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Zoning Bulletin

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Fair Housing Regulations/ Discrimination—Nonprofit corporation sues state housing agency, contending allocation of low-income housing tax credits had disparate impact in violation of fair housing act

Contributors

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State agency contends disparate-impact claims are not cognizable under the Fair Housing Act

Citation: *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015)*

The United States Supreme Court has jurisdiction over all federal courts and over state court cases involving issues of federal law, plus original jurisdiction over a small range of cases.

NATIONAL (06/25/15)—This case addresses the issue of whether disparate-impact claims are cognizable under the federal Fair Housing Act. In other words, the case addresses the issue of whether, under a proper interpretation of the Fair Housing Act, housing decisions (including zoning actions) with a disparate impact are prohibited.

The Background/Facts: The Federal Government provides low-income housing tax credits that are distributed to developers by designated state agencies. In Texas, the Department of Housing and Community Affairs (the "Department") distributes the credits. The Inclusive Communities Project, Inc. (the "ICP"), a Texas-based nonprofit corporation that assists low-income families in obtaining affordable housing, sued the Department and its officers in federal district court. The ICP brought a disparate-impact claim under §§ 804(a) and 805(a) of the federal Fair Housing Act (the "FHA").

Under § 804(a) of the FHA, it is unlawful to "refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to a person because of race" or other protected characteristic. Under § 805(a), it is unlawful "to discriminate against any person in" making certain real-estate transactions "because of race" or other protected characteristic.

The ICP alleged that the Department and its officers had, in violation of those sections of the FHA, caused "continued segregated housing patterns by allocating too many tax credits to housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods." The ICP argued that the Department had to modify its selection criteria in order to encourage the construction of low-income housing in suburban communities.

Relying on statistical evidence, the District Court concluded that the ICP had established a prima facie (i.e., on its face) showing of disparate impact. In so concluding, the District Court assumed that the Department's proffered nondiscriminatory interests in distributing the tax credits were valid, but found that the Department failed to meet its burden to show that there were no less discriminatory alternatives for allocating the tax credits. The District Court thus ruled for ICP. The District Court ordered that the Department add new selection criteria for the tax credits.

The Department appealed. It argued that disparate-impact claims are

not cognizable under the FHA (i.e., not within the jurisdiction of the FHA; not able to be brought under the FHA).

While the Department's appeal was pending, the Secretary of Housing and Urban Development ("HUD") issued a regulation interpreting the FHA to encompass disparate-impact liability. HUD's regulation also established a burden-shifting framework for adjudicating such claims. Under that framework, a plaintiff bringing a disparate impact claim, such as ICP here, would first need to prove that a challenged practice (e.g., here, the Department's allocation of tax credits) caused or predictably will cause a discriminatory effect. (24 CFR § 100.500(c)(1).) If a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case, and there is no liability. After a plaintiff does establish a prima facie showing of disparate impact, the burden shifts to the defendant to "prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." (24 CFR § 100.500(c)(2).) Once a defendant has satisfied its burden at step two, a plaintiff may "prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." § 100.500(c)(3).

The United States Court of Appeals for the Fifth Circuit held that disparate-impact claims are cognizable under the FHA. On the merits, however, the Court of Appeals reversed the District Court's judgment and remanded the matter. Relying on HUD's regulation, the Court of Appeals held that it was improper for the District Court to have placed the burden on the Department to prove there were no less discriminatory alternatives for allocating low-income housing tax credits.

The Department filed a petition for a writ of certiorari on the question of whether disparate-impact claims are cognizable under the FHA. The Supreme Court of the United States granted certiorari (and heard the case).

DECISION: Judgment of United States Court of Appeals for the Fifth Circuit affirmed, and matter remanded.

The Supreme Court of the United States held that disparate-impact claims are cognizable under the FHA. In other words, the court held that, under the FHA, housing decisions with a disparate impact are prohibited. Importantly, the court noted that "[s]uits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability."

In so holding, the court looked at the history and enactment of the FHA and its amendments. It also looked to two other antidiscrimination statutes for guidance—§ 703(a)(2) of Title VII of the Civil Rights Act of 1964 ("Title VII") and § 4(a)(2) of the Age Discrimination in Employment Act of 1967 ("ADEA"). The Supreme Court had found under prior

case law, that each of those statutes authorized disparate-impact claims. In those cases, the court had held that "antidiscrimination laws should be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose."

Looking at § 804(a) of the FHA—which again states that it is unlawful to "refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to a person because of race" or other protected characteristic—the court found that the "results-oriented phrase 'otherwise make unavailable' " referred to the consequences of an action rather than the actor's intent. The court also found that phrase was equivalent in function and purpose to similar phrasing found in Title VII and the ADEA.

The court also found that interpretation of the FHA text was consistent with its statutory purpose—to eradicate discriminatory practices in the Nation's housing sector. The court concluded that "[r]ecognition of disparate-impact liability under the FHA plays an important role in uncovering discriminatory intent: it permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." "These unlawful practices," said the court, "include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification."

In its decision, the court also highlighted, however, the need to properly limit disparate-impact liability "to avoid serious constitutional questions that might arise under the FHA" (e.g., if such liability were imposed based solely on a showing of a statistical disparity). The court said that "[a]n important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest their policies serve." Thus, a disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity, said the court. The court provided further guidance on disparate-impact liability stating that: policies, whether governmental or private, "are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers,' " and noting that when disparate-impact liability is found, remedial orders of courts "should concentrate on the elimination of the offending practice," with race-neutral remedies (as opposed to remedial orders that impose racial targets or quotas, which might raise difficult constitutional questions).

The Supreme Court affirmed the judgment of the Court of Appeals for the Fifth Circuit and remanded the matter for further proceedings consistent with the Supreme Court's opinion.

See also: *Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158, 3 Fair Empl. Prac. Cas. (BNA) 175, 3 Empl. Prac. Dec. (CCH) P 8137, 88 Pub. Util. Rep. 3d (PUR) 90 (1971).*

See also: *Smith v. City of Jackson, Miss., 544 U.S. 228, 125 S. Ct. 1536, 161 L. Ed. 2d 410, 95 Fair Empl. Prac. Cas. (BNA) 641, 86 Empl. Prac. Dec. (CCH) P 41882 (2005).*

See also: *Ricci v. DeStefano, 557 U.S. 557, 129 S. Ct. 2658, 174 L. Ed. 2d 490, 106 Fair Empl. Prac. Cas. (BNA) 929, 92 Empl. Prac. Dec. (CCH) P 43602 (2009).*

Case Note:

In its decision, the court noted that "it would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable. . . ." "Zoning officials," noted the court " . . . must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture). These factors contribute to a community's quality of life and are legitimate concerns for housing authorities."

Case Note:

In its decision, the court noted that, in 1988, Congress had rejected a proposed amendment that would have eliminated disparate-impact liability for certain zoning decisions. (See H.R.Rep. No. 100-711, p. 89-93 (1988), 1988 U.S.C.C.A.N. 2173.)

Uses/Constitutionality of Zoning Ordinance—County finds landowners in violation of zoning ordinance for renting residentially zoned property for weddings

Landowner argues ordinance's nonresidential use prohibition is unconstitutionally ambiguous on its face and as applied to landowner's use

Citation: *Bennett v. Walton County, 2015 WL 3824197 (Fla. 1st DCA 2015)*

FLORIDA (06/22/15)—This case addressed the issue of whether a county zoning ordinance's prohibition on "nonresidential uses" was

unconstitutionally ambiguous either on its face or as applied to a particular property owner.

The Background/Facts: The Bennetts owned a beachfront triplex and adjacent lot known as "The Lawn" (the "Property") in south Walton County (the "County"). The Bennetts rented the Property many times each year for weddings, graduation parties, reunions, and other events. The Bennetts' Property was in a County-designated "Residential Preservation Area" district. After neighbors complained about the events held at the Property—including about 30 events in 2009 and more in 2010—the County cited the Bennetts multiple times for making "nonresidential use" of their Property in violation of the County's Land Development Code (the "LDC").

Section 2.01.03(L)(3)(a)(iii) of the LDC provided that "[n]on-residential uses are not allowed" on lots within the County-designated Residential Preservation Areas, such as the Bennetts' Property.

The Bennetts sued the County. Among other things, they alleged that the LDC's prohibition on nonresidential uses was ambiguous both on its face and as applied to the Bennetts' Property so as to violate their constitutional substantive due process rights.

Finding there were no material issues of fact in dispute and deciding the matter on the law alone, the trial court issued summary judgment in favor of the County.

The Bennetts appealed.

DECISION: Judgment of Circuit Court affirmed.

The District Court of Appeal of Florida, First District, held that the LDC's nonresidential uses prohibition was not unconstitutionally ambiguous on its face or as applied to the Bennetts' Property.

In so holding, the court explained that substantive due process challenges, such as the Bennetts' challenge here, were examined by courts using "the rational basis test." Under that test, there would be no substantive due process violation if the LDC's nonresidential uses prohibition was found to be related to a legitimate governmental purpose. Here, the court found that the County's restriction and enforcement challenged by the Bennetts related to specific zoning requirements that were intended to preserve designated residential areas.

The Bennetts had not challenged the constitutionality of having that sort of zoning classification per se, but had challenged only that the LDC's parameter prohibiting "nonresidential uses" was too ambiguous to ever be constitutionally applied. The court explained that for the LDC's nonresidential uses prohibition to be unconstitutionally ambiguous on its face, the Bennetts had to establish that no set of circumstances existed under which the LDC provision would be valid. The court found there were contexts in which the nonresidential uses prohibition conveyed "a sufficiently definite warning as to the proscribed conduct when mea-

sured by common understanding and practice." For example, the LDC's prohibition, as applied to certain commercial and industrial activities was, at least, sufficiently clear. Accordingly, the court concluded that the LDC's "nonresidential uses" prohibition was not unconstitutional on its face.

The Bennetts had also argued that the LDC's prohibition on nonresidential uses was unconstitutionally ambiguous as applied to the Bennetts' use of their Property. The Bennetts noted that landowners throw large social parties in their homes and residential neighborhoods "all the time." The Bennetts argued that weddings and parties were not inherently "nonresidential" at all. While acknowledging that there was no County prohibition on residential weddings and large parties, the court found that the "frequency and intensity" of the activities on the Bennetts' property bore heavily toward the conclusion that the Bennetts' usage of the Property was nonresidential. Noting that the Bennetts had essentially introduced a wedding venue business into their Residential Preservation Area neighborhood, the court found that hosting up to 30 weddings per year on the Bennetts' Property was not "typical residential usage as measured by common practice." The court concluded that the LDC's nonresidential uses restriction conveyed a "clear and sufficient standard" as applied to the Bennetts' many rentals each year, and thus was not so ambiguous as to violate the Bennetts' substantive due process rights.

Case Note:

The Bennetts had also argued that the County's enforcement of the LDC's nonresidential uses prohibition was unlawfully arbitrary since the County had not set a specific number of weddings that might be allowed as a "residential" use on a lot in the Residential Preservation Area each year. The court found that the County did not have to set a concrete limit in order to enforce its restriction under the facts of the case.

Constitutionality of Zoning Action—Town rescinds permit request to federal agency on behalf of landowner

Landowner argues rescission of request violated its constitutional rights to due process

Citation: *Acquest Wehrle, LLC v. Town of Amherst, 129 A.D.3d 1644, 2015 WL 3797670 (4th Dep't 2015)*

NEW YORK (06/19/15)—This case addressed the issue of whether a town board's rescission of a request to the United States Environmental Protection Agency to allow a landowner to tap into a federally-subsidized sewer violated a landowner's constitutional rights to due process.

The Background/Facts: In 1983, the United States Environmental Protection Agency (the "EPA") gave the Town of Amherst (the "Town") a grant for more than 50% of the Town's cost to construct a sewer project. As a condition of that grant, the Town agreed to prohibit for 50 years new development located in certain identified wetlands (the "Wetlands") from connecting to the sewers funded in part by the grant unless approved by the EPA.

Acquest Wehrle, LLC ("Acquest") owned property (the "Property") located partially in the Wetlands. Sometime in the late 1990s and early 2000s, Acquest proposed to develop the Property into an office park. In February 2001, the Town Board passed a resolution authorizing a request for a sewer tap-in waiver from the EPA for the Property. In January 2002, the Town made a request to the EPA for the sewer tap-in waiver for Acquest. In December 2004, the EPA denied the Town's tap-in waiver request for the Property. Acquest then revised its site plan. By May 2005, the EPA had advised Acquest that, based upon the revised site plan, a tap-in waiver would be approved. The EPA advised Acquest that Town approval of the revised site plan would constitute and be evidence of continuing approval and support by the Town of the tap-in waiver previously requested by the Town to the EPA for Acquest's development project.

In the meantime, neighborhood activists advocated to the Town Board that Acquest's development project be prohibited in order to protect the Wetlands. On March 20, 2006, without any notice to Acquest, the Town Board passed a resolution rescinding the tap-in waiver request and terminated Acquest's office park project.

Acquest sued the Town in federal court. Among other things, Acquest alleged that in rescinding the sewer tap-in waiver request, the Town violated Acquest's substantive due process rights under the constitutions of the United States and the State of New York. Finding no material issues of fact in dispute, and deciding the matter on the law alone, the court granted in part Acquest's motion for summary judgment on its substantive due process claim. A jury trial was held and the jury found that the Town violated Acquest's right to substantive due process causing Acquest damages of nearly $1.5 million.

The Town appealed. Among other things, it argued that the trial court had erred in granting the motion with respect to Acquest's allegations of substantive due process violations.

DECISION: Judgment of Supreme Court affirmed as modified, and remitted.

The Supreme Court, Appellate Division, Fourth Department, New York, held that the Town violated Acquest's constitutional due process rights when the Town rescinded the sewer tap-in waiver request.

In so holding, the court explained that it would find a substantive due process violation if a two-part test was met: (1) if Acquest established "a cognizable property interest, meaning a vested property interest, or 'more than a mere expectation or hope to retain the permit and continue their improvements' "; if Acquest could show that pursuant to State or local law, they had "a legitimate claim of entitlement to continue construction"; and (2) if Acquest established that the Town's action was "wholly without legal justification."

Looking at the first prong of the test, the court further explained that Acquest would only have a legitimate claim of entitlement to sewer tap-in waiver if there was a "certainty or a very strong likelihood" that the waiver request would have been granted. "Where an issuing authority has discretion in approving or denying a permit, a clear entitlement can exist only when that discretion 'is so narrowly circumscribed that approval of a proper application is virtually assured'," said the court.

The court found that Acquest had established a cognizable property interest in the February 2001 sewer tap-in waiver request made by the Town on Acquest's behalf. "As noted by the EPA and agreed to by [the Town]," the court found that "the Town Board had no further discretion to exercise after the EPA advised that [Acquest's] revised site plan would form the basis of an acceptable waiver request." Although Acquest still needed to obtain site plan approval by the Town Planning Board, and the EPA needed to grant the tap-in waiver request before the Property could be developed, the court found that Acquest had established that those actions "were certainties."

The court also found that the second prong of the substantive due process violation test was met. The court concluded that the Town Board's action in rescinding the sewer tap-in waiver request and "emphatically

stat[ing] that the Town Board was 'terminat[ing] [Acquest's] commercial project," was "wholly without justification" and "egregious official conduct." The court so concluded based on the following findings: The Town Board failed to give notice to Acquest that the Town Board was planning to reconsider the waiver request at its hearing. The Town Board Supervisor had admitted that the Town Board had acted in rescinding the waiver request solely on neighborhood activist concerns over the wetland. There had been no new studies on traffic or environmental impacts. Moreover, not only had the Board rescinded the sewer tap-in waiver request, but it had specifically terminated Acquest's project. The court found such conduct by the Town was "solely politically motivated" and thus "without legal justification."

The court concluded that "[d]espite the existence of [Acquest's] constitutionally protected property interest in the January 2002 tap-in waiver request, the Town Board acted on March 20, 2006 to withdraw that waiver request, which was a violation of [Acquest's] constitutional rights."

See also: *Bower Associates v. Town of Pleasant Valley, 2 N.Y.3d 617, 781 N.Y.S.2d 240, 814 N.E.2d 410 (2004).*

Case Note:

Acquest had also alleged violation of its equal protection rights under the constitutions of the United States and the State of New York. The jury had found that the Town violated Acquest's due process rights by treating Acquest differently than two other parties, and had granted Acquest more than $1.5 million in related damages. On appeal, the court rejected Acquest's claim, finding the Town had established that Acquest's Property was not similarly situated to the two other properties and thereby was not selectively treated in comparison to those two properties.

Case Note:

The Town had argued that the state constitutional due process claim should be dismissed because the Town was entitled to qualified immunity (as a government official). The appellate court rejected that argument, noting that a government official is only entitled to qualified immunity if "his or her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Here, since the court found that the Town had violated Acquest's constitutional due process rights, the court concluded that the Town was not entitled to qualified immunity.

Zoning News from Around the Nation

KENTUCKY

The Lexington Urban County Planning Commission voted to change Lexington zoning laws to allow for new recreation and tourism-based businesses. The new law establishes and defines "tourism and recreational businesses such as farm gift shops, family wineries and nature preserves. The changes in the law also establish where those types of new uses can be located." The Planning Commission also voted to define permitted uses and those needing conditional use permits in agricultural natural zones.

Source: *Lexington-Herald Leader; www.kentucky.com*

NORTH CAROLINA

The state Senate recently approved a bill that would "end the requirement for a three-quarter majority vote by a city council to approve zoning changes if enough residents sign a petition opposing the proposed changes." The bill was sent to the state House, where a similar version has reportedly received support. Governor Pat McCrory has indicated that he supports the bill.

Source: *WECT 6; www.wect.com*

OREGON

An inclusionary zoning bill—House Bill 2564— has died in the state Senate. The bill, which had passed in the state House in April, was intended to "expand Oregon's supply of affordable housing." Under current state law, local governments are prohibited from requiring developers to provide affordable units in large construction projects. The now-dead bill would have enabled local governments to set local policies requiring construction of cheaper homes.

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

PENNSYLVANIA

The Philadelphia City Council has passed legislation adjusting zoning rules such that "most [Airbnb-type] rentals [are now] illegal in residential areas. A city license is required for rentals lasting more than 30 days."

Source: *Philadelphia Sun-Times; http://philadelphia.suntimes.com*

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Validity of Zoning Ordinance—Township zoning commission reviews and denies zoning certificate application for permitted use

Applicant argues commission lacks authority under state statute to process application

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and therefore application process is unlawful

Citation: *Willow Grove, Ltd. v. Olmsted Twp., 2015-Ohio-2702, 2015 WL 4043300 (Ohio Ct. App. 8th Dist. Cuyahoga County 2015)*

OHIO (07/02/15)—This case addressed the issue of whether certain regulations and procedures required by a township's zoning resolution unconstitutionally exceeded statutory authority as they related to a proposed development. More specifically, the case addressed: (1) whether a township's zoning certificate application process violated the state statute governing township zoning; and (2) whether a township's procedure for development plan review was authorized by state statute as applied to a proposed development.

The Background/Facts: Willow Grove, Ltd. ("Willow") owned property (the "Property") in Olmsted Township (the "Township"). Willow sought to develop the Property with residential townhouses. Under the Township's Zoning Resolution (the "Zoning Ordinance"), Willow's proposed development was a "use permitted by right as a principal use."

On June 3, 2013, in furtherance of its development plans, Willow applied for a zoning certificate with the Township's zoning inspector (the "Inspector"). A year later, the Township's zoning commission (the "Commission") recommended to the Township's Board of Trustees (the "Trustees") denial of Willow's zoning certificate application. The Trustees adopted the Commission's recommendation and denied the application.

Willow filed a legal action, arguing that the Zoning Ordinance's process and procedures for the issuance of zoning certificates for a multifamily permitted use in a residential multifamily district exceeded the Township's authority and were unlawful under Ohio statutory law, R.C. Chapter 519. Willow argued that: (1) the Zoning Ordinance's requirements for zoning certificates and development plan were unlawful; and (2) it was not required to obtain a zoning certificate or approval of a development plan for the Property for its proposed permitted use.

The trial court agreed with Willow. It found that, under R.C. Chapter 519 and case law: (1) the Commission and Trustees lacked authority to process, approve or deny zoning certificates as the Inspector has sole authority; (2) the Commission and Trustees lacked authority to approve or deny the development plans for Willow's permitted use development because the statutory authority lies solely for review of development plans for planned unit developments. The court also found that the unlawful portions of the Township's Zoning Ordinance could be severed while the remaining provisions retained validity.

The Township appealed.

DECISION: Judgment of Court of Common Pleas affirmed.

The Court of Appeals of Ohio, Eighth District, Cuyahoga County,

also held that the Township's Zoning Ordinance: (1) unlawfully vested authority in the Commission and Trustees to approve or deny zoning certificates; and (2) unlawfully applied the Zoning Ordinance's Chapter 520 development plan process to permitted uses whereas that procedure only applied to planned residential developments where the Commission and Trustees had authority to review and approve per R.C. 519.021.8.

In so holding, the court explained that "[a] zoning regulation is 'presumed to be constitutional unless determined by a court to be clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community.' " The court also explained the source of Ohio township zoning powers: "Townships are strictly statutory creatures, created under R.C. Chapter 503, whose powers are not derived from the Constitution as are counties and municipalities. . . . Authority for township zoning is a delegated power of the Ohio General Assembly set forth in R.C. Chapter 519." A township's authority to regulate zoning as well as the implementation process is set forth in R.C. 519.02. A township's power to regulate zoning with regard to planned unit developments is set forth in R.C. 519.021.

Analyzing those statutory provisions, as well as related case law, the court of appeals here found that "[t]he zoning inspector has sole authority to approve or deny zoning certificates" and that "the enforcing of the township zoning law is not a proper function of the zoning commission."

Here, the court found that the Township's Zoning Ordinance gave zoning certificate review of development plans to the zoning Commission and provided no procedure for processing zoning certificate applications. Accordingly, the court found that "[t]he express acts by the Commission and Trustees denying Willow's zoning certificate application, usurping the sole power of the Inspector, exceeded the authority of those bodies, not only under [Ohio statutory law,] R.C. 519.16, 519.17 and [related case law] . . . but also of the [Township's Zoning Ordinance], as enacted." The court therefore found that the Zoning Ordinance's zoning certificate application process was unlawful.

The court noted that the duty to review plans for permitted uses lies with a zoning inspector. Thus, where a township has delegated enforcement and zoning certificate powers to a zoning inspector, the only statutory authority (R.C. Chapter 519) vested in a zoning commission or board of trustees would be to review development plans for planned unit developments. (R.C. 519.021.) Here, the court found that the Township Zoning Ordinance's requirement that planned residential developments be submitted for Commission and Trustee review and approval was endorsed by R.C. 591.021. However, the court also found that the Township Zoning Ordinance (510.05(b)) subjected permitted uses such as Willow's to a review process that the Commission and Trustees had no statutory authority to conduct since they were not governed by R.C.

519.021. In other words, the Commission and Trustee review process of Willow's permitted use zoning certificate application was unlawful because the procedures for creation of a planned residential development did not apply to Willow's permitted use of the property.

Finding the unlawful portions of the Township's Zoning Ordinance were severable from the remaining substantive provisions, the court struck the unlawful sections (i.e., those requiring development plan review of all uses by the Zoning Commission and the provision requiring application for zoning certificates for permitted uses be transmitted to the Zoning Commission) in their entirety.

Rezoning/Spot Zoning—County rezones property from agricultural to industrial use

Adjacent landowner argues rezoning constitutes impermissible spot zoning

Citation: *Dockter v. Burleigh County Bd. of County Com'rs, 2015 ND 183, 2015 WL 4041146 (N.D. 2015)*

NORTH DAKOTA (07/02/151)—This case addressed the issue of whether a county commissioners' decision to rezone a 311-acre tract of land at the request of the landowner from agricultural to industrial use constituted impermissible spot zoning.

The Background/Facts: In March 2013, Dale Pahlke ("Pahlke") applied to the Bismarck-Burleigh County Planning and Development Department (the "Department") to rezone 311 acres of land (the "Property") that he owned in Menoken Township (the "Township") in Burleigh County (the "County"). Pahlke sought a rezone of his property from agricultural use to light industrial use. Pahlke's Property was located on the north side of an interstate but was otherwise surrounded by property zoned for agricultural use.

Thane and Nicole Dockter (the "Dockters") owned land directly north of Pahlke's Property. The Dockters operated a certified organic farm on their land. The Dockters opposed Pahlke's application, claiming that the industrial use of the adjacent land could contaminate their fields and result in loss of certification of their organic farm.

Eventually, the County Planning Commission (the "Planning Commission") recommended approval of Pahlke's application for the zoning change, subject to specified conditions. In September 2013, the County Board of Commissioners (the "County Commissioners") adopted the Planning Commission's recommendation to rezone Pahlke's Property for industrial use, subject to specified conditions.

The Dockters sought judicial review of the County Commissioners' decision. They argued that the decision to rezone the land constituted impermissible spot zoning. Specifically, they argued that characteristics of spot zoning were established in this case because: the rezoned industrial land was different from prevailing agricultural uses in the area; the rezoned land constituted a small geographical area compared to the surrounding 22,241 acres of land zoned for agricultural use in the Township; the rezoned land benefitted one owner and not the greater community; and the rezoned use was inconsistent with Burleigh County's comprehensive land use plan.

The district court rejected the Dockters' arguments, ruling that the Dockters had failed to establish the County Commissioners' decision constituted impermissible spot zoning.

The Dockters appealed.

DECISION: Judgment of district court affirmed.

The Supreme Court of North Dakota also held that the County Commissioners' decision to rezone Pahlke's Property from agricultural use to industrial use did not constitute impermissible sport zoning.

In so holding, the court explained that spot zoning occurs "when an individual lot is singled out for discriminatory or different treatment than that accorded surrounding property of a similar character and is beyond the authority of a zoning entity, absent a clear showing of a reasonable basis for different treatment." The court further explained that characteristics of "spot zoning" include where: (1) the use is different from the prevailing use of the area; (2) the area rezoned is small; and (3) the classification benefits a particular landowner. The court said that in evaluating whether a rezoning is an impermissible spot zoning, it looks to whether the rezoning is solely for the benefit of a landowner or "whether it is pursuant to a comprehensive plan for the general welfare of the community."

Here, the court found that although Pahlke may individually benefit from the zoning change, there was evidence the County Commissioners' decision benefited Burleigh County as a whole with regard to bolstering economic development. The court found that the record supported a finding that the rezone would provide economic benefits to the community as a whole for the general welfare of the community, "which is a characteristic that militates against a claim of impermissible spot zoning." Moreover, the court found the fact that Pahlke's 311 acres were proposed to be divided into five- to 10-acre lots also militated against a claim that the rezoning change involved an individual lot singled out for discrimination, or different treatment.

In response to the Dockters' argument that the County Commissioners' decision was arbitrary, capricious, and unreasonable, because it was inconsistent with a comprehensive County land use plan, the court

disagreed. The court noted that the County Commissioners had found the rezoning would be consistent with the comprehensive plan because the rezoning application "promoted quality growth of manufacturing within the county convenient to transportation facilities."

The court concluded that the record supported a reasonable basis for the County Commissioners' decision and did not establish the County Commissioners' decision constituted impermissible spot zoning.

See also: *Gullickson v. Stark County Bd. of County Com'rs, 474 N.W.2d 890 (N.D. 1991).*

See also: *Bigwood v. City of Wahpeton, 1997 ND 124, 565 N.W.2d 498 (N.D. 1997).*

Variance—Property Owner seeks use variance to convert residential home to suite of offices

City finds lack of necessary hardship to warrant variance

Citation: *Schadt v. City of Bethlehem Zoning Hearing Bd., 2015 WL 3915949 (Pa. Commw. Ct. 2015)*

PENNSYLVANIA (06/26/15)—This case addressed the issue of whether an applicant for a use variance—to convert a residential home to a suite of offices—established the necessary hardship to warrant a use variance.

The Background/Facts: Mary E. Schadt ("Schadt") owned property (the "Property") in the City of Bethlehem (the "City"). The Property was located in a High Density Residential zoning district and in a Historic District. On the property were three detached buildings: a three-story single-family dwelling that had been occupied by Schadt's family for 40 years and as a residence for a century prior; a detached garage with a vacant apartment above; and a building containing two small, one-story book shops which were lawfully nonconforming uses because they predated the City's zoning ordinance.

Schadt had tried for four months to sell the Property but found that potential buyers for Property were not interested in the commercial and apartment uses and vice versa. After four months, Schadt reached an agreement to sell the Property to a financial services company. Schadt applied to the City for a use variance to convert the existing single-family dwelling into a financial services office. In support of her applica-

tion, Schadt testified that: the financial services office would only have eight employees; the employees would park off site; only two or three clients would visit the office per week; and no changes would be made to the exterior of the building.

The City's Zoning Hearing Board ("Zoning Board") concluded that Schadt had failed to establish the requisite hardship for a use variance and denied her request for such relief.

Schadt appealed. The Court of Common Pleas affirmed the Zoning Board's decision.

Schadt again appealed. On appeal, Schadt contended that the presence of nonconforming commercial uses on the Property was, itself, a unique physical condition which, in combination with the zoning regulations, created an unnecessary hardship.

DECISION: Judgment of Court of Common Pleas affirmed.

Disagreeing with Schadt's argument, the Commonwealth Court of Pennsylvania held that Schadt failed to demonstrate the requisite hardship for a use variance to convert her residential home into a suite of professional offices.

In so holding, the court explained that an applicant for a variance must establish all of the following elements:

> "(1) an unnecessary hardship will result if the variance is denied, due to the unique physical circumstances or conditions of the property; (2) because of such physical circumstances or conditions the property cannot be developed in strict conformity with the provisions of the zoning ordinance and a variance is necessary to enable the reasonable use of the property; (3) the hardship is not self-inflicted; (4) granting the variance will not alter the essential character of the neighborhood nor be detrimental to the public welfare; and (5) the variance sought is the minimum variance that will afford relief."

Moreover, explained the court, an applicant seeking a use variance is not required to show that the property is valueless without the variance, but she must show more than "mere economic hardship," particularly, as here, where "a variance is sought in order to make a change from an existing use consistent with the zoning code to an inconsistent use."

Evaluating those elements, the court agreed with the Zoning Board that Schadt's evidence did not establish an unnecessary hardship. The court noted that the historical use of the home—for over 164 years—as a residence "belie[d] the claim that the property [could] not be used without a variance." The court further found that an inability to sell the property in less than four months did not represent a hardship that would justify a variance. At most it was a "mere economic hardship," said the court. Moreover, the fact that the buyer did not intend to change the exterior of the home was insignificant, said the court, as historic preservation differs from land use and the City regulated the neighborhood as residential under its land use regulations.

Finally, in disagreeing with Schadt's contention that the presence of the nonconforming book shops on the property constituted a unique physical condition that, by definition, prevented the use of the property in conformance with the Zoning Ordinance, the court noted that Schadt did not seek to expand the existing nonconforming use of two small bookstores but, rather, to create an entirely new nonconforming use (i.e., an office). The court said that Schadt was not "entitled to make the property more nonconforming by virtue of the existing non-conformance."

See also: *Taliaferro v. Darby Tp. Zoning Hearing Bd., 873 A.2d 807 (Pa. Commw. Ct. 2005).*

Use—Property owners rent out residentially-zoned property for events

County claims use violates zoning ordinance, while property owners contend it is a permissible accessory use

Citation: *Burton v. Glynn County, 2015 WL 4183018 (Ga. 2015)*

GEORGIA (07/13/15)—This case addressed the issue of whether property owners violated a zoning ordinance by operating their residential property as an event venue. More specifically, it addresses the issue of whether the property owners use of their property to host weddings or social events constituted a permitted accessory use or was an impermissible primary use under the zoning ordinance.

The Background/Facts: Thomas and Lee Burton (the "Burtons") owned oceanfront property (the "Property") on St. Simons Island in Glynn County (the "County"). The Property was situated in a single-family residential "R-6" zoning district under the County Zoning Ordinance. Beginning in 2008, the Burtons began offering the Property for short-term vacation rentals. The Property became increasingly popular as a venue for weddings and other large gatherings. From 2010 through May 2013, at least 79 events were held at the Property, with many of the events exceeding 100 guests in attendance. During that time period, the Property was advertised in print and online media as a wedding destination, and guests who booked the Property were furnished a list of wedding reception vendors.

In 2010, residents in the area of the Property began filing complaints about the use of the Property. Those complaints included complaints related to noise, traffic, and parking issues arising from events held at the Property. The County eventually determined that the Burtons were mak-

ing use of the Property as a commercial venue, in violation of the County Zoning Ordinance.

The County Zoning Ordinance provided that an R-6 district was "designed to encourage the formation and continuance of a stable, healthy environment for one-family dwellings." (County Zoning Ordinance, § 701.1.) To promote the desired "low-to-medium density residential" development in R-6 districts, the County Zoning Ordinance expressly aimed "to discourage any encroachment by commercial, industrial, high density residential, or other uses capable of adversely affecting the single-family residential character of the district." (County Zoning Ordinance, § 701.1.) In furtherance of that purpose, the County Zoning Ordinance generally limited the use of property situated in R-6 zoning districts to "[o]ne-family dwelling[s]" and "accessory uses." (County Zoning Ordinance, § 701.2.) A "dwelling" was defined as "[a] building or portion of a building designed for or occupied for residential purposes" and explicitly excluded hotels, motels, and similar "accommodations used for more or less transient [guests]." (County Zoning Ordinance, § 302.) A "one-family dwelling" was defined as "[a] detached dwelling . . . designed for or occupied exclusively by one family." (County Zoning Ordinance, § 302.) An "accessory use" was defined as a use "which is customarily accessory and clearly incidental and subordinate to the principal use." (County Zoning Ordinance, § 302 and § 609.)

The County issued the Burtons a cease and desist letter, contending that their operation of the Property was not a permitted use in the R-6 district.

The Burtons responded by suing the County. They argued that enforcing the Zoning Ordinance against them violated their constitutional rights to due process. They argued that the Zoning Ordinance was vague in that it failed to quantify precisely the point at which the hosting of large functions on an R-6 property crossed the line from a permissible use "accessory" to a one-family dwelling to an impermissible primary use.

The trial court concluded that "[the] Burtons' permissible accessory use of their property to host a wedding or social event ha[d] become the primary use of their property, and the magnitude, frequency, and cumulative impact thereof ha[d] moved beyond that expected or customary for a one-family dwelling." Thus finding that the Burtons' use of the Property fell outside the normal scope of residential property use, the trial court concluded that the Burtons' use violated the County Zoning Ordinance.

The Burtons appealed.

DECISION: Judgment of trial court affirmed in relevant part.

The Supreme Court of Georgia agreed with the trial court. The court

held that the Burtons' use of their property as an event venue moved beyond that expected or customary for a one-family dwelling, in violation of the County Zoning Ordinance.

In so holding, the court construed the Zoning Ordinance, giving "effect to the intention of the lawmaking body." Looking at the language and purpose of the Zoning Ordinance, the court concluded that "the frequency of the events and the apparently systematic manner in which the [P]roperty ha[d] been marketed and utilized for large-scale gatherings support[ed] the conclusion that the [P]roperty's use as an event venue ha[d], as the trial court found, 'moved beyond that expected or customary for a one-family dwelling.' "

With regard to the Burtons' due process vagueness challenge, the court said that an ordinance need not regulate with "mathematical certainty" to comport with due process. Even where the zoning ordinance may be imprecise in certain situations, if the ordinance clearly applies to a landowner, the landowner may not challenge it on the basis that it may be unconstitutionally vague when applied to others, said the court. Here, the court found that the Zoning Ordinance here was sufficiently specific for "persons of common intelligence" to recognize that the Burtons' use of the Property did not qualify as a permissible use in an R-6 district.

See also: *Cawthon v. Douglas County, 248 Ga. 760, 286 S.E.2d 30 (1982).*

See also: *105 Floyd Road, Inc. v. Crisp County, 279 Ga. 345, 613 S.E.2d 632 (2005).*

Case Note:

The Burtons has also argued that enforcement of the Zoning Ordinance against them violated their equal protection rights since events were sometimes held on rental properties in neighboring areas. The court rejected this claim, finding that the Burtons failed to adduce evidence to support it. The Burtons presented no evidence of properties that had hosted a similar volume of events or had spawned complaints from community members. Thus, the court concluded that the Burtons had failed to establish unequal treatment so as to give rise to an equal protection claim.

Zoning News from Around the Nation

HAWAII

Governor David Ige recently signed into law HB 321 (now Act 241)

Relating to Medical Marijuana. The new law establishes a licensing system for medical marijuana dispensaries. The new law also "prohibits counties from enacting zoning regulations that discriminate against licensed dispensaries and production centers; [and] allows the legal transport of medical marijuana in any public place, under certain conditions by qualified patients, primary caregivers or owners/employees of medical marijuana production centers and dispensaries."

Source: *Big Island Video News*; www.bigislandvideonews.com

OKLAHOMA

Changes to zoning ordinances in Stillwater, designed to protect land uses like homes, schools, and hospitals from the impact of oil and gas drilling with setbacks and noise abatement standards, were expected to come before the Stillwater City Council for a final vote. Under state law, municipalities can regulate only a few specific zoning items as they apply to oil and gas production. The proposed changes to Stillwater's zoning ordinances create standards that address things like setback distances, noise standards, and abatement, odors, and traffic.

Source: *Stillwater News Press*; www.stwnewspress.com

PENNSYLVANIA

Pending in the state House of Representatives, House Bill 809 would "preempt any local ordinance or regulation that is not consistent with the provisions of the proposed law." Among other things, HB 809 would preempt local student housing ordinances. HB 809 states that "no ordinance enacted by a municipality shall prohibit the occupation of a dwelling unit based on an individual's matriculation status or on the number of unrelated individuals sharing the unit." "Matriculation status" is defined as the state of being enrolled in a postsecondary educational institution. Some local zoning ordinances prohibit the number of students that may occupy a "student house" as a means to prohibit conversion of neighborhoods into student rentals. Those opposed to HB 809 say it could have a "devastating impact" on some neighborhoods.

Source: *Mainline Media News*; www.mainlinemedianews.com

WISCONSIN

Before signing the 2015-2017 state budget, Governor Scott Walker vetoed a provision that would have exempted a state development project from Madison zoning ordinances. Walker vetoed the sections noting that though "well-intentioned," they were "unnecessary, as the city and state are working to ensure the project meets local standards and is constructed on schedule."

Source: *The Cap Times*; http://host.madison.com

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Zoning Bulletin

in this issue:

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Use/Preemption—Without obtaining zoning permit, landowner changes land use from surface mine and quarry to solid waste recycling facility

Landowner claims use regulation is preempted by state law and also amounts to a natural

Contributors

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expansion of property's prior use

Citation: *Huckleberry Associates, Inc. v. South Whitehall Township Zoning Hearing Bd., 2015 WL 4253848 (Pa. Commw. Ct. 2015)*

PENNSYLVANIA (07/15/15)—This case addressed whether township zoning ordinances requiring a zoning permit for land use change from a surface mine and quarry to a solid waste recycling facility were superseded by state law—Pennsylvania's Noncoal Surface Mining Conservation and Reclamation Act. The case also addressed whether the change of use amounted to a natural expansion of the property's prior use and was thus permitted.

The Background/Facts: Huckleberry Associates, Inc., Haines and Kibblehouse, Inc., and Lehigh Valley Site Contractors, Inc. (together, "Huckleberry") owned more than 63 acres (the "Property") in South Whitehall Township (the "Township") in a rural holding zoning district ("RH District"). From the 1950s through 1996, Huckleberry operated a noncoal surface mine and quarry at the Property. In 1996 and again in 2000, Huckleberry and the Township entered into settlement agreements, resolving litigation regarding the extent and legality of the mining and quarry operations at the Property. Under the terms of the 2000 Agreement, among other things, Huckleberry discontinued mining and quarry operations.

In late 2012 and early 2013, Pennsylvania's Department of Environmental Protection ("DEP") issued "Biosoil Permits" to Huckleberry to construct and operate a composting and biosoil-production facility. In April 2013, the Township cited Huckleberry for violations of the Township's zoning ordinance for, among other things: failure to obtain a zoning permit to change the use of the Property from a surface mine and quarry to a solid waste recycling facility; and operating a solid waste recycling facility, which was a nonpermitted use in the RH District.

Huckleberry appealed to the Township's Zoning Hearing Board ("ZHB"). Huckleberry argued that the zoning ordinances were preempted by Pennsylvania's Noncoal Surface Mining Conservation and Reclamation Act. Huckleberry asserted that it did not violate the ordinance by producing biosoils at the Property without first securing a zoning permit because the process by which biosoils were produced was preempted by state law. Huckleberry also argued that its solid waste recycling facility was a natural expansion of the Property's prior, nonconforming use as a surface mine and quarry.

The ZHB denied Huckleberry's appeal, finding Huckleberry violated the Township's zoning ordinance.

Huckleberry appealed to the trial court, which affirmed the ZHB's decision.

Huckleberry again appealed.

DECISION: Judgment of Court of Common Pleas affirmed.

The Commonwealth Court of Pennsylvania held that the Township's zoning ordinance was not preempted by the Noncoal Surface Mining Conservation and Reclamation Act. In so holding, the court looked to the language of the Act, which states: "Except with respect to ordinances adopted pursuant to . . . the Pennsylvania Municipalities Planning Code ['MPC'], all local ordinances and enactments purporting to regulate surface mining are hereby superseded. The Commonwealth, by this enactment, hereby preempts the regulation of surface mining as herein defined."

The court found that the zoning ordinance was not preempted by the Act because: (1) the zoning ordinance was enacted pursuant to the MPC; and (2) the zoning ordinance regulated where a noncoal surface mine could be located within the Township; it did not regulate the manner in which such a facility was operated (which was governed and preempted by the state Act).

The court also rejected Huckleberry's claim that the solid waste recycling facility was a natural expansion of the Property's prior, nonconforming use as a surface mine and quarry. The court found that "[u]nder any reasonable interpretation, the collection of third-party, consumer food waste is neither a mining activity nor a quarry activity, nor is it a natural expansion of such activities." Notably, the evidence showed that all of the materials used for the composting and biosoils use at the Property were imported onto the Property from outside sources; none of the materials used in the composting and biosoils manufacturing process were derived from the Property or the quarry on the Property.

Accordingly, the court affirmed the ZHB's decision, finding that Huckleberry's change in use of its Property from a surface mine and quarry to a solid waste recycling facility, without obtaining required zoning permits, violated the Township's zoning ordinance.

See also: *Geryville Materials, Inc. v. Planning Com'n of Lower Milford Tp., Lehigh County, 74 A.3d 322 (Pa. Commw. Ct. 2013), appeal denied, 624 Pa. 699, 87 A.3d 817 (2014)*

Spot Zoning—Two acres of 108-acre aroperty co-owned by father and son is rezoned

Neighbors allege rezone constitutes illegal spot zoning

Citation: *Good Neighbors of Oregon Hill Protecting Property Rights v. County of Rockingham, 2015 WL 4449994 (N.C. Ct. App. 2015)*

NORTH CAROLINA (07/21/15)—This case addressed the issue of whether the rezoning of two acres of land co-owned by a father and son constituted illegal spot zoning.

The Background/Facts: In August 2012, Philip M. Behe (aka "Matt Behe") and his father, Philip L. Behe, purchased a 107.6-acre tract of land (the "Property") in Reidsville, Rockingham County (the "County"). Matt Behe sought to subdivide approximately two acres of the parent tract for a kennel to be used as a bird training facility. He filed an application with the County to rezone the two-acre tract from Residential Agricultural to Highway Commercial-Conditional District.

The County Planning Staff recommended approving the rezone application subject to nine conditions. The County Planning Board approved the rezone. Ultimately, the County Board of Commissioners (the "BOC") approved the zoning amendment, including the nine conditions recommended by the Planning Staff.

In October 2013, Good Neighbors of Oregon Hill Protecting Property Rights ("Neighbors") sought legal action, asking the superior court to find that the rezoning ordinance adopted by the BOC was void and of no legal effect. Among other things, Neighbors claimed that the rezoning constituted illegal spot zoning. The County denied the allegation. Finding no material issues of fact in dispute and deciding the matter on the law alone, the trial court issued summary judgment in favor of Neighbors.

The County appealed.

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

The Court of Appeals of North Carolina held that County's rezoning of the two-acre tract was not illegal spot zoning.

In so holding, the court explained that spot zoning was defined as:

> "A zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected[.]"

The court further explained that spot zoning practices may be valid or invalid depending upon the facts of the specific case. Thus, spot zoning is not invalid per se but, rather, "it is beyond the authority of the municipality or county and therefore void only in the absence of a clear showing of a reasonable basis therefor."

In determining if the rezoning here constituted spot zoning, the court applied a two-part test, looking at: (1) whether the rezoning constituted spot zoning as that action is defined; and (2) if so, whether the zoning authority made a clear showing of a reasonable basis for the zoning, considering the size of the tract in question, the compatibility of the disputed zoning action with an existing comprehensive zoning plan, the benefits and detriments resulting from the zoning action for the Behes of the newly zoned property, their neighbors, and the surrounding community, and the relationship between the uses envisioned under the new zoning and the uses currently present in adjacent tracts.

The trial court had determined that the rezoning was illegal spot zoning because Matt Behe was the sole owner receiving a special benefit. The appellate court disagreed. It noted that the definition of spot zoning requires a single owner of property, not a single person benefitting from the rezoning. The court found that since the parcel was not owned by an individual (an essential element in the definition of spot zoning), but rather Matt and Philip Behe, as father and son, then the rezoning was not illegal spot zoning. Accordingly, the court concluded that the rezoning did not constitute spot zoning as North Carolina courts have defined it.

See also: *Musi v. Town of Shallotte, 200 N.C. App. 379, 684 S.E.2d 892 (2009) (spot zoning claim involving parcels owned by six different owners from same extended family).*

See also: *Alderman v. Chatham County, 89 N.C. App. 610, 366 S.E.2d 885 (1988) (spot zoning claim involving parcel owned by husband and wife).*

See also: *Budd v. Davie County, 116 N.C. App. 168,170, 447 S.E.2d 449 (1994) (spot zoning claim involving land owned by a mother and a strip of land running from that tract owned by her son).*

Case Note:

The Neighbors had also alleged that the County's rezoning of the two-acre parcel was arbitrary and capricious and was therefore void and of no effect. The trial court had agreed. On appeal, however, the appellate court found that the trial court's findings on that issue amounted to findings of fact that went beyond its jurisdiction in ruling on a summary judgment motion. As such, the appellate court reversed the trial court's order and remanded the matter for a new summary judgment hearing.

Variance—Property owner seeks "Critical Area Variance" to build pier across marsh

Opponents of project argue variance standards are not met

Citation: *Assateague Coastal Trust, Inc. v. Schwalbach, 117 A.3d 606 (Md. Ct. Spec. App. 2015)*

MARYLAND (07/02/15)—This case addressed the issue of whether an applicant for a critical area variance met all required standards for the variance. It also addressed the issue of whether in granting a use variance, the local land-use board was required to make express written findings that the landowner had overcome a statutory presumption of nonconformance.

The Background/Facts: In 2003, Roy T. Schwalbach ("Schwalbach") purchased a subdivided property (the "Property") in the "R-3 Multi-Family Residential" zoning district in West Ocean City, Worcester County (the "County"). The Property was located along a tributary of the Sinepuxent Bay and fell within the "Atlantic Coastal Bay Critical Area," per Maryland statutory law. The southern portion of the Property was improved with a residence and swimming pools. The northern portion of the Property was unimproved, bordered the waterway, and was entirely covered by tidal marsh.

Schwalbach planned to construct a pier or walkway to extend across the marsh to connect the improved portion of the property to a proposed dock six feet past the shoreline. Under the County's critical area ordinance, "[n]ew piers or docks shall not extend more than one hundred feet in length over state or private wetlands." To reach the shoreline, however, Schwalbach's proposed structure would have to extend 180 feet across the marsh. As such, in August 2014, Schwalbach submitted an application for a variance with the Board of Zoning Appeals for Worcester County (the "BZA"), requesting "[a] variance [from] the Atlantic Coastal Bays Critical Area Law to authorize a 3 foot wide by 180 foot long pier across tidal marsh."

Pursuant to the County's critical area variance, as well as the Code of Maryland Regulations ("COMAR"), Schwalbach had to satisfy certain specified standards in order to obtain a critical area variance, including submitting evidence that: (1) special conditions or circumstances peculiar to Schwalbach's land or structure and a literal enforcement of provisions and requirements of the County's Atlantic Coastal Bays Critical Area Program would result in unwarranted hardship; (2) a literal interpretation of the provisions of the County's Atlantic Coastal Bays Critical Area Program and related laws would deprive Schwalbach of rights commonly enjoyed by other properties in similar areas within the Atlantic Coastal Bays Critical Area; (3) the granting of a variance would not confer upon Schwalbach any special privilege that would be denied by the County's Atlantic Coastal Bays Critical Area Program to other lands or structures within the Atlantic Coastal Bays Critical Area; (4) the variance request was not based upon conditions or circumstances which were the result of actions by Schwalbach and that the request for a variance did not arise from any condition relating to land or building use, either permitted or nonconforming on any neighboring property; and (5) the granting of a variance would not adversely affect water quality or adversely impact fish, wildlife or plant habitat within the Atlantic Coastal Bays Critical Area and the granting of the variance would be in harmony with the general spirit and intent of the County's Atlantic Coastal Bays Critical Area Program.

Ultimately, the BZA granted Schwalbach's variance request. In doing so, the BZA found that Schwalbach had satisfied all standards required by the County's critical area ordinance and COMAR for a critical area variance.

The Assateague Coastal Trust, Inc. ("ACT") sought judicial review of

the BZA's decision granting the variance. The ACT argued that Schwalbach failed to prove compliance with all required standards. The ACT also argued that the BZA's decision was "defective on its face" because it did not affirmatively express whether Schwalbach had overcome a statutory presumption that the activity subject to the variance application did not conform to the general purpose of the critical area requirements. (The County critical area ordinance, as well as state statutory law, required the Board "make written findings as to whether the applicant has overcome the [statutory] presumption of nonconformance").

The circuit court affirmed the BZA's decision.

ACT appealed.

DECISION: Judgment of circuit court affirmed.

The Court of Special Appeals of Maryland held that substantial evidence in the record supported the BZA's determination that Schwalbach's application satisfied all variance standards. The court also concluded that even though the BZA did not make an express written finding that Schwalbach had overcome the statutory presumption of noncompliance, the fact that the BZA determined all variance standards had been met was essentially such a finding, and, in any case, judicial efficiency did not require reversal or remand in this case based on that omission.

In so holding, the court found that Schwalbach's application met the required standards for a critical area variance:

First, the court found that the need for the variance arose from special features that were peculiar to the property. Schwalbach would be unable to reach the water at the edge of his property without the variance. Under Maryland common law and the Maryland Code, an owner of riparian access has valuable property rights in that he or she has right to make certain improvements to the land in order to access navigable water. Here, the court found that Schwalbach was therefore not making a variance application for the sake of convenience or adding a pleasant amenity, but was exercising an important component of his property rights.

Second, the court found that the hardship faced by Schwalbach was not self-created. Citing prior caselaw on the issue, the court said that Schwalbach's purchase of the property with knowledge that it was located in the critical area adjacent to wetlands was not a self-created hardship that precluded the grant of an area variance.

Third and fourth, the court found that the evidence supported the BZA's findings that the variance was necessary for Schwalbach to enjoy the right of riparian access commonly enjoyed by others in the area and that the granting of the variance would not confer any special privilege denied to other property owners in the area. The evidence showed that there were "numerous properties" that had piers/walkways that crossed an excess of 100 feet of tidal wetlands to access the water, and still more that had private boat docks of varying lengths used to gain access to the water. In any case, without the variance, Schwalbach would be unable to access navigable

waters and would have a reduced amount of rights enjoyed by other properties in similar areas with the Critical Area, found the court.

Finally, fifth, the court found that evidence supported a finding that the granting of the variance would have no adverse environmental impact and would be "in harmony with the general spirit and intent of the critical area program." Configuration of Schwalbach's proposed structure would eliminate adverse effect on water quality, and Schwalbach could mitigate any adverse impact with new plantings.

Finally, disagreeing with ACT's contention that the BZA's decision must be reversed in the absence of some "unequivocal indication that the BZA applied the statutory presumption," the court concluded: "There is no reason to require that an applicant who has overcome his or her respective burdens as to all of the variance criteria must also come forward with additional evidence to rebut the statutory presumption." Here, said the court, the BZA's finding that the variance was in harmony with the general spirit and intent of the Critical Area Program was the same as a finding that Schwalbach had overcome the presumption of nonconformance. To require the "sterile formality" of restating what was already found in different language was a waste of resources, said the court. Even assuming the BZA erred by not making a separate written finding, the court said that did not require reversal of the decision.

See also: *Chesapeake Bay Foundation, Inc. v. DCW Dutchship Island, LLC, 439 Md. 588, 97 A.3d 135 (2014).*

See also: *Richard Roeser Professional Builder, Inc. v. Anne Arundel County, 368 Md. 294, 793 A.2d 545 (2002).*

Standing/Permit/Remedy—Town sues property owners for constructing structures without zoning permits

While litigation is pending, property owners continue and complete construction of structures

Citation: *Town of North Elba v. Grimditch, 13 N.Y.S.3d 601 (App. Div. 3d Dep't 2015)*

NEW YORK (07/02/15)—This case addressed the issue of whether neighbors had standing to challenge a property owners' purported zoning violation. It also addressed the issue of whether construction of a structure without a permit was, under the circumstances, a prior nonconforming use.

It further addressed whether requiring the owners to dismantle the unpermitted structures from their property was an equitable remedy.

The Background/Facts: In 2010, William H. Grimditch, Jr. ("Grimditch") began construction of a three-slip boathouse on his unimproved lakefront property on Lake Placid in the Village of Lake Placid/Town of North Elba (the "Town") in Essex County (the "County"). At the same time, Grimditch's children, Wayne H. Grimditch and Carol Lynn Grimditch Roda ("the Children"), also began construction of a one-slip boathouse on their nearby vacant lakefront property in the Town. The Town's Code Enforcement Officer soon issued stop work orders, alleging that the boathouses were being constructed without the necessary zoning permits.

Eventually, the Town commenced actions against Grimditch and the Children. Owners of land adjacent to the Children's land (the "Neighbors") commenced a separate action, seeking removal of the Children's boathouse.

On the Town's request, the supreme court allowed construction of caissons and decking for the boathouses, but issued a limited preliminary injunction, requiring Grimditch and the Children to apply for building permits pursuant to the New York State Uniform Fire Prevention and Building Code Act ("SBC") and to comply with the provisions of the Village of Lake Placid/Town of North Elba Land Use Code ("LUC"). The court warned Grimditch and the Children that if they proceeded with construction, including of the caissons and decking, they did so at their own peril and on notice that they may need to removal all improvements if the Town prevailed in its action on the merits.

The supreme court issued summary judgment to Grimditch and the Children, apparently finding that their lake front property was under the preemptive jurisdiction of the State of New York (under the Navigation Law, which preempts local land use laws and confers upon the State exclusive jurisdiction). However, that judgment was reversed and the appellate division awarded summary judgment to the Town, finding the Navigation Law applied only where the state owns the navigable waters in its sovereign capacity, while here, most of Lake Placid was within the Town's boundaries and therefore the LUC applied to structures such as the boathouses constructed within those boundaries.

Meanwhile, Grimditch and the Children had continued with, and completed, un-permitted construction of their boathouses. Finally, on remittal for further proceedings, the Supreme Court awarded summary judgment to the Town and the Neighbors. The court ordered Grimditch and the Children to dismantle the boathouses except for the caissons and decking initially authorized.

Grimditch and the Children appealed. Among other things, they argued that: (1) the Neighbors lacked standing (i.e., the legal right) to bring their action; (2) because construction of the boathouses was complete at the time of the Supreme Court's decision, the claims of the Town and

Neighbors were moot; (3) the boathouses were legally constructed; and (4) the boathouses were legal nonconforming structures in light of their construction prior to the Appellate Division's finding that the LUC applied to them; and (5) the remedy requiring dismantling and removal of the boathouses was unequitable.

DECISION: Judgment of Supreme Court affirmed as modified.

The Supreme Court, Appellate Division, Third Department, New York, first held that the Neighbors had standing. The court explained that although municipal officials are tasked with enforcing zoning ordinances within their boundaries, that "does not prevent . . . private property owner[s] who suffer[ ] special damages from maintaining an action seeking to enjoin the continuance of the violation and obtain damages to vindicate [their] discrete, separate identifiable interest[s]." Here, the Neighbors established standing, found the court, in that they made specific allegations of close proximity to the Children's parcel, which gave rise to an inference of damage and injury.

Next, the court rejected the argument of Grimditch and the Children that the claims of the Town and Neighbors were moot given the completed construction of the boathouses. The court explained that "completion of a project does not preclude injunctive relief because offending structures ordinarily can be dismantled." Under the circumstances here—where multiple actions for preliminary injunction were brought by the Town and the Neighbors to prevent construction of the boathouses, and where Grimditch and the Children were warned that they continued construction at their own peril while litigation proceedings continued, the court concluded that the actions were not moot.

The court noted that there was "no longer any dispute" that the SBC and LUC applied to the construction of the boathouses and that no permits were ever obtained under the SBC or LUC for the boathouses. Accordingly, the court affirmed that the boathouses were not lawfully constructed. Moreover, the court rejected the argument that the boathouses were legal nonconforming structures in light of their construction prior to the Appellate Division's finding that the Navigable Water Law did not preempt Town jurisdiction and that the LUC applied to them. The court held that the nonconforming use doctrine had no application here because the boathouses were not constructed prior to the enactment of, or any relevant amendment to, either the LUC or SBC. The court's decision did not constitute a change in a zoning law or ordinance so as to give rise to a prior nonconforming use. That is, the boathouses were—subject to certain specific requirements—a permitted use under the LUC when they were constructed, and those structures did not become nonconforming by virtue of either a zoning change or the Appellate Division's recent decision in the matter.

Finally, the court concluded that the remedy of requiring the boathouses be dismantled and removed was equitable. The court found that such relief was "particularly warranted" where, as here, the record contains abundant

support finding that the offending structures were built in a persistent and "calculated" effort to circumvent and defy the Town's authority and efforts to enforces its zoning laws and procedures.

See also: *Zupa v. Paradise Point Ass'n, Inc., 22 A.D.3d 843, 803 N.Y.S.2d 179 (2d Dep't 2005) (standing).*

See also: *Dreikausen v. Zoning Bd. of Appeals of City of Long Beach, 98 N.Y.2d 165, 746 N.Y.S.2d 429, 774 N.E.2d 193, 32 Envtl. L. Rep. 20763 (2002) (mootness).*

See also: *Beneke v. Town of Santa Clara, 45 A.D.3d 1164, 846 N.Y.S.2d 681 (3d Dep't 2007) (remedy).*

Zoning News from Around the Nation

ARIZONA

Under the terms of legislation recently approved in the State House of Representatives, churches would reportedly "get some special protections against local regulations." "HB 2596 is designed to stop cities from blocking churches from locating in certain neighborhoods."

Source: *Sierra Vista Herald*; www.svherald.com

IOWA/MINNESOTA/NEBRASKA/WISCONSIN

The Center for Rural Affairs has released a report entitled "Zoned Out: An Analysis of Wind Energy Zoning in Four Midwest States." The report analyzes different approaches to zoning commercial wind energy systems in four different Midwest states: Iowa, Minnesota, Nebraska, and Wisconsin. The report also breaks down the advantages and disadvantages of these approaches, and what makes for effective zoning standards. The report finds that the key to effective wind siting and zoning regulation is to "strike the right balance between local and state control, avoiding some of the pitfalls for either approach, while trying to capture the benefits."

Source: *Windpower Engineering & Development;* www.windpowerengineering.com

MARYLAND

State and county lawmakers are reportedly "considering ways to regulate rooming houses for recovering alcoholics and drug addicts." The lawmakers are looking at enacting occupancy limits on sober houses, but are assessing potential liability of such zoning provisions under the Americans with Disabilities Act and the Fair Housing Act.

Source: *Capital Gazette;* www.capitalgazette.com

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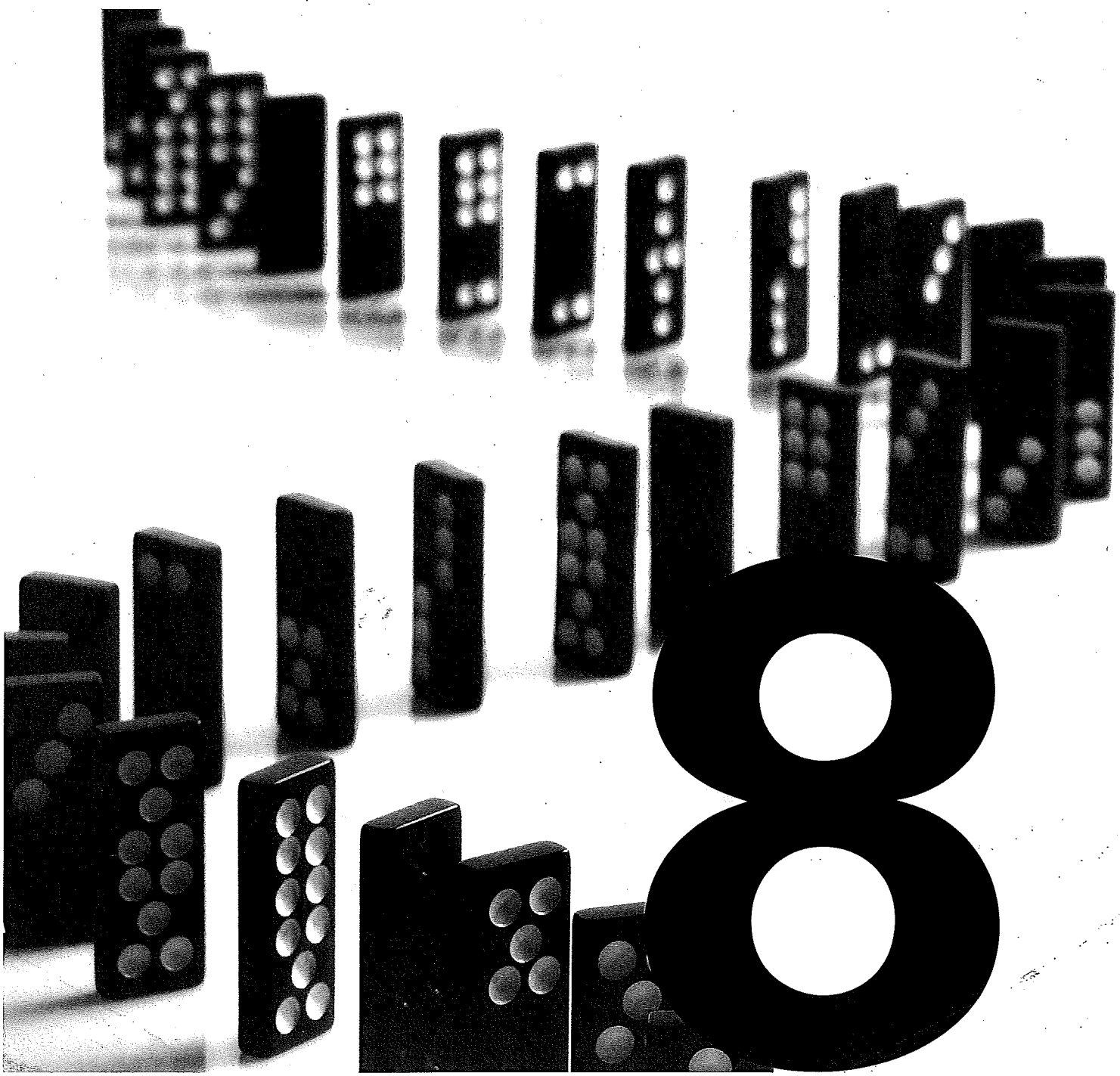
PRACTICE PLAN IMPLEMENTATION



Effective Zoning Methods for Implementing Plans

By Douglas Hammel, AICP

From the beginning of our technical training, planners are taught to 'make no little plans.'

We help communities think big about their futures, and we strive to create plans that capture best practices and reflect a community's vision and aspirations. But how do we get from those big ideas to good development on the ground? Too often, there is a disconnect between a community's vision (i.e., its plan), its rules for development (i.e., its zoning ordinance), and the development that is proposed and built. This article introduces several considerations that can help planners bridge the gap between community vision and the realized built environment. It does so by identifying the best ways to amend or replace a zoning ordinance through calibration, modernization, and transformation.

BEFORE WE ZONE, WE PLAN

Ideally, planning is done to establish a local vision and course of action prior to undertaking zoning amendments aimed at implementing the plan. However, this linear model should not imply that planners disregard zoning during the planning process, or consider it an afterthought. Instead, planners should use the planning process as a way of setting the stage for zoning amendments.

Plan for market realities. One of the biggest challenges planners face is aligning a community's vision with market realities. If this is not done during plan making, stakeholders will likely point out when draft zoning language is seen as a barrier to investment.

Build consensus during plan making. Plan making should provide the opportunity for dialogue about density, sustainability, development character, and other topics that are commonly implemented through zoning. By the time zoning amendments are drafted, the question of "what do we want from development?" should already be answered. The question should instead be "how can zoning be used to best implement what we want?"

Include clear and tangible recommendations. While not every plan recommendation has a direct bearing on zoning, plans commonly address issues of land use, community character, environmental preservation, mobility, and other issues tied to development regulations. To the extent possible, plans should provide specific information that can be translated into zoning regulations and metrics.

Consider other implementation tools. Many communities believe zoning is *the* solution to address their problems. Zoning should be used to remove the regulatory barriers to good development, but other tools, such as financial incentives, partnerships, capital improvements, and special improvement districts, should be used to encourage investment in targeted areas where development might otherwise not occur.

A ZONING INTERVENTION

Communities often begin zoning by asking the wrong questions. Sometimes, they focus immediately on the minutia like "What should our front setbacks be?" or "What kind of brick should we require?" In other instances, they ask "What kind of zoning do we need—Euclidean, form-based, performance-based, or hybrid?" These overlook the most fundamental

This image from the Flint, Michigan, *Imagine Flint Master Plan* clearly defines the desired character for new development and helped establish metrics for new zoning standards.

ASK THE AUTHOR JOIN US ONLINE!

Go online during the month of August to participate in our "Ask the Author" forum, an interactive feature of Zoning Practice. *Douglas Hammel, AICP, 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
Douglas Hammel, AICP, is a senior associate with Houseal Lavigne Associates, where he manages projects that span the range of urban planning, design, land use, zoning, and community development. His recent work leverages his 15 years of professional experience in architecture, urban design, land-use, and transportation planning to help communities bridge the gap between a vision and regulations that result in a desired end.

zoning question: "What do we need our zoning to do in order to get us from what we have now to what we want to be?" Answering this question will allow the community to keep an open mind about what approach, or combination of approaches, is most appropriate in different parts of the community. At its most basic level, zoning intervention can be used in three ways to implement a local vision: calibration, modernization, and transformation.

Calibration is the use of zoning to build upon what is already on the ground, while making small adjustments that allow for market alignment, reinvestment in existing structures, and overall usability of the code.

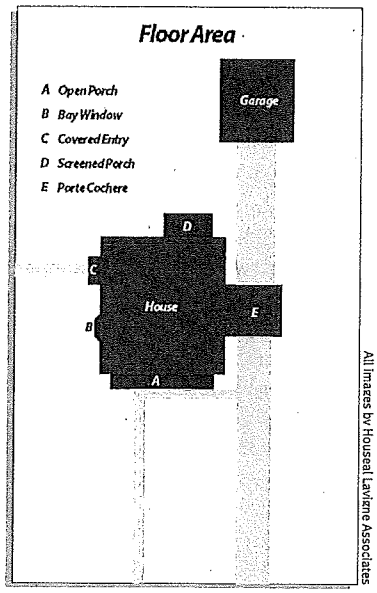
Modernization is the use of zoning to generally maintain the character of what is built, while introducing emerging best practices in a context-sensitive manner.

Transformation is the use of zoning to significantly change the character of development because what is currently on the ground is no longer viable or contradicts the community's vision.

A given community will likely use two or three of the approaches identified above. Tweaking residential bulk standards to allow for market-responsive additions is a common example of calibration, while introducing regulations related to renewable energy systems is an example of modernization. Other parts of a community may be obsolete and in need of complete redevelopment or change in use. In this case, transformation is needed. The following sections describe the nature of these three levels of zoning intervention and how each can be used by communities to address common challenges faced when implementing plan recommendations.

CALIBRATION

Every community has zoning regulations that can be fixed with minor tweaks to maximize market potential and allow reinvestment in existing development. In many instances, outdated zoning regulations are the primary barrier to property investment, resulting in blight and abandonment. Minor amendments can often be made that will foster investment without changing the underlying character of an area. Some of the most common situations where zoning calibration is beneficial include standards for aging commercial centers and older neighborhoods, parking requirements, and older codes that have been amended in a piecemeal fashion over a long period of time.



All images by Houseal Lavigne Associates

Addressing supporting building elements separately from the main building envelope can allow for investment in older neighborhoods.

Aging Commercial Centers

Commercial centers built in the 1970s and 1980s were once thriving destinations for emerging suburbs. But as development has evolved and urbanized regions expanded, many have become obsolete and blighted. These commercial centers must be allowed to evolve in order to thrive. Zoning for these areas often prohibits contemporary development practices that accommodate today's commercial uses and site development preferences. Potential solutions to this issue include reducing setbacks and permitting a wider variety of uses.

Reducing setback requirements for outlot buildings allows development that does not disrupt the existing commercial center. Adding flexibility to permitted uses (i.e., outdoor seating, bars and restaurants, sidewalk retail displays, etc.) can attracts a broader range of users and create a sense of vibrancy.

Older Neighborhoods

In many communities, a traditional urban core is surrounded by older neighborhoods. As one moves away from the urban core, newer neighborhoods and subdivisions become more prevalent. Over the course of several decades, communities tend to standardize zoning regulations across residential areas, often establishing regulations that are appropriate for new development but not for existing structures and properties. While lot sizes vary, standards like lot coverage, floor area ratio (FAR), and setbacks may be universally applied to older homes and properties. As a result, older homes on smaller lots may not be permitted to expand to include contemporary amenities, such as larger kitchens or additional bedrooms or bathrooms, because site intensity has been "maxed out." The result is housing that becomes less marketable, deteriorated, or abandoned. Potential solutions to this issue include redefining terms and modifying bulk requirements.

Redefining terms such as lot coverage and FAR (or whatever nomenclature is used

locally) to omit porches, patios, bay windows, covered entries, and other elements, could be beneficial to remove barriers to minor property investments. Modifying bulk and scale requirements in older neighborhoods allows for additions (horizontal or vertical) that accommodate contemporary amenities without compromising local character.

Parking Requirements

Many communities apply on-site parking requirements equally across all development. However, older, more urban commercial corridors have smaller lots that cannot accommodate a viable building footprint and a suburban parking program (suburban communities often require between 3.5 and 5 parking spaces per 1,000 square feet of retail space). This places an unreasonable burden on the smaller lots. It also fails to recognize, when they are present, the benefits of nearby walkable neighborhoods and on-street parking that often exist along older commercial corridors. Potential solutions to this issue include context-specific parking requirements, limited parking exemptions, shared or remote parking allowances, and situational parking reductions.

Varying on-site parking requirements based on the type of commercial area can encourage investment without altering the existing character of development. An exemption of the first 1,500 square feet (or a similar number of local applicability) of building area as it applies to parking requirements along older commercial corridors can achieve similar results. Allowing shared or remote parking to reduce the burden on individual properties, while treating the area like a collective commercial environment, can create a more functional commercial area. Finally, reducing parking requirements for proximity to transit, bicycle accommodations, or pedestrian access in areas that are transit, bike, or pedestrian friendly recognizes other means of access.

Unfriendly Codes

Zoning codes are often difficult to navigate or understand. They often have redundant or conflicting language. They may leave an applicant guessing how to seek development approval. In some cases, the zoning map may have districts not included in the code. To potential investors, time is money, and a user-friendly code can significantly reduce the amount of time it takes to determine development viability, and ultimately approval. All of these symptoms can be addressed without changing the underlying standards that govern development.

Restructure the code to lead users through a basic sequence of questions: What is the zoning ordinance, and what does it aim to accomplish (purpose and intent, authority, and applicability)? What are the basic characteristics of development permitted on my property (zoning map, district bulk standards, and permitted uses)? What requirements are applicable regardless of what zoning district my property is in (general development standards, use standards, parking, landscaping, and sign regulations)? What supporting information do I need to know (definitions and nonconformities)? And how do I go about getting approval for development (administrative procedures)?

Audit the zoning map and code to ensure they align—you'd be surprised at how often they don't. Some communities adopt regulations for districts they anticipate in the future. However, several communities have old remnant districts that are no longer mapped. This creates confusion and extra language to filter through.

To the extent possible, reduce the number and complexity of zoning districts. Communities often create new districts when they should be looking for ways to reduce the number of districts. Minor nuances can often be handled within a single district, and, to the extent possible, overlay regulations should be folded into base district standards.

Include a navigation guide, tables, flowcharts, graphics, and cross-references throughout the code. A one-page table, diagram of a zoning concepts, or procedural flowchart can often clarify or replace pages of text.

MODERNIZATION

As planning introduces and advocates for new best practices in development, communities often struggle with how to regulate new technologies, infrastructure systems, and design elements. While the value of new practices may be recognized, many fear the unknown and untested and the potential negative impacts on community character. The following are examples of how emerging trends are being integrated into local ordinances through regulatory modernization.

Interactive Codes

More and more, people are accessing local zoning ordinances through the web. This provides the opportunity for several tools that can make the code more dynamic, interactive, and user-friendly. Hyperlinks, pop-up references and definitions, and floating graphics can make static documents easier to navigate. In some instances, online tools are able to model the permitted building envelope for a given property or illustrate the required buffer between two properties based on property variables.

Renewable Energy

Many communities discuss renewable energy in their plans but often meet challenges when trying to accommodate such uses in zoning. Noise and aesthetics are often cited as concerns that create barriers to zoning modernization. Wind energy systems tend to be most contentious since they require minimum heights and motion to be effective. As a result, there are fewer "best practice" models for zoning standards (though some are offered in Chapter 6 of APA's PAS Report, *Planning for Wind Energy* (planning.org/research/wind/pdf/pas566.pdf). However, as solar energy systems become more mainstream, many communities successfully accommodate the technology by regulating the placement of solar panels on a site or structure to minimize their visibility from public streets and the natural grade of adjacent properties, and by regulating the relative height or angle of projection from the roof plane on which they are mounted. These regulations minimize the impacts to the overall character of the structure and neighborhood.

Solar Access

Solar access is becoming a more common concern in development across the country. Public health studies have demonstrated the benefits of sunlight for residents, and solar energy systems are reliant upon solar access to be effective. Several communities are adopting regulations that define the maximum dimensions of a "solar fence." A solar fence is a hypothetical vertical plane built along a property line that determines how far a shadow would be cast on a neighboring structure. By regulating the size of the permitted solar fence, communities can ensure that properties enjoy access to the sun. Considerations related to the regulation of solar access include the following:

- The angle of the sun on December 21 based on local latitude

- The intended scale of development and its corresponding relationship to the maximum size of the solar fence
- The intended area of solar access, whether it is a rooftop to allow for solar energy systems, or grade level to allow for year-round solar access for occupants
- The required setbacks for development in the district in which the solar fence is being regulated

Form-Based Regulations

Form-based zoning regulations are becoming more commonplace in communities where the character of development is a priority. However, many communities still struggle to find the right balance between the regulations and their impacts on development approval and implementation. As communities develop form-based regulations, the following should be considered:

- The extent to which form-based regulations should be applied, recognizing that not all areas in a community might warrant their application
- The potential impacts on development feasibility due to additional development review or project cost
- The level of staff, board, or commission expertise in assessing a development proposal and determining whether or not it conforms to subjective components of the code
- Identifying other mechanisms to achieve a similar end, such as local historic designation or planned development, for projects in a priority area of the community

Housing Diversity

"Aging in place" is a well-established planning concept. To be successful, communities must provide a diverse range of housing as well as complementary social services and transportation systems to support the lifestyle of residents at all stages of life. However, many communities have zoning regulations that prohibit essential diversity in housing stock. Small-lot single-family homes, town houses, duplexes, and small apartment buildings are attractive for both aging empty nesters and young professionals and families looking for a way into or a way to stay in the local housing market. When developing zoning regulations to address this, communities should consider community character, connectivity, access to transit and services, and on-site features.

The character of development should be compatible with surrounding residential neighborhoods. Developments should be required to provide connections to surrounding areas in order to avoid isolation or segregation. Zoning districts that permit this type of housing should be mapped around areas that offer access to public transit, commercial goods and services, medical care, and other services sought by residents. Development should include on-site amenities and pedestrian accommodations that maximize mobility and quality of life for residents.

TRANSFORMATION

In some cases, what's currently on the ground just doesn't work anymore: A neighborhood is beyond the point of revitalization. Miles of commercial corridors are no longer viable. Vacant industrial uses are not coming back. The circumstances and solutions to transformation are unique to every community, so there is no one-size-fits-all approach. However, there are several key questions that must be considered whenever transformation is sought.

What do we want a given area to transform into? Hopefully, this is addressed through a quality plan.

What about the rights of the property owners? If an area is truly in need of transformation, it is likely that the permitted uses under existing zoning are not viable development options. However, this doesn't mean that property owners will automatically support a zoning change. Targeted education and awareness regarding the rationale for and anticipated benefits of a zoning amendment will likely be needed.

How do we get from where we are to where we want to be? How do we *manage* the transition? Simply rezoning for what is envisioned in a plan may ignore what is already on the ground—buildings, uses, parcels, disjointed ownership, etc. Transformational zoning has to balance short-term flexibility and long-term rigidity in order to "transition" over time, rather than immediately.

How do we garner support for transformative zoning? Change often scares residents, property owners, and elected officials. Local education and awareness campaigns are often required to ensure adoption of transformative zoning regulations. This begins in the plan-making process, when consensus building is critical. It will also require the demonstration of how the proposed zoning change is a direct and appropriate response to the adopted plan.

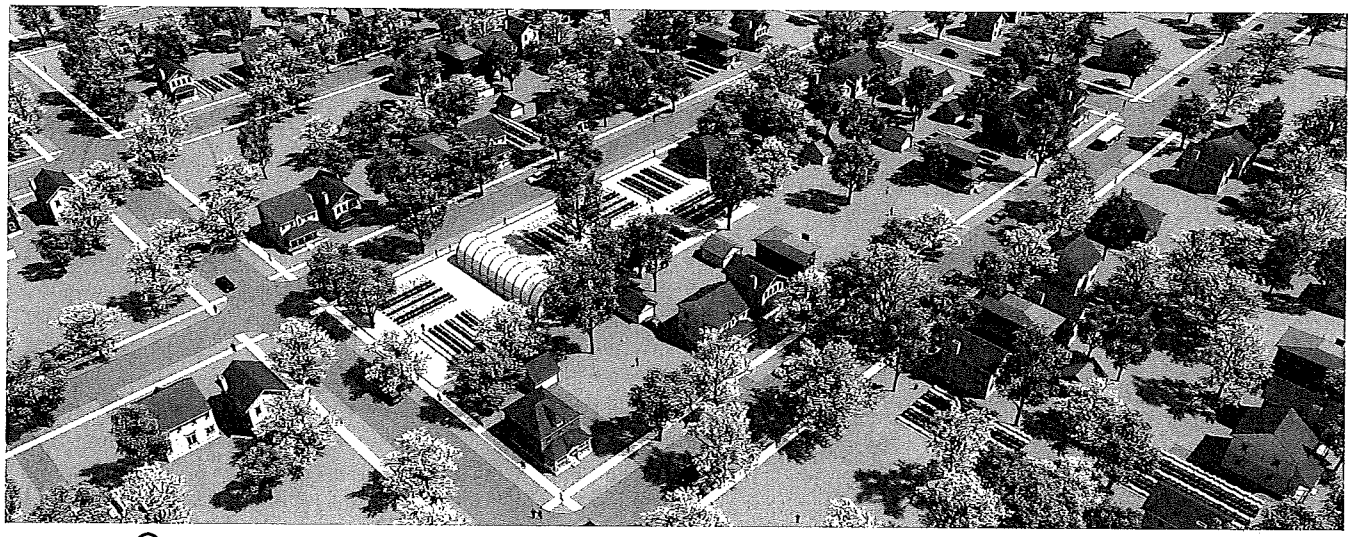
Flint, Michigan, offers a great example of a community looking to implement transformational zoning. The city recently adopted the *Imagine Flint Master Plan* (imagineflint.com). The plan establishes a vision for one of the most economically depressed cities in the nation. The city is nearing completion of a comprehensive zoning update that reflects the goals of the master plan. The following subsections describe two examples of how transformative zoning is being used to reposition entire portions of the city for redevelopment, reinvestment, and innovative uses, and describes the role of community education in securing the political and public will required to adopt the new regulations.

Green Innovation

Flint has more than 1,000 acres of vacant brownfield sites that formerly hosted large-scale automotive production. Much if this industry is gone, but new industries are emerging. There is a growing interest in green industries that would offer significant environmental and economic benefits. The challenge is that many of the specific types of uses are either untested or unknown. Flint needs a zoning approach that allows the vacant brownfields to become "sandboxes" for innovation—areas where nontraditional industry can have a testing ground that will draw innovation and investment. In response to the vision and Green Innovation place-type established in the master plan, the zoning ordinance establishes the Green Innovation District. However, as the task of drafting zoning regulations for these areas unfolded, several key questions and answers emerged.

What kind of uses are to be permitted? This district aims to support nontraditional green industries, so a creative approach was required to determine what uses would be permitted. The ordinance requires that a use must comply with two criteria: 1) It must fall within a range of appropriate use categories (i.e., agriculture, research and development, light industry, heavy industry, etc.); and 2) It must relate to one or more identified green industries (i.e., renewable energy production, waste stream reduction, local food production, alternative transportation, etc.).

How do we mitigate the impacts of the unknown? It is impossible to anticipate the full realm of potential impacts for uses that cur-



Flint, Michigan's Green Neighborhood district addresses the transformation from disinvested residential blocks to sustainable multiuse neighborhoods.

rently don't exist. District regulations establish a series of standards aimed at mitigating the impacts of development, regardless of the use. This approach, similar to performance-based zoning, considers impacts related to noise, vibration, light pollution, stormwater runoff, air pollution, and substantial buffering from adjacent uses.

How does an applicant gain approval for development? Creativity is best served through an effective planned unit development (PUD) procedure. Through the PUD process, applicants can make their case for how their proposed use meets the established "green" criteria, what measures will be taken to mitigate potential impacts, and what overall benefits their development will have on the community as it strives to become a leader in green industry.

Green Neighborhoods

Flint has experienced a dramatic loss in population—a decrease of 100,000 people in the last 50 years. With a residential population that is about half of what is was at its peak, large areas of once thriving neighborhoods are largely or entirely vacant. As of June 2013, the Genesee County Land Bank owned almost one-fifth of all parcels in the city, a number that is expected to increase. As a result there are several neighborhoods that simply aren't coming back. The master plan designated these areas as the Green Neighborhood place type in order to foster a managed transition from traditional neighborhoods to low-density blocks that integrate green nonresidential uses. This raised two key questions during the drafting of zoning regulations: How do we transition to lower-density neighborhoods? And how do we introduce nonresidential uses in a sensitive manner?

Conditions vary widely in areas zoned as Green Neighborhoods. In some areas, vast disinvestment makes the transition to large-lot/green residential easy. However, in other areas, enough homes remain that the new district would create a significant number of nonconformities. As a result, the zoning district was separated into two subdistricts that allow for new green uses in the short-term and manage changing residential density in the long-term.

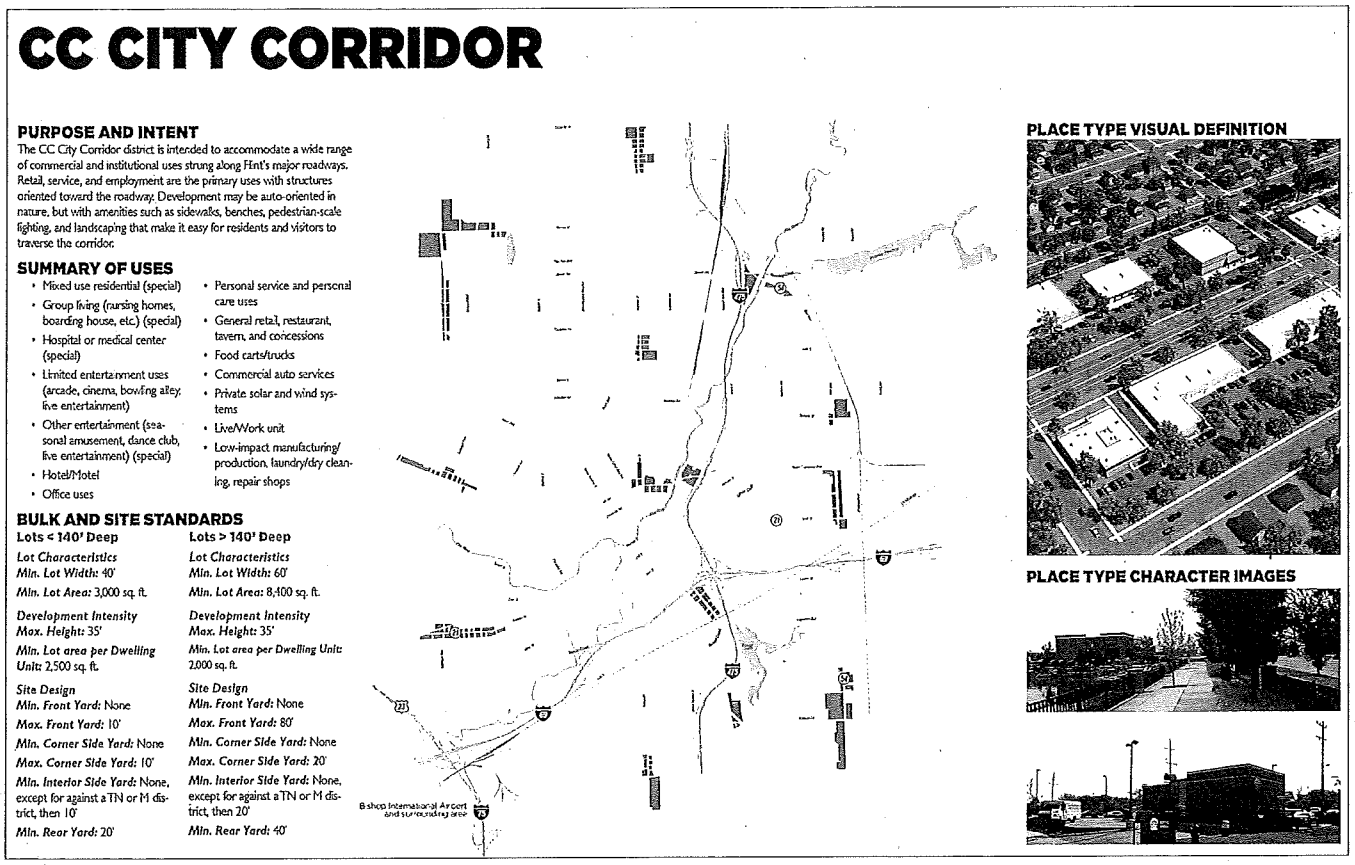
The master plan process included extensive discussions on the role of local food production, animals and livestock, and energy production in Flint's neighborhoods. The challenge is accommodating these uses in a way that won't negatively impact remaining residences. The Green Neighborhood district allows for single-family homes, community gardens, open spaces, small-scale urban agriculture, greenhouses, apiaries, hydroponics, aquaculture, aquaponics, and private renewable energy production as primary uses. In subsequent articles, general development regulations or use standards regulate several characteristics for these uses, including location on the site relative to adjacent structures, hours of operation, the types of machinery and fertilization that are permitted, locations for infrastructure systems and venting, and protective buffers or enclosures.

Community Education

As the draft zoning ordinance was unveiled to the public for review and comment, it was obvious that an education campaign was necessary to demonstrate the connection between the master plan and the zoning regulations aimed at implementing the plan. The project team developed the *Zoning Quick Reference Guide*, which is used by city staff in a series of public zoning workshops. The reference guide uses elements of the master plan and juxtaposes them with summarized zoning standards in order to demonstrate the correlation between the community's vision and the rules that will govern development. This product is the culmination of a planning and zoning process that considered the realities of Flint's market potential, the need to engage and inform residents and stakeholders, and the need to clearly demonstrate how the plan's vision could be realized with the new zoning ordinance.

CONCLUSIONS

The next time you consider amending or replacing your zoning ordinance in an effort to implement a recently adopted plan, just remember: Rather than focusing first on the type of zoning you may need to use (Euclidean, form-based, or hybrid), ask yourself what the most effective and efficient way to amend the code is in order to realize planning objectives. Once you determine which method is best—calibration, modernization, or transformation—you can determine which type of zoning is best.



As part of the public review process, the Flint, Michigan, uses zoning kits to demonstrate the link between the master plan and proposed zoning regulations.

This article is based upon the content developed for and presented at the 2015 APA National Planning Conference by John Houseal, AICP, principal and cofounder of Houseal Lavigne Associates; Douglas Hammel, AICP, senior associate with Houseal Lavigne Associates; Brandon Nolin, AICP, senior associate with Houseal Lavigne Associates; and Christina Bader, AICP, LEED AP, director of marketing and special projects at Farr Associates. Content and editing assistance for this article was provided by John Houseal.

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IS YOUR ZONING CALIBRATED TO HELP IMPLEMENT YOUR PLANS?

8

ZONING **PRACTICE** SEPTEMBER **2015**

AMERICAN PLANNING ASSOCIATION

ISSUE NUMBER 9

PRACTICE WATER CONSERVATION

9

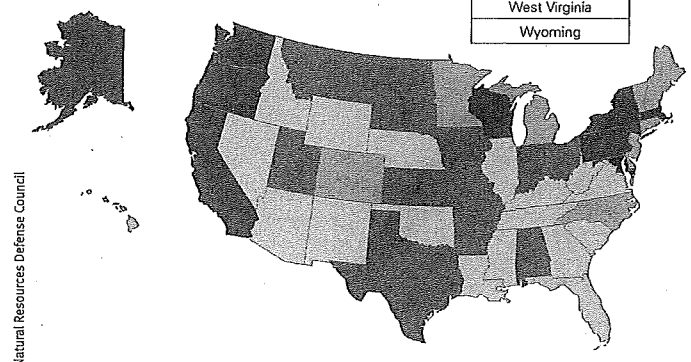
Water-Smart Development Regulations

By Elizabeth Garvin, AICP

Water, or the lack thereof, is always the subject of planning conversation in the arid and growing West.

Ranking of states according to climate preparedness planning

Category 1	Category 2	Category 3	Category 4
Alaska*	Colorado	Arizona	Alabama
California	Connecticut	Georgia	Arkansas
Maryland	Delaware	Florida	Indiana**
Massachusetts	Hawaii	Idaho	Iowa
New York	Maine	Illinois	Kansas**
Oregon*	Michigan	Kentucky	Missouri
Pennsylvania*	Minnesota	Louisiana	Montana
Washington	New Hampshire	Mississippi	North Dakota
Wisconsin*	New Jersey	Nebraska	Ohio
	North Carolina	Nevada	South Dakota
	Rhode Island	New Mexico	Texas**
	Vermont	Oklahoma	Utah**
		South Carolina	
		Tennessee	
		Virginia	
		West Virginia	
		Wyoming	



*Denotes a state where climate preparedness activities at the state government level, although once more robust, appear to have slowed or stalled in some planning areas.

**Denotes a state that has some exisiting water programs and policies (e.g., water conservation) that, if recognized as climate change adaptation tools, could provide beneficial for climate preparedness.

Natural Resources Defense Council

In terms of water planning, some states are better prepared than others. Category 1 states are the most prepared, while Category 4 states are the least prepared.

As the population in this part of the country continues to grow, it appears that many communities—large and small—will need to find more creative and efficient methods to make the water they have go much further. This is not necessarily a new idea, but it is one that has gained in recognition and discussion both inside and outside of planning circles over the past decade. As historic droughts collide with population increases in typically "wet" areas of the county, planning and zoning for water conservation concepts have also taken hold the Midwest and South. This article explores how communities can better address the use of water through local regulations. As with most effective regulations, the process starts with good planning and, in some states, a good understanding of applicable water law. This article will briefly explore how water use can be influenced by pricing, and then look at the range of regulations, particularly in the areas of lot design and landscaping, available at the local level to encourage and require water conservation.

PLANNING FOR WATER CONSERVATION

The highest rates of per capita water usage in the U.S. occur in the dry western states, where more than half of household use goes to watering lawns and gardens (Bates 2011). In many western communities, though, the comprehensive plan does not specifically address water supply or conservation, and the only place local zoning and subdivision regulations consider water is in the requirement that the applicant "prove" the availability of adequate water for a new development. Water planning seems to have fallen between the local jurisdictional cracks of home rule, community planning, public works, emergency preparedness, and regional government, not to mention the challenges of coordination between private water providers and local government (see Bates 2011). There are states, such as Minnesota, Washington, North Carolina, California, Virginia, and Florida, that require local water planning, and local governments that have undertaken voluntary water planning. But for other communities there can be gaps in the planning information and process. Good plans support the best regulations, and it's hard to overemphasize the importance of considering water supply and conservation planning as part of the overall land-use planning and development process. There are many sources available online to assist with creating a plan that addresses water conservation. The American Planning Association's *Policy Guide on Water Resources Management* identifies 10 key items that should be included in water resource and supply plans, including a "plan for water conservation and reuse, and, as appropriate, drought management and emergency contingency plans" (2002). The U.S. Environmental Protection Agency (EPA) Water Sense Program provides water conservation plan guidelines

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Go online during the month of September to participate in our "Ask the Author" forum, an interactive feature of Zoning Practice. *Elizabeth Garvin, AICP, 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

Elizabeth Garvin, AICP, is an attorney with Spencer Fane Britt & Browne in Denver. Garvin has more than 20 years of public- and private-sector experience in land development regulations, urban planning, and economic development. She has prepared code update/revision projects for cities and counties across the country; drafted topic-specific code provisions covering topics such as TOD, sustainability, and signs; created plans for redevelopment projects; prepared regional design standards; organized and undertaken public participation processes; and assisted private clients in obtaining development approvals.

on its website (1998). And the University of Louisville provides a series of 42 questions for communities to consider as they plan for water use and conservation (Arnold et al. 2009).

APPLYING WATER LAW

Before describing the various approaches local governments have available to regulate for water conservation, it is important to add a note to the reader that water law, not just land-use law, may govern any number of aspects of a community's conservation regulatory process. For example, even though the use of rainwater harvesting for plant irrigation has been practiced since the beginning of human agriculture, it was illegal until 2009 to capture and reuse rainwater in Colorado because that water had already been legally appropriated to a specific water user, who was typically not the home owner (Johnson 2009). And while Colorado changed the law, other states have not. Therefore, it is important to have local regulations reviewed in light of the water law of your jurisdiction in order to understand the impacts of the proposed regulations on the existing rights of water users.

PRICING WATER AND FINANCING WATER SYSTEMS

As with most land-use issues, regulations and funding are both critical to water conservation. According to the EPA, there are multiple gaps and oversights in the water provision and pricing system that inadvertently lead to excess water use and waste (Van Lare and Arigoni 2006). These shortcomings include water providers: (1) choosing to defer maintenance on existing, leaking pipes in order to conserve funds to extend the system to new development; (2) not pricing water service to reflect transmission costs to large-lot, dispersed development; and (3) failing to recognize that water systems in low-density areas that are longer and require higher pressure to operate leak more than systems serving higher-density development. If the water system in your community is publicly owned and operated, it may be worth considering the sum of the actual long-term costs to supply low-density residential development and reflecting those costs through the pricing system. Some communities take this approach one step further and establish conservation pricing that increases water rates at peak use times. A study by four Florida water management districts found that increases in water prices result in predictable decreases in water consumption (Whitcomb 2005). The study also found that users in the most expensive homes both used the most water and were able to reduce that use at a greater rate than other home owners because they used water for more discretionary purposes, such as landscape irrigation.

> The highest rates of per capita water usage in the U.S. occur in the dry western states, yet relatively few western communities address water supply or conservation in their comprehensive plans.

WATER CONSERVATION-ORIENTED REGULATION

Local regulation for water conservation can take place both communitywide and at the site level. In local zoning and subdivision regulations, communities can exercise direct control and establish development incentives to encourage water conservation through reduced lot size and water-efficient landscaping.

Lot Size and Density

Smaller lots and vertically mixed uses are popular urban design concepts. It turns out that this approach to neighborhood design is not just trendy, it also saves water.

Small Lots. Research shows that residential developments on smaller lots use less water, or conversely, large-lot residential development results in greater water use (Beckwith 2009). In Utah, as lot size decreased from 0.5 to 0.2 acres (22,000 square feet to 9,000 square feet), per capita water demand reduced from 210 to 110 gallons per day, a roughly 50 percent difference (Van Lare and Arigoni 2006). Similarly, in Seattle, households on 0.15 acre lots (6,500 square feet) use 60 percent less water than those on 0.37 acre lots (16,000 square feet) (Van Lare and Arigoni 2006). This lines up with Bates's finding that much of our household water use goes to irrigation (2011). Most current studies on land use and water conservation identify reduction in lot size as one of the most effective means a community can use to directly conserve water (Driver et al. 2003).

In most communities, the minimum lot size for development is governed by the zoning regulations. One basic approach to achieving smaller lot development, then, is to reduce the minimum lot size in existing districts. Tacoma, Washington, for example, permits single-family residences on lots that range from 2,500 square feet to 6,750 square feet, subject to design standards for new development (§13.06.145). In a growing number of communities, the zone district also specifies a maximum lot size for the district, such as those required by Palo Alto, California,

where the R-1 district has a minimum lot size of 6,000 square feet and a maximum lot size of 9,999 square feet (§18.12.040). Creating development standards for small-lot development may also promote infill development. Moving oddly sized lots from nonconforming and "unbuildable" to built out not only works in the service of water conservation, but it also fills holes, rips, and tears in the community development fabric and may also increase surrounding property values (Filling in the Spaces 2003).

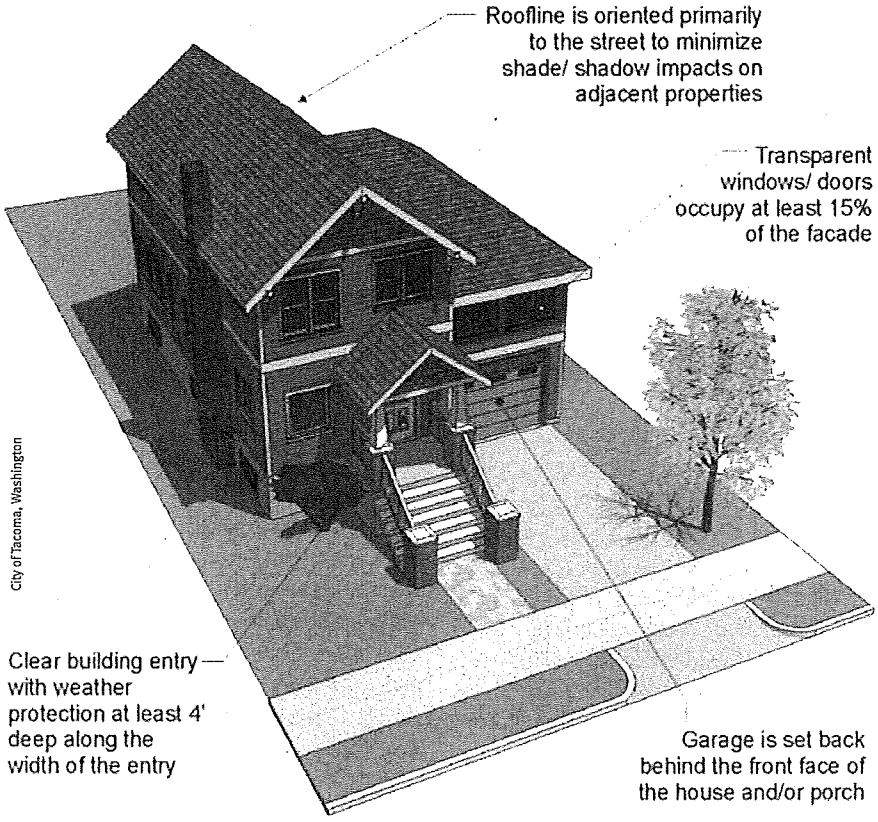
Smaller lots can also be created in an existing neighborhood through the establishment of a process that permits the resubdivision of lots in areas that have been developed with larger lots than the zone district's minimum size. For example, San Diego permits resubdivision of larger lots to smaller lots in multifamily districts that have developed as single-family neighborhoods, with the goal of keeping the new development design in context with the existing neighborhood (§143.0365).

Development on smaller lots also be created through the subdivision process through cluster development subdivision standards.

Compact Development. In addition to providing standards specifically for small-lot, single-family residential development, revising zoning standards to encourage more compact development with increased density through multifamily and mixed use structures also appears to have a positive impact on overall water use. While the relationship between increased density in development and water conservation does not appear to have been proven through any large-scale testing and analysis, the theory, as explained in the *California Water Plan*, seems measurable in terms of overall reduced landscaping demands on residential water use.

Not all communities, however, agree that this assumption is persuasive. For example, the EPA, Denver Water, and the city of San Diego have all used the *California Water Plan* compact development theory to model a locational shift of residents choosing homes with smaller lots and less landscaping over traditional suburban development patterns, reducing per capita water demand and thereby slowing the growth of total volume of water consumed. Phoenix, Arizona, by comparison, assumed that a design change to encourage compact development over traditional density patterns would result in a net overall increase in projected population that will increase overall water demand. In other words, Phoenix assumed that providing a more compact housing option will lure new residents who would otherwise choose to live in other communities, in addition to those people already expected to live in Phoenix (Bush 2007). Whether or not Denver is correct or Phoenix is correct in its long-term use assumptions, designing development within a more compact pattern will have a positive impact on the infrastructure necessary to take water to our homes.

Once a community has appropriate small lot/increased density zoning in place, local officials may also consider incentives to encourage the use of that district or development option. This might include a density or square-foot bonus for small-lot development, water or impact fee reductions or waivers, or expedited plan and permit approval. San Antonio, Texas, allows impact fee waivers for specified new development and redevelopment that takes place within the city's Inner City Reinvestment and Infill Policy Target Area (San Antonio n.d.).



An illustration of small-lot development from Tacoma, Washington's development regulations.

Water Conservation Site Development Standards

Most modern zoning regulations, both traditional and form-based, include any number of standards designed to address specific site development requirements such as parking, lighting, and building design. Water conservation standards can be added to this list, either as a specific group of regulations or incorporated throughout the other standards.

Landscaping Standards. Existing landscaping standards are typically a good subject for revision to better encourage water conservation. Turf grass is the current poster child for water-driven change. Planning lore tells us that turf grass became popular through a combination of our desire to emulate the British—with their ancestral homes and sufficient staff to maintain a lawn—the invention of the lawn mower, and the establishment of the 40-hour work week. This was followed by country clubs, golf courses, and suburbs. Rolling turf grass lawns maintained their status and appeal regardless of where in the country we built our homes. The impact of our preference for lawns is measurable in terms of both water

consumption and environmental impact. According to the EPA, the typical suburban lawn consumes 10,000 gallons of water a year above and beyond rainwater, creates grass clippings that consume 25 to 40 percent of landfill space during the growing season, and requires the use of lawnmowers with gas-powered engines that emit more hydrocarbons than a typical car (National Wildlife Federation n.d.).

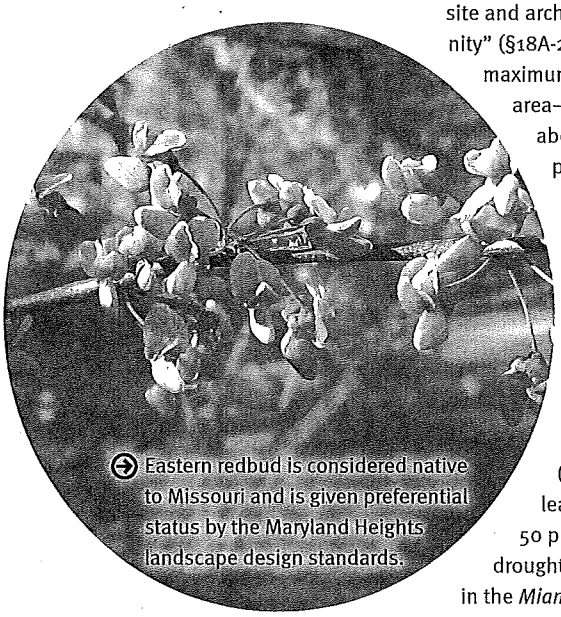
How can a community address this issue? Establish turf grass limits, and create landscaping standards that rely on the use of native and, where appropriate, drought-tolerant species. There are multiple examples of zoning codes across the country that either recommend limitations or establish specific restrictions on the amount of turf grass used to a relatively small percentage of the site, as well as communities that have sponsored turf grass buy-back programs. As an example, Rio Rancho, New Mexico, regulates turf grass to cover no more than 1,000 square feet or 20 percent of the total lot area, whichever is less, while also prohibiting home owner associations bylaws from requiring a minimum amount of grass (§154.05.G).

Avoiding watering issues altogether, some communities also permit the use of artificial turf, such as Simi Valley, California, which permits up to 75 percent of the landscape area to be covered with artificial turf (§9-33.030).

Native and drought-tolerant plant materials along with non-plant groundcovers are both excellent primary plant sources in local landscapes and best choice substitutes for the use of turf grass. What is "native" is subject to some scholarly discussion; however, most of the discussion circles around the idea that native plants "occur naturally in a particular region, state, ecosystem, and habitat without direct or indirect human actions" (Morse et al. 1999). Native plants have, over time, adapted to local soil and climate conditions, which means that they generally need less watering and fertilizing than non-native plants do. State and regional native plant lists are available online and are also typically available through state university agricultural and landscaping programs.

Plants that may be able to survive in long-term drought conditions have different, and sometimes confusing, names. Xeric plants function normally in dry conditions. Drought-tolerant and drought-resistant plants use survival mechanisms, such as temporarily defoliating or going dormant, to survive dry conditions, but these plants still may die in prolonged drought situations (Silver 2015). "Native" and "drought-tolerant" are not interchangeable terms. Some native plants are xeric or drought tolerant; others are not. When drafting zoning standards, it is important to be specific about the category of plant the community wants to promote or require. This is best accomplished through good definitions, such as Sanford, Florida's definition of drought-tolerant: "native, non-invasive plants which will survive and flourish with comparatively little supplemental irrigation," (Part III, Schedule J, §6.0) and this definition of xeriscaping from the University of Florida IFAS Extension: "landscaping with slow-growing, drought-tolerant plants to conserve water and establish a waste-efficient landscape" (2006).

Within a zoning context, requirements for the preservation and planting of native and drought-tolerant plants can range from very general to very specific. Scottsdale, Arizona, starts by identifying native plants already on the site through the creation of a site-specific "native plant program" prior to construction (§§46-105–120). Certain native plants, such as slow-growing desert trees and cacti, are protected, and the city uses the native plant program to work with the applicant to determine how best to work around or relocate these plants.



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Eastern redbud is considered native to Missouri and is given preferential status by the Maryland Heights landscape design standards.

Maryland Heights, Missouri, uses a menu and point system for plant selection in its landscape design standards; all developments must achieve a minimum number of points based on the size of the site through a combination of plants chosen from the menu (§25-16.7). The city establishes a preference for the use of native Missourian plants in the intent section of the regulations as follows: "[p]romote the use of Missouri native plants that are more adaptable to the local climate extremes, are drought tolerant, low maintenance, and thus provide a sustainable, ecologically balanced environment" (§25-16.2.H). The regulations then support this intent by allocating more points to the use of native plants. For example, Missouri native canopy trees are worth two points per tree, while other canopy trees are worth 1.5 points.

The Miami-Dade County, Florida, Landscape Code establishes the basic objective "to use xeriscape (Florida Friendly) principles to reduce water consumption, to expand the use of native species and to protect existing native habitats, to promote energy conservation through the use of landscape and the use of landscape design as an integral part of the site and architectural design of our community" (§18A-2(A)). The code establishes: (1) a maximum lawn area as a percent of net lot area—residential uses are permitted about 50 to 60 per cent lawn area—planted in "species well adopted to localized growing conditions in Miami-Dade County" (§18A-6(A)(1)); (2) a minimum number of trees to be planted—"of a species normally grown in Miami-Dade County"—and 80 per cent of which are listed in the *Miami-Dade Landscape Manual* (§18A-6(C)(12)); and (3) a shrub mix that includes at least 30 per cent native species, 50 per cent low maintenance and drought tolerant, and 80 per cent listed in the *Miami-Dade Landscape Manual*, the *Miami-Dade Street Tree Master Plan*, or the University of Florida's list of Low-Maintenance Landscape Plants for South Florida (§18A-6(D)(1)). The landscape plan review process considers the preservation of native vegetation, planting in hydrozones, use of native plant species, and reestablishment of native habitats (§18A-7).

Finally, when considering water conservation in landscaping standards, communities should also review any irrigation standards in the zoning code. The type and design of

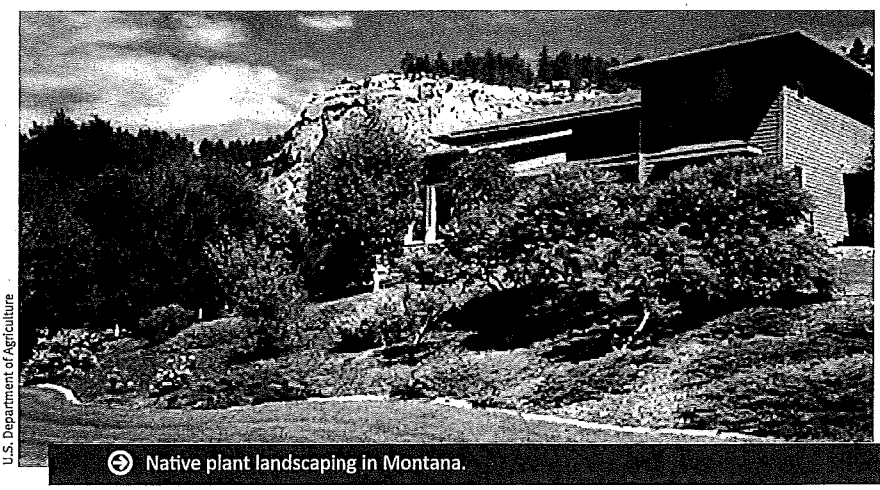
irrigation systems, along with timing of use and restrictions on water waste, can all be specified in a zoning code. At the most basic, irrigation standards should be designed to prevent runoff, overspray, and drainage that flows onto impervious areas.

This requirement can be enhanced, as it is in Riverside, California, with standards for smart irrigation controllers, the use of nonpotable water, separate valves for different planting areas, measurements of water pressure and flow, use of drip-line or low-volume systems in specific locations, and use of rain-sensing devices (§19.570.030). Additionally, some communities, such as Colorado Springs, Colorado, also require plants "with similar water needs within each site microclimate (i.e., shade, west facing, toe of slope, etc.)" to be grouped in hydrozones to allow greater watering efficiency (§7.4.312.E).

Using Water Available On-Site. Where permitted by law, landscaping should be designed to make the best use of water available on the site. This might include the use of nonpotable, graywater systems and rainwater harvesting. According to the Albuquerque Bernalillo County Water Utility Authority, a smooth roof surface on a 3,000-square-foot home can shed more than 12,000 gallons of water per year (2010). Reducing the use of impervious surfaces and replacing those surfaces with pervious materials also allows rainwater to infiltrate on the site and can reduce the amount of potable water used for irrigation purposes. Additionally, the use of low-impact development techniques can help to preserve or restore the natural flow and infiltration of water on a site.

Identifying Regulatory Barriers. While making water-specific changes to the land development regulations, local planning staff should also consider changes to related regulations that may be necessary, such as permitting water collection systems in side-yard setbacks, changing required materials standards for driveways and parking areas, and prohibiting private development covenants from restricting water conservation measures.

Water Conservation Ordinances. Some communities use more holistic water conservation ordinances to regulate a group of water issues, such as conservation measures in new construction along with the design of irrigation systems. Petaluma, California, for example, has water conservation regulations in the municipal code that include indoor water use development standards (such as flow levels in shower heads), requirements for water recycling in car wash facilities, landscape water-use efficiency standards, water budgets for irrigation systems, and water-waste prohibitions (§§15.17.030–070). Santa Fe County, New Mexico, uses its water conservation ordinance to cover outdoor water conservation, indoor conservation, conservation signage (education), water metering, wastewater and fugitive water (§§51.01–99). The Chicago Metropolitan Agency for Planning has prepared a model that provides regulatory standards and supporting commentary for a wide range of subjects that can be addressed in a water conservation ordinance (2010).



U.S. Department of Agriculture

Native plant landscaping in Montana.

Some communities use more holistic water conservation ordinances to regulate a group of water issues, such as conservation measures in new construction along with the design of irrigation systems.

PUDs and Master Planned Communities

Planned unit developments (PUDs) and master planned communities are designed and submitted for development approval as complete developments. Most local governments look carefully at the street layout, open space provisions, and mix of housing styles. Local governments can also review the development applications for water conservation design, preferably through a specific water conservation review requirement included in the PUD approval criteria. For example, Cochise County, Arizona, requires all uses in a rezoning application subject to master development plan approval to demonstrate compliance with the water conservation policies in the county's comprehensive plan and the approved master development plan (§2208.03.B.12).

A number of large master planned developments have been approved in the past 10 or 15 years that include water conservation design, including the Stapleton neighborhood in Denver; Sterling Ranch in Douglas County, Colorado; Civano in Tucson, Arizona; and Rancho Viejo and Oshara Village in Santa Fe, New Mexico (Beckwith 2009).

CONCLUSIONS

How can your community get started with new or improved regulations for water conservation? As always, look first at your comprehensive plan. The identification of local goals and policies for making the link between land use and water conservation establishes the framework for regulations and should answer questions about why and how these changes benefit the community in the long run. With a plan in place, review both zoning and subdivision regulations to find options for the creation of smaller lots, vertical mixed use development, and infill development, all of which should be geared toward a more compact development pattern with reduced landscaping requirements. Next, look at the current landscaping regulations to find

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opportunities for water-sensitive landscaping that incorporates native plants and a little less turf grass. And if your community is looking to provide outreach and educational opportunities, post a good description of the purposes and expected outcomes of the new regulations on your website, consider a turf buy-back program with a little social media coverage, and landscape city hall to showcase all that is natural and beautiful where you live.

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