QUINLAN™ November 10, 2015 | Volume 9 | Issue 21

Zoning Bulletin

in this issue:

THOMSON REUTERS

Mat #41675522

Rezoning—County rezones property from agricultural to industrial for proposed nuclear power plant

Neighboring landowners argue rezone constituted illegal spot zoning

Citation: *Neighbors for Preservation of Big and Little Creek Community v. Board of County Com'rs of Payette County, 2015 WL 5655521 (Idaho 2015)*

IDAHO (09/25/15)—This case addressed the issue of whether the rezoning of a parcel of land from agricultural to industrial in connection with a project to build a nuclear power plant was illegal spot zoning.

Contributors

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

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ISSN 0514-7905

The Background/Facts: Alternate Energy Holdings, Inc. ("AEHI") sought to locate a nuclear power plant on a 5,000-acre parcel of property in Payette County (the "County"). The property was zoned Agricultural. Because the property needed to be rezoned to Industrial for the proposed nuclear power plant, AEHI: (1) submitted an application to amend the County's comprehensive plan to change the designation of the property "from Agriculture 1, 2, and Mixed to Industrial"; and (2) submitted a Rezone and Development Agreement Application to the County's Planning and Zoning Commission (the "PZC") proposing the rezone "of approximately 500 acres from A (agricultural) to I-2 (heavy industrial) zoning."

The County amended the comprehensive plan, designating the subject property as Industrial and adding general language that energy producers wishing to locate in the County would have their applications considered on an individual basis.

The PZC recommended approval of AEHI's rezone application. Opponents of the project, including a neighboring landowner—H-Hook, LLC ("H-Hook") appealed the PZC's decision to the County Commissioners. The County Commissioners approved AEHI's application. They found that the proposed zoning was compatible with surrounding land uses and that the 500-acre parcel that would be rezoned would be contained within a larger 5,000-acre parcel, resulting in a buffer zone from neighboring properties.

A number of parties, including H-Hook, sought judicial review of the County Commissioners' decision. They argued that the rezone of the property constituted illegal spot zoning.

Among other things, the district court determined that the County Commissioners' approval of the rezone did not constitute spot zoning because the rezone was in accordance with the County's amended comprehensive plan.

H-Hook appealed.

DECISION: Judgment of district court affirmed.

The Supreme Court of Idaho also held that the rezone did not constitute illegal spot zoning.

In so holding, the court explained that "[a] claim of 'spot zoning' is essentially an argument the change in zoning is not in accord with the comprehensive plan." The court further explained that there are two types of "spot zoning":

> "Type one spot zoning may simply refer to a rezoning of property for a use prohibited by the original zoning classification. The test for whether such a zone reclassification is valid is whether the zone change is in accord with the comprehensive plan. Type two spot zoning refers to a zone change that singles out a parcel of land for use inconsistent with the permitted use in the rest of the zoning district for the benefit of an individual property owner. This latter type of spot zoning is invalid."

H-Hook had contended that the rezone was impermissible type one spot zoning. H-Hook argued that "under the amended comprehensive plan, power plant siting does not have to follow any sort of comprehensive planning analysis." "Instead," maintained H-Hook, "the Commissioners are permitted to use an ad hoc approach."

The court concluded that the rezone was not invalid type one spot zoning. The court found that the rezone was in compliance with the comprehensive plan's designation of the land due to the amendment of the comprehensive plan to des-

ignate the property as Industrial. Because the rezone was in accord with the comprehensive plan, the court concluded that it was not impermissible type one spot zoning.

H-Hook had also contended that the rezone was "quintessential type two spot zoning because it single[d] out the proposed site for an industrial nuclear power use when the proposed site [was] surrounded by mostly agricultural land."

The court concluded that the rezone was also not invalid type two spot zoning. In so concluding, the court noted that there were five industrial uses within five miles of the proposed site, including a confined animal feeding operation and a county landfill.

Case Note:

H-Hook had also argued that the rezone was invalid because the County's amended comprehensive plan did not contain the statutorily required "analysis" for "power plant sites" and "utility transmission corridors" as required in Idaho Code § 67-6508(h). The Supreme Court of Idaho concluded that the amended comprehensive plan satisfied the statute's "general plan" requirement.

Constitutionality of Zoning Ordinance—Zoning ordinance defines "family" as not including more than three unrelated persons

Landlords challenge ordinance as unconstitutional

Citation: *Schwartz v. Philadelphia Zoning Bd. of Adjustment, 2015 WL 5601248 (Pa. Commw. Ct. 2015)*

PENNSYLVANIA (09/24/15)—This case addressed the issue of whether a zoning ordinance that limited single-family residential use based on a definition of "family" as "group of persons living as a single household unit using housekeeping facilities in common, but not to include more than three persons unrelated by blood, marriage or adoption" was unconstitutional either on its face or as applied.

The Background/Facts: Sheldon Schwartz ("Schwartz") and Paul Abeln ("Abeln") were landlords of properties in Philadelphia, Pennsylvania (the "City"). (Hereinafter, Schwartz and Abeln are collectively referred to as the "Landlords.") Their properties were zoned for single-family and two-family residential use. Their properties were located near Drexel University campus, and they each rented their property to a group of University students.

The City's Department of Licenses and Inspections ("L & I") issued citations to the Landlords. They were cited for violating a section of the City's Zoning Code (the "Code") that prohibited an unauthorized change in the zoned use or occupancy of a property based on the presence of more than three unrelated individuals residing in a property zoned for single-family residential use. The Code defined a "family" as:

> "A person living independently or a group of persons living as a single household unit using housekeeping facilities in common, but not to include more than three persons unrelated by blood, marriage or adoption."

The Landlords each rented their properties to a group of students that contained more than three persons unrelated by blood, marriage or adoptions.

The Landlords each appealed their citations. The City's Zoning Board of Appeals ("ZBA") denied each of their appeals. They then each appealed to the trial court. The trial court consolidated the appeals.

The trial court affirmed the ZBA's denial of the appeals.

The Landlords again appealed.

On appeal, the Landlords argued that the Code provision defining "family" was unconstitutional both on its face and as applied to them. They argued that the Code impermissibly burdened an individual's First Amendment (to the United States Constitution) right to association and the right to privacy. They also contended that the use of their properties by more than three unrelated persons was functionally equivalent to use of the properties by a "family," and that therefore the Code was unconstitutional as applied to their use of the properties.

DECISION: Judgment of Court of Common Pleas affirmed.

The Commonwealth Court of Pennsylvania held that the Code's definition of "family" was not unconstitutional on its face or as applied to the Landlords.

In so holding, the court first reviewed the level of scrutiny applied by courts to the review of zoning ordinances. The court noted that Pennsylvania courts have consistently utilized the rational basis test to examine the constitutionality of zoning ordinances limiting the composition of households in single-family residential districts. In other words, if the Code's definition of "family" had a rational basis, then it would be constitutional on its face.

Here, the court found that the Code did not prohibit more than three persons unrelated by blood, marriage or adoption from cohabitating within the municipality; instead the Code prohibited groups that did not fit within the definition of "family" from cohabitating by right in a property zoned for single-family residential use. The court found that the Code provided for a diversity of residential uses by right. The court further found that the Code struck a balance in its provision of uses by right in single-family residential districts between the fundamental rights surrounding related or legally bound families, and the rights of those who are unrelated but desire a similar residential use without having to seek a variance or special exception.

The court concluded that the Code's provision limiting single-family residential use based on a definition of "family" that permitted an unlimited number of persons related by blood, marriage, or adoption to cohabitate in a single-family residence, while restricting the number of unrelated persons who may do so, was a permissible intrusion when rationally related to the use of land rather than the people using it. In "dense urban areas," noted the court, such an intrusion on land use may be a "practical necessity." Thus, held the court, zoning ordinances, such as the one here, defining "family" using biological and legal bonds are not facially unconstitutional.

The Landlords had argued that the use of properties by unrelated groups of students was functionally equivalent to the use of the properties by a "family."

The Landlords pointed to the fact that each of the occupants had access to the full house and worked together in housekeeping. The court did find that the individual residents had formed a single-household unit, but the court also noted that the Code capped the number of unrelated people who could compose such a unit in a property zoned for single-family residential use at three. Therefore, the court found that the evidence that the group was "living as a single household unit using housekeeping facilities in common," was insufficient to meet the Landlords' burden to show the Code was unconstitutional as applied to them. Instead, explained the court, "when a zoning ordinance utilizes the term 'family' to define single-family residential use based upon how the household is composed rather than on how the residents within the household function, the burdened party must produce substantial evidence to show that the use of the property will be equivalent to the use of the property by a group that does fit within the strict definition of 'family' found in the ordinance."

Here, the court found that the group of unrelated students was not legally bound to one another, as are individuals related by blood, marriage or adoption. The court also found that the Landlords failed to show that the groups of students were a stable permanent unit, since some of the student residents moved out while others moved in each year. Concluding that the Landlords had failed to produce substantial evidence to demonstrate that their use of the properties was equivalent to use of the property by a group of persons related by blood, marriage or adoption, the court held that they failed to demonstrate that the Code was unconstitutional as applied to their use of the properties.

Accordingly, the citations against the Landlords for violation of the Code were upheld.

See also: *Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797, 6 Env't. Rep. Cas. (BNA) 1417, 4 Envtl. L. Rep. 20302 (1974).*

See also: *Appeal of Miller, 511 Pa. 631, 515 A.2d 904 (1986).*

See also: *Children's Aid Soc. v. Zoning Bd. of Adjustment, 44 Pa. Commw. 123, 402 A.2d 1162 (1979).*

See also: *Wengert v. Zoning Hearing Bd. of Upper Merion Tp., 51 Pa. Commw. 79, 414 A.2d 148 (1980).*

Authority/Preemption—City says school district must obtain zoning approval for construction of stadium bleachers

Board of Education argues school district's construction on property used for school purposes is not subject to local zoning

Citation: *Gurba v. Community High School Dist. No. 155, 2015 IL 118332, 2015 WL 5608249 (Ill. 2015)*

ILLINOIS (09/25/15)—This case addressed the issue of whether municipal

zoning ordinances govern a school district's construction of football stadium bleachers on school property. More generally, it addressed whether a school district is subject to local zoning and land use regulations in the course of exercising its statutory powers to construct new facilities on school property.

The Background/Facts: Crystal Lake South High School ("Crystal Lake South") is located in the city of Crystal Lake, Illinois (the "City"), a municipal corporation with home rule authority situated in McHenry County (the "County"). The area surrounding the school was zoned "R-2 residential single family," and the school constituted a legal, nonconforming use. The Crystal Lake South campus was owned by Community High School District No. 155 (the "District") and operated by the Board of Education of Community High School District No. 155 (the "Board").

In 2013, the Board decided to replace the bleachers at the Crystal Lake South football stadium after a failed structural inspection. The proposed new bleachers were to be larger, higher, and closer to the property line than the existing bleachers abutting the residential property next to the school. The Board applied for a permit for the project from the County Regional Superintendent of Schools. The Superintendent approved the plans and issued a building permit pursuant to section 3-14.20 of the Illinois School Code (105 ILCS 5/3-14.20.). The District began work on the project without notifying the city of Crystal Lake or seeking a building permit, zoning approval, or storm water management approval from the City.

Upon learning of the project, the City informed the Board that it was required to comply with the provisions of the Crystal Lake Unified Development Ordinance (the "Zoning Ordinance"), which regulates zoning and land use, as well as the City's storm water management ordinance. The City ordered the Board to stop construction of the bleachers until it obtained a special-use permit, a storm water permit, and zoning variances. The Board disregarded the order and continued construction. The Board took the position that a school district's construction on property used for school purposes was not subject to the zoning authority of the local municipality.

Owners of residential properties adjacent to the school filed a lawsuit against the Board and the District, seeking to privately enforce the City's zoning restrictions. They alleged that the new bleachers failed to comply with the Zoning Ordinance and negatively affected their property values.

The Board filed a third-party complaint. It asked the court to decide whether the City had authority over the District to enforce its Zoning Ordinance and storm water ordinance.

Finding there were no issues of material fact in dispute, and deciding the matter on the law alone, the circuit court awarded summary judgment in favor of the City. The court determined that the City did have authority over the District to enforce its zoning and storm water ordinances. On appeal, the appellate court affirmed.

The Board and the Superintendent appealed. The Supreme Court of Illinois consolidated their appeals.

DECISION: Judgment of Appellate Court affirmed.

The Supreme Court of Illinois held that the City had home rule authority to enforce the Zoning Ordinance and storm water management ordinance on school

property. Thus, the court held that school districts are subject to local zoning and land use regulations in the course of exercising school districts' statutory powers to construct new facilities on school property.

In so holding, the court explained that, in the absence of express statutory exclusions, municipalities are empowered by the Illinois Municipal Code to regulate all land uses within their territory. The court found that although the General Assembly had chosen to exempt certain entities from municipal zoning regulations under the Municipal Code, there was no statutory provision restricting the authority of a municipality to regulate zoning or storm water management on school property. Thus, under the plain terms of the Municipal Code, the court found that school property is subject to municipal zoning laws.

The court further noted that, as a home rule municipality, the City had broad powers to perform any function pertaining to its government and affairs, including, but not limited to, zoning ordinances. (Ill. Const.1970, art. VII, § 6.) Although the General Assembly could restrict a home rule unit's powers, the court found that the General Assembly had not enacted any statute expressly preempting or limiting a home rule unit's zoning powers over public school property. The court concluded that it was therefore within the City's home rule authority to impose its Zoning Ordinance on the District and the Board.

Despite the lack of any statutory provision expressly exempting school property from municipal or home rule zoning authority, the Board nevertheless had argued that the City's zoning powers did not extend to property owned by a school district. The Board had contended that the City's Zoning Ordinance and storm water ordinance unduly interfered with the General Assembly's constitutional authority to regulate the public education system. The court disagreed, finding that, to the contrary, section 10-22.13a of the School Code "evince[d] the General Assembly's intent that school districts are subject to local zoning laws," including zoning laws regulating school property used for "school purposes." More expressly, the court found that the City's zoning ordinances did not unduly interfere with the educational goals of the General Assembly because the City's regulation of school-owned property for the benefit of the community as a whole was not equivalent to the regulation of public education activities such as school curricula, administration and staffing.

See also: *Wilmette Park Dist. v. Village of Wilmette, 112 Ill. 2d 6,96 Ill. Dec. 77, 490 N.E.2d 1282 (1986).*

Case Note:

The Board had also argued that the Health/Life Safety Code for Public Schools (i.e., the school "building code") preempted or limited the City's authority over zoning and land use issues within its jurisdiction. The court disagreed, finding that "[n]either the building code itself nor the statutes referencing the code mention[ed] zoning, land-use, or storm water management." Those issues, said the court, are local matters ordinarily regulated by counties and municipalities, and the issues involving zoning are not addressed by a building code. Thus, the court concluded that the Health/Life Safety Code did not preempt or limit the City's authority over zoning and land use issues within its jurisdiction.

Case Note:

In this case, briefs as amici curiae (i.e., friends of the court) were filed in support of the Board and Superintendent by: the Illinois Association of School Boards, the Illinois Association of School Administrators, and the Illinois Association of School Business Officials. Amicus curiae briefs were filed in support of the City by the Illinois Municipal League and Professor Laurie Reynolds.

Variance—Hotel owner seeks variance to renovate hotel that would encroach by 74% into setback

Opponents contend hotel owner cannot meet showing of unnecessary hardship required for variance

Citation: *Surfrider Foundation v. Zoning Bd. of Appeals, 2015 WL 5597179 (Haw. 2015), as corrected, (Oct. 6, 2015)*

HAWAI'I (09/23/15)—This case addressed the issue of whether a variance granted for a proposed 26-story hotel and residential tower that permitted a 74% encroachment into the coastal height setback along the Waikiki shoreline was properly issued.

The Background/Facts: Kyo-ya Hotels & Resorts LP ("Kyo-ya") owned the Moana Surfrider hotel complex along the Waikiki shoreline in the City of Honolulu (the "City"). The complex contained three hotel buildings: the Surfrider Tower, the Banyan Wing, and the Diamond Head Tower ("DHT"). The complex was located in the Waikiki Special District ("WSD"). In the WSD, the "the City Council recognized the need to step back buildings from the shoreline in order to optimize 'the sense of open space and public enjoyment along the beach.' " ROH § 21-9.80-4(g)(2). To accomplish that objective, the City Council had established the minimum setbacks that applied "to all zoning lots along the shoreline" within the WSD (the "Coastal Height Setbacks").

In 2010, Kyo-ya submitted a land use permit to redevelop the existing eight-story DHT with a 26-story, 282-foot hotel and residential tower (the "Project"). Due to the Project's size, location, and design, the Project required several permits and approvals, including a variance to allow the Project to encroach into the Coastal Height Setback. In total, about 74.3% of the proposed building would encroach into the Coastal Height Setback.

In March 2010, Kyo-ya submitted a variance application to the City's Department of Planning and Permitting (the "Department"). The City's Land Use Ordinance (the "LUO") allowed for an area variance if the applicant could show unnecessary hardship. In order to establish unnecessary hardship, the applicant had to show:

> "(1) the applicant would be deprived of the reasonable use of such land or building if the provisions of the zoning code were strictly applicable;

"(2) the request of the applicant [was] due to unique circumstances and not the general conditions in the neighborhood, so that the reasonableness of the neighborhood zoning [was] not drawn into question; and

"(3) the request, if approved, [would] not alter the essential character of the neighborhood nor be contrary to the intent and purpose of the zoning ordinance."

Kyo-ya maintained that the Project satisfied the City Charter's three requirements for issuance of a variance in that: (1) it would be deprived of the reasonable use of its land if the LUO was strictly applied because the ordinance would "reduce the buildable portion of the property to roughly . . . 33% of the whole lot area"; (2) its variance request was due to unique circumstances in that its Project site was "among the narrowest parcels of land along Waikiki Beach" that was subject to the Coastal Height Setback; and (3) the variance would "not alter the essential character of the locality nor be contrary to the intent and purpose of the zoning code" because Waikiki was "a densely developed, urbanized area, filled with large hotels, condominiums, and mixed-use projects" which already encroached into the Coastal Height Setback. Additionally, Kyo-ya asserted that the Project was consistent with WSD objectives to "[p]rovide for the ability to renovate and redevelop existing structures which might otherwise experience deterioration" and allow for "creative development capable of substantially contributing to rejuvenation and revitalization of the [WSD]."

The Director of the Department agreed that Kyo-ya met the variance requirements and granted partial approval of Kyo-ya's variance application to allow the Project to encroach approximately 74% into the Coastal Height Setback.

Surfrider Foundation, Hawaii's Thousand Friends, Ka Iwi Coalition, and KAHEA—The Hawaiian Environmental Alliance (collectively, "Surfrider") filed a petition to the City's Zoning Board of Appeals ("ZBA"). Surfrider maintained that Kyo-ya did not meet the three requirements for a variance. The ZBA denied Surfrider's appeal.

Surfrider appealed to the circuit court. The circuit court also concluded that Surfrider had failed to show that the Director's actions were erroneous.

Surfrider again appealed.

DECISION: Judgment of circuit court reversed.

The Supreme Court of Hawai'i held that Kyo-ya had failed to demonstrate that it met the three-requirements necessary for the area variance it sought in the WSD.

With regard to the first requirement of deprivation of reasonable use of the land or building if the zoning code were strictly enforced, the court said: "Reasonable use," within the meaning of the City's Charter, "[was] not necessarily the use most desired by the property owner"; rather, to be deprived of the reasonable use of its property, Kyo-ya had to establish an inability to make reasonable use of its land or building without the variance. The fact that Kyo-ya might make a greater profit by using the property in a manner prohibited by the ordinance was irrelevant, since almost any individual applicant could make that same showing, said the court.

Here, the court found that the Project was not necessary to maintain economic viability because renovation or replacement of a nonconforming structure, such as the DHT, was expressly authorized by the LUO, and there was an alternative building design that could achieve the increased density authorized by Kyo-ya's building permit without encroaching into the Coastal Height Setback.

The court also found that the second requirement of unique circumstances was not met. The court explained that unique circumstances, as defined under the City Charter, meant "whether specific attributes of the parcel [were] present that justif[ied] the request for a variance." "Thus, an owner's unusual plans for a parcel [did] not, in themselves, constitute 'unique circumstances,' " said the court.

Here, the court found that the narrowness of the parcel did not alone justify the variance because Kyo-ya had other alternatives that would not require a 74% encroachment into the Coastal Height Setback. Moreover, noted the court, external conditions present in the neighborhood, such as setbacks and the shoreline, were not relevant to the uniqueness of the parcel because they were commonly found in the neighborhood.

As to the third requirement, that a variance request not alter the essential character of the neighborhood nor be contrary to the intent and purpose of the zoning ordinance, the court found that the fact that there were nonconforming properties in the WSD that were built prior to the enactment of the WSD in 1976 did not provide a basis for a finding that the variance was consistent with the essential character of the neighborhood. The court said that nonconformity should not serve as the basis for additional nonconformity. Rather, said the court, "[i]f nonconforming use is so pervasive that it is shared by the majority of properties in a zoning district, the proper remedy is to seek an amendment to the zoning ordinance, not a variance." Moreover, the court found that the Director's findings were insufficient to conclude that a 74% encroachment into the Coastal Height Setback was not contrary to the intent and purpose of the zoning ordinance.

See also: *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Haw. 217, 953 P.2d 1315 (1998).*

See also: *McPherson v. Zoning Bd. of Appeals, 67 Haw. 603, 699 P.2d 26 (1985).*

See also: *Packer v. Hornsby, 221 Va. 117, 267 S.E.2d 140 (1980).*

Case Note:

The Director's partial approval of the variance for Kyo-ya had been conditioned on, among other things, submission of revised plans which showed compliance with the 1:1 Coastal Height Setback as measured from the width the beach would have been had the State of Hawai'i followed through on a 1965 plan to expand the beach. The court noted that any variance must be based on the certified shoreline with a hardship established in consideration of the facts in circumstances in effect at the time of the application. Thus, consideration of hypothetical effects on the land if the shoreland had been extended per the 1965 plan were irrelevant in determining whether Kyo-ya would be deprived of the reasonable use of land, said the court.

Zoning News from Around the Nation

FLORIDA

Pasco County commissioners denied a rezoning request to allow for the grow-

ing of medical marijuana in an industrial zone in Dade City. The Commission determined that agricultural activities were prohibited in the light industrial district. Moreover, the County attorney's office had noted that Pasco County's land development code states that all uses are subject to federal law, which currently does not authorize the cultivation of marijuana.

Source: *The Suncoast News*; www.suncoastnews.com

MARYLAND

"A bill before the Annapolis City Council could stop housing development in the city up to six years as it would link projects to school capacity." If passed, the legislation "would require school crowding to be considered when approving residential projects. If a school is overcrowded, a development that would add students to that system would have to wait until the issue is alleviated, or six years, whichever comes first."

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

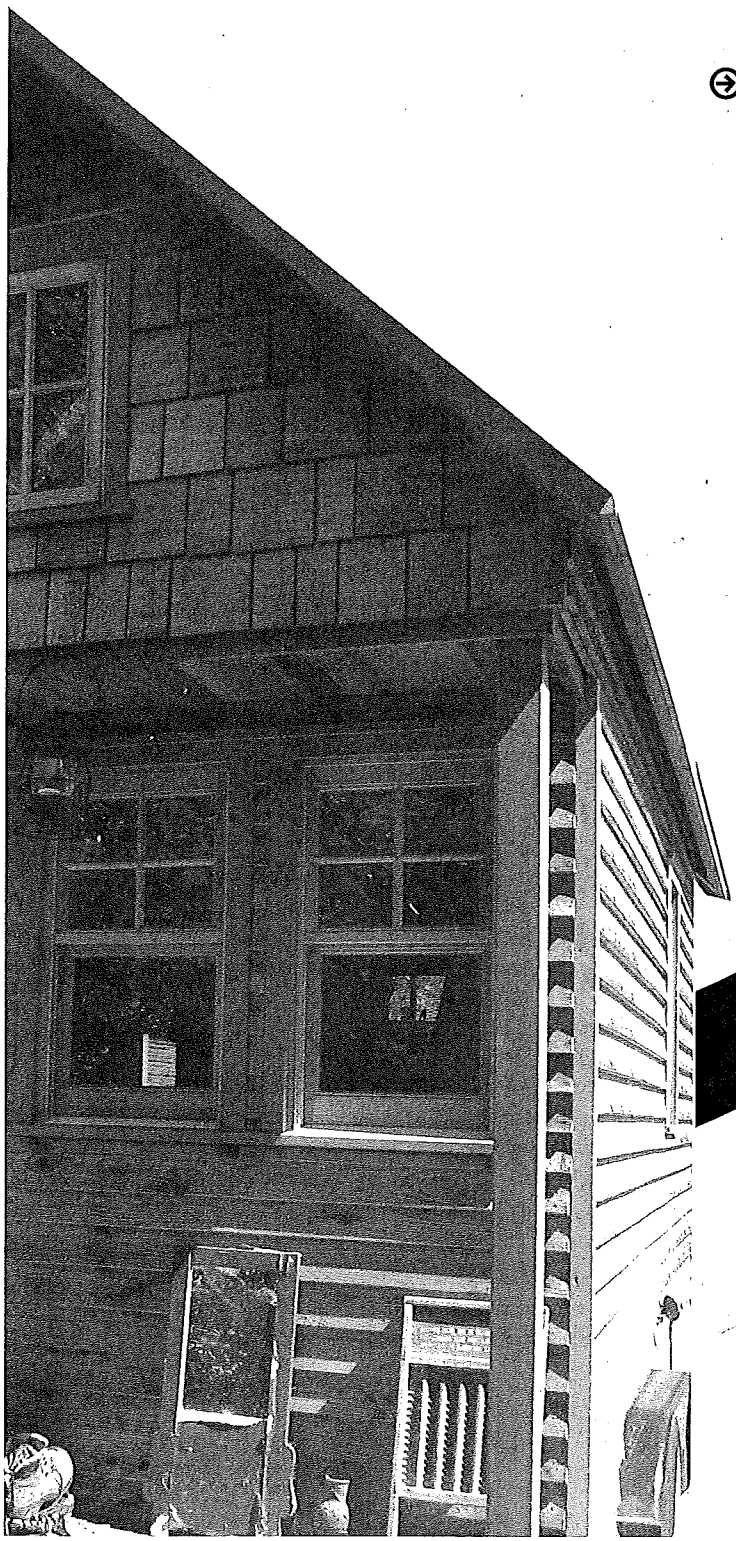
VIRGINIA

A proposed amendment to the Town of Blacksburg's zoning codes would define and outline new rules for the usage of land by mobile food vendors. "The most recent discussion draft allows food truck vendors on private property in several commercial, industrial and office areas around town. It requires vendors to locate 50 feet from residential areas . . . [and] to stay at least 100 feet from a restaurant unless they have the owner's approval." The proposal would also required mobile food vendors to apply annually to get a temporary-use permit based on a town business license or special approval from the Virginia Health department, written permission from the property owner and a sketch of the site on which they plan to operate. The proposal additionally restricts vendors to three trucks per parcel, and limits vendors to two days per week in the same spot, with operating hours between 6:00 a.m. and 9:00 p.m.

Source: *Collegiate Times;* www.collegiatetimes.com

ZONING PRACTICE NOVEMBER 2015

AMERICAN PLANNING ASSOCIATION



ISSUE NUMBER 11

PRACTICE TINY HOUSES

11

Tiny Houses, and the Not-So-Tiny Questions They Raise

By Donald L. Elliott, FAICP, and Peter Sullivan, AICP

Where did they come from—those cute little "cabins-on-wheels" that you see being pulled down the road or sitting on a lot?

With wood siding, a pitched roof, gable windows . . . and even a porch with a railing. All that's missing is the dog in the yard (presumably a small dog in a small yard).

Tiny houses are the latest vehicle/structures to join the small house movement, and are now trending due to television programs like *Tiny House Nation*. Many individuals and couples seem proud to say they live a small but sophisticated lifestyle in less than 500 square feet. Often their stated motivation is to declutter and live a simpler life—maybe even a life "off the grid."

Cuteness aside, tiny houses raise some interesting questions for planners. Questions like . . .

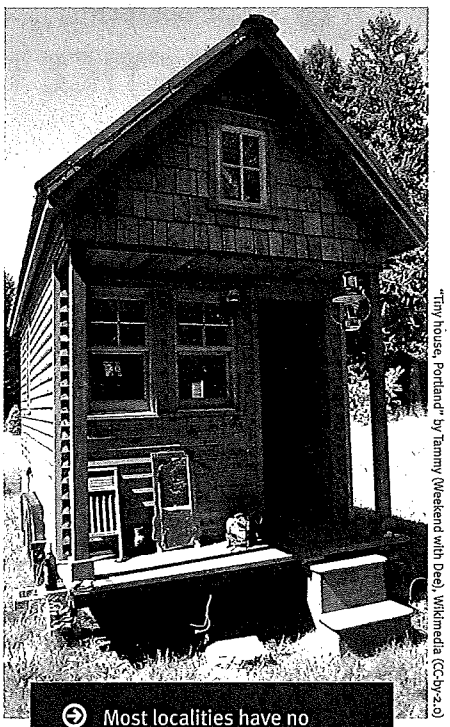
"Is this a house, or a trailer, or . . . just what is it?"

"Would this qualify as an accessory dwelling unit?"

"Does this meet the residential building code?"

"Where should we allow this to be parked . . . or occupied . . . and for how long?"

This article attempts to answer some of those questions for the types of small, trailer-mounted units described above. The sections below review how these units fit into the general U.S. system of land-use control through building codes, zoning ordinances, subdivision regulations, and private restrictive covenants. In addition to addressing individual tiny homes, we also address how small communities of tiny homes might be created.



"Tiny House, Portland" by Tammy (Weekend with Dee), Wikimedia (CC-by-2.0)

Most localities have no specific provisions in their subdivision or zoning codes to accommodate small trailer-mounted homes outside of recreational vehicle parks.

WHAT ARE THEY?

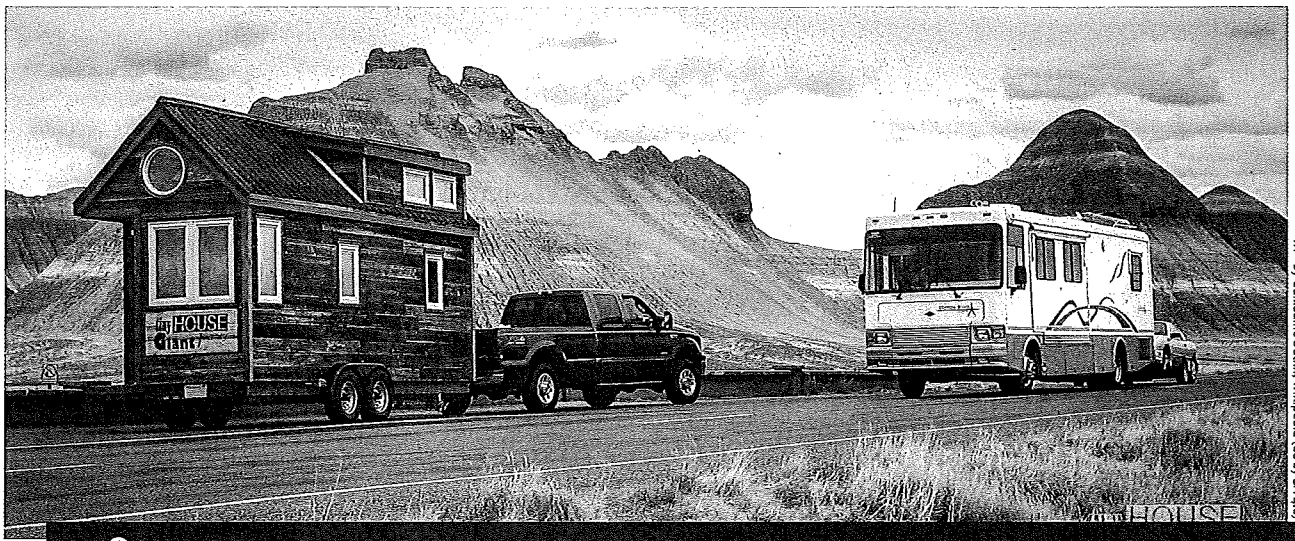
What are tiny houses? The answer is simpler than you think. They're recreational vehicles (RVs), and a careful read of the manufacturers' websites makes that clear. One manufacturer, Tumbleweed Tiny House Company, states that their product is "an RV like you've never seen before."

For planners, this makes things simpler. The question then becomes, "Where do we allow RVs to be occupied?" Traditionally, the answer has been campgrounds (for temporary living) and RV parks (for longer-term living). Most communities typically limit temporary RV occupancy (in a campground or elsewhere) to 30 days, and the logic behind this is that RVs are not permanent dwellings. They have electric systems and water tanks and sewage tanks (or composting toilets) that can only operate for a while before they need to be hooked up to support systems or emptied.

But this answer doesn't satisfy everyone, especially tiny-house proponents and anyone else interested in living smaller, more simply, and (presumably) more affordably (more on that later).

Donald L. Elliott, FAICP, is a director in the Denver office of Clarion Associates, a former chapter president of APA Colorado, and a former chair of the APA Planning and Law Division. As a planner and lawyer he has assisted more than 40 North American cities and counties reform and update their zoning, subdivision, housing, and land-use regulations. He has also consulted in Russia, India, Lebanon, and Indonesia, and served as USAID Democracy and Governance Advisor in Uganda for two years. Elliott is a member of the Denver Planning Board.

Peter Sullivan, AICP, is a senior associate in the Chapel Hill, North Carolina, office of Clarion Associates. His specializations include zoning and comprehensive planning. A Pacific Northwest native, his professional background includes policy and environmental planning and development review. Sullivan is a former officer with Toastmasters International and former member of the University of Washington's Urban Design and Planning Professionals Council. He is currently a correspondent for Planetizen.com and enjoys speaking as academic guest lecturer, webinar host, and conference presenter. Sullivan's project work has been recognized by the Washington State Governor's Office, Puget Sound Regional Council, and the Washington Chapter of APA.



"Tiny House Giant Journey in the Petrified Forest and an RV" by Guillaume Dutilh, Wikipedia (CC-by-SA-4.0)

This tiny house is the star of its own YouTube channel, Tiny House Giant Journey.

Here's why tiny houses are so tricky. Although tiny houses are not generally designed for permanent occupancy, some of them are being purchased by people who intend to use them that way. Most zoning ordinances don't resolve this tension, because they don't address where or how tiny houses can be used for long-term or permanent occupancy.

BUILDING AND OCCUPANCY CODES

With the exception of some very rural communities, most cities and counties require that long-term or permanent residential units meet either the locally or state-adopted residential building code (usually some version of the International Residential Code), or the U.S. Department of Housing and Urban Development (HUD) national standards for manufactured housing safety. Since manufactured homes are obviously not constructed like stick-built housing—and since (unlike stick-built housing) they can be moved across state lines in interstate commerce—back in 1974 HUD adopted national safety standards for this type of housing. As a general rule, residential units for long-term occupancy need to meet one of these two sets of standards.

Unfortunately for many purchasers, some tiny houses do not meet these requirements. While tiny houses might meet the Recreational Vehicle Industry Association (RVIA) safety standard for highway travel and temporary living, these standards are not the same as the HUD manufactured housing standards for permanent living. In fact, the website for CAVCO (a manufacturer of "park model" recreational vehicles—which are similar to and sometimes include tiny houses)—states that these vehicles "are not intended for, nor should they be used for, anything other than recreational camping or seasonal use. They are not permanent residences and should not be used as such."

For those intending to live in their tiny house full time, the trick is to find a tiny house that not only meets the RVIA standards but also the residential building code or manufactured housing standards.

For those intending to live in their tiny house full time, the trick is to find a tiny house that not only meets the RVIA standards but also the residential building code or manufactured housing standards. Or to look for a community that has adopted a building code allowing long-term occupancy of tiny houses. Some communities have done this, and in many communities the ability to use a tiny house for long-term occupancy turns on whether it will be mounted on a permanent foundation and connected to utilities.

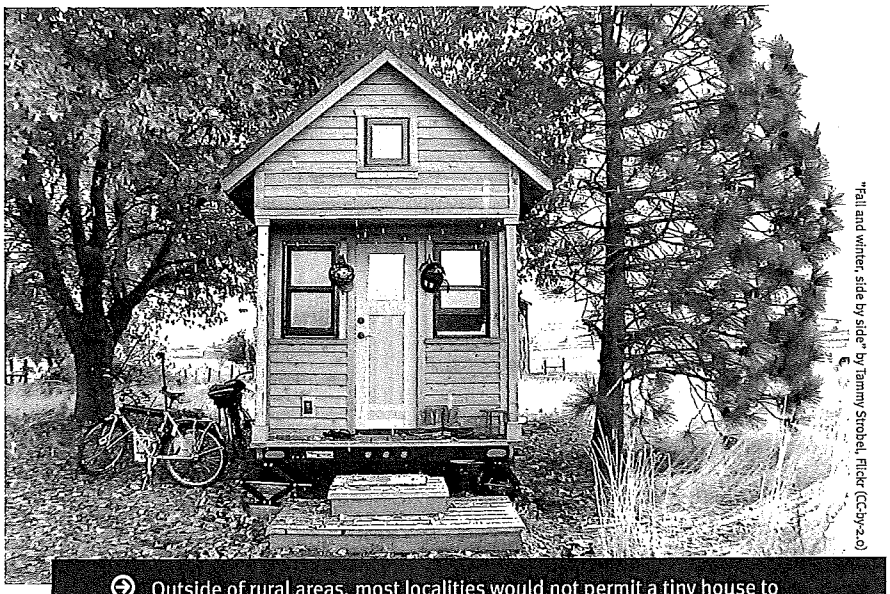
FOUNDATIONS MATTER

Let's assume a potential buyer doesn't want to install a tiny house in a campground or RV park, but rather a traditional residential lot. Some communities allow this if the owner removes the wheels (and sometimes the axles); installs the unit on a permanent foundation (or at a minimum uses secure tie-downs); and connects the unit to public water, sewer, and electric systems.

The logic behind these requirements is that they convert a mobile housing unit into a stationary unit, protect against "blowovers" and other wind-related damage (to the occupants and to neighboring property owners), and make the utility systems safe for long-term operation.

As an example, the small community of Spur, Texas, (population 1,245) has marketed itself as the "First Tiny House Friendly City." Spur permits tiny houses to be used as permanent, primary dwellings by creating an exception to the general building code/manufactured home standard compliance requirement. However, even in this deliberately welcoming community, wheels must be removed, a foundation must be constructed, and the unit tied to the foundation with "hurricane straps," and the unit must be hooked up to local sewer, water, and electric systems. In one well-documented case the cost of the foundation and connections came to about $5,700 (Mccann 2015). In some Spur zoning districts, tiny houses are permitted by right, but in others a variance is required.

Again, there are exceptions. A tiny-house owner might be successful living an off-the-grid lifestyle in areas that are literally far from the grid. In some very rural communities, stick-built



"Fall and winter, side by side" by Tammy Strobel, Flickr (CC-by-2.0)

Outside of rural areas, most localities would not permit a tiny house to serve as a primary dwelling unit unless it was mounted on a permanent foundation and connected to local utilities.

homes do not need to connect to water and sewer systems (i.e., they permit well and septic systems) or electric systems (i.e., they allow off-the-grid power), and those communities would presumably allow the same exceptions for tiny houses.

NOW, ABOUT THOSE ZONING RULES

So, if a buyer doesn't want to live in an RV park, *and* is willing to remove the wheels, install a foundation, and connect to utilities, *and* the local government allows long-term occupancy of tiny houses under those conditions, where can the unit be located? The answer depends on local zoning regulations. Most zoning ordinances do not list tiny houses by name; they simply treat them like other housing uses.

For a tiny house to be used as a primary dwelling unit (i.e., there is no other house or primary use on the property), the question is whether the lot is zoned for single-family homes and whether the tiny house meets any minimum size requirements for houses in that zone. Most zoning codes across the U.S. do not include minimum floor space requirements for single-family homes. But some do, and that can be a barrier to installing tiny houses. Generally this occurs when a residential neighborhood has been developed for—or with—large homes, and some of the lots already have large homes on them. In those circumstances, the local government or neighborhood residents may want to protect against the remaining lots being occupied by smaller homes that they fear will reduce the neighborhood quality or character. Some communities, for example, have adopted minimum width or length-to-width requirements for single-family homes in an attempt to keep "single-wide" manufactured homes out of neighborhoods where the housing stock is of a different character. Those requirements would likely prohibit the installation of a tiny house, despite their charming appearance.

Whether this is fair to the tiny-house (or manufactured home) buyer, and whether it represents sound land-use policy, are emerging issues for debate. Minimum residential size limits are already in poor repute these days because they tend to drive housing prices up; however, these types of requirements are generally not illegal.

One work-around for the eager tiny-house buyer may be to install a tiny house as an accessory dwelling unit (ADU) (i.e., a second housing unit on a lot that already has a primary housing unit or another primary use of land). While ADUs are a fairly recent development, an increasing number of zoning ordinances now address where and under what conditions an ADU can be installed. Again, since most zoning ordinances do not address tiny houses by name, the question is whether your tiny house meets the requirements applicable to other forms of ADUs. One threshold question is whether the community allows detached ADUs or only allows internal ADUs constructed within the building envelope of an existing home. If the latter is true, a tiny house ADU will not be allowed. If the community allows detached ADUs, they often attach conditions like the following:

- Either the primary housing unit or the ADU must be occupied by the owner of the land.
- The ADU must not exceed a maximum size (generally 400 or 600 or 800 square feet).
- An extra on-site parking space for the ADU occupant may be required.

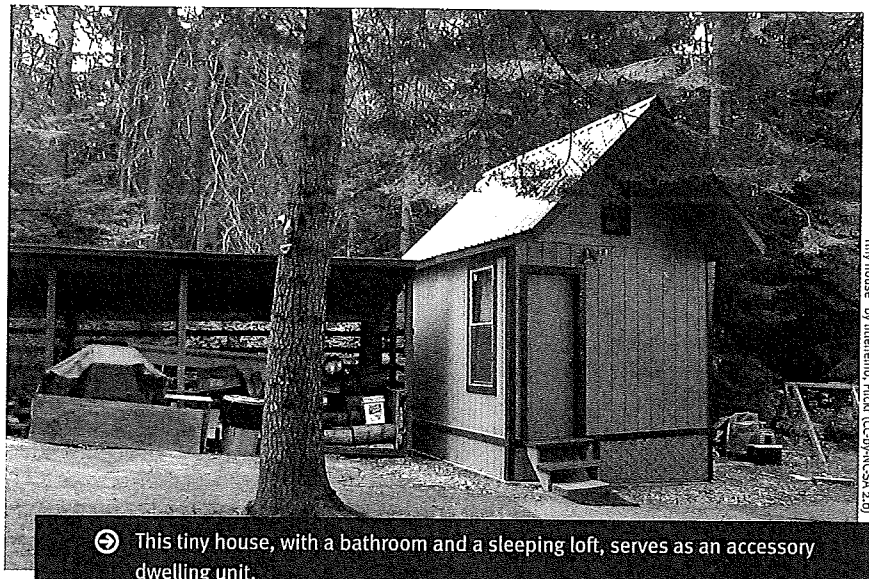
"Tiny house" by Tomas Quinones, Flickr (CC-by-SA-2.0)

Local residential building codes typically require a minimum amount of habitable space per occupant, which may prevent legal habitation of tiny houses by more than one person.

- The ADU may not be allowed to have its entrance door facing the street.
- The part of the lot containing the ADU cannot be carved off and sold as a separate lot.
- If the tiny house can meet these requirements, it may be acceptable as an ADU, even if it would not be approved as a primary home on the same lot. In some cases, however, ordinances that allow detached ADUs limit them to existing structures like carriage houses, garages, or barns, which would prohibit tiny-house ADUs.

Finally, it is important to realize that most communities apply the same building, foundation, and utility requirements to ADUs that they do to primary structures. So if the question is, "can I park my tiny house in my parents' backyard and live in it without installing a foundation or hooking up to utilities?" the answer is probably *no*. Long-term occupancy of a recreational vehicle in a residential zone district (say, for more than 30 days) is usually illegal regardless of whether you have the property owner's consent or you are related to them.

So tiny-house owners need to be thoughtful about where they intend to install the unit, and need to read the zoning ordinance carefully to ensure it is allowed in the area where they want to live. The good news (for planners) is that it is fairly easy to review the existing zoning code and see whether the code permits tiny houses as primary units or ADUs in those locations where the community wants to allow them. Planners might also want to promote more permissive regulations if the community is ready to remove a potential housing barrier.



"Tiny house" by ilitienemo, Flickr (CC-by-NC-SA 2.0)

This tiny house, with a bathroom and a sleeping loft, serves as an accessory dwelling unit.

Tiny-house owners need to be thoughtful about where they intend to install the unit, and need to read the zoning ordinance carefully to ensure it is allowed in the area where they want to live.

OTHER POTENTIAL BARRIERS

OK. So you have decided that your community wants to allow long-term occupancy of a tiny house, and you have modified the zoning ordinance to clarify where they are allowed. There are still three other potential barriers to think about.

First, unless you want to install the tiny house in a very rural area, the parcel of land where the tiny house will be located generally needs to be a subdivided lot. Subdivision regulations ensure that each parcel of land that will be developed with something other than open space or agriculture has access to a street and has utilities in place (if utilities are required in that location). This could be an issue if the tiny-house owner wants to buy 1,000 square feet of land from a property owner—just enough to accommodate the tiny house and a "livin' small" lifestyle—but the subdivision regulations require a minimum lot size of 5,000 square feet. Or it could be an issue if the tiny house must be connected to utilities but the land in question does not yet have utilities in place to connect to.

Second, the community should probably advise the tiny-house owner to check that private restrictive covenants attached to the land do not prohibit tiny houses in that area. Again, *tiny house* will probably not be listed by name, but it is not uncommon to find private covenants that contain minimum house size requirements even if the zoning ordinance does not. While it is generally not the city or county planner's job to check on the existence of private covenants when issuing a zoning approval or a building/installation permit, and local governments are generally not responsible for enforcing those covenants, advising the tiny-house owner to check on this is just good customer service. In the end, the fact that the city or county issues a permit to install a tiny house with a foundation does not protect the owner against a suit from other property owners pointing out that the tiny house does not meet restrictive covenant minimum-size requirements.

Third, even if neither the zoning ordinance nor private restrictive covenants prohibit the tiny house because of its size, many communities have residential occupancy codes to prevent overcrowding. While occupancy codes vary, it is not uncommon to find a requirement that the unit contain 125 square feet of living area per occupant, or that it not contain more than two occupants per bedroom. That could be a problem if the owner intends to house his or her family of four in a 400-square-foot tiny house, no matter how well they get along. Since occupancy of the unit may change in the future (the owner's out-of-work cousin may move in), it is hard to ensure against overcrowding when the installation permit is issued, but making the owner aware of these requirements is good customer service.

WHAT ABOUT A TINY HOUSE COMMUNITY?

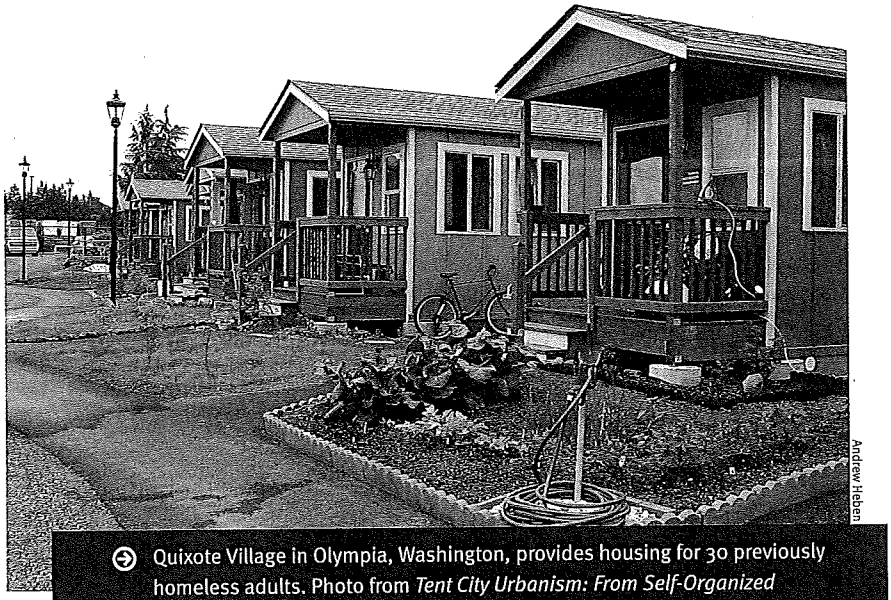
What about a whole group of folks (or a developer) who want to create an entire neighbor-

hood of tiny houses as a source of affordable housing, or just to accommodate a different lifestyle?

That is a bit tougher. While the Internet has many stories of individuals or property owners intending to create tiny house communities, it seems that few if any have been created to date. And some of the existing communities have been created for unique reasons and through "one-off" procedures.

For example, places like Opportunity Village in Eugene, Oregon, or Quixote Village in Olympia, Washington, have been created as alternatives to homeless camps in or near the same location. In both cases, it appears that the local government adopted a contract or resolution approving the use of land for tiny houses without requiring it to comply with some standard utility or construction requirements precisely because it would house very low-income households under better living conditions than the occupants had previously. While inspiring as initiatives to address the challenges of housing affordability and homelessness, both of these examples required individualized negotiations and agreements to vary from normally applicable public health and safety standards—flexibility that might not have been approved for a market-rate housing development.

However, there are at least three different ways in which a tiny-house community for the general public could be created—each modeled on an existing form of land-use approval. The choice of an appropriate tool turns heavily on the question of whether you intend the occupants to be able to sell the house and the piece of land it occupies to someone else in the future.


Andrew Heben

Quixote Village in Olympia, Washington, provides housing for 30 previously homeless adults. Photo from *Tent City Urbanism: From Self-Organized Camps to Tiny House Villages* by Andrew Heben.

A Tailored Zoning and Subdivision of Land

If tiny-house owners are going to be able to sell their lots and homes to others, then the community will need to be subdivided into individual lots, and those lots will need to meet the minimum size and dimension requirements of the zone district where they are located. If you want to allow tiny house community developers to create very small lots (say 1,000 to 2,000 square feet), it is likely that your city or county does not have a residential zone district allowing lots of that size. So the local government will have to create a zone district allowing that type of lot. If the roads within the community are going to be narrower or more lightly constructed than those in stick-built subdivisions, then the community will have to adopt subdivision standards (or exceptions to the current standards) allowing those types of construction. In many cases, the local government is only willing to allow "lower-than-normal-standard" infrastructure if the property owners agree to own and maintain it over time (i.e., the city or county will not accept it as dedicated infrastructure for public maintenance), so the developer will likely have to create a home owners association to do so. These types of specialized standards have been adopted before, however, for unique forms of housing like manufactured home subdivisions or cottage home subdivisions, and those types of standards are good places to look for guidance.

A PUD for a tiny-house community should be drafted assuming that conditions will change in the future, and to avoid locking in an overly specific development plan.

A Planned Unit Development

If the community expects that there will be only one of these communities or it does not want to create a new zone district or subdivision regulations to address tiny houses in general, the tailoring of zoning and subdivision standards described above could be accomplished through a planned unit development (PUD) tailored to a single development and a single developer. While single-project PUDs are relatively easy to adopt, they often reflect a very specific picture of the approved development that is hard to amend over time as conditions change. A PUD for a tiny-house community should be drafted assuming that conditions will change in the future, and to avoid locking in an overly specific development plan. For example, it may not be wise to require a community building of a certain size, or a park or storage area of a specific design in a specific location, because those items may need to be moved or resized in the future.

Similarly, if the home owners association is responsible for roads and utilities, it may be wise to offer some flexibility to relocate or resize those facilities in the future as needs change. The Greater Bemidji Area of Minnesota has thought through these issues and adopted a PUD approach for tiny-home subdivisions (§1101.F).

A Condominium or Cohousing Development

If the occupants of tiny houses in the community do not need to have the right to sell individual lots to others in the future, then a tiny house community could be structured as a condominium or cohousing development. Under this model, the land remains unsubdivided. Instead, a development plan is approved allowing many tiny houses, and perhaps support facilities like community buildings or shared parking areas, to occupy a single parcel of land. Instead of owning individual lots, residents own shares in the development as a whole. If structured as a condominium, each resident's share includes the exclusive rights to occupy their individual tiny house and a parking space, and also a proportionate share in the land, community buildings, roads, and infrastructure serving the area. As with a nontraditional subdivision described above, the local government may well require that the roads and utilities be owned and maintained by the condominium association. Under this approach, residents who decide to sell their tiny house in the future are actually selling their package of rights in the development (and the maintenance obligations that go along with them)—they are not selling the land. Again, it is usually wise to avoid overregulating or "zoning to a picture" in ways that may require additional governing body approval for minor changes in the future.

CONCLUSION

At this point, most city and county zoning and subdivision ordinances are unprepared for tiny houses. Answers to questions about what tiny houses are, where they can be installed, and under what conditions can be found if you search hard enough—but they are not clear or obvious. The good news is that there are several examples of how land-use controls can be developed or modified to accommodate new and creative forms of housing and land development. RV park, manufactured home park, and subdivision, cohousing, and cottage development standards provide a deep pool of content from which tiny-house regulations can be tailored and developed.

As with most land-use questions, however, the appropriate tools cannot be crafted until some policy questions have been answered. To prepare for the arrival of tiny-house owners and community developers in the future, local governments should be prepared to answer these questions:

- Do we want to allow the installation of tiny houses for long-term occupancy, and if so, in what parts of our community?
- Do we want to accommodate only those tiny houses that meet our current building code or the federal manufactured home standards, or do we want to create exceptions for other tiny houses that can be made safe for long-term occupancy in other ways?
- Do all tiny houses need to be installed on foundations and with connections to our electric, water, and sewer systems, or are there some areas (maybe rural areas) where we would allow them under other circumstances?
- Are there areas of the community where they should be permitted as primary dwelling units?
- Are there areas of the community where they should not be permitted as primary dwelling units, but would be acceptable as accessory dwelling units?
- What changes to our building code, zoning ordinance, and subdivision regulations need to be made to achieve those results?
- With a little forethought, you can be prepared for the day a tiny-house owner shows up with some or all of the questions discussed above—and avoid that "deer-in-the-headlights" look that so annoys the town council.

VOL. 32, NO. 11

Zoning Practice is a monthly publication of the American Planning Association. Subscriptions are available for $95 (U.S.) and $120 (foreign). W. Paul Farmer, FAICP, Chief Executive Officer; David Rouse, AICP, Managing Director of Research and Advisory Services.

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

Missing and damaged print issues: Contact Customer Service, American Planning Association, 205 N. Michigan Ave., Suite 1200, Chicago, IL 60601 (312-431-9100 or customerservice@planning.org) within 90 days of the publication date. Include the name of the publication, year, volume and issue number or month, and your name, mailing address, and membership number if applicable.

Printed on recycled paper, including 50-70% recycled fiber and 10% postconsumer waste.

Cover: "Tiny house, Portland" by Tammy (Weekend with Dee), Wikimedia (CC-by-2.0); design concept by Lisa Barton.

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