

# Zoning Bulletin

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## Nonconforming Use—City says nonconforming use ordinance applies to individual mobile home park lots

Mobile home park lot owner contends ordinance applies only to park use as a whole

Citation: *Cleveland MHC, LLC v. City of Richland*, 2015 WL 2250376 (Miss. 2015)

MISSISSIPPI (05/14/15)—This case addressed the issue of whether a

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mobile-home park as a whole, or the individual lots in a mobile-home park, are the nonconforming use resulting from a park's location in a zone that prohibits residential use.

**The Background/Facts:** Since the 1950s, Cleveland Mobile Home Community ("CMHC") had been operating in the city of Richland (the "City") in Rankin County (the "County"). CMHC was a mobile-home park that included spaces for 138 mobile homes and seventeen campers or recreational vehicles, which were rented to tenants. In 1975, the City zoned the land on which CMHC operated as "I-1, Light Industrial Zoning." In that zone, residential uses were prohibited. Accordingly, as of 1975, CMHC became a nonconforming use.

Regarding nonconforming uses, the City ordinances provided that nonconforming lots, uses, or structures were allowed "to continue until they are removed" but the "survival" of the nonconformity is not encouraged. Further, City ordinances provided that nonconformities "shall not be enlarged upon, expanded[,] or extended, [nor] be used as grounds for adding other [s]tructures or uses prohibited elsewhere in the same district."

For years, while CMHC was a nonconforming use, mobile homes were removed from the property and replaced. Cleveland MHC, LLC (the "Park Owner") purchased the mobile-home park in 2008. In April 2011, apparently due to deterioration of the property, the City informed the Park Owner that it would begin enforcing the zoning ordinance and, when an existing mobile home was removed, it could not be replaced.

The Park Owner appealed to the City's Board of Aldermen (the "Board"). The Board upheld the City's decision and voted unanimously to adopt the following resolution: "That in the event a mobile home or similar vehicle is removed from its then present location in the Cleveland Mobile Home Park, another mobile home or similar vehicle shall not be placed on the vacated site."

The Park Owner filed an appeal in the County circuit court; the circuit court held that the Board's action was not in error.

The Park Owner again appealed. The Court of Appeals held that the City's interpretation of the ordinance was arbitrary and capricious and that it deprived the Park Owner of its "constitutional right to enjoy [its] property." More particularly, the Court of Appeals held that the City's nonconforming use ordinance applied to the "mobile-home park as a whole," not to individual lots within the park. Thus, held the Court of Appeals, as long as the Park Owner operated as a mobile-home park and did not expand, its operation was a permitted use.

The City appealed.

**DECISION: Judgment of Court of Appeals affirmed.**

As a matter of first impression (i.e., the first time the court ruled on the issue), the Supreme Court of Mississippi held that the mobile-home park as a whole, rather than individual lots within the park, were the nonconforming use resulting from the park's location in a zone that prohibited residential uses.

In so holding, the court explained that since the individual lots in the mobile-home park were rented to tenants and not owned individually, the

nonconforming use belonged to the Park Owner and the nonconformity was the Park Owner's use of the land as a mobile-park home. While the individual structures in the park were nonconformities in themselves, they made up parts of the whole, said the court.

Having found that the nature of the nonconforming use was the Park Owner's use of the property as mobile-home park, the court concluded that the City's interpretation of the nonconforming use ordinance to apply on a lot-by-lot basis was arbitrary, capricious, and illegal in that: (1) it deprived the Park Owner of its constitutional right to enjoy its property, as the resolution effectively would destroy the mobile-home park; and (2) the City allowed mobile homes to be moved on and off the property for decades without interpreting or enforcing the nonconforming use ordinance on a lot-by-lot basis, and only did so now seemingly without reason and with an apparent "disregard for the surrounding facts and settled controlling principles."

See also: *Stagecoach Trails MHC, L.L.C. v. City of Benson*, 232 Ariz. 562, 307 P.3d 989 (Ct. App. Div. 2 2013).

See also: *Eddins v. City of Lewiston*, 150 Idaho 30, 244 P.3d 174 (2010).

See also: *Sunset Estate Properties, L.L.C. v. Village of Lodi*, 2013-Ohio-4973, 2013 WL 6021470 (Ohio Ct. App. 9th Dist. Medina County 2013), appeal allowed, 138 Ohio St. 3d 1432, 2014-Ohio-889, 4 N.E.3d 1050 (2014) and judgment aff'd, 142 Ohio St. 3d 351, 2015-Ohio-790, 30 N.E.3d 934 (2015).

Compare: *City of Foley v. McLeod*, 709 So. 2d 471 (Ala. 1998) (holding that zoning ordinance, which prohibited enlarging or expanding nonconforming use of land and prevented repair or restoration of nonconformities that were damaged beyond 50% of their replacement value, applied to replacement of existing mobile homes at nonconforming mobile home park).

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*Case Note:*

*In its holding, the court made clear the distinction between nonconforming structures—which cannot, under Mississippi law, be replaced or rebuilt with another nonconforming structure—and nonconforming use of property, such as that here—which has not been destroyed or changed.*

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## Telecommunications—County denies conditional use permit application for cellular tower

Permit applicant argues denial failed to comply with Telecommunications Act procedural requirements and was not supported by substantial evidence

Citation: *Smith Communications, LLC v. Washington County, Ark.*, 2015 WL 2193027 (8th Cir. 2015)

*The Eighth Circuit has jurisdiction over Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota.*

EIGHTH CIRCUIT (ARKANSAS) (02/15/11)—This case addressed the issues of whether: (1) a county provided a telecommunications conditional use permit applicant with adequate notice of the reasons for the county's denial of the permit; and (2) the county's denial of the permit application was supported by substantial evidence.

**The Background/Facts:** Smith Communications, LLC ("Smith") sought to construct a 300-foot-tall cellular tower in Washington County, Arkansas (the "County"). The property on which the proposed tower was to be located was zoned "Agriculture/Single-Family Residential." Smith applied to the County for a conditional use permit to build the cellular tower.

Section 11-200(a) of the County's zoning code governs applications for conditional use permits ("CUPs"). Among other things, § 11-200(a) provides a CUP may be granted if the proposed use: ". . . (4) . . . is compatible with the surrounding area; (5) . . . will not be detrimental to or endanger the public health, safety, moral, comfort or general welfare; [and] (6) . . . will not be injurious to the use and enjoyment of other property in the surrounding area for the purposes already permitted, nor substantially diminish or impair property values in the surrounding area."

The County Planning Board approved Smith's CUP application.

Local residents appealed that approval to the County's Quorum Court. They argued, among other things, that the proposed cellular tower would detrimentally affect their property values and would not be compatible with the surrounding area. The Quorum Court held two meetings on the appeal, and ultimately voted to reject Smith's CUP application, finding it failed to meet the requirements of zoning code § 11-200(a)(4), (5), and (6).

Four days after the Quorum Court reached its decision, the County sent Smith an e-mail containing a letter of denial for the CUP application. Approximately one hour later, the County sent Smith another e-mail stating that "[t]he minutes and video of the first and last Quorum Court meetings will act as the County's written reason for denial." At that time, minutes from the first meeting had already been available to Smith for a week; minutes from the

second meeting, however, were not available to Smith until several weeks later.

Smith filed suit against the County. Smith asserted that the County failed to provide a legally adequate explanation of its reasons for the denial and that the denial was not based on substantial evidence in violation of the Telecommunications Act of 1996 (the "Act"). (47 U.S.C. § 332(c)(7)(B)(iii) and (v).)

The district court held that the County could not rely on the meeting minutes to constitute a legally adequate explanation for the denial under the Act. The court, therefore, remanded the matter to the Quorum Court and required the County to explain the reasons for its denial in a writing separate from the minutes and written record. Accordingly, on April 18, 2014, the County filed an additional explanation, again reciting the requirements of § 11-200(a)(4), (5), and (6) and stating that the denial was based on the tower's proximity to surrounding properties, its detrimental impact on neighboring residents' "exceptional view," and its "incompatib[ility] with the surrounding area." The district court ultimately found that new statement complied with the Act. The district court also concluded that substantial evidence supported the County's denial of Smith's CUP application.

Smith appealed. On appeal, Smith argued that: (1) the district court failed to provide expedited review of Smith's appeal of the CUP denial, as required by the Act (47 U.S.C.A. § 332(c)(7)(B)(v)), because the district court "should have simply 'order[ed] the issuance of a permit' upon concluding that [the County] had failed to provide an adequate written explanation for its denial"; and (2) the County violated the Act by denying the CUP application without substantial evidence supporting its decision.

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

The United States Court of Appeals, Eighth Circuit, first held that the County had provided a legally adequate explanation for its CUP denial when it referred Smith to the meeting minutes for an explanation of the denial. Under the law, said the court, "a locality may rely on detailed meeting minutes" to provide its written reasons for denial, "so long as the locality's reasons are stated clearly enough to enable judicial review." Here, the court found that the meeting minutes were sufficiently clear to "enable judicial review." The meeting minutes from the first meeting alone contained 30 pages of detailed notes from the participants' presentations and discussions about the tower.

Still, the court did recognize that, by failing to provide Smith with the meeting minutes from the second meeting until 24 days after notifying Smith of its denial, the County violated the Act's requirement that written reasons be made available at "essentially the same time as [the locality] communicates its denial." However, the court found that failure was, at most, a harmless error, and did not require the district court to grant Smith immediate relief by ordering the issuance of a CUP since the meeting minutes from the first meeting were already available at the time of the written denial and informed Smith of the reasons for the denial. Thus, the court concluded that Smith received adequate notice of the reasons for the Quorum Court's denial of its CUP application, in compliance with the Act.

The court also held that substantial evidence supported the Quorum Court's

denial of Smith's application. The court explained that the Act's "'substantial evidence' requirement is 'directed at whether the local zoning authority's decision is consistent with the applicable local zoning requirements.'" Here, the court found that the Quorum Court had analyzed the 300-foot tower's placement and proximity to nearby residences and reviewed evidence (including pictures and simulations) of the specific areas in question, and that it had similarly evaluated arguments and evidence about, among other things, the tower's detrimental impact on neighboring residents' unique views and property values. "Keeping in mind that the substantial evidence standard is 'essentially deferential,' [the court concluded] that the [Quorum Court] had before it substantial evidence on the record as a whole that the tower's scale, its proximity to residences, and the surrounding environment made approval inappropriate in view of the considerations outlined in [the County zoning code § 11-200(a)]."

See also: *T-Mobile South, LLC v. City of Roswell, Ga.*, 135 S. Ct. 808, 816, 190 L. Ed. 2d 679 (2015).

See also: *Sprint Spectrum, L.P. v. Platte County, Mo.*, 578 F.3d 727 (8th Cir. 2009).

## Nonconforming Use—Restaurant obtains permit for live entertainment

Opponents appeal grant of permit, arguing permit applicant failed to establish existence of legal nonconforming use of live entertainment

Citation: *Vieux Carre Property Owners v. City of New Orleans*, 2014-825 La. App. 4 Cir. 4/15/15, 2015 WL 1736870 (La. Ct. App. 4th Cir. 2015)

LOUISIANA (04/15/15)—This case addressed the issue of whether a restaurant had established the existence of a legal nonconforming use of live entertainment.

**The Background/Facts:** Antoine's Restaurant, L.L.C. ("Antoine's") has been operating a restaurant in New Orleans (the "City") since 1840. Since 1940, it has been operating a restaurant out of a complex of buildings and several distinct dining areas that are all connected to one another. In 2008, Antoine's began renovating its Hermes Room into "Hermes Bar." On April 11, 2011, Antoine's received a letter from the Louisiana Department of Safety and Permits (the "Department") stating that live entertainment was not a permitted use at "713 St. Louis Street (Hermes Bar)" because the property was zoned VCC-2, Vieux Carre Commercial, under the Comprehensive Zoning Ordinance ("CZO").

Upon receipt of the letter, Antoine's filed an application for a Mayoralty Permit for its live entertainment. Under the City's Code of Ordinances, a Mayoralty Permit may be issued for certain activities such as live entertainment. Along with the application, Antoine's submitted 14 affidavits

from staff members and owners of Antoine's attesting to each person's knowledge that Antoine's had offered live entertainment as part of its operation on a continuous, uninterrupted basis, since as far back as 1955.

The Department's Director, Paul May, reviewed the application and affidavits. The Director approved the issuance of the Mayoralty Permit for live entertainment to Antoine's on April 15, 2011 "pursuant to affidavits of non-conforming use."

Subsequently, the Vieux Carre Property Owners, Residents & Associates, Inc., French Quarter Citizens, Inc., and Carol Allen (collectively the "Opponents") filed an appeal of the Director's decision with the City's Board of Zoning Appeals ("BZA"). The Opponents argued, among other things: that the live entertainment permit issued "at a cocktail lounge at one property (713 St. Louis)" was being used "in an attempt to legitimize an illegal use at another parcel (725 St. Louis)"; and that Antoine's failed to establish a nonconforming use because the submitted affidavits failed to establish the "4-hour, 5-day use required by the CZO." The Opponents argued that CZO Article 13, § 13.6.1 required a nonconforming use be continuously operating for four hours a day, five days a week, and that Antoine's did not offer that frequency or duration of live entertainment.

The BZA denied the Opponent's appeal.

The Opponents again appealed. The district court affirmed the BZA's decision.

The Opponents again appealed. On appeal, the Opponents argued that Antoine's affidavits failed to provide sufficient information about the regular, continuous use of live entertainment to establish a legal nonconforming use of live entertainment.

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

The Court of Appeal of Louisiana held that Antoine's had established the existence of a legal nonconforming use of live entertainment.

In so holding, the court explained a nonconforming use is defined as "[a] use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance although it does not comply with the use restrictions applicable to the area in which it is situated." The court further explained that a property owner who seeks to establish and retain a nonconforming use has the burden of producing evidence that the nonconforming use of the property has been continuous and consistent. "What constitutes sufficient usage to establish nonconforming status may vary with the facts of each case," but the nonconforming use must be continuous and not interrupted for a period in excess of six months, said the court. In addition, noted the court, the CZO placed the burden on Antoine's (as the property owner) to establish the existence and retention of a nonconforming use by clear and convincing evidence. (CZO Article 13, § 13.2.1.) Under the CZO, such evidence "shall include, but need not be necessarily restricted to; such documents, as rent receipts, affidavits, documentation of utility services, or other information as may be deemed necessary in a particular case." (CZO Article 13, § 13.7.) At the time a permit or certificate of occupancy is filed, the property owner must produce acceptable evidence to the Director of Safety

and Permits for an initial determination of the existence of the nonconforming use, said the court.

In this case, Antoine's had sought a permit for the existence of its nonconforming use of live entertainment and submitted 14 affidavits from employees and members of the family owning Antoine's. The court found that each affidavit indicated the length of time the affiant had worked at and been "familiar with all facets of the operations of Antoine's," dating back to 1955; and the court found that each affiant attested that Antoine's "has had live entertainment with no interruptions in excess of six months as part of the Antoine's experience" during the entire period of the affiant's tenure at Antoine's.

Again, the Opponents had argued that, to establish a legal nonconforming use of live entertainment, more specific information than that provided in Antoine's submitted affidavits was required about the regular, continuous use of live entertainment. The Opponents had argued that the affidavits lacked necessary specificity regarding the frequency and duration of the nonconforming use, as required by the 4/5 rule of CZO Article 13, § 13.6.1.

However, the Department's Director had interpreted the 4/5 rule in terms of the use of the property to operate a business. The Director had found that the 4/5 rule was satisfied here by the fact that Antoine's operated a business upon the property for four hours a day, five days a week, and the nonconforming use for live entertainment had been a regular and continuous part of Antoine's operations. The Director had concluded that the nonconforming use itself did not need to continuously operate for four hours a day, five days a week.

Here, the appellate court found that the evidence (the affidavits) provided by Antoine's established that Antoine's had been operating at the property since prior to the original 1956 Code of Ordinances and had offered live entertainment as a regular and continuous part of its operation of the restaurant complex since 1955, 15 years prior to the adoption of the 1970 ordinance restricting live entertainment in the zoning district in which Antoine's was located. The court noted that, on the basis of that evidence submitted by Antoine's the Director made a decision, and the BZA affirmed, that the existence of a nonconforming use had been sufficiently established. The court noted that the Opponents failed to produce any contradicting evidence. Accordingly, the court affirmed that BZA's decision upholding the Department Director's issuance of the Mayoralty Permit for live entertainment to Antoine's based on establishment of a legal nonconforming use of live entertainment.

See also: *Humphrey v. Robertson*, 709 So. 2d 333 (La. Ct. App. 4th Cir. 1998).

See also: *Phillips' Bar & Restaurant, Inc. v. City of New Orleans*, 116 So. 3d 92 (La. Ct. App. 4th Cir. 2013), writ denied, 123 So. 3d 1226 (La. 2013) and writ denied, 123 So. 3d 1227 (La. 2013).

## Enforcement of Regulations— Property owner appeals notice of town ordinance violation

Court addresses issue of whether notice of violation is appealable

Citation: *Paradis v. Town of Peru*, 2015 ME 54, 2015 WL 2114385 (Me. 2015)

MAINE (05/07/15)—This case addressed the issue of whether a notice of ordinance violation could be appealed.

**The Background/Facts:** In 2010, Donald R. Paradis (“Paradis”) applied for and obtained a building permit to construct a two-car garage on a parcel of property in Peru, Maine (the “Town”). In August 2013, the Town sent Paradis a notice of violation that the garage violated multiple town ordinance provisions.

Paradis appealed to the Town’s Board of Appeals (the “Board”). The Board concluded that the town ordinance provisions had been properly applied. The Board denied Paradis’ appeal.

Paradis again appealed to superior court. The superior court affirmed the Board’s judgment.

Paradis again appealed.

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

The Supreme Judicial Court of Maine held that the notice of violation issued to Paradis was not an appealable decision. As such, the court did not reach the merits of the appeal.

The court noted that, under Maine law, “[u]ntil very recently, appeals of notices of violation were not justiciable because a notice merely provided an interpretation of an ordinance; unless and until a municipality acted to enforce the decision in some meaningful way, appeals from notices of violation were ‘dismissed as calling for an advisory opinion.’ ” The court further noted that, in 2013, however, the Maine Legislature enacted a statutory amendment providing for board of appeals and Superior Court review of municipal notices of violation. Thus, since October 2013, under 30-A M.R.S. § 2691(4), “[a]bsent an express provision in a charter or ordinance that certain decisions of its code enforcement officer or board of appeals are only advisory or may not be appealed, a notice of violation or an enforcement order by a code enforcement officer under a land use ordinance is reviewable on appeal by the board of appeals and in turn by the Superior Court under the Maine Rules of Civil Procedure, Rule 80B.”

Here, the notice of violation against Paradis was sent before the effective date of § 2691(4). Moreover, the Town’s Ordinance expressly stated that no appeal from a notice of violation could be taken. (The Town’s Ordinance did

allow administrative or variance appeals but not those for “enforcement-related matters.”) Thus, the appellate court concluded, § 2691(4) by its express terms, did not provide Paradis with a right to appeal. Accordingly, the appellate court concluded that the Board lacked jurisdiction to consider Paradis’s appeal, which in turn deprived the superior court of jurisdiction to consider it, and further precluded the appellate court’s review of the merits of the matter.

See also: *Dubois Livestock, Inc. v. Town of Arundel*, 2014 ME 122, 103 A.3d 556 (Me. 2014).

## Zoning News from Around the Nation

### ILLINOIS

A state House committee has unanimously endorsed Senate Bill 920, which would allow some Illinois counties and municipalities to create zoning regulations for wind farms. The legislation is intended to clarify existing law regarding the placement of wind turbines. Among other things, the legislation provides that a county board must give public notice of where a windmill is set to go no more than 30 days before it is constructed. Any county zoning code created from the legislation does not affect wind farms already in place. Senate Bill 920 already advanced through the Senate.

Source: *The Southern Illinoisian*; <http://thesouthern.com>

### KENTUCKY

Proposed state regulations “would allow digital LED billboards throughout the state and let billboard owners cut trees on public rights of way that block visibility of their outdoor advertisements.” The proposed regulations “would allow billboard companies to take down four traditional billboards to create one new LED billboard, or the companies could take down three static billboards to convert one static billboard into an LED billboard, which has an electronic screen that cycles through advertisements.” The regulations were recently presented by Kentucky Transportation Cabinet officials. Environmental groups are reportedly opposing the proposed regulations, arguing that they could “lead to an explosion of light-polluting billboards, environmental destruction and property devaluation.” Meanwhile, “[I]obbyist for the outdoor advertising industry countered that the regulations would actually decrease the number of billboards in the state, and that vegetation would be removed in an environmentally responsible manner.” The regulations “could take effect as early as October after being reviewed by the legislature’s Administrative Regulation Review Subcommittee and the Interim Joint Committee on Transportation.”

Source: *Lexington Herald-Leader*; [www.kentucky.com](http://www.kentucky.com)

### MARYLAND

In Ocean City, drafted legislation that would establish an R-1A Single Family Residential District and prohibit short-term rentals was forwarded to public hearing.

Source: *The Dispatch*; <http://mdcoastdispatch.com>

## TEXAS

Governor Greg Abbott has signed House Bill 40 into law. The new law reportedly puts “unprecedented restrictions on the ability of cities and other local governments to regulate the oil and gas industry.” “HB 40 requires that any local regulation of the oil and gas industry be ‘commercially reasonable,’ ” and defines “commercially reasonable” as “a condition that would allow a reasonably prudent operator to fully, effectively, and economically exploit, develop, produce, process, and transport oil and gas.”

Source: *Denton Record-Chronicle*; [www.dentonrc.com](http://www.dentonrc.com)

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## Uses—Planning commission approves wind turbine project

Adjacent landowners challenge approval, arguing it prejudices them

Citation: *Dunmoyer v. Wells County*, 2015 WL 2229452 (Ind. Ct. App. 2015)

INDIANA (05/12/15)—This case addressed the issue of whether a planning commission's approval of a wind turbine project prejudiced neighboring landowners such that landowners were entitled to relief from the decision.

**The Background/Facts:** In March 2013, West County Wind II, LLC, Apex Clean Energy Holdings, LLC, and Apex Wind Energy, Inc. (collectively,

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“Apex”) filed with the Wells County, Indiana, Area Plan Commission (the “Plan Commission”) a petition for the development of a large wind energy conversion system (“WECS”) project. The WECS project sought to construct approximately 68 wind turbines on private property located in southern Wells County, Indiana.

Development of the WECS proposed project was governed by the Wells County Zoning and Floodplain Management Ordinance (“the Zoning Ordinance”). Apex proposed to build the WECS project on land in Wells County that was zoned “A-1,” Agriculture-Intensive. Pursuant to the Zoning Ordinance, large WECS projects were permitted uses in A-1 districts provided that they complied with the provisions of Zoning Ordinance Article 15. Article 15 set forth specific requirements with which a WECS project must comply, including: property setback; noise; shadow flicker; color and finish; signage; and safety and installation standards. Article 15 also required review and approval of a WECS Project Development Plan be conducted in accordance with the requirements of Zoning Ordinance Article 14. Article 14 of the Zoning Ordinance addressed development plans in general, including requirements that development plans be: compatible with the surrounding land uses; harmonious with adjacent buildings and grounds; and allow for a total visual impression that is consistent with the environment of the neighborhood.

Adjacent landowners (the “Landowners”) opposed Apex’s proposed WECS project. The Landowners noted that the WECS project would result in wind turbines being in close proximity to their homes. They contended that the WECS project would: decrease their property values; subject them to shadow flicker and noise from the wind turbines; and result in a loss of use and enjoyment of their land.

Ultimately, the Plan Commission approved Apex’s WECS Project Development Plan.

The Landowners appealed. Among other things, they argued that the Development Plan failed to comply with other requirements of the Zoning Ordinance, including compliance with: floodplain management; traffic management; and environmental performance standards. They also argued that the Plan Commission made no findings regarding whether the WECS project was compatible with surrounding land use, harmonious with adjacent buildings and properties, and visually consistent with the environment of the neighborhood as required by Zoning Ordinance sections 14-05(1), (2), and (3).

The trial court found that the Landowners had failed to show that they were “prejudiced by an illegal zoning decision,” as required for relief. (See I.C. § 36-7-4-1614(d).) Noting that a WECS was a permitted use on land zoned A-1 and that Apex’s Development Plan met or exceeded the WECS development requirements (section 15 of the Zoning Ordinance) about which the Landowners complained, the trial court determined that the Landowners were neither aggrieved nor prejudiced by the approval of Development Plan. Finding no material issues of fact and deciding the matter on the law alone, the court issued summary judgment in favor of the Plan Commission.

The Landowners again appealed.

**DECISION: Judgment of superior court affirmed, and matter remanded with instructions.**

The Court of Appeals of Indiana agreed that the Landowners were not prejudiced by the Plan Commission's approval of Apex's WECS Project Development Plan, and therefore were not entitled to relief sought.

The court explained that relief was available to the Landowners only if they could prove that they were prejudiced by the Plan Commission's approval of Apex's WECS Project Development Plan. (I.C. § 36-7-4-1614(d).) The court also explained that, pursuant to powers bestowed upon local legislative bodies by Indiana's Zoning Enabling Act, the Wells County legislative body established the Zoning Ordinance. (I.C. § 36-7-4-1401.5, -1403.) Here, the court found that Apex's Development Plan was in accordance with Article 9 of the Zoning Ordinance (permitted uses in a zoning district) and Article 15 (setting forth requirements for WECS projects).

The appellate court concluded that the circumstances about which the Landowners contended they had been prejudiced—including their proximity to the wind turbines and its resultant noise and shadow flicker plus a decrease in the value of their land—were circumstances created not by the Plan Commission's approval of Apex's Development Plan, but instead, by the legislative body's enactment of Article 15. Accordingly, the court held that the trial court did not err in granting summary judgment to the Plan Commission upon a finding that Landowners were not prejudiced by the zoning decision approving Apex's WECS Project Development Plan.

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*Case Note:*

*In Count II of their complaint, the Landowners had also asked the superior court to declare that a reciprocal setback provision in Article 15 of the Zoning Ordinance was invalid and should be stricken from the Zoning Ordinance because it constituted a taking of private property without just compensation. The trial court had granted the Landowners' petition and ordered that "the Reciprocal Setback provision in Article 15 of the Zoning Ordinance is declared invalid and should be stricken from the Zoning Ordinance." Additionally, the trial court had ordered that the WECS Project Development Plan submitted by Apex be remanded to the Plan Commission with instructions that the Plan Commission review the Development Plan and its record of proceedings leading up to its decision, to determine if the Development Plan satisfied or failed to satisfy the requirements of Article 15 of the Zoning Ordinance and "any additional requirements incorporated into these Articles by reference" (i.e., Article 14 and its compatibility requirements). The parties did not appeal the trial court's conclusions on those two issues. Therefore, while the appellate court affirmed the trial court's grant of partial summary judgment upon a finding that the Landowners were not aggrieved or prejudiced by the Plan Commission's approval of Apex's Development Plan, the appellate court also remanded the action to the trial court with instructions to remand the Apex Development Plan to the Plan Commission.*

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## Preemption—State law allows medical marijuana collective gardens, but city zoning ordinance prohibits collective gardens

Coalition contends state law preempts the ordinance

Citation: *Cannabis Action Coalition v. City of Kent*, 2015 WL 2418553 (Wash. 2015)

WASHINGTON (05/21/15)—This case addressed the issue of whether the Washington State Medical Use of Cannabis Act, which authorizes qualifying patients to participate in “collective gardens” to pool resources and grow medical marijuana, preempts local zoning ordinances that prohibit collective gardens.

**The Background/Facts:** Under the Washington State Medical Use of Cannabis Act (“MUCA”), chapter 69.51A RCW, qualifying patients may participate in “collective gardens” to pool resources and grow medical marijuana for their own use. (RCW 69.51A.085(1).) Under the MUCA, participating in a collective garden involves “sharing responsibility for acquiring and supplying the resources required to produce and process cannabis for medical use,” such as by providing real estate, equipment, supplies, or labor for the collective garden. (RCW 69.51A.085(2).) The MUCA clarifies that local governments retain authority to regulate the production, processing, or dispensing of medical marijuana through zoning, business licensing, health and safety requirements, and business taxes. (RCW 69.51A.140.)

In 2012, the city of Kent, Washington, enacted an ordinance (the “Ordinance”) that prohibits collective gardens. The Ordinance defines “collective gardens” similar to how they are defined under the MUCA. The Ordinance concerns “collective gardens” wherein up to 10 individuals pool resources to grow medical marijuana in potentially large operations of up to 45 plants and 75 ounces of usable marijuana. (Kent City Code 15.02.074(A)-(C).) The Ordinance adopts zoning requirements for “the growing, production, processing, transportation, and delivery of cannabis” in a collective garden, if seven conditions defining a collective garden are satisfied.

The Cannabis Action Coalition and a number of individuals (collectively, the “Coalition”) sued the city of Kent, its city council, and its mayor (collectively, “Kent”), seeking to have the Ordinance declared preempted and invalid. The Coalition contended that the MUCA preempted the Ordinance.

Finding no issue of material fact and deciding the matter on the law alone, the superior court issued summary judgment for Kent, upholding the Ordinance.

The Coalition appealed. The court of appeals held that the MUCA did not preempt the Ordinance.

The Coalition again appealed.

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

The Supreme Court of Washington held that the MUCA, which authorizes qualifying patients to participate in “collective gardens” to pool resources and grow medical marijuana, did not preempt Kent’s zoning Ordinance, which prohibited collective gardens.

In so holding, the court explained that an ordinance is valid under Washington Constitution art. XL, § 11 “unless: (1) the Ordinance conflicts with some general law; (2) the Ordinance is not a reasonable exercise of the [local government’s] police power; or (3) the subject matter of the Ordinance is not local.”

Here, the Coalition had contended only that the Ordinance conflicted with the MUCA, a general law. The court explained that the MUCA would preempt the Ordinance if: (1) there was express legislative intent for the MUCA to preempt the field of medical marijuana regulation; (2) if field preemption of medical marijuana regulation was implied by the MUCA; (3) if the Ordinance conflicted with the MUCA by forbidding what the MUCA permitted or allowing what the MUCA prohibited.

The court found the MUCA had no express preemption clause. With regard to implied preemption, the court said that when a state statute expressly provides for local jurisdiction over a subject, state law does not impliedly preempt the field of that subject. Here, the court found that the MUCA expressly contemplated local regulation of medical marijuana. The MUCA provides that cities and towns may adopt and enforce “any of the following pertaining to the production, processing, or dispensing of cannabis or cannabis products within their jurisdiction: Zoning requirements, business licensing requirements, health and safety requirements, and business taxes.” (RCW 69.51A.140(1).) Given that express state law recognition of local jurisdiction over medical marijuana regulation, the court concluded that the MUCA does not impliedly preempt the field of medical marijuana.

With regard to conflict preemption, the court said that the MUCA would preempt the Ordinance only if the Ordinance “directly and irreconcilably conflicts with the statute.” The Coalition had argued that the MUCA irreconcilably conflicted with the Ordinance because the MUCA granted a right to engage in a collective garden under RCW 69.51A.085, yet the Ordinance prohibited the same activity. The court disagreed with the Coalition’s argument. Instead, the court found that the plain text of RCW 69.51A.140(1), and its statutory context, “demonstrate that it provides local jurisdictions the authority to enact zoning requirements pertaining to the land use activity of participating in a collective garden.” In so finding, the court also rejected the Coalition’s argument that the zoning power allowed localities under RCW 69.51A.140(1) over the “production” and “processing” of medical marijuana applied only to commercial or licensed producers. The court found the plain language made clear that zoning authority under the MUCA included over noncommercial collective gardens.

Finally, the court addressed whether the Ordinance was otherwise consistent with state law. The court found that the Kent’s Ordinance concerned only a land use—namely zoning requirements for “the growing, production, processing, transportation and delivery of cannabis” in a collective garden.

The court held that Kent therefore properly exercised its authority under RCW 69.51A.140(1) (the MUCA) to zone the land use activity involving collective gardens. The court concluded that the Ordinance was consistent with state law and not preempted.

See also: *Lawson v. City of Pasco*, 168 Wash. 2d 675, 230 P.3d 1038 (2010).

## Standing—Restaurant challenges zoning decision for competitor

Competitor says challenge must be dismissed as it was brought by restaurant that had forfeited right to do business in state

Citation: *A Guy Named Moe, LLC v. Chipotle Mexican Grill of Colorado, LLC*, 2015 WL 3440472 (Md. Ct. Spec. App. 2015)

MARYLAND (05/29/15)—This case addressed the issue of whether a foreign LLC that has lost its right to do business in the state of Maryland has a right to bring a petition as a “person aggrieved,” challenging a zoning decision.

**The Background/Facts:** Since 2006, A Guy Named Moe, LLC (“Moe’s”) had operated Moe’s Southwest Grill on Dock Street in Annapolis, Maryland. In August 2012, Chipotle Mexican Grill of Colorado, LLC (“Chipotle”) filed with the City of Annapolis’s Department of Planning and Zoning an application for a special exception to operate a “standard restaurant”—Chipotle Mexican Grill—in close proximity to Moe’s Southwest Grill on Dock Street. The City of Annapolis’s Board of Appeals (the “Board”) approved Chipotle’s application. Moe’s appealed, challenging the Board’s decision.

Chipotle asked the circuit court to dismiss Moe’s appeal. Chipotle noted that Moe’s had forfeited its right to do business in Maryland in November 2006 when it failed to file the proper registration fees, among other things, and had nonetheless continued to do business in Maryland. As such, Chipotle contended that Moe’s lacked standing (i.e., the legal right to bring a lawsuit) as a taxpayer under Maryland Code, § 4-401(a) of the Land Use Article (“L.U.”) (L.U. § 4-401(a)(2)) or as a “person aggrieved” by the Board’s decision (L.U. § 4-401(a)(1)).

The circuit court granted Chipotle’s motion to dismiss Moe’s action “with prejudice.” The court found that Moe’s lacked standing because it was not a taxpayer in that it had failed to pay real property taxes to the City of Annapolis.

Moe’s appealed. Moe’s argued that although it had lost its right to do business in Maryland, it could nonetheless legally maintain a suit because Moe’s had filed its petition for review within the statutorily required 30 days of the Board’s decision and because that petition was revived when, in September 2013, Moe’s right to do business in Maryland was restored. Moe’s also argued that, whether or not able to bring suit as a taxpayer, Moe’s suit should not have been dismissed because Moe’s was a “person aggrieved” by the Board’s decision with a right to bring the suit.

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

The Court of Special Appeals of Maryland held that Moe's did not have standing to file the petition challenging the Board's decision granting Chipotle's special exception because, whether or not Moe's was a "taxpayer" or a "person aggrieved," Moe's petition was void *ab initio* (i.e., invalid from the outset) since, at the time it was filed, Moe's had lost its right to do business in Maryland and was nonetheless continuing to do so. The court explained that while a foreign LLC may have standing as a "taxpayer" or a "person aggrieved" under L.U. § 4-401(a) to petition the circuit court for judicial review of a zoning decision, the foreign LLC loses that standing if it continues to do business in Maryland after its right to do business here has been forfeited.

The court reached that conclusion based upon the plain language of Maryland's Corporations and Associations Article ("C.A") (C.A. § 4A-1002(a), C.A. § 4A-1013, and C.A. § 4A-1007(a)). C.A. § 4A-1002(a) states that "[b]efore doing any interstate, intrastate, or foreign business in this State, a foreign limited liability company shall register with the [State Department of Assessment and Taxation ('SDAT') ]." C.A. § 4A-1013 then warns that the SDAT may "forfeit the right of any foreign limited liability company to do business in this State" if that company "fails to file any report" with the SDAT or "fails to pay any late fee" within the statutorily prescribed period for doing so. Then, of particular significance to the issue before the court, C.A. § 4A-1007(a) provides that "[i]f a foreign limited liability company is doing or has done any intrastate, interstate, or foreign business in this State without complying with the requirements of this sub-title, the foreign limited liability company . . . may not maintain suit in any court of this State" unless it "shows to the satisfaction of the court" "that it has satisfied certain obligations or that it is no longer doing business in Maryland."

The court disagreed with Moe's contention that once a foreign LLC had satisfied the court of its right to maintain suit, it could then rely on a petition it had filed with the court when it had no right to do so. In other words, the court determined that Moe's could not revive its petition, though timely filed, since the petition was initiated after Moe's had lost the right to do business in Maryland and yet persisted to do business in Maryland during that 30-day period for filing a judicial review petition.

The court also briefly addressed Moe's contention that it was a "person aggrieved," entitled to challenge the Board's decision on Chipotle's special exception. The court said that even if Moe's was a "person aggrieved" under L.U. § 4-401(a)(1) and therefore had standing to petition the court for review as such, Moe's petition nonetheless had to be dismissed because it did not meet Rule 7-203(a)'s 30-day deadline. Moe's had no right to "maintain suit" under C.A. § 4A-1007(a) during the entire 30-day period and, when it re-attained that right, the 30-day period had long since lapsed. Moreover, the court noted that the circuit court, in effect, appeared to make a finding as to whether Moe's qualified as "a person aggrieved" when it opined that Moe's action against Chipotle was brought simply as a "matter of competition." The court explained that "a person is not 'aggrieved' for standing purposes when his sole interest in challenging a zoning decision is to stave off competition with his established business."

See also: *Dual Inc. v. Lockheed Martin Corp.*, 383 Md. 151, 857 A.2d 1095 (2004).

See also: *Hill Const. v. Sunrise Beach, LLC*, 180 Md. App. 626, 952 A.2d 357 (2008).

See also: *Tri-County Unlimited, Inc. v. Kids First Swim School Inc.*, 191 Md. App. 613, 993 A.2d 146 (2010).

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*Case Note:*

In its decision, the court noted that if Moe's had revived its right to do business, before or during the 30-day period for filing a petition for judicial review, and had subsequently filed that petition for judicial review, within that time period, then, as long as it could show that it fell within one of the three categories of "persons" who could file an action under L.U. § 4-401(a), Moe's would have been able to oppose the Board's decision in the circuit court.

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## Uses—Single-family dwelling owners rent property for short terms

County and owners dispute whether zoning ordinance prohibits short-term rentals

Citation: *Vilas County v. Accola*, 2015 WL 2193002 (Wis. Ct. App. 2015)

WISCONSIN (05/12/15)—This case addressed the issue of whether a zoning ordinance permitted short-term rental of single-family detached dwelling units located in a single-family residential district.

**The Background/Facts:** In June 2012, Harlan and Brenda Accola (the "Accolas") purchased a home on a lake in the R-1 zoning district in the Town of Presque Isle, County of Vilas, Wisconsin (the "County"). Shortly after purchasing the property, the Accolas began advertising it for rent, for stays as short as two nights. In July 2012, the County notified the Accolas that single-family residences in the R-1 district could not be rented for periods of less than one month. The County asserted rentals of less than one month constituted "transient lodging," as that term was used in the section of the ordinance governing the Residential/Lodging ("RL") district.

Under section 4.1 of the County's zoning ordinance, uses permitted in the R-1 district included: "[s]ingle family detached dwelling units . . ." In addition to the R-1 district, the general zoning ordinance also created a RL district. The purpose of the RL district was to allow for low-density residential use but with some mixing of low-density "transient lodging"—defined as rental of dwelling units for periods of less than one month. Under § 4.2 of the ordinance, uses permitted in the RL district included: "[a]ll uses permitted in the R-1 District . . . [and] rental of residential dwelling unit[s]."

After receiving notice from the County that they could not rent their prop-

erty for periods of less than one month, the Accolas subsequently created a corporation called A Better Way to Live. They began allowing people to stay at their property for periods of less than one month in exchange for “donations” to the corporation. The County again informed the Accolas that renting their property for periods of less than one month violated the general zoning ordinance. The County asserted, “Soliciting donations on a weekly basis in exchange for housing is the functional equivalent of renting the property[.]”

In August 2013, the County brought an enforcement action against the Accolas, seeking forfeitures and an injunction prohibiting the Accolas from renting their lake property for periods of less than 30 days.

The Accolas argued that the short-term rental of their property was permitted because the general zoning ordinance allowed “[s]ingle-family detached dwelling units” in the R-1 district. They asserted their property indisputably qualified as a single-family detached dwelling unit, and the general zoning ordinance did not explicitly prohibit short-term rentals of single-family detached dwelling units in the R-1 district.

The County argued that the Accolas’ short-term rental of their lake property constituted “transient lodging,” which was only expressly permitted in the RL district. Reading together the provisions of zoning ordinance governing the R-1 and RL districts, the County argued that the ordinance permitted rental of residential dwelling units for periods of less than one month in the RL district only. The county contended that the Accolas’ interpretation of the ordinance would render the provision of the ordinance listing rental of residential units as a use in the RL district (§ 4.2(B)(4)) superfluous because, if rentals of residential dwelling units for periods of less than one month were permitted in the R-1 district, there would be no need to separately list “rental of residential dwelling unit” as a permitted use in the RL district.

The circuit court agreed with the County’s argument. The court concluded that short-term rentals of the Accolas’ property for periods of less than one month, whether compensated by direct payment of rent or by donations to the Accolas’ corporation, were not permitted in the R-1 district. As a result, the court imposed a \$35,000 forfeiture and permanently enjoined the Accolas from renting their lake property for periods of less than 30 days.

The Accolas appealed.

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

The Court of Appeals of Wisconsin held that short-term rentals of single-family residential units were not permitted in the R-1 district and therefore the Accolas’ could not rent their lake property for periods of less than 30 days.

In so holding, the court agreed with the Accolas that the provision of the ordinance permitting uses in R-1 districts did not expressly prohibit the rental of single-family detached dwelling units. The court said that if it were limited to considering that provision of the County’s zoning ordinance, it would agree with the Accolas that the ordinance did not unambiguously prohibit the rental of single-family detached dwelling units in the R-1 district for periods of less than one month. However, the court also found that § 4.2(B) of the general zoning ordinance unambiguously permitted in the RL district both: (1) the rental of single-family detached dwelling units for periods of less than one

month; and (2) all uses permitted in the R-1 district, which includes single-family detached dwelling units. Reading the language of the ordinance governing uses in the R-1 district in context with the language of the ordinance governing uses in the RL district, the court agreed with the County that if the Accolas were correct that the rental of single-family detached dwelling units for periods of less than one month was a permitted use in the R-1 district, § 4.2(B)(4) of the ordinance, permitting the rental of single-family detached dwelling units for periods of less than one month in the RL district, would be superfluous because all uses permitted in the R-1 district were already permitted in the RL district under § 4.2(B)(1). The court said that where possible, an ordinance must be read “to give reasonable effect to every word, in order to avoid surplusage.” Consequently, the court concluded that reading § 4.1 of the ordinance (governing R-1 uses) in context with § 4.2 (governing RL uses) lead to the “inescapable conclusion that the rental of single-family detached dwelling units for periods of less than one month [was] not a permitted use in the R-1 district because a contrary interpretation would render § 4.2(B)(4) superfluous.”

See also: *Heef Realty and Investments, LLP v. City of Cedarburg Bd. of Appeals*, 2015 WI App 23, 361 Wis. 2d 185, 861 N.W.2d 797 (Ct. App. 2015).

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*Case Note:*

*In its decision, the court noted a recent holding it had in another case: “when an ordinance simply lists ‘single-family dwellings’ as a permitted use in a zoning district, without more, the ordinance does not unambiguously prohibit short-term rentals of single-family dwellings in that district.”*

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## Zoning News from Around the Nation

### CALIFORNIA

Assembly Bill 243 and Senate Bill 643—each aimed at regulating the medical marijuana industry—have passed their respective chambers. Among other things, the bills would “provide[ ] a regulatory framework for the industry covering the issues of environmental protection and water regulations, law enforcement, licensing, public health related to edibles and product testing, to marketing, labeling, taxing, transporting, zoning, local control and re-sale.” Assembly Bill 243 now heads to the Senate for consideration, and Senate Bill 643 heads to the Assembly for consideration.

Source: *Lost Coast Outpost*; <http://lostcoastoutpost.com>

### NORTH CAROLINA

Senate Bill 25 was passed by the House and Senate and headed to Governor Pat McCrory for signature or veto (or passage into law if the governor takes no action within 10 days). The bill limits local design and appearance rules for single- and two-family homes. The bill impacts local requirements for certain

types of siding, doors and windows, exterior decoration, roofing material, design, and color. Local governments would still be able to regulate the appearance and design of commercial buildings, apartments, and manufactured homes. Rules for historic districts would stay in place, as would homeowners' association requirements.

Source: *WRAL.com*; [www.wral.com](http://www.wral.com)

## PENNSYLVANIA

Middlesex Township Zoning Board has upheld, on a challenge, a zoning ordinance that allows oil and gas companies to drill in residential-agricultural zones.

Source: *NGI's Shale Daily*; [www.naturalgasintel.com](http://www.naturalgasintel.com)

## TENNESSEE

A new "swingers' club" law allows local governments to restrict the location of a private club if it is within 1,000 feet of a private, public or charter school, public park, residences, or place of worship.

Source: *WSMV.com*; [www.wsmv.com](http://www.wsmv.com)