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# Zoning Bulletin

## in this issue:



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# Validity of Ordinance—Housing center seeks enforced compliance with city's affordable housing ordinance for developers who obtain zoning relief conditioned upon ordinance compliance

Contributors

Corey E. Burnham-Howard



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## Meanwhile, developers challenge validity of the ordinance based on its lack of approval from state affordable housing agency

Citation: *Fair Share Housing Center, Inc. v. Zoning Board of City of Hoboken, 2015 WL 4530656 (N.J. Super. Ct. App. Div. 2015)*

NEW JERSEY (07/28/15)—Generally, this case addressed the enforceability of an affordable housing ordinance adopted by the City of Hoboken (the "City"). More specifically, this case addressed the issue of whether the involvement of New Jersey's Council on Affordable Housing ("COAH") was required in all matters affecting affordable housing—and thus since COAH had not approved the City's affordable housing ordinance, whether that left the ordinance invalid and unenforceable. It also addressed whether a provision in the ordinance, which allowed "payment in lieu of" setting aside a percentage of development as affordable housing, needed COAH approval as a condition of enforcement.

**The Background/Facts:** In the City, each of four developers—Advance at Hoboken, LLC ("Advance"), 1415 Park Avenue, LLC ("1415 Park"), 9th Monroe, LLC ("9th Monroe"), and New Jersey Casket Company, Inc. ("NJ Casket") (collectively, the "Developers")—received "significant" relief from the City's zoning laws in the form of variances from the City's Zoning Board of Adjustment ("Zoning Board"). That relief was conditioned upon the Developers' compliance with the City's affordable housing ordinance (the "Ordinance").

Fair Share Housing Center ("Fair Share") filed four individual actions seeking declaratory and injunctive relief against the Zoning Board and the Developers. Fair Share sought compliance with the Ordinance in the form of a judicial declaration that any zoning approvals that the Developers received should be deemed void or enjoined unless each Developer filed a "plan of compliance" with the Ordinance.

The Developers filed cross-claims and third-party complaints against the Zoning Board and the City. Among other things, the Developers argued estoppel (i.e., to bar the enforcement of the Ordinance because it would result in an unequitable result) based on the City's failure to enforce the Ordinance and the Zoning Board's failure to condition prior zoning approvals upon compliance with the Ordinance.

The trial court ultimately found that the City's Ordinance was inconsistent with New Jersey's Fair Housing Act (the "FHA") and the related procedures and guidelines promulgated by COAH. The trial court held that every municipality with an affordable housing obligation must submit to COAH for approval of its plan to meet that affordable housing obligation. Here, the City had submitted the Ordinance to COAH

 

for substantive certification but COAH had found the submission did not meet necessary criteria and that therefore the Ordinance was not under COAH jurisdiction. The trial court invalidated the City's Ordinance as "null, void, and unenforceable as a matter of law." The court enjoined the City from enforcing "any requirement" of the Ordinance on the Developers to construct affordable housing units and/or collect from the Developers "any monetary contribution" related to affordable housing.

Fair Share and the City appealed. The appeals were consolidated. On appeal, they argued that the trial court erred in holding that all municipal affordable housing ordinances require review by COAH whether or not the municipality is under COAH jurisdiction seeking substantive certification. Fair Share and the City maintained that the trial court "failed to appreciate the voluntary nature of COAH's jurisdiction, and the alternative route the FHA provides to municipalities" (under N.J.S.A. 52:27D-313(a)).

On the other hand, on appeal, the Developers argued that COAH's involvement was required in all matters affecting affordable housing, and that since COAH had not approved the City's Ordinance, the Ordinance was invalid and unenforceable against them.

**DECISION: Judgment of Superior Court, Law Division, reversed and matter remanded.**

The Superior Court of New Jersey, Appellate Division, concluded that the trial court erred in invaliding the City's zoning approval conditions related to compliance with the City's affordable housing Ordinance's provisions as to the Developers. The appellate court held that "[t]here is no provision in the FHA or regulations promulgated by COAH requiring municipalities to submit all ordinances that impact a municipality's affordable housing obligation to COAH for approval." Rather, found the court, the "substantive certification" provided by COAH to those municipalities seeking its protection from builder's remedy suits is "entirely voluntary."

The trial court's decision had invalidated the section in the City's Ordinance that provided for voluntary payments by developers in lieu of compliance with the Ordinance's affordable housing requirements. In the interest of clarity, the appellate court also expressly reversed that portion of the trial court's decision. The court held that "payment in lieu" provisions in affordable housing ordinances do not need COAH approval. The court found that although COAH has jurisdiction over "development fees," COAH has regulatory oversight of "payments in lieu" only when a municipality seeks substantive certification. The court found support for its holding under both the FHA (see N.J.S.A. 52:27D-329.3(a)) and COAH regulations (see N.J.A.C. 5:97-8.3(b)). In summary, the court concluded that the payment in lieu section of the

 

City's Ordinance did not require approval by COAH as a condition of enforcement.

See also: *Holmdel Builders Ass'n v. Township of Holmdel, 121 N.J. 550, 583 A.2d 277 (1990).*

See also: *Toll Bros., Inc. v. Township of West Windsor, 173 N.J. 502, 803 A.2d 53 (2002).*

# Constitutionality of Zoning Ordinance/Sexually-Oriented Business/Jurisdiction—Owner of adult entertainment establishment challenges zoning ordinance governing adult entertainment overlay districts as unconstitutional

## Owner argues that despite later amendments to ordinance, given unconstitutional original ordinance, its adult entertainment use is legally nonconforming

Citation: *Green Valley Investments v. Winnebago County, Wis., 794 F.3d 864 (7th Cir. 2015)*

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

SEVENTH CIRCUIT (WISCONSIN) (07/27/15)—This case addressed the issue of whether a zoning ordinance governing adult entertainment overlay districts constituted prior restraint that violated the First Amendment to the United States Constitution. It also addressed a federal district court's jurisdiction over supplemental state law claims that remain after the federal issue is resolved.

**The Background/Facts:** In 2006, Green Valley Investments, LLC ("Green Valley") opened Stars Cabaret ("Stars"), a nude dancing establishment in Neenah, Wisconsin in Winnebago County (the "County"). At the time that Stars opened, the County Zoning Ordinance required adult entertainment establishments to locate within "adult entertainment overlay [AEO] district [s]." An AEO district could be

 

established only if the County issued a conditional-use permit to the would-be adult entertainment operator. The zoning committee responsible for this process would issue such a permit only if it found that the proposed use complied with several requirements, including that it would: "not be a detriment to the public welfare;" and "in no way [would] contribute to the deterioration of the surrounding neighborhood"; or "have a harmful influence on children residing in or frequenting the area." The application also had to demonstrate (among other things) that no intoxicating beverages would be sold within the AEO district, and that any "adult use" within the district would be located at least 1,500 feet from any other adult use and at least 2,000 feet from land zoned residential or institutional (i.e., a setback provision).

In its operation of Stars, Green Valley never attempted to satisfy the requirements of the County Zoning Ordinance 17.13. It never sought a permit to establish an AEO district encompassing its location. Stars openly featured nude dancing and served alcoholic beverages. Rather, in 2006, Green Valley sued the County for declaratory and injunctive relief. Green Valley alleged that Ordinance 17.13 was an unconstitutional restriction on expression in violation of the First Amendment to the United States Constitution.

While that suit was pending, the County amended the ordinance, and Green Valley agreed to a dismissal without prejudice. In 2008, Green Valley again sued, this time challenging the constitutionality of a 2007 amendment to the ordinance. The district court permanently enjoined the County from enforcing the provisions of the 2007 ordinance relating to conditional use permits, but it found that the remainder of the ordinance once the unconstitutional parts were severed could operate effectively on a standalone basis. Green Valley appealed, but while the appeal was pending, the County again changed the ordinance. Believing that this mooted the appeal, Green Valley voluntarily dismissed it on June 1, 2012. Finally, in 2013, Green Valley again sued the County. This time it argued that the 2006 version of the ordinance violated the First Amendment, and that since Stars operated before that invalid ordinance was modified, its use was a valid nonconforming use that was legally grandfathered despite later amendments to the ordinance.

The district court agreed that parts of the 2006 ordinance were unconstitutional prior restraints (i.e., prohibiting speech or other expression before it could take place). However, the court also held that the unconstitutional provisions of the 2006 ordinance could be severed (under a severability clause in the County's general zoning law), leaving a constitutionally permissible law that, from the time before Stars opened, had regulated alcohol sales at adult establishments and established setback limitations on the location of such businesses. Since Stars has never complied with those requirements, its operation (the court reasoned) had never been lawful.

 

Green Valley appealed.

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

The United States Court of Appeals, Seventh Circuit, first agreed with the district court that the "permissive use scheme laid out in the County's ordinance" was unconstitutional. The court found that the 2006 version of County Zoning Ordinance 17.13 "unquestionably" imposed an unconstitutional prior restraint that violated the First Amendment to the United States Constitution. The court found that the ordinance required applicants such as Green Valley to apply to the County for permission to undertake their selected mode of expression—nude dancing. The County's committee would then decide whether applicants received permission to make their proposed communication based on the content of that communication. That required the committee to review such "amorphous points" as whether the proposed use was "a detriment to the public welfare," "[would] in no way contribute to the deterioration of the surrounding neighborhood," or "[would] not have a harmful influence on children" in the area. The ordinance, found the court, left it to the County's discretion to decide yes or no on each of those criteria. Finally, the County had to affirmatively grant permission for the use to occur. That, concluded the court, was a "quintessential prior restraint."

The court explained that prior restraints are generally unconstitutional, in violation of the First Amendment, unless fitting one of the narrow exceptions: (1) where there is a presence of "a powerful overriding interest" such as national security, obscenity, or incitement to violence and overthrow of the government; (2) where the prior restraint "takes place under procedural safeguards designed to obviate the dangers of a censorship system" (e.g., limitation on the prior restraint for during judicial review); and/or (3) where the restraints imposed are valid time, place, and manner restrictions. The court here found that the first exception had "nothing to do with [the instant] case," and that the County's ordinance included none of the safeguards from the second exception. The court also found that the ordinance did not fit an exception for valid time, place, and manner restrictions, given the fact that a proposed adult use could not occur at all under the ordinance without permission from the County to establish an AEO district for it. In short, the court concluded that the 2006 ordinance created an unconstitutional prior restraint and could not be enforced.

After confirming that portions of the ordinance were unconstitutional, the court next held that the district court erred in severing the unconstitutional portions and slightly modifying the remaining language in order to have a remaining ordinance that made sense. The Seventh Circuit found it was not clear as a matter of Wisconsin law

that the power to sever included the power to modify, nor was it clear whether what remained of an ordinance after severance could serve as a standalone law if modifications or additions were necessary. In other words, the Seventh Circuit found that the ability of a court to do more than excise the unconstitutional portions of the ordinance did not appear to be settled in Wisconsin. While the case presented a federal issue as to the constitutionality of the 2006 ordinance, the issues of severance and of whether remaining provision of the ordinance could stand alone were state law questions, found the court. Thus, the court held that the federal district court should have relinquished its jurisdiction over those supplemental state claims and dismissed them without prejudice.

See also: *Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991).*

See also: *Cantwell v. State of Connecticut, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, 128 A.L.R. 1352 (1940).*

# Validity of Zoning Ordinance—Amendment to county's overlay district zoning ordinance exempts a certain class of property owners from the ordinance

## Nonexempt property owner challenges amendment as unconstitutional special legislation

Citation: *Dowd Grain Company, Inc. v. County of Sarpy, 291 Neb. 620, 867 N.W.2d 599 (2015)*

NEBRASKA (08/14/15)—This case addressed the issue of whether an amended overlay district zoning ordinance imposing design requirements for new development, which exempted a certain class of property owners from the ordinance, was an unconstitutional special law (under the Nebraska Constitution).

**The Background/Facts:** In March 2004, the Sarpy County Board of Commissioners (the "Board") adopted an overlay district zoning ordinance. In 2007, the Board amended the overlay ordinance to exempt properties platted before the effective date of the original (2004)

 

ordinance. Thus, under the 2007 exception, any land platted prior to March 9, 2004 did not have to comply with the design guidelines contained in the overlay ordinance.

Dowd Grain Company, Inc. ("Dowd Grain") owned property in the County that was not exempt from the overlay ordinance. Down Grain sued Sarpy County (the "County"), claiming that the 2007 exemption was unconstitutional as special legislation.

Under the Nebraska Constitution, Neb. Const. art. III, § 18, municipalities cannot pass municipal ordinances, including zoning ordinances, that are "special laws" in that they grant "any special or exclusive privileges, immunity, or franchise whatever."

The district court entered judgment in favor of the County. It found that the 2007 overlay district zoning ordinance amendment was not an unconstitutional special law.

Dowd Grain appealed.

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

The Supreme Court of Nebraska agreed that the 2007 amended overlay district zoning ordinance, which created exceptions from enforcement of design guidelines for a certain class of property owners (those with land platted prior to March 9, 2004), was not an unconstitutional special law.

In so holding, the court explained that the focus of the constitutional prohibition against special legislation was the prevention of legislation which arbitrarily benefits or grants special favors to a specific class. The court further explained that a legislative act, including the amended overlay district zoning ordinance here, would constitute unconstitutional special legislation if it either: (1) created an arbitrary and unreasonable method of classification (rather than being based on some substantial difference of circumstances or situation or being based on a public purpose); or (2) created a permanently closed class.

Here, the court found that the ordinance's exception for land platted prior to the effective date of the ordinance did not meet either of those criteria. The court determined that the exception did not create a closed class because the number of parcels within the fixed geographic area was subject to change and the owners composing the class could change via a sale of real property. The court further determined that the class that benefited from the exemption (i.e., owners of land platted prior to March 9, 2004) was not arbitrarily selected, but rather was exempted from enforcement of the overlay ordinance on a reasonable basis; those property owners who had submitted a plat for their property prior to the enactment of the overlay ordinance incurred significant expenses and time planning and were thus in a substantially different situation from property owns who had not yet completed a plat for their property.

 

See also: *Steven Banks v. Heineman, 286 Neb. 390, 837 N.W.2d 70 (2013).*

See also: *City of Ralston v. Balka, 247 Neb. 773, 530 N.W.2d 594 (1995).*

# Special Permit/Discretion—Zoning board of appeals denies special permit application for residential retirement community

## Board's denial is based on subjective finding that proposed project was "out-of-character with its surroundings"

Citation: *Buccaneer Development, Inc. v. Zoning Bd. of Appeals of Lenox, 35 N.E.3d 737 (Mass. Ct. App. 2015)*

MASSACHUSETTS (08/11/15)—This case addressed the issue of whether a zoning board of appeals acted within its discretion when it denied a developer's application for a special permit to build a residential retirement community.

**The Background/Facts:** Buccaneer Development, Inc. ("Buccaneer") sought to build a residential retirement community for individuals 55 years of age and older on a 23-acre parcel of land (the "Property") in a residential zoning district in Lenox, Massachusetts (the "Town"). The proposed development would consist of 23 single-family townhouses. Surrounding the Property were: 68 acres of protected open space to the north and northeast; four single-family homes to the west; a cul-de-sac development to the east of 17 single-family homes; and a resort and associated properties, including a golf course, 10 condominium units, and a 37-unit housing development to the south.

Under § 6 ("Use Regulations") of the town's zoning bylaw, as in effect at the relevant time, a special permit was required to build a retirement community in a residential zone. Thus, in furtherance of its proposed project, Buccaneer submitted an application for a special permit to the Town's zoning board of appeals (the "ZBA").

The ZBA unanimously voted to deny Buccaneer's application for the special permit. The ZBA members found, among other things, that the proposed development project was "simply too dense and too out-of-character with its surroundings."

 

Buccaneer appealed the ZBA's determination. The land court judge affirmed the ZBA's denial of the special permit.

Buccaneer again appealed.

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

The Appeals Court of Massachusetts, Suffolk, held that the ZBA acted within its discretion when it denied Buccaneer's application for a special permit to build the proposed residential retirement community.

The appellate court noted that in applying for the special permit to build the "retirement community," Buccaneer had met all minimum requirements outlined under § 9.6 of the Town's zoning bylaw. In that regard, the court concluded that the density of the proposed project was "well within" the bylaw's requirements and that the ZBA therefore "had no basis to deny the special permit under the [dimensional] provisions included in [the bylaw]." However, noted the appellate court, "[e]ven if the record reveals that a desired special permit could lawfully be granted by [a] board because the applicant's evidence satisfied the statutory and regulatory criteria, the board retains discretionary authority to deny the permit." Thus, said the court, here, the ZBA's denial of the special permit application would be affirmed unless the denial was "on a legally untenable ground" or was "unreasonable, whimsical, capricious or arbitrary."

Here, in addition to the dimensional requirements of the bylaw (under § 9.6, which had been met), the court found that under the bylaw's Use Regulations (§ 6.1.1), the ZBA had to consider five factors in determining whether to grant a special permit. Of those five factors, noted the court, three were subjective: the ZBA could not grant a special permit unless it found the proposed use "(a) [was] . . . in harmony with [the bylaw's] general intent and purpose; (b) [was] essential or desirable to the public conveniences or welfare at the proposed location; [and] (c) [would] not be detrimental to adjacent uses or to the established or future character of the neighborhood." Here, the appellate court found that the ZBA's denial of Buccaneer's special permit application "was firmly grounded in its assessment that the proposed use failed to meet these criteria." The court found that the facts provided support for the ZBA's determination in that the now 23 acres of open land of the Property would become a cluster development of single-family homes, representing a "substantial change in the appearance and 'feel' of the area."

Accordingly, the court concluded that the ZBA in denying Buccaneer's special permit application acted "within its discretion, consistent with the facts on the ground, and conformably with the applicable by-law."

See also: *Subaru of New England, Inc. v. Board of Appeals of Canton, 8 Mass. App. Ct. 483, 395 N.E.2d 880 (1979).*

***Case Note:***

*In its decision, the court noted that in exceptional cases a board can be ordered to grant a special permit—such as where the board fails to provide an adequate statement of its reasons for denying the special permits and commits numerous errors of law in the process, or where the board's findings are inadequate and amount to "little more than a mere recitation of the statutory and by-law standards," or where the board fails to apply its own standards "rationally." Here, however, the court did not consider this case to be one of those exceptional cases where the ZBA could be ordered to grant the special permit.*

# Zoning News from Around the Nation

## LOUISIANA

The New Orleans City Council was expected to look at a proposed zoning law amendment that would change the definition of a "standard restaurant," deleting a current requirement that says alcoholic drink sales must be "incidental" to the serving of food. Supporters of the proposed amendment say it would appease restaurant concerns about being forced to keep kitchens open when their bars are serving alcohol or closing up shop all together, when food is not being served. Opponents worry it will "open the door for restaurants to morph into more bars."

Source: *4 WWL; www.wwltv.com*

## NEW YORK

Under language inserted in the state budget passed in July, counties are now prohibited from keeping shoreland zoning ordinances that are "more stringent than the looser state rules."

Source: *News Watch 12; www.wjfw.com*

## RHODE ISLAND

Bristol Town Council Chairman Nathan Calouro is proposing changes to the town's zoning regulations to limit where recreational marijuana stores and cultivation centers may open. Calouro is also proposing special use permits that require a public hearing. Medical marijuana has been legal in Rhode Island since 2006.

Source: *Portland Press Herald; www.pressherald.com*

 

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# Conditional Use Permit/ Preemption/Noise—County denies conditional use permit based on use's negative noise impact on neighborhood

## Permit applicant argues that basis fails since noise levels do not exceed state standards

Contributors

Corey E. Burnham-Howard



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Citation: *August v. Chisago County Bd. of Com'rs, 2015 WL 4877658 (Minn. Ct. App. 2015)*

MINNESOTA (08/17/15)—This case addressed the issue of whether, in deciding to deny a landowner a conditional use permit, a county board could consider the effects of noise from a landowner's desired use of the property even if the noise level did not surpass state statutory noise standards.

**The Background/Facts:** Jeffery August ("August") owned a 20-acre tract of land (the "Property") located in Sunrise Township (the "Township") in Chisago County (the "County"). The Property was zoned for agricultural use and was generally surrounded by property developed in "a rural, residential manner, with farm fields or residential lawns."

In 2013, August began hosting mounted shooting competitions and clinics on his Property. Mounted shooting competitions consist of 10 to 15 contestants who ride on horseback while attempting to shoot balloons on mounted posts in the center of the arena. Contestants shoot at the balloons with .45 caliber blanks.

August typically held the mounted shooting competitions on Saturdays from 10:00 a.m. to dusk and on Sundays from noon until 6:00 p.m. In connection with the competitions, contestants and spectators camped overnight in either tents or RVs in an adjacent pasture on the property. In addition to the competitions, August hosted "major shoots," which typically spanned the course of a three-day weekend. August also offered one-day clinics where club members could train and learn safety skills. The 2014 schedule listed two clinics, five shoots, and five major shoots.

After receiving complaints about the property, in 2014, the County Department of Environmental Services and Zoning (the "Zoning Department") determined that August's use of the Property did not conform to its zoned use. August was advised to apply for a conditional-use permit ("CUP"). August applied for a CUP and agreed to have his CUP application processed as "rural retail tourism/commercial outdoor recreation use." Ultimately, the County Planning Commission recommended denial of August's CUP application because it would violate "Section 4.15, part D, part five [of the rural tourism criteria,] [in that it would] 'create[ ] negative impact on the neighborhood by intrusive noise.' "

Incorporating the County Planning Commission's findings, the County Board of Commissioner's (the "County Board") denied the CUP "based upon its conflict with the required performance characteristics cited in Section 4.15 of the Chisago County Zoning Ordinance governing rural retail tourism uses." Essentially, the County Board concluded that intrusive noise from August's proposed use would negatively impact the neighborhood.

Under the County zoning ordinance, "[e]xisting nearby properties shall not be adversely affected by intrusion of noise, glare or general unsightliness." (§ 8.04, subd. C.) In addition to the CUP requirements, ru-

 

ral retail tourism uses—such as that proposed by August—were required by the County zoning ordinance to remain "small-scale and low-impact," which required the use to "not negatively impact the neighborhood by intrusion of noise . . . ." (§ 4.15, subd. D.)

August appealed the denial of his CUP application. August argued that the County Planning Commission "failed to provide a proper and sufficient legal basis for the denial of his CUP." He also argued that the County Board erred in considering the effects of noise from his use of the property for mounted shooting competitions because the "noise created by the mounted shooting [did] not rise above the sound pressure levels promulgated by the [Minnesota Pollution Control Agency]."

**DECISION: Determination of county board of commissioner's affirmed.**

The Court of Appeals of Minnesota rejected August's arguments and upheld the County Board's denial of August's CUP application.

In upholding the denial of the CUP application, the court explained that county zoning authorities have wide latitude in making decisions on CUPs but cannot base their decisions on "unreasonably vague or unreasonably subjective" standards. In other words, the denial of a CUP cannot be arbitrary—such as where the applicant establishes that all of the standards specified by the zoning ordinance as conditions of granting the permit are satisfied.

Here, the court upheld the County Board's decision finding it (1) was based on legally sufficient reasons; and (2) based on reasons that had a factual basis in the record.

The court found that the County Board denied the CUP application based on the conflict of August's proposed use with the rural retail tourism use standards, specifically the small-scale/low-impact requirement of the zoning ordinance and the impact the use would have on the neighborhood "by intrusion of noise, glare, odor, or other adverse effects." Thus, the court concluded that, in denying the CUP, the County Board "relied on the criteria enumerated in the [C]ounty zoning ordinances and thereby provided legally sufficient reasons for denying the CUP."

The court also found that the County Board's denial had a factual basis. The court disagreed with August's contention that the Board could not consider the effects of noise since the noise from his use did not meet or exceed the sound pressure levels promulgated by the Minnesota Pollution Control Agency ("MPCA"). The court found that the County zoning ordinance did not conflict with the MPCA. The County zoning ordinance provided that noise from any use must be in compliance with MPCA rules. Minnesota statutory law prohibited local governments from setting more stringent sound pressure levels. The County zoning ordinance did not conflict with the statutory law—as it did not establish more stringent noise standards; nor did it establish noise standards different from those promulgated under the MPCA. Rather, the pertinent sections of the County

 

zoning ordinance simply required: that a CUP applicant show that the noise from a proposed use would not adversely affect neighboring properties; and that the use would not impact the neighborhood by intrusion of noise.

Furthermore, the court refused to adopt—as August had urged—the proposition that a governing body could consider the effect that noise would have on surrounding properties only if the noise level surpassed the sound level limits promulgated by the MPCA. Such a proposed rule of law would place a governing body or property owner at risk for a Minnesota Environmental Rights Act ("MERA") violation, said the court. The court reasoned that if a government entity could only consider noise from a proposed use that meets or exceeds the limits enumerated in the administrative rules or statutes then the entity could, by definition, only consider noise levels that establish a prima facie MERA violation.

See also: *Minnesota Public Interest Research Group v. White Bear Rod and Gun Club, 257 N.W.2d 762, 8 Envtl. L. Rep. 20002 (Minn. 1977).*

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*Case Note:*

*August had also argued that the County Board of Commissioners had erroneously considered neighborhood comments. The court rejected that argument, finding a "a municipal entity may consider neighborhood opposition when it is based on something more concrete than non-specific neighborhood opposition"—such as detailed factual complaints from the neighborhood like August's neighbors' descriptions of their personal experiences with the noise caused by all of the rounds being fired each weekend.*

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# Procedure/Comprehensive Plan—County municipal development commission adopts comprehensive plan for neighborhood

## Landowner and commission dispute whether commission was required to establish township advisory committees when adopting the plan

Citation: *Fifty Six LLC v. Metropolitan Development Com'n of Marion County, 2015 WL 4753802 (Ind. Ct. App. 2015)*

INDIANA (08/12/15)—Among other things, this case addressed the issue of whether a metropolitan development commission was required, under state statutory law, to establish township advisory committees when adopting a comprehensive plan for a neighborhood.

**The Background/Facts:** In May 2012, the Metropolitan Development Commission of Marion County (the "MDC") approved a resolution amending the County's Comprehensive Plan by adopting the "Millersville Plan," which applied to Millersville—a neighborhood located on the northeast side of Indianapolis and located in both Lawrence and Washington Townships in Marion County (the "County"). 56, LLC ("Landowner") owned an approximately 21-acre parcel of land in Millersville ("Landowner's Parcel"). Landowner apparently took issue with the Millersville Plan's characterization, land use, and development recommendations that were adopted for Landowner's Parcel. Landowner filed a legal action challenging the adoption of the Millersville Plan. In that action, Landowner alleged: (1) that the MDC failed to adhere to the state statutory law (Ind. Code § 36-7-4-504.5) requiring the establishment of township advisory committees when preparing or revising a comprehensive plan for a township; and (2) that the MDC failed to adhere to public notice requirements for amendments to the comprehensive plan provided under state statutory law (Ind. Code §§ 36-7-4-507 and -511(a)).

Indiana law (Ind. Code § 36-7-4-504.5) requires that "[i]n preparing or revising a comprehensive plan for a township, the legislative body of the consolidated city shall adopt an ordinance requiring the plan commission to establish an advisory committee of citizens interested in problems of planning and zoning for that township, a majority of whom shall be nominated by the township legislative body." The County had adopted the required ordinance (Marion County Ordinance § 231-401), which required the MDC to "establish an advisory committee of township citizens interested in problems of planning and zoning in that township to provide advice in preparing or revising the comprehensive plan for any township in Marion County."

The MDC maintained that township advisory committees were not required here because: (a) the Millersville Plan amended the County Comprehensive Plan, which did not require the formation of township advisory committees; (b) the Millersville Plan did not revise the comprehensive plans for Lawrence and Washington Township; and (c) neither Ind. Code § 36-7-4-504.5(a) nor County Ordinance § 231-401(b) required the formation of township advisory committees in preparing a comprehensive plan for a neighborhood, small community, or sub-area. The MDC also asserted that it actually or substantially complied with the statutory notice requirements.

Eventually, finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the superior court issued summary judgment in favor of the MDC.

Landowner appealed.

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

The Court of Appeals of Indiana held that the MDC was not required to establish township advisory committees when adopting the Millersville

 

Plan. The court explained that the text of Ind. Code § 36-7-4-504.5(a) requires the formation of township advisory committees when "preparing or revising a comprehensive plan for a township" but does not include provisions requiring township advisory committees when a neighborhood or sub-area is the subject of a comprehensive plan. The court found that the Millersville Plan was prepared as a village and corridor plan for the Millersville neighborhood, and not as a revision to the comprehensive plans for either Lawrence or Washington Township. Although Millersville partially lay within both Lawrence and Washington Township, the court found that the evidence showed that the Millersville Plan was not prepared as a revision to the existing comprehensive plans for either Lawrence or Washington Township and that the process for adopting township comprehensive plans, including the formation of township advisory committees, was followed at the time comprehensive plans were adopted for those townships. Under the circumstances, the court declared that it could not "say that township advisory committees were required."

The court did, however, also hold that the MDC failed to comply with statutorily required notice and hearing provisions. Statutory law applicable to comprehensive plan approval (Ind. Code § Ind. Code § 36-7-4-507) required that the "schedule must 'state where the entire plan is on file and may be examined in its entirety for at least ten (10) days before the hearing.' " Substantial compliance (as opposed to strict compliance) with these requirements was not sufficient, said the court, because no statutory provision allowed for only substantial compliance with notice and hearing requirements in the context of amendments to comprehensive plans.

Here, the court found that the Millersville Plan was adopted just five days after publication of its final draft. Accordingly, the court concluded that the Millersville Plan did not comply with the requirement that the plan be published in its entirety 10 days prior to a hearing pursuant to Ind. Code § 36-7-4-507. On that basis, the court reversed the superior court order granting the MDC's cross-motion for summary judgment.

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*Case Note:*

*In this case, the MDC had challenged Landowner's standing (i.e., the legal right to bring the action). The court found that because a comprehensive plan "is one of several factors that determines future, binding land-use regulations," Landowner would be directly impacted by the recommendations of the Millersville Plan and therefore had standing to challenge it.*

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# Procedure/Comprehensive Plan—Entities object to town's amendments to comprehensive plan

## They contend the comprehensive plan failed to include supporting data and thus failed to comply with state law

Citation: *Friends of Frederick County v. Town of New Market, 2015 WL 5021387 (Md. Ct. Spec. App. 2015)*

MARYLAND (08/25/15)—This case addressed the issue of whether a comprehensive plan is required to include data to support the plan's goals, policies and recommendations.

**The Background/Facts:** In 2005, the Town of New Market (the "Town") adopted a comprehensive plan (the "Plan"). In November 2010, the Town amended the Plan by adding a water resources element and a municipal growth element ("MGE"). Of relevance here, the MGE proposed the annexation of various tracts of land adjacent to the present Town boundaries ("Annexation Areas"). The MGE also proposed that, upon annexation, the Town change the zoning classifications of the Annexation Areas from agricultural and low-intensity uses to higher-density residential and mixed commercial and industrial uses.

Several different entities—including Friends of Frederick County, the Audubon Society of Central Maryland, Inc.—as well as a number of individuals (collectively, the "Objectors") disagreed with the proposal in the MGE that the Town annex and rezone the Annexation Areas. They filed a legal action contending that the Town failed to comply with state law requirements in several respects.

Among other things, the Objectors presented the following multistep argument: Under Maryland case law, "[c]omprehensive plans are more than mere guides consisting only of policy statements;" under state law they are actually "regulatory devices." Because of the significance of comprehensive plans and in light of the "language and purpose of the relevant statutory provisions," comprehensive plans must "contain substantive factual determinations, not merely policy statements." The Objectors argued that because the Plan here did not include data to support its goals, policies, and recommendations, it failed to comply with state law.

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

The Objectors appealed.

 

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

The Court of Special Appeals of Maryland concluded that the Town's Plan did comply with and satisfy the specific requirements of the Maryland Land Use Articles ("LU") with regard to the Plan's substantive content. In so holding, the court rejected the Objector's arguments and held that, under Maryland law, a comprehensive plan is not required to include data to support the plan's goals, policies and recommendations.

In support of its argument that a comprehensive plan was required to include data, the Objectors had pointed to LU § 3-112 and § 1-201. § 3-112 sets out the matters that must be addressed in a comprehensive plan's municipal growth element. § 1-201 articulates the visions that a local planning commission "shall implement . . . through the comprehensive plan[.]"

Looking at the texts of that statute both in isolation—particularly the definitions of the words "include" and "implement"—as well as the text in the context of the larger statutory scheme, the court determined that it did not support the Objectors' contentions. The court found "[i]nclude" was defined as "[t]o contain as a part of something," and "[i]mplement" was defined as "to carry into effect: to fulfill; to accomplish[.]" The court found that these dictionary definitions of "include" and "implement" failed to support the Objectors' contention that the statutes in question required a local planning commission to include detailed factual analyses as part of the plan.

The court also found that the only provision in the LU addressing the means by which comprehensive plans should be prepared required only "careful and comprehensive study;" it did not mandate use of particular methodologies or analytical techniques. The court looked at another applicable LU § —LU § 3-202(b)(1). Section 3-202(b)(1) required that the elements of a comprehensive play "may be expressed in words, graphics, or any other appropriate form." The court similarly found that this section fell short of a requirement that a plan must contain data-based analyses to support the plans' conclusion and recommendations.

The court concluded that the relevant statutory provisions did not support the Objectors' contentions that the LU required planning commission to use specific analytical techniques or that comprehensive plans, in their final and adopted forms, must contain discussions of data.

Finally, the court noted that because the Town's planning commission and the Town council were acting, respectively, in quasi-legislative and legislative capacities, "neither body was obligated to create a record to provide a basis for its decision." "If the planning commission and the town council were not obligated to create an evidentiary record to support their decisions to adopt the Plan, then a fortiori, the text of the Plan itself need not contain such information," concluded the court.

See also: *Lewis v. Gansler, 204 Md. App. 454, 42 A.3d 63 (2012).*

# Validity of Zoning Decision/ Nonconforming Use—Convenience store seeks to authorization to sell high-alcohol content beverages

## City denies request, saying it is an impermissible expansion of its sale of low-alcohol content pursuant to a nonconforming use status

Citation: *Mannino's P & M Texaco Service Center, Inc. v. City of New Orleans, 2015-109 La. App. 4 Cir. 8/19/15, 2015 WL 4965885 (La. Ct. App. 4th Cir. 2015)*

*The Fourth U.S. Circuit has jurisdiction over Maryland, North Carolina, South Carolina, Virginia, and West Virginia.*

LOUISIANA (08/19/15)—This case addressed the issue of whether a board of zoning appeals acted arbitrarily and capriciously in denying authorization to sell high-alcohol content beverages to a convenience store that had previously sold low-alcohol content beverages pursuant to a nonconforming use status. More specifically, the case addressed whether the sale of high-alcohol content beverages differed in nature, purpose, or character from the sale of low-alcohol content beverages such that the addition of high-alcohol sales to a store that sold low-alcohol content beverages as a nonconforming use would constitute an impermissible intensification of the nonconforming use.

**The Background/Facts:** Mannino's P & M Texaco Service Center, Inc. ("Mannino's") operated a gas station and convenience store in New Orleans in a historic commercial district ("HMC-2"). For many years, Mannino's sold low-content alcohol (i.e., beer) pursuant to a legal nonconforming use status. Mannino's sought to expand its sales to include high-alcohol content beverages.

The City's Department of Safety and Permits (the "Department") found that pursuant to the City's zoning ordinance, Mannino's business, located in the HMC-2 district was required to have at least 5,000 square feet of floor area in order to sell high-alcohol content beverages. Mannino's business had less than 2,000 square feet of floor area. The Department also determined that Mannino's enjoyed "legal, non-conforming status as to low-content alcohol sales and that this nonconforming [status] [could] not be expanded to include high-content alcohol." The Department differentiated the types of alcohol license for which a location can be considered legally nonconforming. The Department concluded that it could not approve Mannino's request for high-alcohol content beverage sales because

 

that would be an impermissible intensification of the nonconformity in direct conflict with the clear language of the City's zoning ordinance.

Mannino's appealed the Department's decision to the BZA. The BZA denied the appeal and upheld the decision of the Department.

Mannino's again appealed. The trial court affirmed the BZA's decision. It concluded that the sale of high-alcohol content beverages was neither a permitted use nor an accessory use for a retail store located in HMC-2 having less than 5,000 square feet of floor area. It also agreed that allowing Mannino's to sell high-content alcohol would be an intensification of the nonconforming use of low-alcohol content beverages, which the City zoning ordinance did not allow.

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

The Court of Appeal of Louisiana, Fourth Circuit, held that the BZA did not act arbitrarily and capriciously in denying authorization to Mannino's to sell high-alcohol content beverages. Reviewing the City's zoning ordinance the court also concluded that the sale of high-alcohol content beverages was neither a permitted use nor an accessory use for a retail store located in HMC-2 having less than 5,000 square feet of floor area. The court further affirmed that it would be an intensification of Mannino's nonconforming use to permit the sale of high-alcohol content beverages.

Mannino's had argued that the law did not distinguish between low-alcohol content beverages and high-alcohol beverages. Mannino's had further argued that the sale of high-alcohol content beverages was the same character, nature, and purpose as the original use (of selling low-alcohol content beverages), and it would have no adverse effect on the neighborhood. The appellate court disagreed.

While the court acknowledged that the City's zoning ordinance did not define the types of alcohol, it found it clear that governing case law made a distinction as it applies to zoning disputes. The distinction, noted the cited case law, was "reasonably related to promoting the public's health, safety, and/or general welfare." Moreover, the court found that when considering the use of property located in a historic zoning district, such a distinction was not unreasonable.

The court also found that case law supported the conclusion that the sale of high-alcohol content beverages was an illegal intensification of a nonconforming use because it was in fact different in character, nature, and kind from the original use. The court found it clear that the BZA's decision was consistent with governing case law, as well as with promoting health, safety, morals, and/or general welfare of the community. Accordingly, the court concluded that the BZA's decision was not arbitrary and capricious, and should therefore be upheld.

See also: *Toups v. City of Shreveport, 60 So. 3d 1215 (La. 2011).*

 

# Zoning News from Around the Nation

## MASSACHUSETTS

Reportedly, Air BnB locations in Winthrop have been told to cease and desist "after several officials questioned the safety and set up of these rooms." Winthrop officials say that such locations will not operate until a related ordinance is passed, in light of concerns over "licenses, safety issues, building code violations, health code violations and sanitation," as well as "taxes and fees."

Source: *Winthrop Transcript; www.winthroptranscript.com*

## MARYLAND

Baltimore County has approved zoning rules for medical marijuana. Under the new rules, "growing and manufacturing facilities would be limited to industrial areas around the county with dispensaries located in business districts, . . . [and] [d]ispensers . . . locate[d] in commercial revitalization districts, with special exemptions."

Source: *WBALtv; www.wbaltv.com*

## WEST VIRGINIA

Charleston City Council recently passed an ordinance "that will require businesses in certain parts of the city, including convenience stores that sell single bottles and cans, to have a special permit. The conditional-use alcohol permit will allow police to pinpoint where the alcohol is being purchased, as well as if the sales from that store are contributing to the problem.

Source: *WSAZ; www.wsaz.com*

 

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# Zoning Bulletin

## in this issue:



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# Use Permit—Company tional use permit for well on property in griculture zoning district

proposed use is similar and other uses in the zoning district

*Board of Supervisors of Fairfield Township, 2015 14, 2015)*

Contributors

Corey E. Burnham-Howard



THOMSON REUTERS

610 Opperman Drive
P.O. Box 64526
St. Paul, MN 55164-0526
1-800-229-2084
t.customerservice@thomsonreuters.com
ISSN 0514-7905

PENNSYLVANIA (09/14/15)—This case addressed the issue of whether a proposed conditional use of a natural gas well met the threshold requirements for a conditional use permit in a township's zoning ordinance.

**The Background/Facts:** Inflection Energy, LLC ("Inflection") sought to construct and operate a natural gas well on land it leased from Donald and Eleanor Shaheen (the "Shaheens"). The Shaheens' property (the "Property") was located on land in a Residential Agriculture zoning district (the "RA District") in Fairfield Township (the "Township"). The Township's zoning ordinance did not specifically authorize natural gas wells, so Inflection applied to the Township for a conditional use permit ("CUP") under the zoning ordinance's "savings clause." That savings clause authorized the Township's Board of Supervisors (the "Board") to grant a CUP where a proposed use was not specifically authorized anywhere in the Township, provided that the applicant showed that the proposed use was consistent with: the uses that were permitted in the zoning district; and with the public health and safety.

Brian and Dawn Gorsline and Paul and Michele Batowski and other neighbors (collectively, the "Neighbors") opposed Inflection's CUP application. They expressed concerns about: well water contamination; truck traffic; noise; light pollution from nighttime operations; the possible criminal record of employees at the site; and the effect of the natural gas well on their property values.

The natural gas well operation was to include a level pad, a well head, a water impoundment for 2 million gallons of water, and sediment and erosion controls. The well pad was to be located on the Shaheens' 59-acre Property and within 1,000 feet of one home and 3,000 feet of a residential development. During the 90-day construction period, an average of 35 trucks would visit the Property per day, with more trucks required for graveling the road. A total of 120 trucks would enter the Property during the drilling phase and 225 during the completion phase. Once each well became operational, it was to be unmanned, with one pick-up truck per day visiting the well. However, if water could not be provided to the Property by pipeline, thousands of water trucks would need to visit the Property for fracking operations.

In evaluating the CUP application, the Board focused on whether Inflection satisfied the standards for a CUP under the zoning ordinance. In general, the zoning ordinance required conditional uses not to: adversely affect the neighborhood; create an undue nuisance or serious hazard; adversely impact the area economically; or create excessive noise, glare or odor. Further, the zoning ordinance required that conditional uses must satisfy standards for traffic, parking, and waste disposal. Under the savings clause of the zoning ordinances, all conditional uses had to be "similar to and compatible with other uses permitted in the [RA] zone . . . ."

The Board concluded that Inflection met its burden on each of those factors. That conclusion created a presumption that Inflection's proposed use was consistent with the general welfare and safety of the public.

The Neighbors disagreed and expressed their concerns, however, the Board found that their concerns were based on speculation, and that the

 

Neighbors failed to meet their burden of rebutting the Board's presumptive conclusion with their own evidence.

The Neighbors appealed to court. Disagreeing with the Board, the trial court held that Inflection failed to satisfy each factor in the zoning ordinance section governing CUPs. The court found that Inflection had failed to show that its proposed well was: (1) similar to other uses expressly permitted in the RA District; and (2) compatible with other uses permitted in the RA District. The court found that there was too much uncertainty in Inflection's CUP application (i.e., uncertainty as to how many wells would be drilled; how much water would be used; how long the Property would be used for natural gas extraction) to compare it to other expressly permitted uses. Moreover, the court found that the truck noise and fracking activities would create much noise, which was not compatible with the quiet residential and farming uses of the RA District. The trial court granted the Neighbors' appeal and nullified the Board's decision to grant Inflection's CUP.

Inflection appealed. On appeal, Inflection's primary argument was that it had proven that its well would be similar and compatible with uses permitted in the RA District, as required for CUP approval under the zoning ordinance's savings clause. Inflection pointed to other uses allowed either as a matter of right or as conditional uses in the RA District, including: forestry operations; hunting camps; hospitals; retirement homes; and commercial recreation. More specifically, Inflection maintained that its proposed well was similar to a "public service facility," which was expressly permitted under the zoning ordinance in an RA District. Inflection claimed that its proposed well would serve the general public by producing natural gas for its use and consumption.

**DECISION: Judgment of Court of Common Pleas reversed.**

Disagreeing with the trial court and agreeing with the Board, the Commonwealth Court of Pennsylvania held that Inflection's proposed use satisfied the requirements of the savings clause of the Township's zoning ordinance, which governed Inflection's proposed conditional use. The court found that, based on the evidence presented, the proposed natural gas well was "similar to and compatible with other uses permitted in the [RA] zone . . . ."

In so holding, the court recognized that the zoning ordinance permitted a "wide range of conditional uses in the RA District." The court agreed with Inflection's argument that in contrast to the size of a hospital—which was a permitted conditional use in the RA District—a natural gas well would present a low physical profile and involve a small footprint on the land. The court agreed with Inflection that Inflection's proposed well was similar to a public service facility, which was expressly allowed in the RA District. In fact, noted the court, the Board had already authorized other natural gas wells owned by Inflection in the RA District. Moreover, the court found that the evidence about Inflection's well at this Property "was in no way rebutted"; the Neighbors had presented speculated concerns but no evidence.

The court further noted that, in addition to proving that its proposed use was similar and compatible with uses expressly permitted in the RA District, Inflection also had the burden of showing that is proposed use did not

 

"conflict with the general purpose of [the Township's zoning ordinance." The court found that Inflection also met that burden. The zoning ordinance expressly authorized the extraction of minerals.

See also: *MarkWest Liberty Midstream & Resources, LLC v. Cecil Tp. Zoning Hearing Bd., 102 A.3d 549 (Pa. Commw. Ct. 2014), appeal denied, 113 A.3d 281 (Pa. 2015).*

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*Case Note:*

*In its holding, the appellate court noted that the trial court had focused on noise and compatibility of truck deliveries during the construction phase of the natural well development project. The appellate court said that focus was in error because "[z]oning regulates the use of land and not the particulars of development and construction."*

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# Preemption—City rejects outdoor advertising sign registrations for signs on metropolitan transportation authority property

## Outdoor advertising companies challenge city jurisdiction over signs, arguing state law preempts local law as to signs on such property

Citation: *CBS Outdoor, Inc. v. City of New York, 16 N.Y.S.3d 411 (Sup 2015)*

NEW YORK (09/08/15)—This case addressed the issue of whether Metropolitan Transportation Authority facilities were exempt, under the Public Authorities Law, from local laws restricting the placement of outdoor advertising signs. The case also addressed whether local zoning laws were preempted under the federal Interstate Commerce Commission Termination Act of 1995 ("ICCTA")—which preempts all local laws managing or governing rail transportation.

**The Background/Facts:** CBS Outdoor, Inc. ("CBS Outdoor"), Lamar Advertising of Penn, LLC ("Lamar"), and Clear Channel Outdoor, Inc. ("Clear Channel") (collectively, the "Outdoor Advertising Companies" or "OACs") are each engaged in the business of outdoor advertising. The City of New York (the "City") regulates outdoor advertising under its zoning laws. The City's Building Code requires outdoor advertising companies to register with the City's Department of Buildings ("DOB"), and to provide DOB with an inventory of their outdoor advertising signs, sign structures, and sign locations that are within 900 feet and within view of an arterial highway.

 

Each of the OACs submitted registrations for signs on property owned or under control of the Metropolitan Transportation Authority ("MTA"). CBS Outdoor had also submitted registrations for signs on property owned by CSX Transportation Inc. ("CSXT").

In 2012, the DOB issued Notice of Sign Registration Rejection letters denying registration for those signs on the MTA property and on the CSXT property. The DOB rejected the sign registrations, finding the signs were not allowed because they were too close to an arterial highway or in a residential or low-density commercial zoning district.

The OACs each appealed the denials to the City's Board of Standards and Appeals ("BSA"). The BSA reviewed the appeal applications together. The BSA ultimately denied the appeals of the OACs with respect to the total 13 signs on MTA property. The BSA also denied CBS Outdoor's application with respect to CBS Outdoor's 12 signs on CSXT property.

The three OACs brought legal actions, seeking to vacate and annul the DOB's rejection of their applications to register their outdoor signs and the resolution of the BSA, which upheld the DOB's rejection. The OACs also asked the court to declare that local laws governing outdoor signs do not apply to property or facilities owned, leased, or controlled by the MTA. They maintained that the local laws conflicted with the Public Authorities Law, which exempted MTA facilities from local regulation.

CBS Outdoor also argued its signs on CSXT property were legal nonconforming uses. CSXT also brought a "cross claim" under which it argued that the local zoning laws did not apply and were preempted under federal law—the Interstate Commerce Commission Termination Act of 1995 ("ICCTA")—which preempts all local laws managing or governing rail transportation.

**DECISION: Petitions challenging determination of Department of Buildings granted in part and denied in part.**

The Supreme Court, New York County, New York, held that the City regulations restricting the placement of outdoor advertising conflicted with the Public Authorities Law. The court concluded that the City's laws governing outdoor sign placement did not apply to property or facilities owned, leased, or controlled by the MTA.

In so concluding, the court found that, by its terms, the Public Authorities Law § 1266(8) expressly provides that local laws and rules that are "in conflict" with the Public Authorities Law are inapplicable to MTA facilities, except for "facilities that are devoted to purposes other than transportation or transit purposes."

The Public Authorities Law discusses, in part, jurisdiction of municipalities over MTA facilities. Public Authorities Law § 1266(8) provides in relevant part that:

> "Except as hereinafter specially provided, no municipality or political subdivision, including but not limited to a . . . city . . . shall have jurisdiction over any facilities of the authority and its subsidiaries, and New York city transit authority and its subsidiaries, or any of their activities or operations. The local laws, resolutions, ordinances, rules and regulations of a municipality . . .

 

> conflicting with this title [Title 11 of the Public Authorities Law] or any rule or regulation of the [MTA] . . . shall not be applicable to the activities or operations of the [MTA] . . . or the facilities of the [MTA] . . . except such facilities that are devoted to purposes other than transportation or transit purposes."

Here, the court found that, insofar as the application of the City's laws governing sign placement would result in a loss of revenue to the MTA from outdoor advertising, the City's laws were "in conflict" with Public Authorities Law § 1266(8). In other words, the court found that "the loss of revenue from compliance with the local laws and regulations at issue would interfere with the accomplishment of the MTA's function and purpose of, among other things, generating revenue to fund public regional transportation."

Finding a conflict existed, the court next had to determine whether the MTA facilities at issue were "devoted to purposes other than transportation or transit purposes." The City had argued that the MTA facilities were not devoted to transportation or transit purpose because the outdoor signs on the facilities were not about transportation or transit. On the other hand, the OACs had argued that generating revenue for the MTA was, in itself, a "transportation or other transit purpose" under Pubic Authorities Law § 1266(8). The court found that "[t]he outdoor signs did not render the railroad facilities here unusable as railroad rights of way, trestles, and overpasses; [those] facilities continue[d] to function as part of a system for moving trains and transit equipment." Thus, the court found that it could not be said that the MTA facilities at issue were devoted to purposes other than transportation or transit purposes. Accordingly, the court concluded that the MTA facilities at issue—i.e., the railroad rights-of-way, railroad trestles and overpasses upon which the 13 subject signs were affixed or erected—were not facilities devoted to purposes other than transportation or transit purposes. Therefore, the court held that those MTA facilities were exempt from the city's zoning laws regulating sign placement. Accordingly, the court concluded that the DOB's rejection of the sign registrations for those 13 signs and the BSA's resolution as to those 13 signs must be vacated and annulled.

With regard to CBS Outdoor's signs on CSXT property, the court determined that the BSA's determination, which upheld the DOB's rejection of the registration of those outdoor signs, must be vacated to permit the DOB to consider whether those signs had the status of legal nonconforming use. Moreover, the court rejected CSXT's cross claim. The court found that the ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, but permits the continued application of laws having a more remote or incidental effect on rail transportation. Disagreeing with CSXT, the court held that zoning regulations barring advertising signs located on railroad rights-of-way or overpasses, which consequently limit the raising of advertising revenue for a commuter train system, do not have the effect of "managing or governing rail transportation," and cannot be said to have an effect, if any, on "the movement of passengers or property, or both, by rail." Thus, the court concluded that the local laws and regulations with respect to outdoor advertising on CSXT property or rights of way were not preempted by the ICCTA.

 

See also: *People v. Long Island Railroad, 90 Misc.2d 269, 397 N.Y.S.2d 846 (App Term, 2nd Dept. 1976).*

See also: *Tang v. New York City Transit Authority, 55 A.D.3d 720, 867 N.Y.S.2d 453 (2d Dept. 2008).*

See also: *Terranova v. New York City Transit Auth., 49 A.D.3d 10, 15, 850 N.Y.S.2d 123 (2d Dept. 2007).*

See also: *Echevarria v. New York City Transit Authority, 45 A.D.3d 492, 847 N.Y.S.2d 38 (1st Dept. 2007).*

See also: *Metro. Transp. Auth. v. City of New York, 70 A.D.2d 551, 416 N.Y.S.2d 612 (1st Dept.), lv denied 48 N.Y. 607 (1979).*

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*Case Note:*

*The OACs had urged the court to declare that every outdoor sign on all MTA property is exempt from local law and regulations. The court refused, noting that Public Authorities Law § 1266(8) does not exempt from local law and regulations "facilities that are devoted to purposes other than transportation or transit purposes." Here, on the record before it, the court could not find, as a matter of law, that there were no facilities that existed that were "devoted to purposes other than transportation or transit purposes"; neither could the court find, as a matter of law, that every MTA facility with an outdoor sign was devoted to a transportation or transit purpose.*

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# Jurisdiction/Authority—Intervenor in zoning appeal claims proposed development would result in environmental resource damage

## Court enjoins development, and developer claims state Environmental Protection Act does not give court authority to enter an injunction in the context of a zoning appeal.

Citation: *Hunter Ridge, LLC v. Planning and Zoning Commission of Town of Newtown, 318 Conn. 431 (Sept. 1, 2015)*

CONNECTICUT (09/01/15)—This case addressed the issue of whether Connecticut's Environmental Protection Act of 1971—Conn. Gen. Stat. §§ 22a-18 and 22a-19—empowers or allows a trial court to enter an injunction in an administrative appeal of a zoning decision brought pursuant to § 8-8 in which an individual has intervened pursuant to § 22a-19.

**The Background/Facts:** Seeking to develop a parcel of land, Hunter Ridge, LLC ("Hunter Ridge") applied for a subdivision permit from the

 

Planning and Zoning Commission (the "PZC") of the Town of Newtown (the "Town"). The PZC denied the application, finding that Hunter Ridge failed to meet the open space requirements in the Town's subdivision regulations. Hunter Ridge appealed to the trial court.

Spencer Taylor ("Taylor") intervened in the appeal pursuant to Connecticut's Environmental Protection Act of 1971 (the "Act"). The Act provides any person seeking to prevent unreasonable pollution two separate avenues for bringing their concerns before a court: (1) an independent cause of action under § 22a-16; or (2) intervention in an existing administrative, licensing, or other proceeding pursuant to § 22a-19. Here, Taylor intervened under § 22a-19(a).

Section 22a-19(a)(1) allows a person to intervene in an existing proceeding relating to conduct that may impact the natural resources of the state. In relevant part, the statute provides that, "[i]n any administrative, licensing or other proceeding," any person or legal entity "may intervene as a party on the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state." Section 22a-19 (b) also directs agencies to consider the allegations of likely harm to the environment and provides that no conduct shall be approved if there exists a "feasible and prudent alternative" to the harmful conduct.

Here, Taylor raised concerns related to the environmental impact of the proposed subdivision. Taylor sought and received permission from the trial court to present additional evidence that was not included in the administrative record. After receiving the evidence, the trial court concluded that Taylor made out a case, on its face, on his environmental claims. The court remanded the matter back to the PZC for fact-findings relative to Taylor's claims.

The PZC responded to the trial court's request for fact-finding, concluding that Hunter Ridge's proposed subdivision would not "unreasonably pollute, impair or destroy the natural resources on the property."

Ultimately, with the matter returning to the trial court, the court set aside the PZC's findings, adjudicated the factual issues itself, and found that the proposed subdivision would have an unreasonable impact on the natural resources of the property. The court enjoined Hunter Ridge from developing a portion of its property without prior court approval or without meeting certain conditions in the court's order.

Hunter Ridge appealed. Hunter Ridge claimed, among other things, that: the Act did not give the trial court authority to enter an injunction in the context of a zoning appeal. Hunter Ridge maintained that the grant of power in § 22a-18(a)—which authorizes a court to enter temporary and permanent equitable relief as necessary to protect natural resources from unreasonable destruction—applied only to independent actions for declaratory and equitable relief brought under § 22a-16, and not to interventions brought under § 22a-19(a)(1).

Taylor countered that the court did have power to enter an injunction in the context of a zoning appeal, pursuant to § 22a-18(a).

 

The Supreme Court of Connecticut transferred the appeal to itself.

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

The Supreme Court of Connecticut agreed with Hunter Ridge, finding the trial court erred in issuing an injunction in the context of this zoning appeal. The court held that the Act—specifically § 22a-18(a)—does not give a trial court independent authority to enter an injunction in an administrative appeal involving an intervention under § 22a-19. Instead, the court declared, an intervenor under § 22a-19 must take the proceeding as he or she finds it at the time of the intervention. In other words, the Act does not permit the intervenor to expand the remedies allowed in the underlying proceeding; it only allows the intervenor to raise those claims for relief otherwise permitted in the existing proceeding. Thus, only where the underlying proceeding would permit the use of equitable remedies by the court may the court issue an injunction in a proceeding in which someone intervenes. Otherwise, a person who seeks an injunction to prevent conduct that would violate the Act must seek such relief through an independent action brought under § 22a-16.

In so holding, the court found the language of the relevant statutes was "ambiguous as to whether the grant of equitable power in § 22a-18(a) applie[d] in actions in which a party has intervened pursuant to § 22a-19." The court did find that, in permitting the recovery of costs and attorney's fees when a party obtains declaratory and equitable relief against a defendant in an intervention under § 22a-19, the Act clearly contemplated that equitable relief may be available in certain interventions, including: in enforcement proceedings brought by town zoning officers or by the Commissioner of Energy and Environmental Protection.

Still, after analyzing related, prior case law, the court found that § 22a-18(a) (equitable relief) does not apply to all interventions, but only to some types of proceedings covered by § 22a-19. The court found that prior case law showed that "an intervention under § 22a-19 is not intended to displace or expand the statutes that govern agency powers and procedures. Instead, § 22a-19 simply allows an intervenor to raise environmental concerns within the statutory limitations placed on the agency." Thus, said the court, "[i]f the environmental concerns that a party wishes to raise are not within the scope of the agency's statutory power, the party must bring a separate action under § 22a-16." (Although the cases that the court reviewed addressed the impact of § 22a-19 on the powers of an agency, the court found that they applied "with equal force to the powers of a trial court.")

Thus, although § 22a-19(a)(1) allows some types of equitable relief, the court emphasized that a trial court hearing a zoning appeal ordinarily does not have the authority to enter equitable relief, "but rather, is extremely limited in its powers." The court explained that "[p]ermitting an intervenor to raise claims for injunctive relief in an administrative or zoning appeal would entirely change the character of the proceedings by potentially requiring the trial court to engage in fact-finding and empowering it to grant sweeping relief not otherwise permitted in such a limited proceeding."

Accordingly, the court concluded that the legislature did not intend for

 

§ 22a-18 (a) to enlarge the powers of a trial court hearing an action in which a party has intervened under § 22a-19. Rather, the court found that § 22a-19 allows intervenors to seek only those forms of relief that otherwise are permitted in the underlying proceeding. Again: "Courts hearing an intervention claim under § 22a-19 can enter an equitable remedy only if the underlying proceeding otherwise allows for such relief remedy."

See also: *Connecticut Fund for the Environment, Inc. v. Stamford, 192 Conn. 247, 470 A.2d 1214 (1984).*

See also: *Middletown v. Hartford Electric Light Co., 192 Conn. 591, 473 A.2d 787 (1984), overruled in part on other grounds by Waterbury v. Washington, 260 Conn. 506, 800 A.2d 1102 (2002).*

See also: *Connecticut Water Co. v. Beausoleil, 204 Conn. 38, 526 A.2d 1329 (1987).*

See also: *Nizzardo v. State Traffic Commission, 259 Conn. 131, 788 A.2d 1158 (2002).*

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***Case Note:***

*Hunter Ridge had also argued that the court improperly substituted its judgment on issues of fact for that of the PZC. For the reasons that the court had found § 22a-18(a) (equitable relief) did not apply to an action in which a party had intervened, the court concluded that §§ 22a-18(b) through (d)—which give a trial court the discretion to remand a matter to an agency for consideration of environmental issues and allow the court to adjudicate the environmental issues itself—also did not apply to proceedings with interventions. "Permitting a trial court to entirely reject an agency's decision and render its own findings on an intervenor's environmental claims would eviscerate [statutory] limitations and would convert the trial court's role from that of an appellate tribunal to a court of general jurisdiction," said the court. The court concluded that a trial court can adjudicate facts relating to environmental matters raised by an intervenor only if the underlying proceeding gives the trial court authority to adjudicate such factual issues. If the proceedings the intervenor intends to join do not allow him or her to present new claims or obtain the relief sought, the intervenor must address the environmental concerns through an action under § 22a-16, declared the court.*

*Thus, held the court, in the case at hand, the trial court could not properly have relied on § 22a-18 (b) through (d) to remand the matter back to the PZC for consideration of Taylor's claims or to independently adjudicate the factual issues raised in those claims. "If the trial court hearing a zoning appeal is to consider additional evidence not found in the administrative record, it may do so only pursuant to the statutes controlling the procedures on appeal." (See, e.g., Conn. Gen. Stat. § 8-8(k).) Because the trial court in this case based its decision to reject the PZC's findings on § 22a-18 (b) through (d), its decision had to be reversed and remanded for further consideration of Hunter Ridge's appeal and the Taylor's claims, concluded the court.*

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# Zoning News from Around the Nation

## CALIFORNIA

"Developers in California are taking their fight against the state's inclusionary zoning laws to the U.S. Supreme Court." The California Building Association opposes the inclusionary zoning law which is soon to become effective. The law mandates that developers discount a percentage of units in new housing projects for low-income families. Opponents claim the law constitutes an illegal "taking" of private property by the government. California's Supreme Court rejected that argument in June. The California Building Association is appealing that ruling to the United States Supreme Court.

Source: *The Atlantic; www.citylab.com*

## MASSACHUSETTS

The state Senate is considering proposed legislation that would require local review of all state projects, with hearings before local zoning officials. Currently, under a state Supreme Judicial Court ruling, local zoning rules do not apply to state-owned property.

The proposed legislation reportedly would not give zoning boards a vote on state projects, or affect projects already underway. It would require a public vetting of projects and a written review by zoning officials of the size and height of structures, required setbacks, open space, parking and other local building requirements.

Source: *Gloucester Times; www.gloucestertimes.com*

Senate Bill 122, which seeks to "modernize the state's zoning, subdivision and planning laws," was recently "aired" at a legislative hearing

Source: *Daily Hampshire Gazette; www.gazettenet.com*

## WISCONSIN

Senate Bill 104, which allows the Town of La Pointe on Madeline Island to enact a shoreland zoning ordinance that is more restrictive than county shoreland zoning, has passed the state Senate. "The need for this legislation came about as a result of an appellate court ruling [that] . . . established that a town has no standing to adopt a shoreland zoning ordinance if the county adopted shoreland zoning prior to the town."

Source: *Ashland Daily Press; http://www.apg-wi.com*

ZONING **PRACTICE** OCTOBER **2015**

AMERICAN PLANNING ASSOCIATION

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# PRACTICE SHORT-TERM RENTALS

# Peering into the Peer Economy: Short-Term Rental Regulation

*By Dwight H. Merriam, FAICP*

You will recall, or if you are a millennial (18 to 34 years old), you might have read about the mantra that James Carville dreamed up for President Bill Clinton's 1992 campaign: "It's the economy, stupid."

Today, for planners, thanks to the entirely new perspective brought to us by the millennials, our theme must be "It's the sharing economy, stupid." It is called variously collaborative consumption, the peer economy, and the sharing economy. More than half of millennials have used sharing services. It is permeating our daily lives in many ways.

This new ethic about our relationship to things, to transportation, to where we bed down, and even to other people has taken us away from owning and exclusively using, to not owning, not possessing, and not using alone. We see the sharing economy in three broad spheres—transportation, goods and services, and housing. While our focus here is on short-term rentals, it helps to understand the larger context for "home sharing."

Dwight H. Merriam

This four-bedroom colonial home in Wetherfield, Connecticut, rents for $385 per night, with a four-night minimum stay.

**RIDE-SHARING REVOLUTION**

Transportation may be the most obvious and most pervasive face of the sharing economy. Millennials own fewer automobiles than other age cohorts. Millennials purchased almost 30 percent fewer cars from 2007 to 2011 (Plache 2013). Why? Because they use short-term car rentals, public transportation, and ride-sharing services. They are less likely to get driver's licenses. One-third of 16 to 24 year olds don't have a driver's license, the lowest percentage in over 50 years (Tefft et al. 2013). At the same time, so we don't get too carried away with this trend, as the millennials age, they will buy more cars. Forty-three percent said they are likely to buy a car in the next five years (Kadlec 2015).

Ride sharing as a generic term encompasses short-term rentals, making your car available to others, sharing rides, and driving or riding in taxi-like services brokered online through companies like Uber.

Instead of owning a car, you can rent one on a short-term basis from companies such as Zipcar and Enterprise Rent-A-Car. Why own a car when you can conveniently pick one up curbside and use it to run errands for a few hours?

Sharing a ride and splitting the cost is made easier with services like Zimride (also by Enterprise Rent-A-Car), which links drivers with riders at universities and businesses. You boomers will remember the ride-share bulletin boards on campus. Same thing.

Got a car, not making much use of it, and interested in making some money? You can make it available to others on a short-term basis through peer-to-peer car-sharing services including Getaround, which presently operates in Portland, Oregon; San Francisco; San Diego; Austin, Texas; and Chicago. They will rent your car for you while you are away. Cars are covered with a $1 million policy, and they even clean it for you. RelayRides connects neighbors to let them rent cars by the hour or the day, and if you're traveling more than 14 days, they will take your car at the airport, rent it for you, and pay you. You can even do it for boats with Boatbound. With the help of Spinlister, you can connect with others and rent a bicycle, surfboard, or snowboard.

**Dwight Merriam, FAICP, founded Robinson & Cole's Land Use Group in 1978, where he represents land owners, developers, governments, and individuals in land-use matters. He is past president of the American Institute of Certified Planners and received his masters of Regional Planning from the University of North Carolina and his juris doctor from Yale.**

Want to make some money by driving others around in your car, or are you a rider who wants to be driven? Just about everyone has heard of Uber, the leader in this form of ride sharing, which includes other services such as Lyft and now Shuddle for ferrying children around and Sidecar for both people and packages. Wireless communications, the Internet, and smartphones have made such ride-sharing and delivery services possible. This is a big deal. Lyft and Uber are worth $2.5 billion and $50 billion (more than FedEx and 405 companies in the S&P 500) respectively (Dugan 2015; Tam and de la Merced 2015). And want to be a driver but don't have a car? You can rent one from Breeze just for that purpose.

### GOODS AND SERVICES PEER TO PEER

Beyond transportation, the sharing economy extends to relationships between people and service providers. There is peer-to-peer or collaborative consumption through services like TaskRabbit and Skillshare which provide help, paid or bartered, or sometimes free. Instacart will grocery shop for you and claims it will deliver to your door in an hour. You can be a shopper and delivery person for them, making up to $25 an hour.

NeighborGoods lets you share all those things you have but use so little, from leaf blowers, to pressure washers, to . . . well, take a look in your garage, that place where you used to park your car. If you live in Austin, Texas; Denver; Kansas City, Missouri; Minneapolis; or San Francisco, Zaarly seeks to create a marketplace to help freelance home-service workers connect with home owners.

There seems no end to the sharing. Fon, touting over 7 million members, lets you share your home WiFi in exchange for access. The Lending Club connects borrowers and investors, enabling, so they say, better rates than credit cards and more return for lenders than what banks offer. Over $11 billion has been borrowed since it started in July 2007, with investors earning a median of 8.1 percent. Poshmark lets you show your unneeded clothing in a virtual closet and get linked with people who share your sense of style. You can even share your dog, or become a sitter, with DogVacay and Rover helping you find a local dog sitter to care for your dog at your home or theirs.

The power of the Internet in facilitating collaborative consumption was probably best evidenced first when eBay and Craigslist provided an online marketplace never experienced before. Today, we have web-based services like Freecycle where people can post things they don't want, the remnants of our overconsumption, and others can take that flotsam and jetsam for free. Yes, for free. It solves the donor's solid waste disposal problem and provides free goods for the takers.

### SHARING THE ROOF OVER OUR HEADS

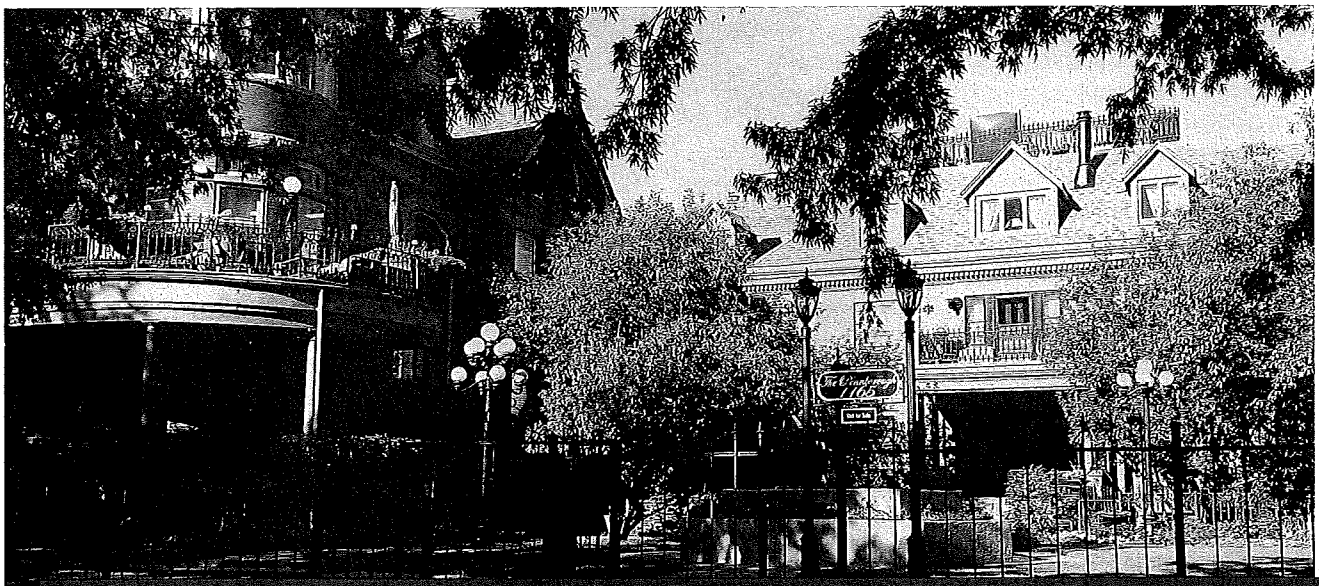
That brings us to the subject matter of greatest interest to planners—the sharing of space. Maybe it began with the sale of timeshares in the United States in 1974. These fractional interests have proved difficult to sell. Short-term vacation rentals emerged as a better way for many, linking property owners with vacationers through companies like HomeAway and its numerous related entities, claiming over one million listings. FlipKey does much the same with what it says are over 300,000 listings in 179 countries.

But Airbnb goes beyond vacation rentals. You can rent a shared or private room for a night, a whole house, an apartment for your exclusive use for a week, a British castle (Airbnb says it has 1,400-plus castles), a teepee, an igloo, a caboose, or an eight-foot by 14-foot treehouse in Illinois ($195 a night) if you wish.

The company, originally "AirBed & Breakfast," was founded in 2008 by Brian Chesky, Joe Gebbia, and later Nathan Blecharczyk. It began when Chesky and Gebbia, to help pay their rent, rented sleeping accommodations on three air mattresses in their San Francisco apartment living room and made breakfast for the guests (Salter 2012). The company is now worth $25.5 billion and joins the ranks of the rest of the great ideas we wish we had thought of first (O'Brien 2015).

### GOOD OR BAD?

Are short-term rentals good or bad for your community? Like so many things, it depends.



Brian J. Connolly

A second-floor condominium in this converted mansion in Denver's Capitol Hill neighborhood offers a private bedroom and bath rental for $105 per night, with a two-night minimum stay.

Sorell E. Negro

This three-bedroom home near Miami's Coconut Grove rents for $325 per night, with a five-night minimum stay.

**Affordable Housing**

Short-term rentals (STRs) increase the stock of furnished, short-term accommodations. Because many of the rentals involve renting a room in a permanently occupied dwelling, they are often less expensive than commercial lodging. The benefit for home owners or long-term tenants who host STR guests is additional income, which can help offset mortgage or rent payments.

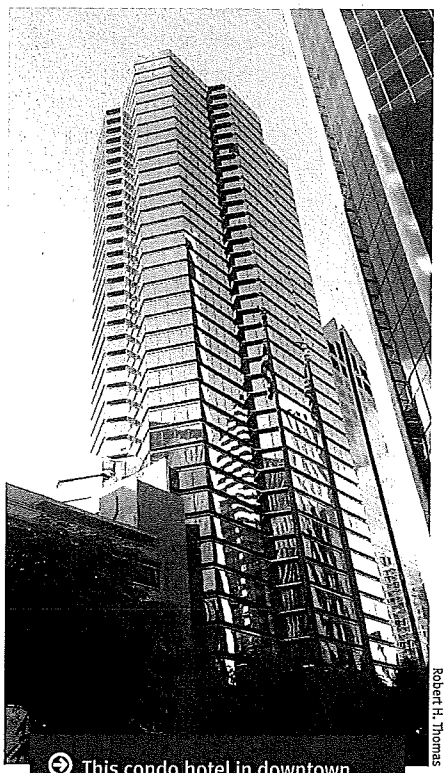
Some contend that STRs may exacerbate the shortage of lower cost rentals because landlords, attracted by the higher revenue stream from STRs, are taking apartments out of long-term rentals, especially in tight markets like New York and San Francisco (Monroe 2014; Moskowitz 2015). Others say high tenant demand and demographics are the cause of the problem, not STRs, which are a small share of the market (Lewyn 2015; Rosen 2013).

**Aging in Place**

Short-term rentals of rooms in homes and apartments not only provide additional revenue for those aging in place, but they may provide an opportunity for sharing of chores and bartering for services, just as accessory apartments do. This can enable older people to stay in their homes longer before transitioning to an independent or assisted living facility.

**Commercial Lodging**

The only possible benefit of STRs with regard to existing commercial lodging is that it may stimulate competition and lower prices for the consumer. The negatives are several. Short-term rentals may reduce commercial lodging revenues. In many situations STRs have an advantage over commercial lodging because the STRs do not pay the occupancy taxes paid by commercial lodging. Short-term rentals generally do not need the service workers employed in commercial lodging. Unions and service workers often oppose STRs.



Robert H. Thomas

This condo hotel in downtown Honolulu includes owner- and long-term renter-occupied units, privately owned units available for daily rental through the building's hotel operator, units owned by the hotel operators, and privately owned units available for short-term rental through Airbnb and similar sites.

**State and Local Government**

Revenues to state and local government may go down as a result of STRs because, as noted, such rentals usually do not pay the occupancy and other taxes levied on commercial lodging. Airbnb does provide 1099 forms to hosts to report their income, and it has begun collecting and remitting hotel and tourist taxes in San Francisco; San Jose, California; Chicago; and Washington, D.C. (Hantman 2015).

**Health and Safety**

Much of the STR market today is unregulated. Those who rent typically do not have their premises inspected to determine compliance with health, building, housing, and safety codes. For its part, Airbnb does clearly state in its terms of service that some localities have zoning or administrative laws that prohibit or restrict STRs and that "hosts should review local laws before listing a space on Airbnb."

Airbnb also provides a guide to responsible hosting on its website, and what they do address is good guidance for local planners and regulators, and thus worth reading. How many hosts read and follow up on the suggestions is another matter. Airbnb's list is still a good starting point for local action.

Many STR hosts do not have home owners and liability insurance to cover losses that may result from occupancy. There is a life safety issue here, and in the event of death, injury, or property damage, there may not be insurance coverage or sufficient assets available to cover the liability.

## AN OUNCE OF PREVENTION IS WORTH A POUND OF CURE

So said Benjamin Franklin, and it is apt here. You need only take a few relatively easy steps to get out ahead of the potential problems with STRs and capitalize on the good that such rentals can provide your community.

**Moratorium**

This is not a recommendation, but something worth considering. As you work down this list of

steps you will have the sense that you need to do six things at once. You do. One way to get a grip on it is take a "planning pause" moratorium on all STRs for, say, six months, during which time no one can rent. However, given that the number of such rentals in many places is still relatively small, it is unlikely that much harm will come from letting them continue on while you plan and prepare to regulate. It may not be worth the effort to have a moratorium. A moratorium takes time—for drafting, maybe some legal advice, and the expenditure of political capital in most cases—and may cause some pushback from those already renting, all of which may cost more than the planning pause is worth. Moratoria sometimes serve only to delay the inevitable hard work and are often extended. Back to Ben Franklin: "Don't put off until tomorrow what you can do today."

**Education**

Learn what is available out there now by going to all of the websites and services that you can find, most of which are identified here. Look online to see what STRs are being offered in your community. You may be surprised at how many of your friends and neighbors are already in the STR business. Don't forget to check Craigslist as well, and use an online search engine, such as Google, with a few key terms, like "rentals Anytown" and "house-sharing Anytown," to find other STR activity.

Conduct educational sessions in your community ("Everything You Need To Know About Short-Term Rentals") even before trying to regulate, to sensitize present and potential hosts to the need for proper code compliance, fire prevention, emergency response, following rules for rent controlled units, first aid, protecting privacy (e.g., disclosing security cameras), insurance coverage, parking, noise, smoking, pets, childproofing, operation of heating and ventilating systems (including fireplaces and heating stoves), safe access, occupancy limits, deciding what to tell neighbors, home owners association approval, tax obligations, and any required zoning approvals. These sessions may also provide an opportunity to learn who is renting and to connect with them. Consider establishing a section of your municipal website as a resource portal. You will not have all the answers to all the questions as you start, but you need to start.

**Planning**

Yes, planning. The rational planning model in its simplest terms is what do you have, what do you want, and how do you get it. You need to know who is renting and what is being rented to whom for how long. You need to determine what you may expect in the future. What do you think the demand is for STRs, in what mix of accommodations, and for what length of tenancy? This will prove useful to deciding whether you need to limit the number of units available for STR and to regulate the length of occupancy.

**Regulate**

Regulation probably will come in two forms: licensing of individual hosts to insure code compliance and general regulation (either through zoning or licensing standards) as to location, number of units, and terms of tenancy. You will have to draw the line somewhere as to what is an STR and what is simply an unregulated rental.

Conduct educational sessions in your community even before trying to regulate, to sensitize present and potential hosts to the need for proper code compliance.

Is an STR a rental of less than 30 days or 90 days, or some other somewhat arbitrary number of days, and everything else is just an unregulated rental? It is for you to decide. You will also want to consider whether owner-occupied STRs might be regulated less strictly, given that the owner is present during the STR.

Austin, Texas, has a robust program with licensing. They carve out three types of STRs: owner-occupied single-family, multifamily, or duplex units (Type 1); single-family or duplex units that are not owner occupied (Type 2); and multifamily units that are not owner occupied (Type 3). There is a three percent limit by census tract on the Type 2 single-family and duplex STRs, a three percent limit per property on Type 3 STRs in any noncommercial zoning district, and a 25 percent limit per property on Type 3 STRs in any commercial zoning district. However, each multifamily property is allowed at least one Type 3 STR, regardless of these limits.

Austin has separate application forms for Type 1 primary, secondary, and partial STRs. All of these forms include owner and property identification information as well as insurance information, number of sleeping rooms, occupancy limit, and average charge per structure. To qualify as a Type 1 primary STR, the unit must be owner occupied at least 51 percent of the time and can only be rented out in its entirety and for periods of 30 days or less. To qualify as a Type 2 secondary STR, the unit must be accessory to an owner-occupied principal residence and can only be rented out in its entirety and for periods of 30 days or less. To qualify as a Type 1 partial unit, namely a room rental, the unit must provide exclusive use of a sleeping room and shared bathroom access. Only one partial unit can be rented out at a time, to a single party of individuals, and for periods of 30 days or less. Owners must be present for the duration of the rental.

The annual licensing fee for STRs in Austin is $235. Applicants must also pay a one-time notification fee of $50.

Of course, as with all regulation there are those with schemes to beat the regulation. There are sites online that advise potential STR hosts to avoid posting on Craigslist, use Airbnb's community and social features to screen the reservations (presumably to avoid enforcement types), "hide your home" by using Airbnb's public view that only shows a large circle within which the unit is located, use word of mouth (or social networking sites) to rent the unit, and "get lost in the crowd" in that there are thousands of listings in large places like Austin (but not in the rural counties, suburbs, and small towns). This advice to those interested in breaking the law suggests that it will not always be easy for code enforcement to find the STRs. Perhaps some notice to all property owners, maybe a note with the tax bill, telling them of the need to register would help. Free, simple, online registration might increase compliance. The critical issue is life safety—you need to find all of these STRs to make sure they are safe.

San Francisco has an Office of Short-Term Rental, and in 2014 the city adopted major revisions to its planning codes for STRs. Those amendments include some useful definitions of hosting platform, primary residence, residential unit, short-term residential rental, and tourist or transient use. The code requires registration, occupancy of the unit by the owner not less than 275 days a year, maintenance of records for two years, certain insurance coverage, payment of transient occupancy taxes, compliance with the

housing code, posting the registration number on the hosting platform's listing, and a clearly printed sign inside of the front door with the locations of all fire extinguishers in the unit and building, gas shut-off valves, fire exits, and pull fire alarms. The application fee and renewal fee every two years is $50. The hosting platform has numerous responsibilities, and there are fines for violations. It is a good model from which to start.

Isle of Palms, South Carolina, regulates STRs through zoning, defining an STR to be three months or less. The city's STR standards limit the number of overnight occupants to six and daytime occupants to 40 (can we assume a wedding party or the like?), set a minimum floor area per occupant, and establish off-street parking requirements.

Monterey County, California, also regulates STRs in its zoning code, defining STRs as rentals between seven and 30 consecutive calendar days. The county considers stays of less than seven days to be a motel/hotel use. The regulation provided for administrative approval of all STRs in operation at the time of its adoption in 1997 if the property owners applied within 90 days. Most of the existing, legal STRs date from that initial round of approvals. Since then, there have been some discretionary approvals, and many STRs are believed to be operating without the required permits.

San Bernardino County, California, permits STRs, defined as rentals of less than 30 days, by zoning in the "Mountain Region" by special use permit exempting multifamily condominium units in fee simple and timeshares with a previous land-use approval. The development standards include code compliance, maximum occupancy based on floor area per occupant and the number of beds, off-street parking requirements, and signage specifications. Conditions of operations address the contents of the rental agreement, posting of the property within the unit with all the conditions of use, and details of fire safety and maintenance, even including a prohibition on the use of extension cords.

Miami Beach, Florida, prohibits STRs in all single-family homes and in many multifamily buildings in certain zoning districts.

Registering all these STRs can be burdensome. Since May 1, 2015, Nashville has issued 1,000 permits, and staff estimates the city still has 800 illegal hotels and motels (Bailey 2015). Wait times for all types permits went from 30 minutes to four hours because of all the STR registrations (Bailey 2015).

## THE MAKINGS OF WORKABLE PROGRAM

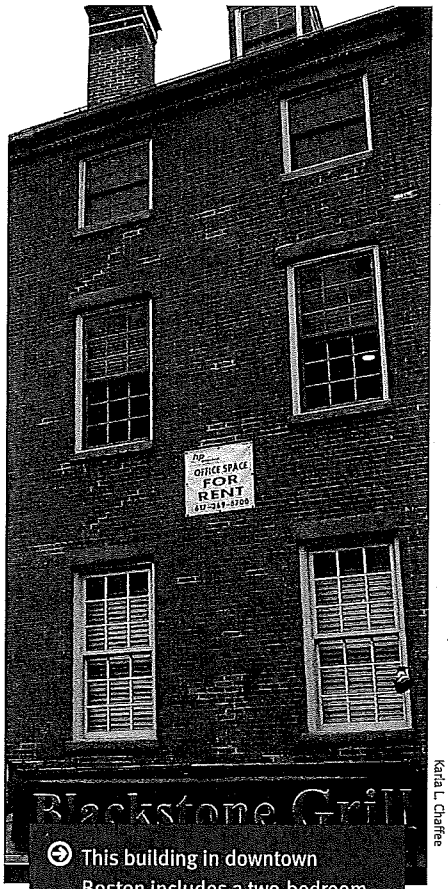
Overarching issues to consider include the nature of the activity you aim to regulate, the management structure of the STR, and the limits on STR use.

### What Is the Nature of the Activity You Will Regulate?

Presumably, hosting a STR is a private enterprise and almost certainly not a commercial lodging business. It is a type of lodging that is largely advertised online, through social media, and on bulletin boards. How will you draw the line between that modest, private activity and a commercial operation?

### How Is It Managed?

Does the host have to be the owner, and does the host need to be there during the rental? If not, will you regulate differently in terms of numbers of units allowed, number of days per year, or terms of occupancy?




Karla L. Chaffee

This building in downtown Boston includes a two-bedroom loft apartment that rents for $245 per night, with a seven-night minimum stay.

### What Is the Limit of Use?

Will you require the host to live in the residence at least some minimum number of days per year? Will you limit rentals to some maximum number of days per year? Will you define STR as a rental of 30 consecutive days or less and not regulate longer rentals in any way? Will you regulate whole-house, exclusive-use rentals differently, for example by only regulating when the house is rented for less than a week or two weeks? And will you regulate renting of rooms on a different schedule, for example by including room rentals only if they are less than one month and otherwise not regulating longer room rentals, which may be covered by zoning anyway, possibly under the definition of a rooming house? There are so many questions to be answered and so many lines to be drawn.

A checklist of considerations for hosts and public officials for planning, regulation, and operation might include current zoning requirements; applicable codes (sanitation, health, building, occupancy among many); business licensing; business organization (none, limited liability corporation, general or limited liability partnership, Subchapter S, etc.); home owners association covenants and restrictions; other easements, covenants, restrictions on the land; lodging to be offered (room, whole house, host-occupied, length of stay); 911 marking at the street; emergency notifications; food service (permitted? licensed?); federal, state, and local taxes; safety inspections; fire, smoke, $CO_2$, and other detectors; fire extinguishers; child safety; parking; insurance; emergency notifications; water and septic; safe hot water temperature; electrical and plumbing in good repair; pest/vermin-free (especially bed bugs); ventilation, heat, air conditioning adequate; no hazards; no mold or excessive moisture; working doors, windows, and screens; adequate means of egress; linen sanitation; and pool and spa maintenance.

## YOU'VE MADE YOUR BED . . .

So goes the idiom from the French as early as 1590: "Comme on faict son lict, on le treuve" (As one makes one's bed, so one finds it). In planning for and regulating STRs, you will indeed be the ones making the bed, and you will have to lie in it. There are benefits and burdens in how you permit STRs and many considerations to be weighed. If you start with life-safety issues first, you can be quite certain the most important aspect of this rapidly emerging sharing economy phenomenon will be addressed. After that, it is the usual planning and politics.

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DOES YOUR COMMUNITY REGULATE SHORT-TERM RENTALS?

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