commission a conditional use permit and variance to allow Woody's Wharf to have a patio cover, remain open until 2:00 a.m. on weekends, and allow dancing in the restaurant. Subsequently, City Council member Mike Henn ("Henn") sent an e-mail to the City clerk in which he

made an “official request to appeal” the Planning Commission’s decision to the City Council because he “strongly believ[ed]” the “operational characteristics requested in the application and the Planning Commission’s decision [were] inconsistent with the existing and expected residential character of the area and the relevant policies of the voter approved 2006 General Plan.”

At the City Council’s hearing on Henn’s appeal, Henn gave a long, prepared presentation, arguing why the Planning Commission decision needed to be overturned. The City Council ultimately voted to reverse the Planning Commission’s decision.

Woody’s appealed, seeking a writ of administrative mandate. The court denied Woody’s requested writ. Woody again appealed. Among other things, Woody argued that Henn was biased. Woody also argued that, under the City’s municipal code, Henn was not permitted to bring the appeal.

**DECISION: Judgment of superior court reversed with directions.**

The Court of Appeal, Fourth District, Division 3, agreed with Woody’s arguments. It held that Woody’s due process right to fair procedure was violated by: (1) the “unacceptable probability of bias” on the part of Henn; and (2) the City Council’s consideration of the appeal in light of the fact that, pursuant to the City’s municipal code, the City Council had no authority to hear Henn’s appeal since he had failed to comply with procedures required by the municipal code.

In so holding, the court noted that the law requires an adjudicatory body—such as the City Council in its capacity in reviewing land use decisions—to be “neutral and unbiased.” The court said that a land use permit applicant’s due process right to fair procedure would be found to have been violated if it could be shown that there was an “unacceptable probability of actual bias” on the part of the municipal decision maker. Here, the court found that Woody’s had shown an “unacceptable probability of actual bias” on Henn’s part. The wording in Henn’s e-mail appeal showed that Henn was strongly opposed to the Planning Commission’s decision on Woody’s application. It was Henn who “appealed” the Planning Commission’s decision to the City Council on which he was a member, and gave a lengthy, prepared presentation at the City Council’s hearing on the appeal in support of overturning the decision.

The court also found that Henn, a City Council member, violated the City’s own municipal code—as well as Woody’s due process rights to fair procedure—by initiating an appeal to the City Council. Among other things, noted the court, the City’s municipal code required that appeals from Planning Commission decisions be: (1) brought by an “interested party”; (2) filed on forms provided by the City clerk; and (3) accompanied by a filing fee. The court found that Henn’s appeal did not meet any of those requirements.

Significantly, the court found that the requirement of an “interested party” bringing an appeal simultaneously conveyed that “disinterested” persons were not eligible to bring an appeal. The court noted that California Civil

Code § 170 provides that no judge shall sit or act in any action in which he is a party or in which he is interested. Thus, as fact-finders serving in adjudicatory capacity, the City Council members were required to be “disinterested” for the purposes of affording due process, said the court. Accordingly, since as a member of the council, Henn was to be a disinterested party, he could not simultaneously be an “interested party,” for purpose of the appeal. Moreover, if he was, in fact, “interested,” the fact that he sat and acted in the proceedings violated the law and Woody’s due process rights.

The City Council had contended that it was their “custom” to allow an exception for City Council members to appeal land use decisions “for the benefit” of the residents. The court rejected that argument, finding it was not authorized by the municipal code. In fact, the court found such a practice by the City Council was in direct violation of the code’s requirements.

Having found that the City’s municipal code never allowed the appeal in the first place, the court concluded that the City Council’s decision to reverse the Planning Commission’s approval of Woody’s permit and variance had to be nullified (not just returned for consideration).

See also: *Cohan v. City of Thousand Oaks*, 30 Cal. App. 4th 547, 35 Cal. Rptr. 2d 782 (2d Dist. 1994), as modified on denial of reh’g, (Dec. 21, 1994).

See also: *Nasha L.L.C. v. City of Los Angeles*, 125 Cal. App. 4th 470, 22 Cal. Rptr. 3d 772, 35 Env’tl. L. Rep. 20007 (2d Dist. 2004).

---

*Case Note:*

*In its decision, the court, in discussing prior case law, noted that a city council member may be able to appeal a land use decision to the city council if: (1) the municipal code explicitly permits an appeal by a council member; (2) the city council member is arguably not committed “to a result” of the appeal; and (3) the city council member does not control the hearing on the appeal. (See, e.g., Breakzone Billiards v. City of Torrance, 81 Cal. App. 4th 1205, 97 Cal. Rptr. 2d 467 (2d Dist. 2000).)*

---

## Preemption/Oil and Gas Well Regulation—Energy company argues that city’s zoning ordinances are preempted by conflict with state statutory scheme governing oil and gas drilling operations

City contends Home Rule Amendment to Ohio Constitution gives it power to regulate oil and gas drilling via municipal zoning ordinances

Citation: *State ex rel. Morrison v. Beck Energy Corp.*, 2015-Ohio-485, 2015 WL 687475 (Ohio 2015)

OHIO (02/17/15)—This case addressed the issue of whether the Home Rule Amendment to the Ohio Constitution grants to municipalities the power to enforce their own permitting schemes for oil and gas drilling regulation atop the state system. More specifically, the case addressed the issue of whether a particular city’s zoning ordinances represented a valid exercise of the city’s home-rule power, or whether those ordinances were preempted by conflict with state laws regulating oil and gas drilling.

**The Background/Facts:** In 2011, Beck Energy Corporation (“Beck Energy”), obtained a permit from a division of the Ohio Department of Natural Resources (“ODNR”) for the purpose of drilling an oil and gas well on property within the corporate limits of the city of Munroe Falls (the “City”). Beck Energy obtained its state permit through state statutory law, R.C. Chapter 1509. Under that statute, specifically R.C. 1509.02, regulatory authority of oil and gas wells and production operation is within the “sole and exclusive authority of a division of the ODNR” (except for certain activities regulated by federal laws). R.C. 1509.02 does preserve certain regulatory powers granted to local governments including: (1) the “special power” to control public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts (R.C. 723.01); and (2) the power to grant permits to operate certain heavy vehicles on highways within their jurisdiction (4513.34). However, R.C. 1509.02 expressly prohibits a local government from exercising those powers “in a manner that discriminates against, unfairly impedes, or obstructs oil and gas activities and operations regulated under [R.C. Chapter 1509].”

Beck began drilling the oil and gas well in the City pursuant to its state permit. Soon thereafter, the City issued a stop-work order and filed a legal action in county court. The City alleged that Beck Energy was violating

multiple provisions of the City's zoning ordinance, including: a general zoning ordinance that prohibits construction or excavation without a "zoning certificate" issued by the City zoning inspector after approvals by the zoning commission and city council; and four zoning ordinances specifically relating to oil and gas drilling. Those four ordinances required payment of fees and the deposit of a performance bond, a public hearing, and the obtainment of a "conditional zoning certificate," and made violation of those requirements a first-degree misdemeanor.

Beck argued that the City's ordinances conflicted with the statewide regulatory scheme in R.C. Chapter 1509 and were thus preempted. The trial court disagreed.

Beck appealed. The court of appeals agreed with Beck. It reversed the trial court. The court of appeals held that R.C. 1509.02 prohibited the City from enforcing the five ordinances.

The City appealed. The City argued that the Home Rule Amendment to the Ohio Constitution granted the City the power to enforce its own permitting scheme atop R.C. 1509.02.

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

The Supreme Court of Ohio held that the City's five ordinances at issue did not represent a valid exercise of the City's home-rule power under the Home Rule Amendment to the Ohio Constitution.

The court explained that the Home Rule Amendment gives municipalities the authority to "exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." (Ohio Constitution, Article XVIII, § 3.) The court further explained that given the fact that the Home Rule Amendment does not allow municipalities to exercise their police powers in a manner that "conflict[s] with general laws," a municipal ordinance must yield to a state statute if: (1) the ordinance is an exercise of the police power, rather than of local self-government; (2) the statute is a general law; and (3) the ordinance is in conflict with the statute. Here, the court found that all three of those elements were met and thus the Home Rule Amendment did not allow the City's ordinances to apply concurrently with R.C. 1509.02.

The court found that the ordinances constituted an exercise of police power rather than local self-government. The ordinances did not regulate the form and structure of local government, but rather prohibited—even criminalized—the act of drilling for oil and gas without a permit.

For the purposes of its analysis, the court also found that R.C. 1509.02 constituted a general law in that it: (1) is part of a statewide and comprehensive legislative enactment; (2) applies to all parts of the state alike and operates uniformly throughout the state; (3) sets forth police, sanitary, or similar regulations, rather than purports only to grant or limit legislative power of a municipal corporation to prescribe those regulations; and (4) prescribes a rule of conduct upon citizens generally.

The City had argued that the second of those conditions was not met. The

City contended that R.C. 1509.02 did not apply to all parts of the state alike. According to the City, R.C. 1509.02 failed the uniformity requirement because only the eastern part of Ohio had economically viable quantities of gas and oil. The court found that argument “unpersuasive.” The court said that “a general law can operate uniformly throughout the state ‘even if the result . . . is that the statute does not operate in all geographic areas within the state.’ ” The court said that “[w]hether or not every acre of Ohio constitutes viable drilling land, R.C. 1509.02 imposes the same obligations and grants the same privileges to anyone seeking to engage in oil and gas drilling and production operations within the state.” Moreover, the court noted, “the statute applies to all municipalities in the same fashion.”

Finally, the court concluded that the City’s five ordinances conflicted with R.C. 1509.02 in two ways. The court found that there was a “classic licensing conflict” in that the ordinances prohibited what R.C. 1509.02 allowed—state-licensed oil and gas production within the City, and the court found that the statute did not allow for concurrent regulatory authority or “double licensing.” The statute explicitly prohibited municipalities from exercising their municipal powers to regulate infrastructure in a way that “discriminates against, unfairly impedes, or obstructs” the activities and operations covered by R.C. 1509.02.

The City had argued that there was no conflict because the statute and ordinances regulated two different things: the ordinances addressed “traditional concerns of zoning,” while the statute related to “technical safety and correlative rights topics.” The court disagreed, finding that under the “plain text of the ordinances, as well as the statute,” they both regulated “the same subject matter—oil and gas drilling—and they conflict[ed] in doing so.” The City’s ordinances prohibited “any excavation” or the drilling of a well for oil, gas, or other hydrocarbons without fully complying with local provisions, while the statute prohibited drilling for oil or gas “without having a permit to do so issued by the chief of the [ODNR].” The court concluded that because Beck Energy obtained a valid state permit in accordance with R.C. Chapter 1509, the City could not “extinguish privileges arising thereunder through the enforcement of zoning regulations.”

See also: *Clermont Environmental Reclamation Co. v. Wiederhold*, 2 Ohio St. 3d 44, 442 N.E.2d 1278, 13 *Envtl. L. Rep.* 20466 (1982).

See also: *Auxter v. City of Toledo*, 173 Ohio St. 444, 20 Ohio Op. 2d 71, 183 N.E.2d 920 (1962).

---

*Case Note:*

*In its decision, the court emphasized that its holding was limited to the five municipal ordinances at issue in this case; it made no judgment as to whether other ordinances could coexist with R.C. 1509.02.*

---

---

*Case Note:*

*The court was split in its decision, with two justices concurring, one concurring in judgment alone, and three dissenting.*

---

## Zoning News from Around the Nation

### NEW MEXICO

The State House of Representative's Energy and Environment Committee recently passed a bill "that curtails the ability of local governments to regulate the oil and gas industry." House Bill 366 would have exclusive authority over oil and gas well siting, drilling, processing and storage. The bill now heads to the House Judiciary Committee for consideration.

Source: *Farmington Daily Times*; [www.daily-times.com](http://www.daily-times.com)

### PENNSYLVANIA

A Penn Township zoning board is reportedly "reviewing plans for a Marcellus Shale gas drilling operation at the eastern end of the township, considering what is the first application for hydraulic fracturing since commissioners started revising their zoning laws late last year." A draft ordinance, which has yet to be formally approved, requires the zoning board to review applications for special exception permits for unconventional drilling operations.

Source: *Pittsburg Post-Gazette*; <http://powersource.post-gazette.com>

### SOUTH DAKOTA

A State House Committee has passed House Bill 1201, which would "allow county zoning boards to issue conditional-use permits on a simple majority vote if that county chooses to change the rules." Currently, such permits require a two-thirds majority. The bill is reportedly "designed to make it easier to permit large-scale feedlots" in the state, but would affect permitting for a wide variety of development projects. The bill now moves to full House for consideration.

Source: *Argus Leader*; [www.argusleader.com](http://www.argusleader.com)

# Zoning Bulletin

## in this issue:

Preemption—Environmental organization seeks to invalidate county's critical areas regulations as noncompliant with state's growth management act	2
Uses—Neighboring property owners allege town violated bylaws by installing wind turbine without special permit	5
Historic Property—Property owner seeks to remove property from historic property designation per state statute	6
Sexually Oriented Business—In prosecuting owner of sexually oriented business for operating within 1,000 feet of residential zone, state instructs jury that there only need be proof of business owner's knowledge of business	8
Proceedings—At hearing on zoning amendments, commission allegedly prohibits discussion on specific property and owner	9
Zoning News from Around the Nation	11



# Preemption—Environmental organization seeks to invalidate county's critical areas regulations as incompliant with state's growth management act

County argues that statute authorizing Voluntary Stewardship Program participating

Contributors

Corey E. Burnham-Howard

For authorization to photocopy, please contact the Copyright Clearance Center at 222 Rosewood Drive, Danvers, MA 01923, USA (978) 750-8400; fax (978) 646-8600 or West's Copyright Services at 610 Opperman Drive, Eagan, MN 55123, fax (651) 687-7551. Please outline the specific material involved, the number of copies you wish to distribute and the purpose or format of the use.

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

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

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



THOMSON REUTERS

610 Opperman Drive  
P.O. Box 64526

St. Paul, MN 55164-0526

1-800-229-2084

email: [west.customerservice@thomsonreuters.com](mailto:west.customerservice@thomsonreuters.com)

ISSN 0514-7905

©2015 Thomson Reuters

All Rights Reserved

Quinlan™ is a Thomson Reuters brand

## municipalities to adopt its regulations, reflects legislative determination that regulations are valid

Citation: *Protect the Peninsula's Future v. Growth Management Hearings Bd.*, 2015 WL 686883 (Wash. Ct. App. Div. 2 2015)

WASHINGTON (02/18/15)—This case addressed the issue of whether a county that did not elect to participate in the Voluntary Stewardship Program for critical areas protection could comply with the state's Growth Management Act by adopting critical areas regulations in the statutes governing the Voluntary Stewardship Program. In other words, the case addressed the issue of when a county can invoke RCW 36.70A.735(1)(b) and achieve compliance with the Growth Management Act by adopting critical area regulations outlined in the statutes governing the Voluntary Stewardship Program.

**The Background/Facts:** Under Washington's Growth Management Act ("GMA"), counties are required to designate and protect "critical areas." (RCW 36.70A.060.) "Critical areas" include: wetlands; aquifer recharge areas; natural fish and wildlife habitats; frequently flooded areas; and geologically hazardous areas. (RCW 36.70A.030.) As required, in December 1999, Clallam County ("Clallam") adopted critical areas regulations. As part of those regulations, Clallam exempted preexisting agricultural operations from the critical areas protection requirements.

The organization Protect the Peninsula's Future ("PPF") petitioned the Western Washington Growth Management Hearings Board (the "Board") to invalidate Clallam's agricultural exemption and other parts of the ordinance. The Board invalidated Clallam's agricultural exemption, finding it did not comply with GMA requirements. Clallam then amended its ordinance to limit the agricultural exemption to preexisting agricultural uses on land classified as farm and agricultural land under the open space tax program. PPF again petitioned the Board and the Board again found the exemption was invalid.

PPF again appealed. On appeal, the Court of Appeals agreed with PPF that Clallam could not exempt all preexisting agricultural uses from critical areas regulations. The court remanded to the Board for further proceedings. Among other things, the court directed the Board to determine whether the agricultural exemption complied with the GMA. Before the Board could make that determination on remand, the legislature enacted a moratorium on alteration of GMA critical areas that lasted from 2007 to 2011.

In August 2012, PPF reinitiated the delayed compliance review before the Board.

Clallam moved to dismiss the compliance action. It pointed to the Legislature's 2011 amendments to the GMA. Those amendments estab-

lished a Voluntary Stewardship Program (“VSP”). Under the statutes governing the VSP, counties electing to participate in the VSP, which are unable to implement a VSP work plan, are authorized to comply with the GMA by instead adopting the critical areas regulations of one of four counties, one of which is Clallam. (RCW 36.70A.735(1)(b).) Clallam argued that through that statute, the Legislature had validated that Clallam’s critical area regulations as fully compliant with the GMA.

The Board agreed with Clallam’s interpretation and granted Clallam’s motion to dismiss.

PPF appealed. The superior court affirmed the Board’s decision.

PPF again appealed.

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

The Court of Appeals of Washington, Division 2, held that RCW 36.70A.735(1)(b) does not reflect a legislative determination that Clallam’s regulations unconditionally comply with the GMA’s critical areas protection requirements.

Looking at the plain language of that statute, the court found that the statute did not support an interpretation that the Legislature “approved” Clallam’s regulations for counties not participating in the VSP. Rather, the court found that the Legislature chose to distinguish alternative pathways to GMA compliance for counties that have elected to participate in the VSP and counties that have not. (Election to participate in VSP had to be made by January 22, 2012.) Under the unambiguous language of the statute, the court found that only VSP participating counties can comply with the GMA by adopting Clallam’s regulations. Therefore, concluded the court, counties not electing to participate in the VSP, including Clallam, cannot comply with the GMA by adopting Clallam’s critical areas regulations.

The court remanded that matter to the Board to determine whether Clallam’s critical areas regulations complied with the GMA under RCW 36.70A.060 and related statutes.

---

**Case Note:**

*Clallam had also argued that it would be “absurd to allow a county to comply with the GMA by adopting Clallam’s regulations while Clallam itself could not rely on those same regulations to comply with the GMA.” The court disagreed. The court said that whether a statutory directive implements good or bad policy was immaterial to its analysis.*

---

## Uses—Neighboring property owners allege town violated bylaws by installing wind turbine without special permit

Town maintains wind turbine is a “municipal purpose” allowed as of right

Citation: *Drumme v. Town of Falmouth*, 25 N.E.3d 907 (Mass. Ct. App. 2015)

MASSACHUSETTS (02/26/15)—This case addressed the issue of whether a town-operated windmill on town land constituted a “municipal purpose” such that it fell within the enumerated community services permitted as of right under the town by-law.

**The Background/Facts:** In 2009, the Town of Falmouth (the “Town”) installed a wind turbine known as “Wind 1” on town land at its wastewater treatment facility. Town residents who lived within 3,200 feet of Wind 1 (the “Neighbors”) alleged significant distress from sound pressures and noise related to the operation of Wind 1. The Neighbors asked the Town’s building commissioner to find that the Town was in violation of the Town’s zoning by-law in its operation of Wind 1 without a special permit. Under the Town’s zoning by-law, in all zoning districts, including public use districts, windmills were classified as an accessory use by special permit.

The building commissioner determined that Wind 1 was a “municipal purpose[ ]” that fell within the enumerated community service uses permitted as of right under the zoning by-law. The building commissioner therefore denied the Neighbors’ request for an enforcement action.

The Neighbors appealed to the Town’s zoning board of appeals (“ZBA”), which affirmed the building commissioner.

The Neighbors again appealed and the superior court affirmed the decision of the ZBA. The court found that the special permit requirement of the by-law did “not apply in the limited circumstance where the Town itself desire[d] to construct and operate a windmill for municipal purposes in a district where all such [municipal] purposes [were] permitted as of right.”

The Neighbors again appealed.

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

Agreeing with the Neighbors, the Appeals Court of Massachusetts held that the Town, under its zoning by-law, was required to obtain a special permit from the ZBA for the installation of the wind turbine on town land.

In so holding, the court found that the interpretation of the by-law to include Wind 1 as a permitted community service was error. Looking at the language of the by-law, the court noted that windmills were specifically designated in the public use district as an accessory by special permit. The court found no exceptions in the by-law for the Town. The court found that it therefore “logically follow[ed] that windmills could not have been intended to fall within the more general municipal purpose as of right . . . .” The court also pointed to another section of the zoning by-laws that stated that where an activity might be classified under more than one of the within uses, “the more specific classification shall govern,” and “if equally specific, the more restrictive shall govern.” Emphasizing that provisions of a zoning by-law must not be looked at in isolation, the court concluded that the classification of windmills as a permitted municipal purpose failed to consider the comprehensive scheme that included wind turbines in the by-law and controlled their placement and impact in the town.

See also: *Sinn v. Board of Selectmen of Acton*, 357 Mass. 606, 259 N.E.2d 557 (1970) (involving zoning by-law that did contain an exemption for the municipality).

## Historic Property—Property owner seeks to remove property from historic property designation per state statute

Local preservation society contends that only original owner at time of designation can seek such removal

Citation: *Lake Oswego Preservation Society v. City of Lake Oswego*, 268 Or. App. 811, 2015 WL 469341 (2015)

OREGON (02/04/15)—This case addressed the issue of whether ORS 197.772(3), which allows “a property owner” to remove from the property a historic property designation, applies only to the property owner at the time of the historic designation, or whether it also applies to subsequent owners of the property.

**The Background/Facts:** In 1990, the City of Lake Oswego (the “City”) placed a historic designation on a specific parcel of property (the “Property”). Marjorie Hanson, Trustee for Wilmot Trust (“Hanson”), is now the current owner of the Property. In 2013, Hanson asked the City to remove the historic property designation. Ultimately, the City Council determined that Hanson was “entitled per ORS 197.772(3) to require the City to remove the historic designation from the subject [P]roperty.”

ORS 197.772(3) provides as follows: “A local government shall allow a property owner to remove from the property a historic property designation that was imposed on the property by the local government.”

Lake Oswego Preservation Society (“LOPS”) appealed the City Council’s determination to Oregon’s Land Use Board of Appeals (“LUBA”). LUBA concluded that the City had erroneously interpreted ORS 197.772(3). LUBA concluded that the phrase “a property owner” did not include “persons who become owners of the property after it is designated.” Thus, because Hanson was not the property owner at the time of the Property’s historic designation, LUBA reversed the City’s decision applying ORS 197.772(3) to Hanson’s Property.

Hanson appealed. On appeal, Hanson contended that LUBA lacked jurisdiction to hear LOPS’ appeal because the City’s decision under ORS 197.772(3) was not a “land use decision.” Hanson contended that the statute only required the City to determine whether a historic designation was imposed on a property, a decision which did not concern planning goals or land use regulations. Hanson also contended that LUBA’s interpretation of the statute was erroneous; she argued that “a property owner” applied to all owners of property with historic designation, including those property owners that took ownership subsequent to the designation.

**DECISION: Judgment of LUBA affirmed in part and reversed in part.**

The Court of Appeals of Oregon first held that the City’s decision to remove the historic designation under ORS 197.772(3) was a land use decision, subject to LUBA jurisdiction. In rejecting Hanson’s argument that LUBA lacked jurisdiction, the court noted that Hanson failed to account for the City’s actions that occurred as a consequence of its conclusion that ORS 197.772(3) applied to Hanson’s Property. The City “did more than just determine the applicability of state law,” found the court. The City then removed Hanson’s Property from its Landmark Designation List—a land use regulation. Amending that list placed the City’s actions “squarely within the definition of ‘land use decision,’ ” concluded the court.

The court also held that LUBA’s interpretation of ORS 197.772(3) was correct. The court found that the text and context of ORS 197.772(3) did not “shed much light” on the proper interpretation of “a property owner.” Thus the court looked to the legislative history of the statute. Analyzing the legislative history of the statute, the court concluded that the legislature, in adopting the statute, “intended to allow any property owner that had a local historic designation forced on their property to remove that designation.” The court found that the legislature was “focused on correcting imposition of unwanted designations, and not on the identity of the property owner that might be now stuck with that designation.” The court found no legislative text narrowing the definition of “a property owner.” Thus, the court concluded that Hanson, as a successor property owner, was entitled to have the historic property designation removed under ORS 197.772(3).

See also: *Leipold & Stevens, Inc. v. City Of Beaverton*, 226 Or. App. 374, 203 P.3d 309 (2009).

## **Sexually Oriented Business—In prosecuting owner of sexually oriented business for operating within 1,000 feet of residential zone, state instructs jury that there only need be proof of business owner’s knowledge of business**

Business owner argues proof for indictment had to include knowledge of business proximity to residential zone

Citation: *State v. Eldakrouy*, 2015 WL 519058 (N.J. Super. Ct. App. Div. 2015)

NEW JERSEY (02/10/15)—This case addressed the issue of whether when seeking conviction for the crime of operating a sexually oriented business within 1,000 feet of a residential zone, the State of New Jersey must prove both that the defendant “knowingly” operated a sexually oriented business *and* “knew” the business was located within 1,000 feet of a residential zone.

**The Background/Facts:** Ibrahim J. Eldakrouy (“Eldakrouy”) was accused of operating a sexually oriented business, known as Hott 22, within 1,000 feet of a residential zone. New Jersey criminal law, N.J.S.A. 2C:34-7(a), provides in relevant part that: “[N]o person shall operate a sexually oriented business . . . within 1,000 feet of any area zoned for residential use.” In prosecuting the crime of such operation against Eldakrouy, the State of New Jersey (the “State”) prosecutor instructed the grand jury that the State was only required to prove that Eldakrouy knowingly operated a sexually oriented business. The prosecutor instructed that the State did not have to prove that Eldakrouy knew the business was within 1,000 feet of a residential zone.

After a grand jury indictment, Eldakrouy asked the court to dismiss the indictment. He argued that the instructions given to the grand jury were in error. The judge agreed, concluding that the business’ prohibited

location (within 1,000 feet of a residential zone) was a material element of the offense, and that the State had to also prove that Eldakroury acted knowingly with respect to that element.

The State appealed.

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

The Superior Court of New Jersey, Appellate Division, agreed with the superior court judge. It concluded that the location of the business was a material element of the offense and that the State had to also prove that Eldakroury acted knowingly with respect to that element.

In so concluding, the court noted that the statute concerning sexually oriented businesses, N.J.S.A. 2C:34-7(a), did not include a strict liability provision like statutes concerning illegal drug activity or assault by auto in protected zones. Since it was not a strict liability statute, the mens rea (knowingly) standard applied “to each material element.” (N.J.S.A. 2C:202(a).) Finding the location of a sexually oriented business was a material element of the offense under N.J.S.A. 2C:34-7(a), the court concluded that the State was required to prove that Eldakroury not only knew he was operating a sexually oriented business, but also that he knew that the business was within 1,000 feet of a residential zone. Since the instructions to the grand jury on proof lacked that requirement, the court determined that dismissal of the case was proper.

---

*Case Note:*

*In its decision, the court had also noted that even if it “found the statute hopelessly ambiguous” as to whether strict liability or the knowingly standard applied, it would have to invoke the rule of lenity, with any ambiguity with respect to the mens rea requirement having to be resolved in Eldakroury’s favor.*

---

## **Proceedings—At hearing on zoning amendments, commission allegedly prohibits discussion on specific property and owner**

Opponents of amendments argued that prohibition resulted in a legally insufficient public hearing

Citation: *Campbell v. County Commission of Franklin County, 2015 WL 468225 (Mo. 2015)*

MISSOURI (02/03/15)—This case addressed the issue of what consti-

tutes a legally sufficient hearing for zoning amendments, as required by Missouri statutory law, Mo. Ann. Stat. § 64.875.

**The Background/Facts:** The Franklin County Commission (the “Commission”) proposed and adopted zoning amendments allowing Union Electric Company, d/b/a Ameren Missouri (“Ameren”) to build a coal-ash landfill adjoining Ameren’s Labadie power plant. After the amendments were adopted, several individuals and the Labadie Environmental Organization (collectively, “LEO”) challenged the legality of the adoption of the zoning amendments. They filed a writ of certiorari in the circuit court of the county challenging the Commission’s amendment of the Franklin County Unified Land Use Regulations to permit the construction of coal-ash landfills “contiguous to the boundary of the property upon which a public utility power plant is situated.” Among other things, LEO alleged that the Commission’s adoption of the amendments was unlawful because the Commission failed to conduct a valid public hearing as required by Missouri Annotated Statutes § 64.875.

Section 64.875, in pertinent part provides as follows: “[N]o amendments shall be made by the county commission except after recommendation of the county planning commission, or if there be no county planning commission, of the county zoning commission, after hearings thereon by the commission.”

LEO alleged that: (1) that the proposed zoning amendments authorized the presence of coal-ash landfills next to and under common ownership with an existing power plant, without mentioning Ameren by name; (2) Ameren’s Labadie plant was the only power plant in Franklin County and Ameren had publicly proposed to build a new coal-ash landfill on their property adjacent to the plant; (3) during hearings on the zoning amendments, the Commission announced that the public could not speak regarding Ameren’s landfill proposal and that the limitation on discussion had a “chilling” effect on discussion at the hearing.

The Commission and Ameren asked the court to dismiss the action, arguing that LEO failed to state a claim upon which relief could be granted.

The circuit court dismissed the action.

LEO appealed.

**DECISION: Judgment of circuit court reversed, and matter remanded.**

The Supreme Court of Missouri held that the circuit court erred in dismissing LEO’s petition, which had asserted that the Commission failed to conduct a legally sufficient hearing prior to adopting the zoning amendments.

In so holding, the court assessed the requirements for a legally sufficient hearing and then whether LEO’s allegations stated a viable claim that the zoning amendments had been enacted without a legally sufficient hearing.

In analyzing § 64.875, the court found that the statute did not define the term “hearing” or prescribe the requirements for a valid hearing. The court also found no guidance from judicial interpretation of the “hearing” requirement (in prior decisions issued by Missouri courts on the issue). Thus, the court looked to the plain language of the statute. Since the statute required public notice of such hearings, the court concluded that a legally sufficient hearing must be public. Looking at the dictionary definition of “hearing,” the court found that its meaning included “an opportunity to be heard, to present one’s side of a case . . . .” Thus, the court concluded that “while the specific procedures for conducting the hearing can be tailored to meet logistical necessities, at a minimum, the hearings required by § 64.875 must be public and give an opportunity for the public to present its views about the subject matter of the proposed zoning amendment.”

Analyzing LEO’s petition against that standard, the court found that LEO stated a valid claim for relief. The court remanded the matter to the circuit court to try the merits of the claim.

See also: *State ex rel. Freeze v. City of Cape Girardeau*, 523 S.W.2d 123 (Mo. Ct. App. 1975).

See also: *Yost v. Fulton County*, 256 Ga. 324, 348 S.E.2d 638 (1986).

See also: *Appeal of Kurren*, 417 Pa. 623, 208 A.2d 853 (1965).

---

**Case Note:**

*LEO had also alleged that the zoning amendments were unlawful because they did not promote the health, safety, and general welfare of the citizens of the Franklin County. The circuit court had also dismissed that count of LEO’s petition. The appellate court determined that it was “unnecessary” for it to determine whether the zoning amendments promoted public health, safety, and welfare because the circuit court first had to determine whether the Commission conducted a legally sufficient hearing.*

---

## Zoning News from Around the Nation

### NEW HAMPSHIRE

The Concord City Council was expected to consider a draft zoning ordinance that would allow two new uses in an industrial zone: an alternative treatment center for both growing and selling medical marijuana, and a center only for growing medical marijuana. The draft zoning code would also allow a center only for distribution to operate in an institutional zone.

Source: *Concord Monitor*; [www.concordmonitor.com](http://www.concordmonitor.com)

## NEW JERSEY

In early February, Governor Chris Christie signed a “controversial bill that would fundamentally change planning and development in the Meadowlands district, merging two regional agencies and placing the new entity in charge of Liberty State Park.” “The Hackensack Meadowlands Agency Consolidation Act (S2490) combines the New Jersey Meadowlands Commission and New Jersey Sports and Exposition Authority. The merged agency will be called the Meadowlands Regional Commission. The legislation also effectively eliminates a regional tax-sharing plan . . . , replacing it with a hotel tax.”

Source: *NJ.com*; [www.nj.com](http://www.nj.com)

## SOUTH DAKOTA

The state House of Representatives have approved House Bill 1201, which would reduce the threshold for conditional-use permit decisions, allowing approval by a majority of board members present (simple majority) rather than a majority of the full board (two-thirds vote). The bill would also allow a county or municipality to adopt a certification process for conditional uses. Reportedly, HB 1201 would make it easier for counties with zoning ordinances to allow confined livestock operations that have over 1,000 head of livestock and other conditional uses. The Senate Agriculture and Natural Resources Committee was expected to debate the measure.

Source: *Rapid City Journal*; <http://rapidcityjournal.com>

## TENNESSEE

State Representative Bill Beck has filed “legislation that would prohibit private clubs from within 1,000 feet of schools, churches, parks and residences.”

Source: *The Tennessean*; [www.tennessean.com/](http://www.tennessean.com/)