QUINLAN™ May 25, 2015 | Volume 9 | Issue 10

Zoning Bulletin

in this issue:

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Mat #41675511

Nonconforming Use—County seeks injunction against use of land for livestock operations

Property owners claim use falls under state statutory definition of agricultural nonconforming use which preempts zoning ordinance regulations

Citation: *County of Lake v. Pahl, 28 N.E.3d 1092 (Ind. Ct. App. 2015)*

INDIANA (03/31/15)—This case addressed the issue of whether a parcel of property qualified as an agricultural nonconforming use under Ind. Code

Contributors

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ISSN 0514-7905

§ 36-7-4-616—which governs agricultural nonconforming uses—and, if so, whether or not a county zoning ordinance could restrict the agricultural use of the property.

The Background/Facts: In 2006, Alan J. and Roderick Pahl purchased a 10.08-acre parcel of land in a five-lot subdivision in Lowell, Indiana (the "Property"). The other lots in the subdivision were less than five acres. The Property was situated in an area of Unincorporated Lake County. From 1957 through 1995, the Property was zoned by Lake County (the "County") as an A-1 agricultural zone. In 1995, the zoning classification for the Property was changed to R-1, single family residential.

When the Pahls purchased the Property, the realtor's listing advertised it as being zoned Agricultural-Residential, and the Property was being used for agricultural purposes. The Pahls constructed a home on the property and, beginning in 2008, kept a variety of animals on the Property, including chickens, ducks, rabbits, riding horses, mini horses, alpacas, and goats.

In 2009, the County Plan Commission notified the Pahls that they were in violation of the Unincorporated Lake County Zoning and Planning Ordinance (the "Zoning Ordinance") because they were keeping animals on the property. Under the Zoning Ordinance, the R-1 district in which the Property was zoned prohibited the keeping of any animals except dogs or cats. The Zoning Ordinance also required at least a 20-acre parcel in order for a landowner to have a farm, and prohibited "hobby farms" in a residential subdivision unless 80% of the subdivision platted lots were five acres or more in size.

The Pahls filed petitions for a variance with the County Board of Zoning Appeals—one to operate a hobby farm and the other to build an accessory building barn. The Pahls soon withdrew those petitions upon their determination that their Property might qualify as an agricultural nonconforming use under Indiana Code § 36-7-4-616.

Indiana Code § 36-7-4-616, deems certain agricultural uses as "agricultural nonconforming uses." Among other things, the statute defines an "agricultural nonconforming use" as including: (1) the "the production of livestock or livestock products" or "poultry or poultry products" "in the case of land that was not subject to a comprehensive plan or zoning ordinance before the most recent plan or zoning ordinance, including any amendments, was adopted"; or (2) agricultural purposes consistent with a comprehensive plan or zoning ordinance but not permitted under the most recent comprehensive plan or zoning ordinance. The statute prohibits county or municipal: termination of an agricultural nonconforming use that has been maintained for at least any three-year period in a five-year period; or restriction of an agricultural nonconforming use; or the requirement of a variance, special exception, special use, contingent use or conditional use for the agricultural nonconforming use of land. Notwithstanding those restrictions, the statute specifies that an agricultural nonconforming use can still be required to be maintained and operated in compliance with all: state environmental and state health laws and rules; and requirements to which conforming agricultural use land is subject under the county's comprehensive plan or zoning ordinance.

The Pahls maintained that their use of their Property qualified as an agricultural nonconforming use under Ind. Code § 36-7-4-616. They argued that they

could therefore use their Property as a hobby farm because the County could not define or restrict such a farm since the statute provided that "there can be no termination or restriction" of an agricultural nonconforming use.

The County disagreed. The County contended that the statute did not give the Pahls "free reign to engage in unlimited agricultural pursuits," and that pursuant to the statute, the Pahls were still required to comply with the County Zoning Ordinance.

The County filed a legal action against the Pahls. The County argued that the Property was located in a residential subdivision and did not qualify as a hobby farm. The County sought an injunction against the Pahls use of their property.

The superior court issued judgment in favor of the Pahls. The court acknowledged that since 1995 the Property had been zoned residential, but the court also found that since 1957, the County's Comprehensive Plan had classified the Property for "agricultural use." The court concluded that the Property met the statutory definition of agricultural nonconforming use because it was an agricultural use consistent with a comprehensive plan prior to the rezoning and subdividing of the land for residential purposes. The court denied the injunctive relief that the County had sought.

The County appealed.

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

The Court of Appeals of Indiana held that even assuming that the Property qualified as an agricultural nonconforming use, pursuant to the statute (Ind. Code § 36-7-4-616(f)(2)), the agricultural use of the land still had to meet the "requirements to which conforming agricultural use land is subject under the . . . [Z]oning [O]rdinance." (Ind. Code § 36-7-4-616(f)(2)).)

The court found that the text of the statute was clear and unambiguous. The court found that with that text, the Legislature intended Ind. Code § 36-7-4-616(f) to "operate as a limitation on a landowner's right to exercise an agricultural nonconforming use . . . ." In other words, whether or not the Property qualified to be treated as an agricultural nonconforming use under the statute, the Zoning Ordinance provisions governing hobby farms still applied to the Pahls' Property.

The court determined that the Pahls' Property would not qualify as a hobby farm under the Zoning Ordinance because the Pahls kept a substantial number of animals on their 10.08-acre lot, which the Zoning Ordinance prohibited on lots smaller than 20 acres, and because 80% of the platted lots in their subdivision were not five acres or more, as required by the Zoning Ordinance for a hobby farm in a subdivision.

The court concluded that in failing to apply the relevant portions of the Zoning Ordinance to the Pahls' use of the land, the trial court had erred in denying the County's request for an injunction.

Case Note:

The Pahls had also argued that because their use of the land was agricultural, the

Zoning Ordinance did not apply to their buildings and land incidental to the agricultural use. The court disagreed, noting that the Zoning Ordinance specifically provided regulations for agricultural and residential zones related to accessory buildings and fencing. The court found that the Pahls' lean-tos, sheds, wheelless semi-trailers, and fencing all failed to comply with those regulations.

Nonconforming Use—Opponents of nonconforming landfill say property owner's vested right lapsed for failure to commence use within time required by zoning ordinance

Property owner argues obtaining certificate of zoning compliance was sufficient commencement of use to maintain vested right

Citation: *Southern States-Bartow County, Inc. v. Riverwood Farm Property Owners Ass'n, Inc., 769 S.E.2d 823 (Ga. Ct. App. 2015)*

GEORGIA (03/25/15)—This case addressed the issue of whether a developer's vested rights to a nonconforming use on the property lapsed subject to a zoning ordinance that prohibited the nonconforming uses for which a vested right is acquired unless the use is commenced within one year of adoption of the ordinance.

The Background/Facts: In 1989, Southern States-Bartow County, Inc. ("Southern States") filed an application with the Georgia Environmental Protection Division ("EPD") to develop and operate a solid-waste landfill on property that it owned in Bartow County (the "County"). In connection with that application, Southern States was required to obtain a certificate of zoning compliance from the County, demonstrating that the landfill complied with local zoning and land-use ordinances. However, at that time, the County's applicable zoning ordinances did not allow for a landfill on the subject property. Consequently, the County refused Southern States' request for a certificate of zoning compliance.

Eventually, in a separate but somewhat related action, the Supreme Court of Georgia declared the County zoning ordinance to be invalid on the ground that the County failed to comply with the Zoning Procedures Law. As a result, the Supreme Court held that there was "no valid restriction on the property, and [that Southern States had] the right under the law to use the property as it so desire[d]." The Superior Court then issued an order, in which it ruled that because no valid zoning ordinance controlled in 1989 when Southern States submitted its landfill-permit application, Southern States had "a vested right to obtain a certificate of the right to use their real property without county land use restrictions . . . despite the enactment of a subsequent zoning ordinance."

Subsequently, Southern States quickly requested and received a certificate of zoning compliance from the County. Nevertheless, it failed to do any development of the landfill for nearly two decades. It did file a new permit application for the landfill in 2004, and it received new certificates of zoning compliance from the County in 2004 and 2012.

In May 2013, while Southern States permit application was still pending with the EPD, a group of private property owners—the Riverwood Farm Property Owners Association, Inc. ("Riverwood Association") sued Southern States and the County, among others. Riverwood Association alleged that the proposed landfill violated County zoning ordinances and should be enjoined. Riverwood Association argued that based on the 1993 zoning ordinance in force at the time the superior court issued its 1994 order (ruling that Southern States had a vested right to operate a landfill), Southern States' vested right lapsed because it failed to commence using the property as a landfill within one year.

Section 6.1.4 of the County zoning ordinance, which became effective in September 1993, provided that any intended nonconforming use for which a vested right was acquired prior to the adoption of the ordinance was prohibited unless actually commenced within one year of the adoption of the ordinance.

The superior court agreed with Riverwood Association. Finding there were no material issues of fact in dispute and deciding the matter on the law alone, the court issued partial summary judgment in favor of Riverwood Association. The court found that whatever vested right Southern States may have had (under the 1993 zoning ordinance) lapsed when it failed to commence using the property as a landfill within one year.

Southern States appealed to the Supreme Court of Georgia, which transferred the case to the Court of Appeals of Georgia. On appeal, among other things, Southern States argued that it complied with § 6.1.4 of the 1993 zoning ordinance by obtaining a zoning-compliance letter from the County within a few months after the 1994 Superior Court order.

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

The Court of Appeals of Georgia held that Southern States' vested rights had lapsed.

In so holding, the court disagreed with Southern States' argument that it had complied with the zoning ordinance and "commenced" the nonconforming landfill use within one year of the adoption of the zoning ordinance because it had obtained a zoning-compliance letter within that year. Looking at the plain language of the zoning ordinance, the court found that the plain meaning of "commencing" the non-conforming "use" indicated the start of operating an actual landfill on the property and, therefore, "at the very least, involve[d] something more than submitting paperwork." The court found that Southern States failed to do more than submit paperwork, and that it did not actually begin operating a landfill on the property within one year of the 1994 order or even within 10 years. As such, the court affirmed the trial court's finding that Southern States failed to comply with the 1993 zoning ordinance and that its vested right to operate a landfill, therefore, lapsed.

Case Note:

Southern States had also raised a constitutional challenge to the County zoning ordinance before the superior court. However, the superior court failed to address that challenge. The appellate court held that because a decision on the constitutional issue had the potential to affect Riverwood Associates' lawsuit against Southern States, the court had to vacate the superior court's judgment and remand the case for consideration of the constitutional challenge. The appellate court explained that "[a] ruling in favor of [Riverwood Associates] on the constitutionality of the 1993 zoning ordinance [would resolve] the case at the trial-court level and render[ ] the characterization of the 2004 EPD permit application moot, while a ruling in favor of Southern States, i.e., that the ordinance [was] unconstitutional, would then necessitate resolution of the 2004 permit-application issue."

Case Note:

The appellate court also held that genuine issues of material fact existed as to whether Southern States' application submitted to the EPD in 2004 constituted a new permit such that any vested rights resulting from the 1989 application were waived. The appellate court explained that "should [Riverwood Associates] prevail in a trial on the merits of whether or not the 2004 EPD permit application was a new application, the constitutionality of the 1993 zoning ordinance would be rendered moot, whereas the question of constitutionality would still require resolution should Southern States prevail."

Public Utilities—State Utility Commission says switching station is "Transmission Line" and thus exempt from local zoning under state utility act

Opponents of utility project argue switching station is subject to local zoning regulations

Citation: *BASF Corp. v. State Corp. Com'n, 2015 WL 1727294 (Va. 2015)*

VIRGINIA (04/16/15)—This case addressed the issue of whether utility "switching stations" are subject to local zoning ordinances or whether switching stations constitute a part of a "transmission line" and are thus exempt from local zoning ordinances pursuant to Code § 56-46.1 of the Virginia Utility Facilities Act.

The Background/Facts: In 2012, Virginia Electric and Power Company

d/b/a Dominion Virginia Power ("Dominion") filed an application with the State Corporation Commission (the "Commission") seeking the issuance of certificates of public convenience and necessity ("CPCNs") authorizing the construction of electric transmission facilities (the "Project") in James City County under Code § 56-265.2 of the Virginia Utility Facilities Act, and approval under Code § 5646.1.

Eventually, the Commission issued an order (the "Certificate Order") granting the CPCNs to Dominion. Several opponents of the Project challenged the granting of the Certificate of Order. Among those opponents were James City County, Save the James Alliance Trust, and James River Association (collectively, "JCC"). JCC appealed from the Certificate Order to the Supreme Court of Virginia. Among other things, JCC argued that the Commission erred in its construction and application of Code § 56-46.1(F) in finding that the Project's utility switching station was a "transmission line" under that provision and thus exempt from local zoning regulations.

DECISION: Judgment of State Corporation Commission reversed in part, and matter remanded.

Agreeing with JCC, the Supreme Court of Virginia held that the Project's switching station was not a "transmission line" under Code § 56-46.1(F) of the Virginia Utility Facilities Act, and was therefore subject to local zoning regulations.

In so holding, the court looked at the plain language of the Code. Code § 56-46.1(F) states: "Approval of a trans-mission line pursuant to this section shall be deemed to satisfy the requirements of [Code] § 15.2-2232 and local zoning ordinances with respect to such transmission line."

The Commission had found that switching stations and transmission lines functioned together as "inseparable" components and thus should be governed under the same authority. The Commission had construed "transmission line," as used in that provision, to include switching stations, so that Code § 56-46.1(F) exempted the Project's switching station from the requirements of James City County zoning ordinances. The Supreme Court of Virginia held that construction was error.

The court explained that in determining whether certain structures or uses are exempt from local zoning ordinances, there must be a "manifest intention on the part of the legislature" to exempt them. Looking at the plain language of Code § 56-46.1(F), the court found that the intention to exempt switching stations from local zoning ordinances is not manifest within Code § 56-46.1. Rather, the court found that under the plain language of Code § 56-46.1(F), the only structures or uses expressly exempt from local zoning ordinances are transmission lines. The court also found that the term "transmission lines" does not include switching stations.

Although Title 56 of the Code of Virginia, governing public utilities, does not define the term "transmission line" as used in Code § 56-46.1(F), the court found that "[a] layperson" could identify the plain meaning of a transmission line: "the wires used to transmit electric current over great distances and the structures necessary to physically support those wires." With that definition, the court concluded that " '[t]ransmission line' does not mean 'switching

station.' " Rather, the court found that a "switching station" was "a station"—a "facility," which was "distinguishable from and more intrusive to its surrounding environment than transmission lines." The court concluded that it was "reasonable for such facilities to be subject to local zoning, while continuous transmission lines are exempt because of the onerous nature of navigating local zoning ordinances for all the acreage over which transmission lines cross."

Having concluded that a switching station is not a transmission line, the court reversed the decision of the Commission with regard to the applicability of Code § 56-46.1(F) to the Project's switching station.

See also: *City of Norfolk v. Tiny House, Inc., 222 Va. 414, 281 S.E.2d 836 (1981).*

Case Note:

Other challenges to the Certificate Order were brought, including additional challenges by JCC, as well as challenges by BASF Corporation ("BASF"). Since those other challenges were not related to zoning, they are not discussed here in this summary.

Standing—County Citizens Challenge Comprehensive Rezoning

Other citizens and county argue challengers lacked standing

Citation: *Anne Arundel County v. Bell, 2015 WL 1798953 (Md. 2015)*

MARYLAND (04/21/15)—This case addressed the issue of whether challengers to a county's comprehensive rezonings had standing (i.e., the legal right to bring the case to court). In the case, the court explained the types of standing needed to challenge zoning actions, as well as the elements of the standing necessary to bring a challenge to a comprehensive rezoning.

The Background/Facts: In 2011, the County Council for Anne Arundel County (the "County") adopted a comprehensive zoning ordinance, Bill 12-11. Bill 12-11 governed 59,045 individual parcels or lots. It rezoned the classifications of 264 parcels or lots and maintained essentially the pre-existing zoning of the rest.

Bill 12-11 was challenged by various Anne Arundel County property owners and community associations (the "Citizens"), who objected to some, but not all, of the rezonings. The Citizens filed an action in court, alleging that the County engaged in illegal spot and contract zoning with regard to those rezonings and failed to provide the public with the required notice of the proposed zoning changes.

Several Anne Arundel County property owners and ground leaseholders

whose properties had been re-zoned to classifications desired by them (collectively with the County, referred to as "Petitioners") intervened to protect their interests. Petitioners moved to dismiss the Citizens' suit, arguing, among other things, that the Citizens lacked standing (i.e., the legal right to bring the case).

The Circuit Court agreed with the Petitioner's and dismissed the case. The court concluded that the Citizens lacked standing because they failed to meet the burden of proving special aggrievement. The court found that the Citizens' interests in the matter were not any different than the interests of a member of the general public.

The Citizens appealed. The Court of Special Appeals disagreed with the Circuit Court. The Court of Special Appeals concluded that the Citizens could bring the case challenging Bill 12-11 because they enjoyed property owner standing. The Court of Special Appeals held that the property owner standard of presumed special aggrievement applied to judicial challenges to comprehensive zoning legislative actions (as well as quasi-judicial and other administrative land use actions generally).

The Petitioners appealed. They argued that property owner standing applied only to quasi-judicial and administrative land use actions, but was not sufficient standing for challenges to comprehensive zoning legislative actions.

DECISION: Judgment of Court of Special Appeals reversed, and matter remanded with directions.

The Court of Appeals of Maryland agreed with the Petitioners. The court held that property owner standing should not be expended to apply to judicial challenges to comprehensive zoning legislations. Rather, held the court, plaintiffs (including the Citizens) wishing to challenge in Maryland courts the legislative action adopting a comprehensive zoning are required to demonstrate taxpayer standing. Here, the court found that the Citizens failed to demonstrate taxpayer standing.

In holding that property owner standing should not be extended to apply to challenges to comprehensive zoning legislations, the court explained the differences between legislative zoning actions—such as comprehensive zoning—and quasi-judicial zoning actions—such as piecemeal rezoning. Comprehensive zoning is legislative and encompasses a large geographical area, with a process generated by a local government, rather than by a property owner or owners. It also is the product of careful study and consideration. On the other hand, administrative land use actions, whether reached via quasi-judicial or executive processes encompass a wide variety of things, including piecemeal rezonings, applicable to smaller, specific areas of land.

The court said that property owner standing requires that the owner of property has property rights that are specially or adversely affected—as different from the rest of the public. The court determined that "[c]omprehensive zoning on the one hand, and quasi-judicial or administrative land use actions on the other, are not similar sufficiently in process or justification to warrant extension by analogy of property owner standing principles from the latter to the former." The court based that determination on its conclusion that "problems . . . would arise if complainants may satisfy the judicial require-

ment of standing based on the doctrine of property owner standing when challenging comprehensive zoning ordinances." For example, noted the court, "[h]ypothetically, thousands of plaintiffs with the benefit of property owner standing could have standing to challenge comprehensive zoning legislation."

The court stated that plaintiffs (including the Citizens) wishing to challenge in Maryland courts the legislative action adopting a comprehensive zoning are required to demonstrate taxpayer standing. The court said that under the taxpayer standing doctrine (as well as the property owner standing doctrine), "the complainant must have a special interest in the subject-matter of the suit distinct from that of the general public." With regard to taxpayer standing, that special interest can be shown by alleging both: (1) an action by a municipal corporation or public official that is illegal or ultra vires; and (2) that the action may injuriously affect the taxpayer's property, "meaning that it reasonably may result in a pecuniary loss to the taxpayer or an increase in taxes." Further, said the court, to establish eligibility to maintain a suit under the taxpayer standing doctrine, a "complainant must [also] allege two things: (1) that the complainant is a taxpayer and (2) that the suit is brought, either expressly or implicitly, on behalf of all other taxpayers." With regard to the latter, the plaintiff could allege expressly that the plaintiff is bringing the suit on behalf of other taxpayers similarly situated, or it is enough that the allegations of the injury apply to all taxpayers in the assumed class and not merely the plaintiffs as private complainants. In summary, the court said that for taxpayer standing, the plaintiff must allege an illegal or ultra vires act that caused harm to the plaintiff taxpayer and that there is a potential for remedy to alleviate the harm incurred.

Here, the court concluded that the Citizens did not satisfy the requirements of the taxpayer standing doctrine. While at least some of the Citizens were taxpayers, and they had alleged that the actions taken by the County in adopting "the zoning reclassification[s]" in Bill 12-11 constituted "illegal spot zoning," the court found that the Citizens failed to allege that the illegal action would result in a pecuniary loss or an increase in taxes. Because the Citizens did not allege sufficiently the elements of taxpayer standing, the court concluded that their action challenging Bill 12-11was properly dismissed.

See also: *State Center, LLC v. Lexington Charles Ltd. Partnership, 438 Md. 451, 92 A.3d 400 (2014)'.*

See also: *Ray v. Mayor and City Council of Baltimore, 430 Md. 74, 59 A.3d 545 (2013).*

Zoning News from Around the Nation

CALIFORNIA

San Francisco Mayor Ed Lee "is proposing amendments to the city's so-called Airbnb law in an effort to ease community concerns over the controversial law governing short-term rentals." The proposed amendments would reportedly "impose a 120-day limit on the number of days per year that residents can rent out their homes or rooms"—in hosted or unhosted rentals.

Current San Francisco law legalizes short-term rentals of private residences. The amendments aim to make the homesharing laws "more clear and easier to enforce."

Source: *CNET; www.cnet.com*

OREGON

The state House of Representatives recently passed through legislation that would "kill a 1999 law that prohibits local governments from requiring affordable housing in large development projects." "Oregon and Texas are the only states that currently prohibit what's commonly known as inclusionary zoning." House Bill 2564 would allow government leaders to set their own affordable-housing requirements, with up to 30% of units in a development to be sold below market prices. The bill now moves to the state Senate for consideration.

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

TEXAS

The state House of Representatives has approved legislation that would "bar cities from banning fracking and placing other limits on oil and gas drilling." Under House Bill 40, "local governments could enact ordinances to regulate above-ground oil and gas activity, such as traffic, lights, noise and drilling setbacks—so long as they are considered 'commercially reasonable.' Regulatory power would otherwise reside with the state."

Source: *Denton Record-Chronicle; www.dentonrc.com*

QUINLAN™ June 10, 2015 | Volume 9 | Issue 11

Zoning Bulletin

in this issue:

THOMSON REUTERS

Mat #41675512

Voting/Variances—Zoning board denies variance with tie vote

Applicants contend decision was inadequate and claim entitlement to variance

Citation: *Pham v. Upper Merion Tp., 2015 WL 1588025 (Pa. Commw. Ct. 2015)*

PENNSYLVANIA (04/10/15)—This case addressed the issue of whether a zoning board's tie-vote decision was adequate for purposes of

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ISSN 0514-7905

appellate review. It also addressed whether landowners had established a right to a variance.

The Background/Facts: Anh Pham and Roland W. Muller (the "Pham-Mullers") owned a circa 1904 6,000-square-foot single-family home in an R-1 Residential District in Upper Merion Township, Pennsylvania (the "Township"). The Pham-Mullers wanted to use the property as a "Bed and Breakfast" ("B & B"). They applied to the Township's Zoning Hearing Board ("ZHB") for a variance. In support of their variance application, the Pham-Mullers asserted, among other things, that the property's unique size and older age made it functionally obsolete, creating an unnecessary hardship. They noted, for example, that it annually cost $20,000 for them to supply heat and hot water to the home.

Ultimately, the ZHB members voted two in favor and two opposed to the Pham-Mullers' request for a variance. The ZHB determined that the tie vote rendered the request denied, pursuant to § 906 of the Pennsylvania Municipal Planning Code ("MPC").

Section 906 provides that, for the taking of any action, there must be a majority quorum of all members of the board.

The Pham-Mullers appealed to the trial court, which affirmed the ZHB's decision.

The Pham-Mullers again appealed. On appeal, they argued, among other things, that: (1) the ZHB's decision was inadequate for the purposes of effective appellate review because the ZHB's decision failed to include specific credibility determinations and adequate legal analysis and/or reasons for the denial; and (2) the ZHB abused its discretion in denying their variance because the Pham-Mullers provided sufficient evidence to establish their right to a variance.

DECISION: Judgment of Court of Common Pleas affirmed.

The Commonwealth Court of Pennsylvania first held that the ZHB's tie-vote decision was adequate for purposes of appellate review. The court explained that a timely action by a zoning board which is reduced to writing, though it may not alter the status quo, is materially different from a lack of timely action that would warrant a deemed approval under § 908 of the MPC. Here, noted the court, the action by the ZHB was timely made, but it was one by an evenly-divided board. Under § 906 of the MPC, a zoning hearing board lacks authority to act other than by a majority, said the court. Thus, the court explained, the result of a zoning hearing board's tie vote is that the subject-matter with which it is dealing must remain status quo. Therefore, here, "[w]hether the zoning hearing board's action, memorialized in writing, be treated as one by an evenly-divided appellate tribunal (thus leaving in effect the negative administrative response which the landowner had appealed to the board) or as an original administrative response leaving a direct application unimplemented, the result is a refusal of the landowner's request."

Addressing, the Pham-Mullers' inadequacy argument directly, the court concluded that, in this case, "because the ZHB's tie vote decision [was] valid as a matter of law, . . . and because the ZHB's decision sets forth findings of fact upon which its members agreed, noted the relevant legal standards, and explained that its tie vote constituted a denial of the variance as a matter of law," here the court concluded that "the absence of additional findings or conclusions [did] not constitute an abuse of discretion and that the decision [was] adequate for purposes of appellate review."

Also disagreeing with the Pham-Mullers' second argument, the appellate court held that the ZHB did not abuse its discretion in denying the variance because the Pham-Mullers failed to provide sufficient evidence to establish their right to a variance. Most significantly, the court noted that the Pham-Mullers had not established the variance criteria of showing unnecessary hardship. The court explained that "in the context of use variances, unnecessary hardship is established by evidence that: '(1) the physical features of the property are such that it cannot be used for a permitted purpose; or (2) the property can be conformed for a permitted purpose only at a prohibitive expense; or (3) the property has no value for any purpose permitted by the zoning ordinance.' " The court found that the Pham-Mullers had not testified that the home could not be improved for purposes of maintaining it as a single-family residence or that it would be economically prohibitive to make necessary improvements for use as a single-family residence; they had only opined that it would be "more reasonable" to use the property as a B & B. Accordingly, the court concluded that the Pham-Mullers were not entitled to a variance as a matter of law.

See also: *Giant Food Stores, Inc. v. Zoning Hearing Bd. of Whitehall Tp., 93 Pa. Commw. 437, 501 A.2d 353 (1985).*

See also: *Danwell Corp. v. Zoning Hearing Bd. of Plymouth Tp., 108 Pa. Commw. 531, 529 A.2d 1215 (1987).*

See also: *Marshall v. City of Philadelphia, 97 A.3d 323 (Pa. 2014).*

Equal Protection—Property owners allege city denial of their proposed condominium project violates their equal protection rights

Property owners claim different treatment by city due to discriminatory animus

Citation: *Miller v. City of Monona, 2015 WL 1947886 (7th Cir. 2015)*

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

SEVENTH CIRCUIT (WISCONSIN) (05/01/15)—This case addressed the boundaries of the class-of-one doctrine under the Equal Protection Clause of the 14th Amendment to the United States Constitution. More specifically, it addressed the issue of whether property owners could prevail in their class-of-one equal protection claim based on denial of approval to build.

The Background/Facts: Stephanie Miller and her husband James Stellhorn, along with their co-owned company, Harlan LLC (hereinafter, for the sake of simplicity, "Miller"), owned property in the City of Monona, Wisconsin (the "City"). In 2004, Miller applied to the City for permission to build a 10-unit condominium project. The approval process dragged on and was snagged when it was discovered that Miller's property, on which there were vacant and dilapidated structures, contained asbestos. Following improper and then professional asbestos removal, Miller faced additional enforcement actions while awaiting approval. For example, Miller was: cited for building code violations related to the razing of the structures on her property; was order to erect a fence and later ordered to remove the fence; and was denied approval for construction of her project until outstanding fines were paid.

Eventually, Miller filed a lawsuit alleging that the City and various City officials (collectively, hereinafter, the "City") in denying the proposed condominium project had discriminatory animus toward her and intentionally treated her differently than others similarly situated without a rational basis and in violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution.

The Equal Protection Clause provides that no state shall deny to any person within its jurisdiction "the equal protection of the laws." As a comparator (i.e., a similarly situated person who was treated differently),

Miller pointed to Kevin Metcalfe ("Metcalfe") and his approved 45-unit condominium development project, which was on the same street as Miller's proposed project. Miller noted that Metcalfe's project was approved without opposition.

The district court dismissed Miller's class-of-one equal protection claim. (Miller's claim was a "class-of-one" claim because it was not a claim brought as a member of a racial, gender, ethnic or other group.) It concluded that the problems with citations and demolitions on Miller's property precluded a comparison with Metcalfe's project, which had not had dilapidated buildings and asbestos.

Miller appealed.

DECISION: Judgment of district court affirmed.

The United States Court of Appeals, Seventh Circuit, held that Miller's class-of-one equal protection claim failed because: (1) Metcalfe's project was not a suitable comparator for Miller's claim; and (2) the denial of Miller's project was rationally related to persistent asbestos and building code problems on the property.

The court explained that the equal protection rule that people should be treated alike under like circumstances and conditions is not violated when the state action involves discretionary decision making based on individualized assessments—such as with the approval process and code enforcement at issue here. The court said that is true even if one person is treated differently from others because treating like individuals differently is an accepted consequence of the discretion granted to state officials in zoning decisions, and allowing an equal protection challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.

Addressing Miller's specific claim of being treated differently from Metcalfe with regard to each of their proposed condominium development projects, the court found that Metcalfe was not an adequate comparator because he was not "identical or directly comparable" to Miller "in all material respects." While Miller's property required multiple rounds of asbestos removal and eventual demolition, Metcalfe's project was not alleged to have had any similar problems.

Nevertheless, the court said that the lack of a comparator did not doom Miller's claim. As long as Miller could exclude rational explanations for why the City targeted her, her claim could proceed. In other words, for a successful class-of-one equal protection claim, Miller had to allege that the City lacked a rational basis for singling her out for intentionally discriminatory treatment. The court found Miller failed to meet that burden. Regardless of whether City officials were motivated by discriminatory animus toward Miller and her project, as she had alleged, the court found that the City's denial of approval of Miller's proposed con-

dominium project was rationally related to the persistent asbestos and building code problems on the property. In other words, the court found that the actions of the City with regard to Miller's project had rational explanations. Because there were "potential rational reasons to target Miller's derelict property," the court concluded that the district court had properly dismissed Miller's class-of-one equal protection claim.

See also: *Swanson v. City of Chetek, 719 F.3d 780 (7th Cir. 2013).*

See also: *Geinosky v. City of Chicago, 675 F.3d 743, 86 A.L.R.6th 713 (7th Cir. 2012).*

Case Note:

Miller also brought a claim of sex discrimination. The district court issued summary judgment in favor of the City on that claim, and Miller did not challenge that decision.

Preemption/Special Use—Despite township's zoning ordinance prohibiting helistops, state agency issues helistop special use license to applicant for use in township

Township appeals arguing zoning ordinance precludes grant of license

Citation: *Township of Fairfield v. State, Dept. of Transp., 2014 WL 8514005 (N.J. Super. Ct. App. Div. 2015)*

NEW JERSEY (04/10/15)—This case addressed the issue of whether the New Jersey Department of Transportation could issue a special use license in contravention to a local zoning ordinance prohibiting such use.

The Background/Facts: Anthony Pio Costa ("Pio Costa") owned property (the "Property") in an industrial park in a C-3 Zone in Fairfield Township, New Jersey ("Fairfield"). Pursuant to Fairfield's zoning ordinance, helipads were prohibited in C-3 zones. Thus, pursuant to Fairfield's zoning ordinance, the use of the Property for helistops was prohibited. Nonetheless, Pio Costa was granted a temporary helistop

license from the New Jersey Director of the Division of Multimodal Services, Department of Transportation ("DOT") from 1995 through 1997, and a permanent helistop license from 1998 through 1999. After expiration of that license, Pio Costa continued to use the property as a helistop.

Eventually, Fairfield brought a civil action against Pio Costa in federal district court relative to the use of the helistop. Pio Costa argued that Fairfield's zoning ordinance was preempted by the Federal Aviation Administration. The district court disagreed with Pio Costa and remanded the matter to state superior court, which prohibited Pio Costa's use of the helistop without a DOT license.

Pio Costa applied to the DOT for a permanent helistop license. Pio Costa also applied to Fairfield for a use variance. Fairfield's Board of Adjustment (the "Board") denied Pio Costa's use variance request. In 2012, the DOT issued to Pio Costa a "restricted use" helistop license, and Pio Costa returned to using the Property as a helistop.

Fairfield appealed the DOT's decision to issue the license. Fairfield pointed to its zoning prohibition on helipads. It also argued that the helistop was contrary to sound planning and unsafe due to its proximity to an airport, a cellular tower, a car wash, a neighborhood of residential homes and a highway. In response thereto, and after noting the objections of Fairfield, the DOT altered the "restricted use" license issued to Pio Costa to a "special use" license.

Fairfield appealed DOT's decision to issue the special use license to Pio Costa. Among other things, Fairfield argued its zoning ordinance barred helistops and the Board's resolution denying Pio Costa's application for a variance should have effectively precluded the DOT from issuing the special use license to Pio Costa.

DECISION: Decision of DOT affirmed.

The Superior Court of New Jersey, Appellate Division, held that sufficient evidence supported the DOT's decision to grant Pio Costa the helistop special use license.

In so holding, the court explained that pursuant to the state Aviation Act, the DOT is charged with the "supervision over aeronautics within [New Jersey], including, . . . heliports and helistops . . . [as well as the] develop[ment] and promo[tion] of aeronautics within [New Jersey]." (N.J.S.A. 6:1-29.) Therefore, said the court, the DOT is tasked with "the ultimate authority as to the placement of aeronautical facilities." Thus, although the Aviation Act does not preempt a municipality's authority to adopt zoning ordinances pertaining to aeronautical facilities, DOT is vested with final authority to approve and license such facilities. Therefore, "while municipalities may pass ordinances restricting heliports under N.J.S.A. 40:55D-2, 'they must not exercise their zoning authority so as to collide with expressed policy goals of the [Aviation Act]. " Still, said the court, although the DOT need not "give con-

trolling weight to local zoning provisions," it also should not "arbitrarily [override] all important legitimate local interests," but should consider local objections and suggestions "in order to minimize the conflict as much as possible." Nevertheless, while DOT must carefully consider the local municipality's zoning concerns, "the 'ultimate authority over the regulating and licensing of aeronautical activities and facilities' remains with the [DOT]." In other words, the DOT Commissioner has sufficient statutory authority "to override local zoning decisions," said the court.

Here, the court found that the DOT gave the required careful consideration to Fairfield's objections to Pio Costa's helistop license application and the Board's resolution denying the use variance application. Thus, the court found that DOT did not abuse its discretion.

In sum, the court concluded that there was sufficient credible evidence in the record to support the DOT's decision to grant to Pio Costa a helistop "special use" license.

See also: *Garden State Farms, Inc. v. Bay, 77 N.J. 439, 390 A.2d 1177 (1978).*

Case Note:

Fairfield had also argued that the DOT should have conducted a contested case hearing (i.e., a hearing on a licensing proceedings in which legal rights and duties of specific parties are addressed). The court disagreed, noting that Fairfield failed to cite to any statute or controlling decisions that require a contested case hearing as a predicate when considering an application for a helistop license. The court acknowledged that Fairfield's right to enact zoning ordinances flowed from a state constitutional provision, N.J. Const. art. IV, § 6, ¶ 2, but said that provision did not grant a constitutional right to a hearing under the circumstances of the case, since here Fairfield had no liberty or property interest implicated by the helistop application.

Rezoning—Developer seeks rezoning of large parcel

Neighbors challenge rezoning, citing lack of evidence of change in neighborhood character or public need

Citation: *Wrigley v. Harris, 2015 WL 1638088 (Miss. Ct. App. 2015)*

MISSISSIPPI (04/14/15)—This case addressed the issue of whether an applicant had proven sufficient evidence existed that the character of

the neighborhood had changed and that a public needed existed to warrant a rezoning.

The Background/Facts: In January 2012, Randy Wrigley submitted a request to the Jackson County Planning Department ("JCPD") seeking a change in zoning from A-1, Agricultural Residential District, to A-3, Agricultural-Residential District (Smaller-Lot Development) for a parcel of property (the "Property") owned by Breland Homes LLC ("Breland Homes"). The Property contained approximately 163.28 acres and was located in Vancleave, Mississippi. Breland Homes sought to convert the Property into a subdivision.

The JCPD denied Wrigley's request. On a second motion to change the zoning from A-1 to A-2, Agricultural-Residential (Large-Lot Development), the JCPD also denied the request.

Wrigley appealed the JCPD's decision to the Jackson County Board of Supervisors (the "Board"). Wrigley's appeal requested that the Board consider rezoning the Property from A-1 to A-2. The Board voted to approve the zoning request.

David and Mary Ann Harris (the "Harrises") owned property adjacent to the Breland Homes Property. The Harrises appealed the Board's approval of the rezoning of the Property to the county circuit court. The court reversed the Board's decision, finding that it was not supported by clear and convincing evidence.

Wrigley appealed.

DECISION: Judgment of Circuit Court affirmed.

The Court of Appeals of Mississippi agreed with the circuit court that Wrigley had failed to support his rezoning application with sufficient evidence.

The court explained that for an applicant's request for rezoning to be granted, the applicant must prove by "clear and convincing evidence" either: "(1) . . . there was a mistake in the original zoning;" or "(2) the character of the neighborhood has changed to such an extent as to justify rezoning and that public need exists for rezoning." In order to show the necessary proof of evidence, further explained the court, the applicant must support the rezoning with, at a minimum: "a map showing the circumstances of the area, the changes in the neighborhood, statistics showing a public need, and such further matters of proof so that a rational, informed judgment may be formed as to what the governing board considered."

Here, Wrigley had not argued a mistake in the original zoning. Therefore, in order to succeed on his application, he had to show sufficient evidence that the rezoning request was supported by a change in the character of the neighborhood and by a public need. The Board had found that Wrigley had met that burden of proof, but the court found that "Wrigley's evidence consisted of general statements and nothing

more, far short of the clear-and-convincing [evidence] burden." Finding that Wrigley's evidence was based upon "general statements, predictions about future need, and other vague speculations," the court determined that Wrigley "failed to prove a change in the neighborhood as well as any statistics showing a public need." Having found no proof in the record of a change in character or public need for the rezoning requested, the court concluded that there was neither change nor public need warranting Wrigley's rezoning request.

See also: *Bridge v. Mayor and Bd. of Aldermen of City of Oxford, 995 So. 2d 81 (Miss. 2008).*

See also: *Cockrell v. Panola County Bd. of Sup'rs, 950 So. 2d 1086 (Miss. Ct. App. 2007).*

See also: *Town of Florence v. Sea Lands, Ltd., 759 So. 2d 1221 (Miss. 2000).*

Zoning News from Around the Nation

LOUISIANA

In a lawsuit brought by St. Tammany Parish Council against Helis Oil & Gas Co. ("Helis") in relation to Helis' proposal project that would drill a well, a judge ruled in a hearing that St. Tammany does not have the authority to stop Helis' project based on zoning laws. Reportedly, the judge stated that the local zoning laws cannot override the regulatory authority of Louisiana Department of Natural Resources' Office of Conservation.

Source: *Marcellus.com; http://marcellus.com*

PENNSYLVANIA

Philadelphia Mayor Michael Nutter is proposing to have the city's 8.5% hotel tax applied to short-term home and room rentals. Supporters of the proposed tax say Airbnb-type rentals are essentially short-term hotels and should be made to follow the same rules. The proposed legislation would also adjust zoning rules that have made most rentals illegal in residential areas, and would require a city-issued license for rentals more than 31 days.

Source: *The Boston Globe; www.bostonglobe.com*

RHODE ISLAND

State legislators are reportedly seeking to expand the Rhode Island Right to Farm Act. Among other things, the proposed changes would

add weddings to the list of nonagricultural uses allowed at farms and vineyards. As well, under the proposed changes, "all the nonagricultural uses would have blanket protection and no longer be regulated by local zoning ordinances or public nuisance laws."

Source: *The Jamestown Press; www.jamestownpress.com*

TEXAS

The State House of Representatives have passed House Bill 2595, which would bar local governments from putting measures on their ballots that would "restrict the right of any person to use or access the person's private property" for economic gain. The legislation is reportedly in response to the City of Denton's ban on hydraulic fracking.

Source: *Texas Tribune; www.texastribune.org*

Both the State House and Senate have passed House Bill 40, "landmark legislation that would preempt local control over a variety of oil and gas activities." The bill needs the Governor's signature before it becomes law.

Source: *Texas Tribune; www.texastribune.org*

VIRGINIA

In early May, Virginia Attorney General Mark Herring released an opinion "confirming a locality's ability to use its land use and zoning authority to prohibit shale gas development, also known as fracking. The opinion also confirms that, in the absence of a prohibition on fracking, a locality can enact ordinances that restrict drilling activity to protect the health, safety and welfare of residents." The opinion of the attorney general "says that localities can prohibit fracking through zoning ordinances or restrict fracking through reasonable zoning ordinances that do not conflict with state statutes or regulations. As examples, the opinion confirms that restrictions on the location and siting of oil and gas wells are allowed."

Source: *Augusta Free Press; http://augustafreepress.com*

ZONING **PRACTICE** JUNE 2015

AMERICAN PLANNING ASSOCIATION

ISSUE NUMBER 6

PRACTICE VALUE CAPTURE

6

Value Capture and Community Benefits

By Nico Calavita

Market-based regulatory strategies have become relatively common, though far from universal, in communities across the country.

It has been almost a quarter of a century since Jerold Kayden alerted planners to the momentous change occurring in land-use planning—"the movement from command-and-control to market-based regulatory strategies"—when public and private interests would "join forces for the common good" by harnessing mechanisms such as transfer of development rights and incentive zoning (1992, 565).

As planners seek to promote higher-density compact development in a climate of declining public revenues, it is imperative for them to help cities and counties capture a portion of the increases in land and development value resulting from granting additional development rights to provide public amenities.

To that end, this article highlights a number of promising approaches for capturing value created from land-use and other regulatory changes. Specifically, it focuses on the new ways in which incentive zoning is being shaped and implemented in California. Throughout, I will use the term "value capture" to encapsulate mechanisms like public benefit zoning, floor area ratio (FAR) acquisition programs, amenity bonus programs and community benefits programs. All of these techniques seek to capture some of the value increases—both land and development value—resulting from entitlements.

While beyond the scope of this article, it should be noted, however, that the value of real estate also increases as a result of the building of infrastructure and public facilities. The main tool to capture those increases is a special assessment district, and in some contexts, tax-increment financing (TIF) is also seen as a value capture mechanism (Huxley 2009). It should be noted, however, that with TIF the value captured is from increases in real estate taxes resulting, at least in part, from public investments in redevelopment areas, and not from landowners and developers.

Image courtesy PYATOK

ORIGINS AND PROBLEMS

Incentive zoning (IZ) encourages developers, usually through additional densities, to provide community benefits or amenities. (In this article I will use the two terms interchangeably). It has a dual origin: In cities like New York and Chicago, where IZ was initially attempted in the 1960s, the benefits sought from developers tended to emphasize ways in which to improve the public realm, such as encouraging the creation of public plazas or theaters. In Fairfax County, Virginia, on the other hand, density bonus systems were introduced to circumvent court decisions that prohibited inclusionary zoning.

Concerns about IZ are many, including the charge that it undermines planning. After all, if planning rationale has established a maximum density, what makes certain community benefits worthy enough to trump the benefits gained from plan-established densities? Similarly, if amenities are so important that plans can be undermined for them, why should not they be required without incentives?

Studies that compared the benefits and costs of IZ found that developers benefited disproportionally. A case study that analyzed public plazas and arcades provided under the IZ program in New York City found that developers enjoyed huge windfalls while providing, in many cases, poorly designed public spaces at a relative low cost (Kayden 1978). As experiences with IZ grew, changes and improvements were made. For example, in a few cities—such as San Francisco and Santa Monica, California—the amenities were obtained through mandatory incentives; the cities are now utilizing IZ to obtain additional benefits. It should

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Go online during the month of June to participate in our "Ask the Author" forum, an interactive feature of Zoning Practice. *Nico Calavita will be available to answer questions about this article. Go to the APA website at planning.org and follow the links to the Ask the Author forum. From there, just submit your questions about the article to the active thread. After each thread closes at the end of the month, the archived questions and answers will be available through the Ask the Author forum.*

About the Author
Nico Calavita is professor emeritus in the graduate program in city planning at San Diego State University. He is coauthor of *Public Benefit Zoning* (East Bay Housing Organization, 2014) and *Inclusionary Housing in International Perspective: Affordable Housing, Social Inclusion and Land Value Recapture* (Lincoln Institute of Land Policy 2010).

be pointed out that development value is not only created by zoning changes to individual parcels, but also through plan changes, especially in states like California where zoning ordinances must be in conformance with land-use plans, and value capture can be "plan based."

Now a new wave of IZ is emerging, characterized by three elements: 1) reliance on economic analysis; 2) particular attention paid to the effects of value capture on land values; and 3) utilization of extensive public participation processes.

ECONOMIC ANALYSES AND VALUE CAPTURE

According to Cameron Gray, former director of Vancouver, British Columbia's Housing Centre, community benefits contributions "cannot be calculated or negotiated without using development economics and real estate analysis, and the question is not whether but how" (n.d., 1).

Economic Analyses

In order to calculate what it is economically feasible under a value capture scheme, it is necessary to compare the value of a project under existing zoning and its value after the plan change or upzoning. This is done through economic analyses that establish the costs and revenues of a project. For example, in a residual land value analysis, costs are subtracted from the revenues, providing information about how much the developer can pay for the land and still make a profit. Comparing the residual land value before and after a rezoning, a city can determine the "uplift" or "enhanced value." Such determination provides the basis for the level of amenities that can be required while maintaining the development's financial feasibility. Other methodologies may assign a particular cost to the land and calculate the developer's profit.

Reminders

For value capture to work, there needs to be market demand for additional development. Many communities, especially those that are struggling economically, will amend their plans to allow greater densities in the hope of luring new development. Unfortunately, once additional benefits have been granted (for free), no community benefits will be forthcoming when a city experiences a market revival. This is happening in Oakland, California, for example, where large parts of the city, including downtown, were upzoned a few years ago when the market was relatively weak. Now the market is quite strong, but city planners are still reluctant to secure community benefits from developers, and community groups are having difficulties getting them.

Decisions about the levels of amenities and incentives to be established are ultimately political ones, but they need to be based on economic analyses that establish the value of both. For planners the goal should be to seek the highest possible level of amenities without making the proposed development financially unfeasible. Past experiences indicate that political decisions might have been biased in favor of the developer because of their exclusive accessibility to development information and the political sway they enjoy in certain communities. For example, in the 1980s in New York, "anticipation of bonuses fed back into higher land prices" (Cullingworth and Caves 2003, 116), probably the result of developers' intuition that the value of the density bonuses would be much higher than the cost of community benefits.

Higher densities generally come at a public cost. From shadows cast by tall buildings to increased street congestion, development exceeding plan-established densities is likely to lower the quality of life in a particular community. Since positive externalities are also possible, planners should determine whether the value of the amenities to be gained is significantly higher than the public cost of the additional densities.

Case in point: The developer of a proposed high rise in downtown Berkeley, California, claims that he is providing a community benefit by subsidizing the continued operations of a multiplex movie theater and a children's museum that will be displaced by the new development. While the subsidies may represent an additional cost to the developer, they do not constitute an *additional* community benefit.

Image courtesy PYATOK

What the developer can pay for the land and still make a profit.

VALUE CAPTURE AND LAND VALUES

Upzonings or plan changes that allow higher densities are likely to increase land values. It has been argued that when public action raises the value of land, the public should "recapture" at least a portion of that increase through the provision of community benefits. This under-

standing shapes planning approaches in many European and South American countries, as well as in a few American and Canadian cities.

Who pays and who benefits from value capture? In order to determine the effect of value capture on land values, we need to consider two scenarios: "base density plus" and "rezonings."

Base Density Plus

Under this scenario developers have the choice of building at an established base density for which they pay prescribed exactions (or not, depending on the locality), or of trading additional densities (or other incentives such as greater height or reduced parking requirements) for amenities. Under the scenario of a fair economic trade-off between incentives and amenities, land prices should be unaffected. If—as was the case in New York in the 1980s—the value of the incentives is much higher than the cost of the amenities, the value of the land is likely to rise. In the opposite case, the developer will not choose to use the incentive zoning option, and the city will have to reduce the level of amenities.

To summarize, the consumer benefits because of the increase in market choices and the amenities provided, while the developer also benefits from the amenities as well as from higher profits. The landowner still profits from selling the land, but at a price that reflects the base density only or slightly more.

Rezonings

Localities have the discretionary power to rezone properties to allow higher densities or change land-use designations. These changes, under appropriate market conditions, will lead to higher land prices. Under the "rezoning" scenario, for example, developers might acquire land zoned industrial—a use for which there is no demand—and initiate the process of rezoning the land to medium-density residential. Presumably developers will pay less for industrially zoned land than residentially zoned property, allowing them to provide community benefits, cover the cost of the rezoning, and gain a portion of the "enhanced value" resulting from the rezoning as additional profit.

How this scenario plays in real life will depend on the market and circumstances in a given locale. It could be argued, for example, that landowners, anticipating the likelihood of a rezoning to a more valuable use, will seek a higher return over industrial land value, in effect withdrawing their property from the market. But if the rezoning is part of an overall plan to change land uses or increase densities, thus increasing the supply of land available on the market, the levy should not cause land prices to rise significantly.

In conclusion, both developers (who get the rezoning) and the community win. Landowners will win because they will be able to sell their land, but not at a price that reflects the higher-level use.

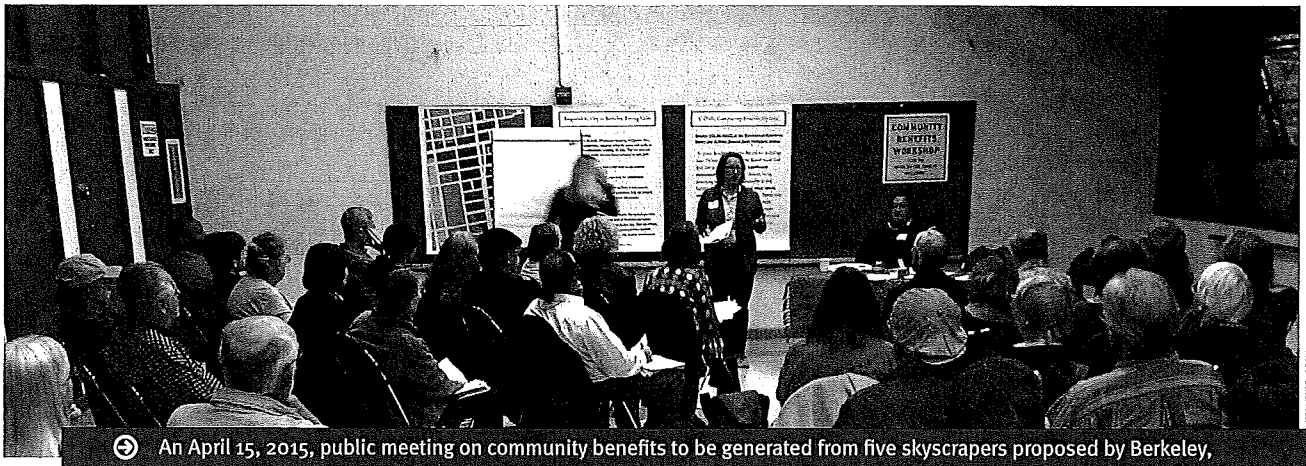
Could "density plus" and "rezonings" be likened to selling zoning? That depends on whether the value capture scheme is based on a plan and how good the plan is. Key questions: Is the additional density based on good planning principles? In the trade-off between the public costs of additional density and the benefits of public amenities, is the public interest clearly the winner? Was the trade-off system openly based on economic analysis and extensive public participation? Were accountability and transparency an integral part of the process?

KEY QUESTIONS

1. Is the additional density based on good planning principles?
2. In the trade-off between the public costs of additional density and the benefits of public amenities, is the public interest clearly the winner?
3. Was the trade-off system openly based on economic analysis and extensive public participation?
4. Were accountability and transparency an integral part of the process?

PUBLIC PARTICIPATION AND COMMUNITY BENEFITS

In changing from a top-down, command-and-control approach to a market-based approach, planning has also embraced a more participatory, community-empowering planning process. The fact that value capture is wedded to an engaged citizenry is in large part due to this shift. However, when public benefits that are part of the status quo are exchanged for other public benefits in a value capture context that enhances developers' profits, it behooves planners to provide ample opportunities for transparency and accountability and for citizens to demand the same. As we shall see from the Santa Monica and San Francisco, California, case studies, value capture originated from citizen demands and was enacted



Nico Calavita

An April 15, 2015, public meeting on community benefits to be generated from five skyscrapers proposed by Berkeley, California's *Downtown Area Plan*.

under their careful watch. Citizen participation is especially appropriate for expressing preferences for possible amenities, and online participation is becoming common. Redwood City, California, for example, is making use of an online forum, in addition to community workshops, to define desired benefits and identify top priorities. The list of amenities identified in cities with value capture includes affordable and workforce housing (usually on top of the list), open space and parks, bikeways, public right-of-way improvements, public art and art programs, and funding for mass transit services.

CASE STUDIES

The following case studies are based on plans prepared with extensive public participation, but with different value capture mechanisms. In downtown San Diego developers pay cash for FARs. In the Eastern Neighborhoods in San Francisco they pay fees for additional height and provide more affordable housing for land-use changes from industrial to mixed use. The same is true in Santa Monica. But in Santa Monica the approval process varies depending on the type of development and incentive: negotiation-based for large developments and ministerial for smaller ones. In all cities the level of cash, fees, and affordable housing requirements were based on economic analyses.

San Diego FAR Incentive and Bonus Payment Program

In 2005 the San Diego's Centre City Development Corporation (CCDC) released a draft plan for downtown San Diego. It proposed to double its development potential, both for residential and commercial uses, from 53 million square feet to 106 million square feet. The draft included increases of two FARs over the earlier (1992) downtown plan for the majority of downtown. In addition, CCDC proposed a system of FAR incentives and transfer of development rights to provide parks, preserve historic sites, and develop inclusionary units on-site.

Citizen groups, notably Citizens Coordinate for Century Three (C-3), pointed out that additional FAR should not be handed out for free. Since they would increase land value considerably, they argued, some of the increases in value should be recaptured for downtown's benefit. C-3 also predicted that additional FAR would probably make the utilization of incentives by developers less desirable. Heeding these criticisms, the plan was changed to maintain the lower FARs of the 1992 plan as the base maximum density. Developers could receive increases in FARs if they provided benefits that included affordable housing, urban open space, three-bedroom units, eco-roofs, and employment uses.

Additionally, a few weeks before the approval of the plan in March 2006, the mayor and the council member for the downtown announced a FAR bonus payment program

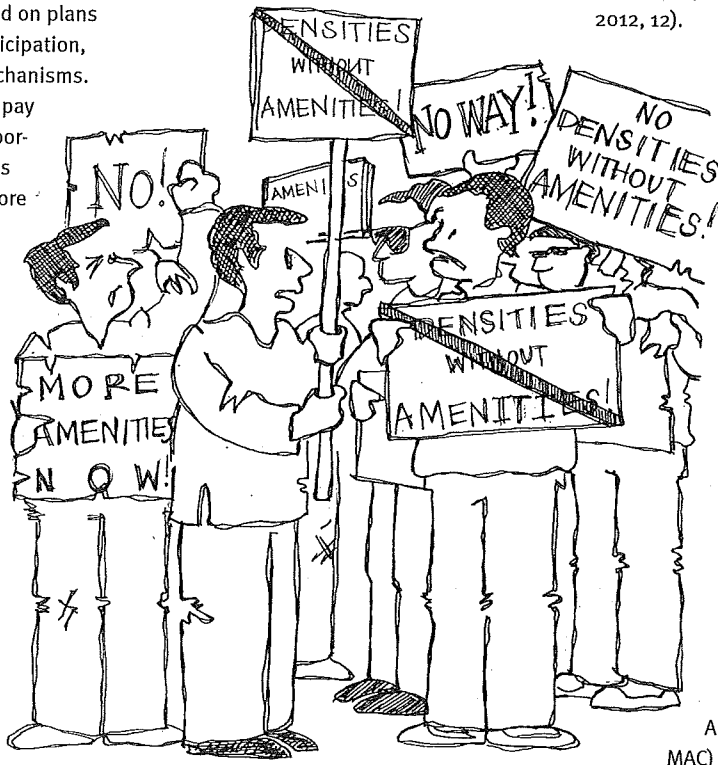


Image courtesy PYATOK

that would help pay for parks and open space: Builders wishing to build above and beyond the levels allowed in the 1992 plan could do so at a cost of $15 per square foot. In May 2007, CCDC approved this FAR bonus program for certain geographic areas of downtown.

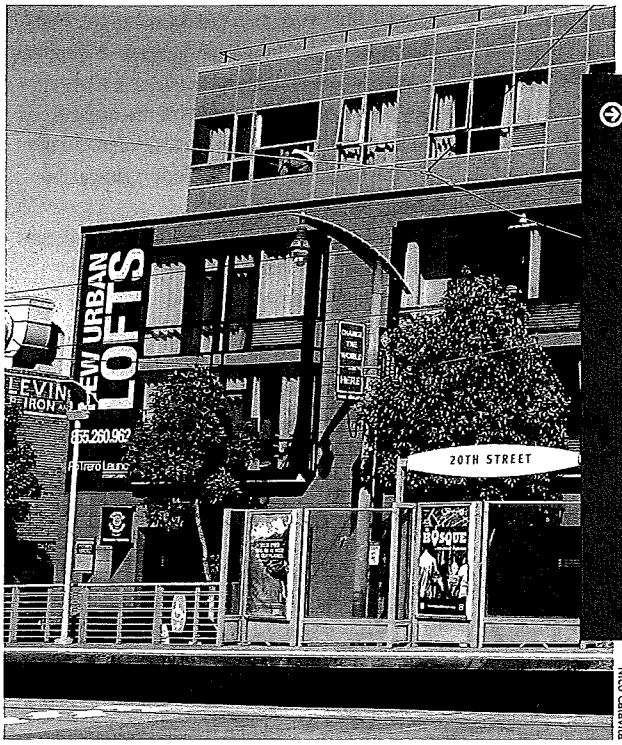
In 2011, the state of California eliminated redevelopment agencies, increasing the need to identify additional funding sources in redevelopment areas. In downtown San Diego, the elimination of funding for the implementation of the open space system especially worried city officials. In 2012, Civic San Diego (CCDC's successor organization) proposed, and the city council approved, an amendment to the FAR acquisition bonus program to expand the areas where FAR could be purchased, as well as an increase of about 50 percent in the number of FARs that could be purchased through the program to help implement the open space and park system in downtown.

According to a Civic San Diego document, the bonus programs "have been attractive to developers and have been successful in increasing densities and have resulted in the provision of public amenities and benefits," with the FAR payment bonus program resulting in $1.7 million in funds for the potential implementation of public parks and enhanced public right-of-way improvements (Civic San Diego 2012, 12).

San Francisco—Eastern Neighborhoods Plan

The plan for San Francisco's Eastern Neighborhoods (ENs) came about as a result of the need for the city to plan for areas containing underutilized industrial areas and the conflicts that arose from the dotcom boom of the late 20th century. During the boom, certain areas east of Market Street—primarily in the mostly Latino Mission District—experienced rapid increases in real estate values, gentrification, and the displacement of families and businesses.

The coalition that formed to fight the changes occurring in their neighborhoods (the Mission Anti-Displacement Coalition, or MAC) decided—when the city initiated a planning process for those areas—that they would create their own plan, called the *People's Plan for Jobs, Housing, and Community*. As part of the *People's Plan* preparation, the leaders of MAC came up with the idea of "Public Benefit Incentive Zoning" (PBIZ). They argued that increases in density create greater value for land owners and developers and that, through PBIZ, a portion of this increase could be captured in the form of public benefits that would mitigate the impact of the additional development. The plan included a menu of public benefits, with affordable housing on top of the list. Eventually the city embraced the concept of PBIZ as part of the planning process for the ENs.



Nico Calavita

Twenty percent of the 196 loft units at Potrero Launch in San Francisco are affordable to households making between 30 and 50 percent of the area median income. The higher affordability levels were in part the result of the rezoning change from industrial to mixed use, which, under the city's *Eastern Neighborhoods Plan*, calls for higher inclusionary requirements.

The EN plan's main task was to identify the areas that could be changed from "gray" industrial areas to mixed use or residential, and those areas where industrial uses, mainly production, distribution, and repair uses (PDR) would remain.

The plan provided additional benefits to land owners and developers, including height increases and removal of conditional use permits for residential uses in all areas—except for PDR preservation districts—and changes in land-use designations from industrial in some areas to residential uses. In order to learn more about how much these changes enhanced land values, the city hired a consultant to prepare a residual land value analysis to estimate the enhanced value from height increases and land-use changes. The analysis showed that residual land values and profitability were generally higher under proposed zonings and requirements than under current zoning. The question remained as to how, and how much of, this value could be recaptured for public benefits.

The city had two choices: (1) to recapture land values through individual project "deals," utilizing development agreements or similar instruments or (2) to establish *a priori* the level of public benefit to be expected, proportional to the benefit received, exercised through a system of fees on top of baseline impact fees. To reflect the relationship between higher densities and increased value for land and development, the city established a tiered approach to baseline and public benefit fees (Table 1).

To fulfill the goal of increased affordable housing production in the ENs, the plan also requires more affordable housing than is required under the city's inclusionary program.

Santa Monica—A Flexible, Tiered Approach

Santa Monica has a long-standing tradition of achieving community benefits through development agreements, including parks and park improvements, and child care centers with subsidies for low-income families. In 2010, after many years of extensive community engagement, the city adopted the *Land Use and Circulation Element (LUCE)*. A fundamental tenet of the *LUCE* program was that future development should fund a range of measurable public benefits, from open spaces and parks to affordable housing.

As part of the *LUCE* preparation, preliminary economic studies analyzed the extent of "enhanced land value" resulting from higher densities.

These analyses indicated that projects that would provide community benefits under *LUCE* were able to achieve financial feasibility. For individual projects the enhanced value is arrived at through economic analyses and pro formas that identify developers' profit. Consultants employed by the developer prepare this analysis, which is then reviewed by consultants to the city in a give-and-take process referred to as a "peer review." The process ends when both consultants agree on the soundness of the analyses.

LUCE established a tiered community benefits structure for projects requesting an increase in the base height of 32 feet. There are three tiers.

Tier 1 establishes the base height and FAR. No community benefits in addition to the existing ones are required, and the approval process is ministerial. Three to seven extra feet are allowed if affordable housing is provided on-site or close to transit corridors.

TABLE 1. FEE SCHEDULE FOR *EASTERN NEIGHBORHOODS PLAN* AREAS

Tier	Description	Residential	Commercial
1	Projects that remain at current height. Projects under increased housing requirements, affordable housing, or other "protected" development types.	$8/GSF	$16/GSF
2	Projects rezoned with minimal (1–2 story) increase in height.	$12/GSF	$20/GSF
3	Projects rezoned with significant (3 or more story) increase in height; other designated districts.	$16/GSF	$24/GSF

Tier 2 allows additional height and FAR through a ministerial approval process when community benefits are provided.

With Tier 3 even more height and FAR are allowed in exchange for higher levels of community benefits. It is when developers seek Tier 3 density increases that development agreements are required. This process requires additional public review and flexibility and encourages high-quality projects. Tier 3 projects are larger in scale, and development agreements provide developers with a greater degree of entitlement certainty.

However, given the high costs of development agreements, the city is now pursuing a ministerial approach with fixed fee schedules as part of its zoning code update. When a developer chooses to exceed densities from Tier 1 up to Tier 2, he will be required to provide additional community benefits. The quantity (additional fees or affordable housing units) of these community benefits will be defined in 2015 as part of the city's zoning update. At the time this article was written (April 2015), the proposed benefits are:

Given the high costs of development agreements, Santa Monica is now pursuing a ministerial approach with fixed fee schedules as part of its zoning code update.

- *Affordable Housing*: At least 50 percent more than what is required under Tier 1. For nonresidential projects the housing mitigation fee is increased by 14 percent above the base fee as required under the affordable housing fee for commercial development.
- *Transportation Impact Fee, Open Space Fee, and Child Care Facilities*: 14 percent above base fee. An alternative for open space is the provision of accessible open space that complies with specific requirements.

These increases were based on financial analyses of development prototypes that found that the proposed increases could be absorbed by developers of projects like the ones analyzed, and could result in financially feasible projects.

CONCLUSIONS

Value capture can generate benefits for both the public and the developer, provided that decisions about incentives and amenities are based on economic analysis, transparency, accountability, and intensive public participation. The value captured is a portion of the *increase* in land values that result from public action. This increase is referred to in other English-speaking countries as "planning gain." The San Diego and San Francisco case studies show examples of value capture based on plans. In Santa Monica the overall program is also based on a plan, the *LUCE*, that provides a framework for its "negotiation-based" implementation, based on development agreements. In the making is an alternative approach for smaller projects based on fixed fees.

At a time when planners advocate for compact development that is likely to sharply increase land values, and as public resources continue to decline, planners in areas with growth potential should capture a portion of that increase to ensure funding for the public city.

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Cover: Image courtesy PYATOK; design concept by Lisa Barton.

VOL. 32, NO. 6

Zoning Practice is a monthly publication of the American Planning Association. Subscriptions are available for $95 (U.S.) and $120 (foreign). James M. Drinan, JD, Executive Director; David Rouse, AICP, Managing Director of Research and Advisory Services.

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

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6