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Zoning Bulletin

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Due Process/Equal Protection—Village threatens to sue property owner for zoning violations

Property owner alleges threatened litigation violates its due process and equal protection rights

Contributors

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Citation: *Black Earth Meat Market, LLC v. Village of Black Earth, 2016 WL 4468085 (7th Cir. 2016)*

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

SEVENTH CIRCUIT (WISCONSIN) (08/24/16)—This case addresses the issue of whether a village's threat of litigation related to zoning violations violated a property owner's due process and/or equal protection rights under the United States Constitution.

The Background/Facts: In 2001, Black Earth Meats ("BEM") purchased property in a "B-1 General Commercial" zoning district in the Village of Black Earth (the "Village"). Although an animal slaughtering operation was not allowed in that zoning district, the property had been used as a slaughterhouse and retail butcher shop for the previous 60 years. Thus, BEM's use of the property as a slaughtering operation constituted a legal nonconforming use.

In 2008, Kemper Durand, Jr. ("Durand") purchased BEM. Within a year of that purchase, BEM's slaughter operations increased in both volume and frequency. That increase led to a large number of complaints from neighbors. A consulting firm hired by the Village to investigate the complaints found that BEM's slaughter operation was responsible for: "[i]ncreased truck traffic on local residential streets"; "[i]ncreased noise due to trucks and slaughter operations on the premises"; "[o]ffal runoff from the property that goes into storm sewers and adjacent properties"; "[f]lies and other vermin due to offal runoff and outdoor storage of animal waste that is not promptly removed from the property"; and "[a]nimals escaping from the property." As complaints continued from neighbors, the Village increased zoning enforcement efforts against BEM. Over a three-month period alone—in late 2013 to early 2014—BEM was issued nine citations for zoning violations. When the violations continued, the Village Board gave BEM 120 days to present "an acceptable plan for relocating its slaughter operation." The Village Board advised BEM via a letter that if BEM failed to timely present such a plan, the Village "intend[ed] to commence legal action to abate the nuisance and secure a court order enjoining slaughter operations."

Meanwhile, Durand had been looking for new financing for BEM's operations. BEM secured a loan with a bank that required a guarantee from the United States Department of Agriculture (USDA) Office of Rural Development. The USDA would only give a guarantee conditioned on there being "[n]o . . . suits . . . pending or threatened" against BEM. BEM later alleged that, as a result of the Village's threat of litigation, the USDA refused to guarantee the loan from the bank and BEM lost its financing. By August 2015, BEM had closed and listed its facility for sale.

In June 2014, BEM and Durand (hereinafter, collectively, "BEM")

sued the Village. Among other things, BEM alleged that the Village violated BEM's procedural due process rights under the 14th Amendment to the United States Constitution when, instead of rezoning the property and actually executing a taking, the Village threatened to sue, thus, "indirectly depriv[ing] BEM of financing and forc[ing] it to shut down." (The Due Process Clause of the 14th Amendment provides that no "State" shall "deprive any person of life, liberty, or property, without due process of law . . . .") BEM also alleged that the Village violated its equal protection rights in that the Village intentionally and arbitrarily discriminated against BEM. (The 14th Amendment's Equal Protection Clause provides that no state shall deny to any person within its jurisdiction "the equal protection of the laws.")

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the district court issued summary judgment in favor of the Village on BEM's procedural due process and equal protection claims.

BEM appealed.

DECISION: Affirmed.

The United States Court of Appeals, Seventh Circuit, concluded that BEM's procedural due process and equal protection claims both failed.

In so holding, the court explained that in determining whether the Village deprived BEM of its procedural due process rights, the court would look at: (1) whether BEM was deprived of a protected liberty or property interest; and (2) if so, whether the deprivation occurred without due process. Here, BEM had asserted two interests were deprived: a liberty interest in the occupation of slaughter and its interest in its financing agreement with the bank. The court acknowledged that those were interests protected under the due process clause of the 14th Amendment. However, the court found that the Village's actions did not actually deprive BEM of those protected interests. The court found none of the Village's actions were "more than a threat of litigation;" the Village did not actually forbid slaughter operations. Any causal link was far removed by many steps between the Village's threat of litigation and the deprivations, found the court.

Moreover, the court explained that a statement by the Village that BEM's actions were in violation of the law and the Village's threat of litigation did not amount to a deprivation of BEM's protected interests without notice and an opportunity to be heard. The statement of violation and threat of litigation was the "provision of notice," said the court. The ensuing litigation would have been the opportunity to be heard. In general, reiterated the court, "a threat to sue cannot qualify as a deprivation of procedural due process." Still, "[e]ven if the threat of litigation could in itself constitute a violation of due process and were a sufficiently direct cause of BEM's alleged deprivations," here the court

found there was "no reason to think that the process accorded to BEM was inadequate" as BEM had received a notice and opportunity to be heard at every step.

As to BEM's equal protection claim, the court explained that in order to succeed on such a "class of one" equal protection claim, BEM had to show that it was "intentionally treated differently from others similarly situated and that there [was] no rational basis for the difference in treatment." BEM had argued that where official action is motivated only by "sheer malice, vindictiveness, or malignant animosity," the victim states an equal protection claim and is not required to provide evidence of a better-treated comparator. The court found "[t]he law on that point is up in the air," but "assume[d] for present purposes that BEM's position [was] correct." Nevertheless, the court found that BEM's claim failed because there was "no evidence of animus in this case." The court found no evidence that the Village was motivated by malice or animosity. Rather, it was responding to a myriad of complaints by neighbors against BEM. "As a result, although the Village pursued a campaign against continued slaughter activities by BEM at its current location, it had a rational basis for doing so," concluded the court.

See also: *Hussein v. City of Perrysburg, 617 F.3d 828 (6th Cir. 2010).*

See also: *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).*

Case Note:

In addressing the procedural due process claim, the court warned that if procedural due process claims made are actually takings claims, they are unripe to first be brought in federal court. Rather, under Wisconsin law, an inverse condemnation procedure allows a property owner to seek just compensation by initiating condemnation proceedings (see Wis. Stat. § 32.10). Here, the court found that BEM's financing agreement with the bank and its "liberty interest in slaughter" both represented interests independent of the property itself, thus allowing BEM's due process claim to be "properly construed as (non-takings) procedural due process claims, and therefore ripe [for adjudication by the federal court]."

Case Note:

In its decision, the court also noted another, independent reason to reject BEM's equal protection claim: BEM failed to suggest a similarly situated comparator (which was in similar circumstances and treated differently than BEM).

Jurisdiction—After amateur radio enthusiast is denied permit for tall tower, he appeals to federal court

Federal court analyzes federal preemption of local zoning laws and weighs whether it has jurisdiction over the appeal

Citation: *DePolo v. Board of Supervisors Tredyffrin Township, 2016 WL 4525228 (3d Cir. 2016)*

The Third Circuit has jurisdiction over Delaware, New Jersey, and Pennsylvania.

THIRD CIRCUIT (PENNSYLVANIA) (08/30/16)—This case involved the question of the federal preemptive effective of a federal rule on amateur radio towers to local zoning matters. The case addressed the issue of whether the federal court, in this instance, had jurisdiction over the matter.

The Background/Facts: Jeffrey DePolo ("DePolo") was a federally licensed amateur or "ham" radio enthusiast. DePolo owned property in an R 1/2 Residential Zoning District in Tredyffrin Township (the "Township"). DePolo sought to construct a 180-foot radio antenna on his property so that he could "communicate with other ham radio operators around the world." Since DePolo's property was surrounded by mountains or hills, DePolo claimed that the 180-foot height of the tower was necessary for him to reliably communicate with other ham radio operators. In November 2013, DePolo applied to the Township zoning officer, requesting a building permit to construct the 180-foot tower on his property. The zoning officer denied DePolo's application, noting that the Township's zoning ordinance limited structures in the R 1/2 Residential Zoning District to 35-feet. Notwithstanding that restriction, the zoning officer offered DePolo a permit to construct a 65-foot tower. DePolo rejected that proposal and appealed the denial of his building permit application to the Township's Zoning Hearing Board of Appeals ("ZHBA"). His appeal was accompanied by a variance application, requesting allowance to erect a tower that exceeded the height restriction in the ordinance.

The ZHBA also denied DePolo permission for a 180-foot tower, but agreed to a variance for a tower that was 65-feet tall. In so determining, the ZHBA found that DePolo's proposed 180-foot tower was: "not compatible" with the surrounding residential neighborhood; would create an

adverse visual impact on the neighborhood; involved a "height, mass, and latticework design" of a type associated with a "industrialized complex"; and posed a safety hazard to neighboring properties since its fall radius extended "well into those properties."

DePolo appealed the ZHBA's decision. Rather than appeal to the state County Court of Common Pleas, DePolo filed suit in federal court. DePolo argued that the ZHBA's 65-foot variance and the zoning ordinance's fixed and firm height restriction of 35-feet, were preempted by federal law—specifically a ruling of the Federal Communications Commission (the "FCC"): PRB-1.

Under FCC regulations (47 C.F.R. § 97.15(b)), state and local regulations of a station antenna structure "must not preclude amateur service communications," but must "reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose." Under the FCC's ruling—PRB-1—"a zoning ordinance is preempted where a local municipality fails to apply land use regulation in a manner that reasonably accommodates amateur communications."

The District Court dismissed DePolo's suit "for failure to state a claim." The court held that the Township's 65-foot variance was a valid and reasonable accommodation for DePolo's 180-foot tower request. It also held that the Township's local zoning ordinance was not preempted by PRB-1.

DePolo appealed. Again, on appeal, DePolo claimed that the Township's zoning ordinance, which prohibited any building taller than 35-feet, was preempted as enacted and as applied under the FCC regulations (47 C.F.R. § 97.15(b)), and the closely related FCC declaratory ruling known as PRB-1.

DECISION: Appeal dismissed.

The United States Court of Appeals, Third Circuit, also dismissed DePolo's suit, finding it did not have jurisdiction to hear it.

In so concluding, the court first analyzed the law on regulation of amateur radio towers, looking to obtain a "complete understanding of [PRB-1's] application." The court noted that the federal government's interest in preserving amateur radio communications stems from the fact that such communication towers "afford the federal government reliable emergency preparedness, national security, and disaster relief communications." The result of the combination of federal interests and local land use interests is "a 'perfect storm' for conflict because there is a direct correlation between a ham's antenna height and an ability to properly transmit signals," said the court. The FCC's PRB-1 was an attempt "to strike a balance between the federal interest in promoting amateur operations and the legitimate interests of local governments in regulating local zoning matters," found the court.

The court noted that the FCC did not specify a minimum height below which local governments must allow for radio towers. Rather, the court found that, "as the FCC has explained, PRB-1 provides that 'local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose.' " The court explained that: "Notwithstanding PRB-1's somewhat vague language, several principles emerge. First, local municipalities must reasonably accommodate amateur communications. Second, zoning ordinances should be the minimum practicable restrictions which accomplish the local municipalities' legitimate purposes. Third, local municipalities may not ban all amateur communications towers. Finally, the FCC has explicitly declined to regulate the specific permissible heights for antenna towers."

Despite its analysis of the applicable law, the court, nonetheless determined that it did not, in this case, have jurisdiction to hear DePolo's PRB-1 preemption claim and decide the matter on the merits. The court noted that while DePolo was aggrieved by the ZHBA's decision, Pennsylvania law required that "[a]ll appeals from all land use decisions . . . shall be taken to the court of common pleas of the judicial district wherein the land is located." The court found that DePolo had "adequate opportunity to litigate the matter beyond the ZHBA by appealing to the appropriate [state] Court of Common Pleas within 30 days of the ZHBA's decision. However, rather than do that, DePolo filed his federal lawsuit and allowed the 30-day appeal period under state law to expire. That, said the court, was "fatal to his ability to obtain federal review of his claim." DePolo, concluded the court, was "now bound by the final judgment of the ZHBA," as its ruling was a "final judgment on the merits that is entitled to preclusive effect in federal court."

See also: *Evans v. Board of County Com'rs of County of Boulder, Colo., 994 F.2d 755 (10th Cir. 1993) (interpreting PRB-1 and upholding its preemptive effect).*

See also: *Thernes v. City of Lakeside Park, Ky., 779 F.2d 1187 (6th Cir. 1986) (per curiam) (interpreting PRB-1 and upholding its preemptive effect).*

See also: *Williams v. City of Columbia, 906 F.2d 994 (4th Cir. 1990) (interpreting PRB-1 and upholding its preemptive effect).*

See also: *Howard v. City of Burlingame, 937 F.2d 1376, 1380 (9th Cir. 1991) (interpreting PRB-1 and upholding its preemptive effect).*

See also: *Izzo v. Borough of River Edge, 843 F.2d 765 (3d Cir. 1988).*

Case Note:

In concluding that it did not have jurisdiction to hear DePolo's PRB-1 preemption claim, the Third Circuit acknowledged that its decision "leaves amateur radio enthusiasts with limited avenues into federal court." The court explained that the federal court could have narrowly addressed the question of preemption here if DePolo had appealed the ZHBA's decision and stayed the matter in state court, while his federal claims were resolved. Alternatively, the court noted that the FCC has enforcement powers, and "conferring jurisdiction on the District Courts of the United States 'upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions.' "

Standing—After city council affirms planning commission's decision and grants variance, area residents appeal

City contends residents are not statutorily authorized to appeal the city council's variance decision

Citation: *Schmidt v. City of Minot, 2016 ND 175, 883 N.W.2d 909 (N.D. 2016)*

NORTH DAKOTA (08/31/16)—This case involved statutory interpretation of statutory provisions pertaining to zoning and variance procedures, and addressed the issue of whether neighbors had standing to appeal a city council's variance decision.

The Background/Facts: In August 2014, First Western Bank and Trust (the "Bank") applied for two variances from Minot City (the "City") zoning regulations for off-street parking. The City's Planning Commission approved the variance application. The City Council later affirmed the Planning Commission's decision. Subsequently, 16 City residents (the "Residents") appealed the City Council's approval of the Bank's application for the variances. The court ruled that the Residents lacked standing to appeal the City Council's approval of the zoning variances under North Dakota statutory law—N.D.C.C. §§ 28-34-01 and 40-47-12.

Under N.D.C.C. § 40-47-12, "the proper local authorities of the city" are "authorized" to "institute any appropriate action or proceeding" to restrain, correct, or abate zoning violations if "any building or structure

is erected constructed, reconstructed, altered, repaired, converted, or maintained, or . . . used in violation of" zoning laws. Also, N.D.C.C. § 40-47-11(1) authorizes review of a board of adjustment decision and provides a board of adjustment decision may be appealed to the governing body of the city "by either the aggrieved applicant or by any officer, department, board, or bureau of the city." Under N.D.C.C. § 40-47-11(2), "[a] decision of the governing body of the city on an appeal from a decision of the board of adjustment may be appealed to the district court in the manner provided" by N.D.C.C. § 28-34-01.

The court explained that the City had not adopted an ordinance conferring standing on citizens to appeal a City Council decision to the district court under N.D.C.C. § 40-47-12, and that the Residents' appeal did not involve the City Council's review of a board of adjustment decision under N.D.C.C. § 40-47-11. (Rather, the City Council's review here was of a Planning Commission decision). Thus, finding the statutes provided no avenue of standing for the Residents here, the court dismissed the Residents' appeal and denied their request for reconsideration.

The Residents appealed. They argued that they did have standing to appeal the City Council's approval of the zoning variances here. They argued that N.D.C.C. § 40-47-12 did not apply to their case because their appeal was not an action or proceeding to restrain, correct, or abate a zoning violation. They claimed instead that the Planning Commission was acting as a board of adjustment in granting the variances, and that the Residents had a right to appeal the City Council decision affirming the Planning Commission's decision (made as it was acting as a board of adjustment) under N.D.C.C. §§ 28-34-01 and 40-47-11. They also claimed that if the Planning Commission was not acting as a board of adjustment, the Planning Commission had no authority to grant variances and the variances were void. In other words, they argued that the City could not delegate a board of adjustment's functions to a planning commission in order to deprive Residents of the legislatively created right to appeal a board of adjustment's variance decision.

The City maintained that the Planning Commission was not acting as a board of adjustment in granting the variances, and noted that the statutory procedure authorizing an appeal of a board of adjustment did not apply to the planning commission decision. The City claimed that its home rule ordinances did not provide for a board of adjustment and thus did not incorporate the statutory provisions pertaining to appeals form variance decisions by a board of adjustment. Therefore, the City contended that the City Council's variance decision was final and not appealable.

DECISION: Affirmed.

The Supreme Court of North Dakota first agreed with the Residents

that N.D.C.C. § 40-47-12 did not apply to their case because the Residents were not "proper local authorities of the city" and they did not bring an action or proceeding to restrain, correct, or abate a zoning violation. Rather, the court found that the residents appealed a City Council decision granting the Bank's application for two variances.

However, the court also agreed with the City, finding that the Residents were not statutorily authorized to appeal the City Council's variance decision. In so ruling, the court did not decide whether the City was correct in its claim that it was authorized by statute, as a home-rule city, to have the Planning Commission decide variance appeals "and ostensibly preclude appeals from variance decisions to a district court." Rather, the court simply pointed to the statutory language of N.D.C.C. § 40-47-11 again—noting it authorized review of a board of adjustment decision and provided a board of adjustment decision may be appealed to the governing body of the city "by either the aggrieved applicant or by any officer, department, board, or bureau of the city." Interpreting "aggrieved applicant" as the "entity applying for a variance" (which here was the Bank), the court concluded that the Residents were not "aggrieved applicants" within the meaning of N.D.C.C. § 40-47-11. Accordingly, the court concluded that the Residents were not statutorily authorized to appeal the City Council's variance decision in this case.

See also: *Munch v. City of Mott, 311 N.W.2d 17 (N.D. 1981).*

Case Note:

In another case, Munch v. City of Mott, 311 N.W.2d 17 (N.D.1981), the Supreme Court of North Dakota had held that a city ordinance conferring standing to bring an action for injunctive relief upon "any affected citizen or property owner" did not exceed the city's authority under N.D.C.C. §§ 40-47-04 and 40-47-12. The Court, in that case, had said that the city's extension of standing requirements beyond N.D.C.C. § 40-47-12 to also include affected citizens or property owners was compatible with promoting the health, safety, morals, or general welfare of the community. In the case here (*Schmidt*), the court made clear that rationale in *Mott* did not extend standing to appeal to the Residents. While the *Mott* case involved a city ordinance extending standing to "any affected citizen or property owner" to bring an action or proceeding to restrain, correct, or abate zoning violations under N.D.C.C. § 40-47-12, the case here was instead about the statutory authorization to appeal a variance decision. Here, § 40-47-11 authorized only an appeal by an "aggrieved applicant" and the court had determined that the Residents were not aggrieved applicants.

Zoning News from Around the Nation

CALIFORNIA

The United States Postal Service ("USPS") has reportedly filed a lawsuit against the city of Berkeley "over a zoning ordinance that depletes the value of the Berkeley Main Post Office building and allegedly prevents its sale." The post office at issue is located in Berkeley's Civic Center Historic District. In 2014, following USPS's attempt to sell the building, Berkeley City Council passed a zoning ordinance restricting use of buildings in the Civic Center Historic District of Berkeley for civic and nonprofit uses. The USPS now alleges that zoning change "so drastically reduced the value of the property as to render a sale untenable."

Source: *The Daily Californian; www.dailycal.org*

PENNSYLVANIA

Penn Township commissioners were expected to finish, in late September 2016, their review of a draft zoning ordinance "that has come under criticism for its rules on shale gas drilling." On August 17, the first public hearing was held on the draft zoning laws since they were proposed in the fall of 2014. "Although they are still in draft form, they have been in effect." In addition to regulating fracking, the draft zoning ordinance "would reduce the number of zoning districts in the township and make rules in those districts more adaptable." The ordinance's proposed mineral extraction overlay district has drawn the most attention, as the special zoning district "would open up more than half of the 30-square-mile township to unconventional drilling involving fracking."

Source: *Pittsburgh Post-Gazette; www.post-gazette.com*

TENNESSEE

Nashville's Metro Council recently approved two bills that amount to "landmark action on affordable housing for Nashville." "One bill approved a new three-year pilot program that will let residential developers who agree to build affordably priced units compete for financial incentives and grants totaling $2 million." A second bill approved will require, beginning in June, "that residential apartment developers in Nashville building five or more units include a percentage of new workforce units in their projects when they request a zoning variance for greater development rights, such as density or greater height."

Source: *The Tennessean; www.tennessean.com*

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Due Process—County Board enforces zoning regulations that were adopted without following procedures outlined under state law

Affected landowners allege Board's actions violated their constitutional due process rights

Contributors

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Citation: *Onyx Properties LLC v. Board of County Commissioners of Elbert County, 2016 WL 5720529 (10th Cir. 2016)*

The Tenth Circuit has jurisdiction over Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming.

TENTH CIRCUIT (COLORADO) (10/03/16)—This case addressed the issue of whether the Due Process Clause of the United States Constitution requires notice and public hearings prior to the adoption of zoning regulations. It also addressed the issue of whether a county board of commissioners' purported conduct was sufficiently egregious so as to violate affected landowners' substantive due process rights.

The Background/Facts: In 1983, the Board of County Commissioners of Elbert County (the "Board") enacted comprehensive zoning regulations. Those zoning regulations referred to an official county zoning map. By 1997, the Board discovered that its files contained only six pages of the regulations and no zoning map. The Board authorized the County's Planning Director, Kenneth Wolf, to research historical zoning information and report his findings in a series of replacement maps and zoning regulations (the "Wolf Documents"). Although no public proceedings were conducted to approve the Wolf Documents, county officials treated them as authoritative.

Between 1997 and 2008, a number of landowners in Elbert County (the "County") sought to subdivide their properties. County officials informed them that their properties were zoned A-Agriculture, and that County regulations required the parcels to be rezoned as A-1 in order to be subdivided. At substantial expense, the landowners applied to the Board for rezoning, paid required fees, and obtained approval of their rezoning applications. Subsequently, however, the landowners became aware that, the Wolf Documents, which required the rezonings, had not been formally adopted in accordance with Colorado law. Colorado law requires that "before the adoption of any zoning resolutions, the board of county commissioners shall hold a public hearing thereon, the time and place of which at least fourteen days' notice shall be given." (Colo. Rev. Stat. § 30-28-112.)

One group of landowners brought a lawsuit alleging that the Board's actions violated their substantive and procedural due process rights. Another group of landowners brought another suit, raising the same claims. The landowners argued that after the Board lost the original documents reflecting the 1983 comprehensive zoning ordinance, the Board created the Wolf Documents without following proper state law procedures for enacting an ordinance—in violation of the landowners' rights to procedural due process. The landowners also alleged that the Board covered up their misconduct thus violating the landowners' substantive due process rights.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution prohibits the state from depriving any person "of life, liberty, or property, without due process of law." (U.S. Const. amend. XIV, § 1.) "Procedural due process ensures the state will not deprive a party of property without engaging fair procedures to reach a decision, while substantive due process ensures the state will not deprive a party of property for an arbitrary reason regardless of the procedures used to reach that decision." In other words, procedural due process rights ensure that an affected party will receive

some kind of notice and some kind of hearing before being deprived of property rights, while substantive due process rights ensure that, regardless of the fairness of the procedures, certain egregious governmental actions are prohibited.

In the first case, the district court dismissed the substantive due process claim. Finding no material issues of fact and dispute and deciding the matter on the law alone, the court also granted summary judgment in favor of the Board on the procedural due process claim. In the second case case, the district court dismissed both the procedural and substantive due process claims.

In both cases, the landowners appealed. Those appeals were consolidated.

DECISION: Judgments of District Courts affirmed.

The United States Court of Appeals, Tenth Circuit, held that the Board's adoption of the Wolf Documents as the official zoning regulations and maps was a legislative act, such that the Due Process Clause did not apply and no public hearings were required prior to the adoption. The court also held that the allegations of Board misconduct in covering-up and misrepresenting the Wolf Documents was not so egregious as to violate substantive due process rights.

In so holding, the court explained that violation of state procedural requirements (i.e., here, the Colorado statutory procedural requirements for adoption of zoning ordinances) "does not in itself deny federal constitutional due process." The board recognized that when a municipal board's actions have a limited focus, affecting a few people or properties and based on grounds that are individually assessed, it may be an adjudicative action that is subject to procedural due process requirements of notice and hearing. However, the court explained that the adoption of a general zoning ordinance, though felt differently by specific landowners, is a legislative action, involving the discretionary implementation of prospective policies, which is not subject to due process requirements of notice and hearing. In summary, the court concluded that the Board's adoption of the Wolf Documents was a legislative act for which the federal Constitution did not afford the landowners' right to a hearing.

With regard to the substantive due process claims, the court found these also failed because the allegations of Board misconduct did not rise to a level that "shocks the conscience of federal judges." The court explained that "only the most egregious official conduct can be said to be arbitrary [and thus violative of substantive due process rights] in the constitutional sense." "Intentionally or recklessly causing injury through the abuse or misuse of governmental power is not enough," said the court. Rather, the actions "must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." Here, the court found no allegation of corruption, self-dealing, or bias against any protected group or activity. While the landowners alleged "clandestine activity and a cover-up," the transcript of a 1997 public Board meeting showed the Board publicly disclosed the loss of the zoning map. The court concluded that the allegations against the Board simply did not arise to actions that "shock the conscience," and thus did not violate the landowners' substantive due process rights.

See also: *Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 36*

S. Ct. 141, 60 L. Ed. 372 (1915). As to other jurisdictions, see, e.g., Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield, 907 F.2d 239, 111 A.L.R. Fed. 835 (1st Cir. 1990) (enactment of zoning ordinance is a legislative act); County Concrete Corp. v. Town of Roxbury, 442 F.3d 159 (3d Cir. 2006) (municipal body's act of recommending or voting for change in permitted uses in a zoning district is legislative in character); Jackson Court Condominiums, Inc. v. City of New Orleans, 874 F.2d 1070 (5th Cir. 1989) (moratorium on establishment of time-share condominiums in residential area was a legislative zoning decision of broad applicability to which no procedural-due-process rights attached); Dennis v. Village of Tonka Bay, 156 F.2d 672 (C.C.A. 8th Cir. 1946) (enactment of zoning ordinance is "legislative in character"); Kuzinich v. Santa Clara County, 689 F.2d 1345 (9th Cir. 1982) ("[T]he enactment of a general zoning ordinance is a legislative act."); *Kentner v. City of Sanibel, 750 F.3d 1274 (11th Cir. 2014), cert. denied, 135 S. Ct. 950, 190 L. Ed. 2d 831 (2015) (generally applicable, prospective, policy-making zoning ordinance restricting building of docks and piers is a legislative act); see also Calvert v. Safranek, 209 Fed. Appx. 816 (10th Cir. 2006) ("In Colorado, adopting zoning ordinances is a legislative function entrusted to the boards of county commissioners.").*

See also: *County of Sacramento v. Lewis, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).*

Case Note:

Notably, in its decision, the court indicated that the landowners here may be able to pursue in state court, under state law, their allegations that the Board allegedly violated state procedures in adopting the zoning ordinance. The court noted that "[a] procedural failure in the approval process may render legislation invalid under state law but does not change its character as legislation" (and legislation is not subject to federal due process requirements).

Referendum and Initiative—Opponents of zoning resolution get referendum petition on general election ballot

Zoning applicant challenges validity of referendum petition

Citation: *State ex rel. Jacquemin v. Union Cty. Bd. of Elections, 2016-Ohio-5880, 2016 WL 5222401 (Ohio 2016)*

OHIO (09/19/16)—This case addressed the issue of whether the summary contained in a referendum petition regarding a proposed zoning amendment was misleading so as to render the petition invalid.

The Background/Facts: Paul and Mary Jacquemin (the "Jacquemins") owned two parcels of land in Jerome Township (the "Township") in Union County (the "County"). Arthur and Elizabeth Wesner (the "Wesners") owned one parcel of land in the Township. In late 2015, the Schottenstein Real Estate Group filed a rezoning application for the three parcels of land owned by the Jacquemins and the Wesners. In furtherance of a proposed Mixed Use Planned Development on those parcels, the rezoning application sought to rezone the parcels from U-1 Rural District to P.U.D. Planned Unit Development. The Township's Board of Trustees (the "Board") approved the rezoning application in an adopted Township Zoning Resolution (the "Zoning Resolution").

Subsequently, opponents of the Zoning Resolution delivered a referendum petition on the Zoning Resolution to the Township. The Jacquemins and Wesners filed protests of the petition with the County Board of Elections (the "BOE"). They contended that the referendum summary was invalid because it contained six omissions and three errors. The BOE voted to deny the protests and to place the referendum issue on the November 8, 2016 general election ballet.

The Jacquemins then filed an action, asking the Supreme Court of Ohio to issue a writ of mandamus preventing the referendum regarding the Zoning Resolution from appearing on the ballot.

DECISION: Writ granted.

The Supreme Court of Ohio granted the writ of mandamus preventing the referendum regarding the Zoning Resolution from appearing on the November general election ballot.

In its decision, the court explained that Ohio statutory law—R.C. 519.12(H)—requires that each part of a petition seeking a referendum on a township zoning resolution contain "a brief summary" of the resolution's contents. The main purpose of such a summary, explained the court, "is to present the question or issues to be decided fairly and accurately, so as to ensure that voters can make a free, intelligent, and informed decision." For that reason, noted the court, "the petition summary must be accurate and unambiguous." "If the summary is misleading, inaccurate or contains material omissions which would confuse the average person, the petition is invalid and may not form the basis for submission to a vote. "

Here, the court found that one of the Jacquemins' arguments about inaccuracies in the summary had merit. The referendum petition summary stated that the nearest intersection to the parcels that were rezoned under the Zoning Referendum was "Hyland-Croy Road and SR 161-Post Road." However, the court found that the closest intersection was actually Hyland-Croy Road and Park Mill Drive. While that error may have seemed minor on its face, a separate big-box retail use, which had involved a contentious zoning change, was near the Post Road intersection with Hyland-Croy Road. The court found that "[b]y misidentifying the nearest intersection as one that is near property that is already being developed for big-box retail use, the petition summary may have poisoned would-be signers against the new development, which is more than a quarter mile away from the intersection identified in the summary. At the very least, it suggests to a would-be signer that the developments would nearly overlap each other." Having found the petition summary to be mislead-

ing, the court concluded that it could not form the basis to submit the issue to a vote.

See also: *State ex rel. Hamilton v. Clinton Cty. Bd. of Elections, 67 Ohio St. 3d 556, 621 N.E.2d 391 (1993).*

Zoning Use—Landowner receives notice of zoning violation for short-term rentals of property in residential district

Landowner argues short-term rentals were not inconsistent with single-family dwelling use

Citation: *Marchenko v. Zoning Hearing Board of Pocono Township, 2016 WL 4978459 (Pa., Sept. 19, 2016)*

PENNSYLVANIA (09/19/16)—This case addressed the issue of whether short-term rentals of property were inconsistent with single-family dwelling use as per a township's zoning ordinance.

The Background/Facts: Tatiana Marchenko ("Marchenko") owned a single-family dwelling (the "Property") in Pocono Township (the "Township"). The Property was located in the Township's R-1 Low Density Residential Zoning District ("R-1 District"). Under the Township's Zoning Ordinance (the "Ordinance"), uses permitted in the R-1 District included, among other things: single-family detached dwellings, customary accessory uses, churches and related uses, and home occupations.

In September 2014, the Township's zoning officer issued to Marchenko a notice of zoning violation (the "Notice"). The Notice stated that Marchenko's use of the Property for short-term rentals was use of the Property for a commercial purpose which was in violation of the Ordinance. Commercial uses were not one of the permitted uses in the R-1 District.

Marchenko appealed to the Township's Zoning Hearing Board ("ZHB"). The ZHB found that Marchenko considered the Property to be her primary residence because she received mail at the Property, did not own other property, and listed the Property on her driver's license. The ZHB found that Marchenko rented out the Property on weekends to help defray her housing expenses. It also found that, during the rental periods, she would stay with a friend and lock her personal effects in a room at the Property. The ZHB determined that, for the first 185 days that Marchenko owned the Property, she resided at it for 114 days (62% of the time) and rented out the Property 71 days (38% of the time). The ZHB heard testimony from neighbors who said that the people who rented the Property created noise and other disturbances in the neighborhood.

Ultimately, the ZHB denied Marchenko's appeal. In doing so, the ZHB

found that no term in the Ordinance addressed "the short-term renting of a single-family dwelling to a series of different families, where only one family lives at the single-family dwelling during a rental period." The Ordinance's definition of "single-family dwelling" also failed to address such a short-term rental use. The Ordinance defined "single-family dwelling" as "[a] detached building designed for and occupied exclusively by one family." The Ordinance defined "family" as: "One or more persons, related by blood, adoption or marriage, living and cooking together in a dwelling unit as a single housekeeping unit or a number of persons living and cooking together in a dwelling unit as a single housekeeping unit though not related by blood, adoption or marriage, provided that they live together in a manner similar to a traditional nuclear family."

The ZHB determined that Marchenko's rental activity, in fact, constituted a lodge use. Although the Ordinance did not define "lodge," it did list "lodge" as an example of a "transient dwelling accommodation," an undefined use that was only permitted in the Township's RD Recreational District.

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

Marchenko again appealed. On appeal, she argued that her short-term rentals of the Property were not prohibited in the R-1 District and were not inconsistent with the single-family dwelling use. She also argued that the ZHB erred in concluding that her short-term rentals of the Property constituted use as a lodge.

DECISION: Judgment of Court of Common Pleas reversed.

The Commonwealth Court of Pennsylvania agreed with Marchenko's arguments. It concluded that the ZHB erred in finding Marchenko's short-term rentals of the Property were prohibited in the R-1 District. It also concluded that the ZHB erred in concluding that Marchenko's short-term rentals of the Property constituted a "lodge" use.

In reaching its decision, the court focused on Marchenko's personal use of the property. It noted that the Property was primarily used as a single-family dwelling by Marchenko, and thus determined that "the composition of the family living at the Property is not purely transient." Moreover, the court noted that the Ordinance's definition of "single-family dwelling" did not prohibit short-term rental activity, and short-term rental activity was not encompassed by any other use defined by the Ordinance. Under those circumstances, the court found that the ZHB "should have broadly interpreted the term 'single-family dwelling' to allow this rental activity rather than straining to designate the activity as a prohibited lodge use, which the Ordinance does not define."

Similarly, noting that Marchenko used the Property as her primary residence and only rented it out "a minority of the time in order to defray her housing expenses," the court found that designating it as a lodge use was inappropriate. The court noted that the purpose of a lodge, per dictionary definition, was to provide short-term accommodations, while the primary purpose of Marchenko's property was for use as her primary residence.

See also: *Albert v. Zoning Hearing Bd. of North Abington Tp., 578 Pa. 439, 854 A.2d 401 (2004).*

Fees and In-Lieu Payments—City's inclusionary housing ordinance requires developers to set aside units as affordable housing or pay in-lieu fee

Developer contends in-lieu fee is an unconstitutional taking of property

Citation: *616 Croft Ave., LLC v. City of West Hollywood, 3 Cal. App. 5th 621, 207 Cal. Rptr. 3d 729 (2d Dist. 2016)*

CALIFORNIA (09/23/16)— This case addressed the issue of whether the in-lieu housing fees under a city's inclusionary housing ordinance were constitutionally valid.

The Background/Facts: Shelah and Jonathan Lehrer-Graiwer and 616 Croft Ave., LLC (collectively, "Croft") was a developer of a complex of residential rental units in the City of West Hollywood (the "City"). In 2004, Croft applied to the City for permits to demolish two single-family homes sitting on adjacent lots and to construct in their place an 11-unit condominium complex. In reviewing Croft's permit applications, the City determined that Croft's proposed development fell under the City's inclusionary housing ordinance (the "Ordinance"). The City had enacted the Ordinance in order to increase the availability of affordable housing in the City. The Ordinance required developers to sell or rent a portion of their newly constructed units at specified below-market rates or, if not, to pay an "in-lieu" fee designed to fund construction of the equivalent number of units the developer would have otherwise been required to set aside. The City calculated the "in-lieu" fee according to a schedule developed via resolution by the City Council. When issuing its approval of Croft's permits, the City inquired how Croft would comply with the Ordinance. Croft responded it would pay the in-lieu fee.

In 2005, the City approved Croft's permits application. The City conditioned the approval on Croft's agreement to, among other conditions, pay the in-lieu fees. Croft's development was delayed due, in part, to an economic downturn that began in 2007. The City agreed to extend its approval of Croft's permit application, and Croft agreed to be subject to new fee schedules.

In 2011, when Croft requested its building permits, the in-lieu housing fee totaled $540,393.28. Croft paid the fee "under protest." Croft challenged the in-lieu fee as being invalid: (1) facially under the due process clause of the Fifth Amendment of the United States Constitution, and (2) "as applied" under that due process clause because "the City did not bear its burden in proving the fees were 'reasonably related' to the deleterious public impact caused by Croft's development." The Fifth Amendment's Due Process Clause provides that the no one shall be "deprived of life, liberty or property without due process of law." Here, Croft was arguing that City's inclusionary housing

Ordinance and its in-lieu of fee was a restriction that violated the Fifth Amendment on its face and insofar as it governed Croft's future use of its property.

Croft also argued that the City violated California's Mitigation Fee Act. The Mitigation Fee Act provides the requirements for development impact fee programs.

Croft asked the court to issue a writ of mandate to compel the city to return the funds, or, alternatively, to hold an administrative hearing to determine the validity of the collection.

The court denied the writ, and Croft voluntarily dismissed its remaining claims and appealed.

DECISION: Judgment of superior court affirmed.

The Court of Appeal, Second District, Division 1, California, held that the in-lieu fees charged to Croft by the City were valid and legal.

In so holding, the court first determined that Croft's facial due process challenge failed for procedural reasons, finding it was time barred. With regard to Croft's as-applied challenge, the court found that the in-lieu fee charged under the City's inclusionary housing Ordinance was not an "exaction" which invoked the United States Constitution's Fifth Amendment. The court found the in-lieu housing fee here was "not to defray the cost of increased demand on public services resulting from Croft's specific development project, but rather to combat the overall lack of affordable housing." The fee was one voluntarily paid by a developer as an alternative to setting aside affordable housing units under the City's inclusionary housing Ordinance, said the court. In other words, it was, found the court, a condition of property development, not an exaction or special tax. Thus, finding the fee was a land use regulation (and not an exaction), the court explained that: "[a]s a general matter, so long as a land use regulation does not constitute a physical taking or deprive a property owner of all viable economic use of the property, such a restriction does not violate the takings clause insofar as it governs a property owner's future use of his or her property." The court emphasized that was "especially true when the regulation, like the one here, broadly applies nondiscretionary fees to a class of owners because the risk of the government extorting benefits as conditions for issuing permits to individuals is unrealized."

With specific regard to Croft's argument that the in-lieu fee violated the due process clause because "the City did not bear its burden in proving the fees were 'reasonably related' to the deleterious public impact caused by Croft's development," the court noted that the burden of proving an absence of a reasonable relationship between the impact of Croft's development project on the demand for affordable housing was, in fact, on the developer (Croft), and not the City (as Croft had argued). The court said that, as a general matter, so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible. In any case, here, the court said the "reasonableness test" applied to the creation of the fee schedule by the City, and not its application. Because Croft did not dispute the City's creation of the fee schedule, the court did not address the reasonableness of the fee schedule itself.

Given its determination that the in-lieu housing fee was not an exaction, the

court similarly concluded that the Mitigation Fee Act did not apply. That was because, noted the court, the Mitigation Fee Act only "applies when 'a monetary *exaction* other than a tax or special assessment . . . is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project . . . .'"

See also: *California Building Industry Assn. v. City of San Jose, 61 Cal.4th 435, 189 Cal.Rptr.3d 475, 351 P.3d 974 (2015).*

Case Note:

Croft had also challenged other fees charged to it, including parks and recreation and traffic mitigation fees. The court concluded that those fees were also proper.

Zoning News from Around the Nation

NATIONWIDE

In a recently released "Housing Development Toolkit," the White House calls for cities to update their zoning rules to increase the development of affordable housing. Specifically, the Toolkit provides that: "[t]he accumulation of state and local barriers to housing development—including zoning, other land-use regulations, and unnecessarily lengthy development approval processes—has reduced the ability of many housing markets to respond to growing demand. . .The increasing severity of undersupplied housing markets is jeopardizing housing affordability for working families, exacerbating income inequality by reducing workers' access to higher-wage labor markets, and stifling GDP growth by driving labor migration away from the most productive regions." Among other things, the Toolkit "highlights 10 actions taken by states and local jurisdictions to promote healthy, responsive, high-opportunity housing markets," including: streamlining permit processes; employing inclusionary zoning requirements; and eliminating parking requirements.

Source: *Affordable Housing Finance*; www.housingfinance.com

Source: *"Housing Development Toolkit" (September 2016)* https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf

TENNESSEE

Reportedly, "State Representative Micah Van Huss plans to propose a bill that would give counties across Tennessee more say in city zoning regulations." Under the proposed legislation, where city land is bordered by more than 50% county property, county commissioners would be allowed to vote on how the city property is zoned. Those opposed to the bill say that it oversteps the jurisdiction of cities.

Source: *WCYB*; *www.wcyb.com*

VIRGINIA

In October, the Arlington County Council voted unanimously to advance proposed regulations governing "accessory homestays" such as Airbnb short-term rentals. "Under proposed changes to the zoning laws, homes in all residential areas of the county could be used in the online marketplace for short-term lodging." The proposed regulations also outline "owner occupancy requirements, the maximum number of guests allowed and whether parking must be provided."

Source: *WTOP*; *http://wtop.com*

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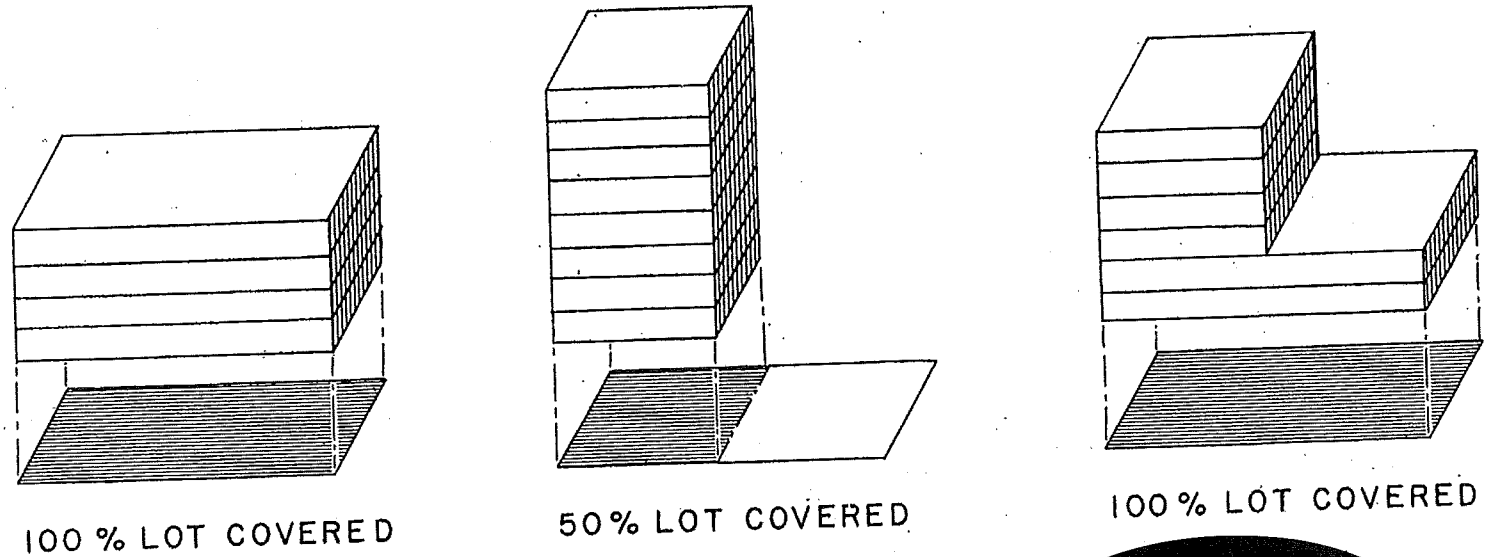

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Zoning Education for Communities

By Joseph DeAngelis

A Zoning 101 presentation as part of your outreach can help to educate the public, elected officials, staff, and other stakeholders on the very basics of zoning and your city's code, maps, and development process.

It's 7:30 on a Tuesday evening. You are at a public forum to discuss revisions to your city's zoning map. The recently revised comprehensive plan identified a declining low-rise commercial stretch as ideal for revitalization. The plan uses phrases such as "mixed use corridor," "town center-style," and "growth-oriented redevelopment."

Over the past three months your office has worked to translate the community aspirations identified in the plan visioning process into a concrete rezoning proposal requiring both a text and map change. The proposal includes a new zoning designation and remapping that incentivizes the very type of development in the very same location recommended by the consultant and the community in the comprehensive plan.

This includes, among other changes, doubling the floor area ratio (FAR) and increasing the height limit for mixed use buildings, a reduction in the parking requirement per residential dwelling unit (from two vehicles to 1.5), and the relocation of parking to the rear of the building.

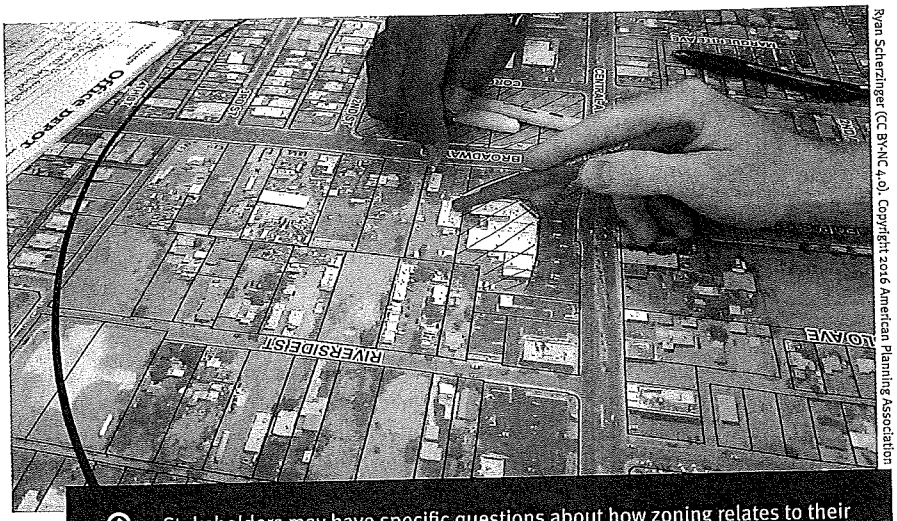
The pushback from community members in attendance, some of whom participated in the visioning process and endorsed the plan's recommendation, is swift. Why are we reducing the parking requirement if we are encouraging new people to live here? Where are they going to park? How can someone own 1.5 cars? Everyone I know has at least two cars. The requirement should be three. Why are you putting parking behind the building? I don't want to have to walk around from the back of the building. What about the height? Why are you allowing taller buildings? A four-story building is completely out of character for this neighborhood. Will these be rental units? How much will they cost?

The questions come quickly, and your answers aren't good enough. You struggle to explain how parking requirements work, or how an FAR bonus for mixed use buildings or the relocation of parking to the rear is meant to realize the type of development recommended in the community's visioning plan. You explain that this is not a development proposal, but a rezoning, and you don't have any information on whether the new units will be rentals or owner occupied.

After the forum wraps up, you struggle to organize your notes. What did they think? Generally, they seemed to be opposed to the measure, though these same people were in favor when it was discussed in more illustrative terms during the visioning process. They liked the buildings and streetscape the consultant drew, but they seemed utterly confused by both the technical terminology you are using and the rules and requirements of the local zoning text and map. You need feedback on the proposal, but what feedback you did receive seemed utterly uninformed or confused. You remember that this isn't an isolated instance. This has happened before. Perhaps a Zoning 101 session is in order.

Zoning is complicated. It's complicated for residents, elected officials, administrators, developers, and architects. It's even complicated for planners not regularly steeped in the plan review or development process. Putting aside the intricacies of zoning as a concept, local zoning itself requires specialized knowledge, fine analytical skills, and big-picture understanding. Planners must understand the zoning code, the zoning map, the local development process, and how the three relate to each other. Think about the complexity of this process for the planner: the small frustrations with this bit of counterintuitive code, the lines on the map inherited from four decades earlier dividing this residential district from that, or the bizarre flowchart of interagency and interdepartmental review in the development process. Now think about the citizen or elected official at a public meeting to discuss a variance sought by a developer or proposed changes to the zoning map. Do citizens and officials have the proper tools to offer informed feedback, or even to engage in discussion about some tweak to the FAR or parking requirement? Even highly engaged members of the community may only have the most rudimentary (and possibly misleading) picture of what zoning can and can't do. Elected officials often carry enormous weight with the community in the planning and development process, but they may also have serious misconceptions about what zoning is and what it can and can't do. Developers may regularly submit plans without the proper information, may repeatedly misinterpret some line of code, or may only be familiar with the code pertaining to a single district.

In an ideal world, these audiences would offer their vision for how the community should look and function in the comprehensive planning process. They would not be expected to weigh in on the specifics of the zoning code or map. Instead, the planners would become technicians, turning the vision of the community into a reality through some change to the parking requirement, commercial setbacks, or landscaping regulations. The community would be pleased to see the transformation of their vision into text and lines on the map. The reality, as always, is far messier. As a bulwark against the community pushback that arises out of confusion—rather than genuine disagreement—a short presentation, meeting, or forum on the very basics of zoning and



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Stakeholders may have specific questions about how zoning relates to their homes and businesses. Come prepared to discuss this.

your local code and maps can be an extraordinarily useful primer for residents, elected officials, developers, or other city staff.

WHAT IS THE CONTEXT FOR A ZONING 101 PRESENTATION?

Before putting together a Zoning 101 presentation, take some time to think about the context. At what stage of the planning process is it? Is it a part of the traditional planning process at all? After all, this may be a stand-alone meeting with a civic group, the first step in a visioning process, or may even come just in advance of explicit zoning recommendations from your planning office. The following are a series of possible scenarios for a Zoning 101 discussion, and how your approach might differ.

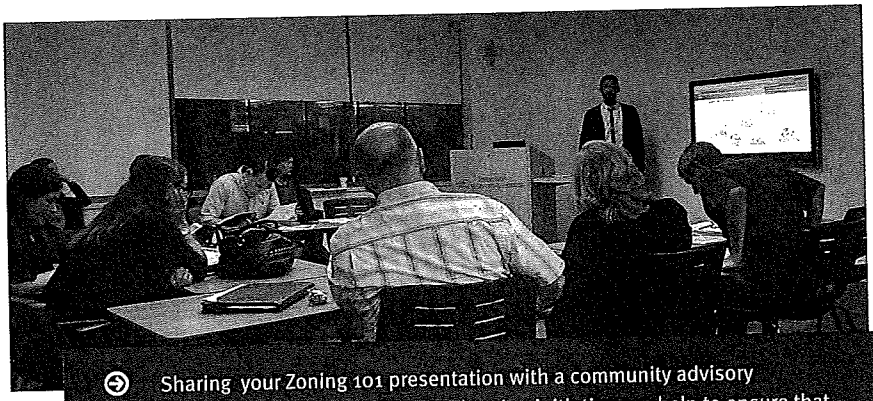
The Stand-Alone Neighborhood Meeting

You may decide that talking to your community about zoning independent of any project, plan, or proposal may be helpful. Typically, a stand-alone meeting will allow more time for presentation and discussion than other Zoning 101 scenarios, making it easier to cover a wide range of topics. And holding the meeting at a community center, branch library, or other neighborhood gathering spot may be ideal for civic groups, neighborhood associations, chambers of commerce, or community boards. They may have participated in earlier planning exercises, either as representatives of their group or as private citizens, but perhaps never fully grasped what exactly zoning is and how it is used in planning. In some cases, these organizations may even repeatedly push back on your office's proposals. If you believe this push back comes from a point of confusion about zoning, then scheduling a stand-alone meeting with these organizations may be of help.

A one- or two-hour session can feature discussion on why zoning exists, the range of zoning districts in your town, a brief, jargon-free description (this is particularly important, as it is possibly the source of community confusion) of what is possible in those districts, and an overview of your local zoning map. Stakeholders in a specific neighborhood may be more interested in how zoning affects them personally rather than its impact communitywide. Providing local context in your presentation or discussion will be vital in both retaining your audience's attention and giving them actionable information. Obviously a traditional presentation may be useful, but you should also consider preparing colorful handouts clearly illustrating the zoning map, what can be built in certain districts, and what the development process looks like. Be prepared to clearly answer specific questions about specific zoning districts, as attendees might be curious about where they are on the map and what this means for them.

At a Forum for a New Planning Initiative

The first forum announcing a new planning initiative may be crucial in establishing a baseline for your community. Whether this is a city-wide forum with a diverse set of stakeholders, or a "traveling roadshow" to various neighborhood groups and organizations, discussing zoning at this early stage can help educate the audience on some basic terminology and offer clear explanations of what is currently possible. Taking this step may ease complications in later stages of the planning process where you discuss changes. With enough time, you may be able to take a similar approach to the stand-alone meeting. This might include walking your community through the local zoning districts and where they are on a clear, colorful, and well-defined map. If your planning process will have an advisory group or council, this step is extraordinarily important. It is likely that members of this advisory group may have vastly different understandings of zoning. A transportation advocate may have little to no experience considering FAR. A housing association representative may have a very clear picture of her zoning district, but may be confused about mixed use building requirements in a commercial district. A chamber of commerce spokesperson might understand the value of increasing height limits, but



Joseph DeAngelis

Sharing your Zoning 101 presentation with a community advisory committee at the start of a new planning initiative can help to ensure that all members are on the same page.

may be utterly lost on why a reduction in the parking requirements can be an incentive to development in downtowns. Here we can see the value in establishing a minimum baseline for your community to clear up early misconceptions and ensure that all participants are on the same page at the very beginning of the planning process.

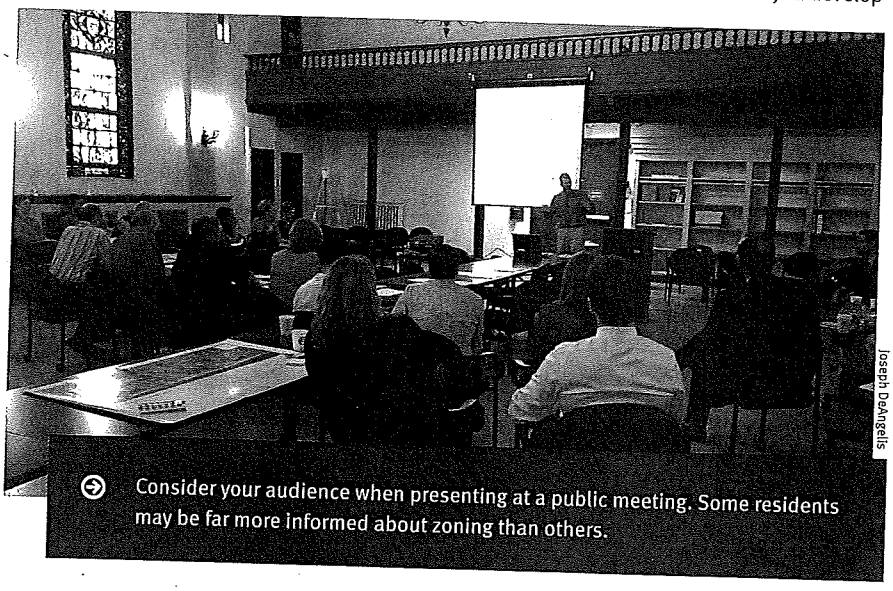
In Advance of Zoning Recommendations

You may find yourself nearer the end of a planning process rather than the beginning. It's not too late! A basic primer even at this stage may be valuable, especially if it is fresh on the minds of a community now tasked with weighing in on some tweak to lot coverage or setbacks. Take some time to consider the composition of your audience and the thoughts they have expressed through the planning process. It is possible some participants have been active throughout the process, while others may only be in attendance because changes are imminent. Are there specific elements related to zoning and land use that you think need a more thorough explanation? How can you catch up the new folks in the room so they can give informed feedback?

Of course, it is already standard practice to describe the current zoning before putting forward a change. Establishing the existing condition may be considered a pro forma step before giving your recommendations, but pay special attention to how well you are describing the current zoning code and map. Simply stating the various elements that comprise the current zoning district and then what you are proposing to change is not enough. This offers no context to the attendee, especially those new to the process. To a person who does not know what a floor area ratio is, proposing a change from 0.5 to 0.6 is rather meaningless. Instead, give your recommendations some context by spending a few minutes discussing your zoning map, with a special focus on the district where you are proposing change, and simple diagrams and colorful maps outlining the current and proposed conditions. Give your existing zoning condition as much context, color, and jargon-free attention as your proposed scenario. As this presentation *will* (and should) discuss the changes in detail, foundational understanding of what you are changing is crucial. You probably don't have a lot of time, so it's important to make what time you have count.

WHO IS YOUR AUDIENCE?

In the previous section we discussed how the context for your presentation matters, and we touched on how the composition of an advisory group may inform the content of the presentation. Tailoring your discussion to the given audience is crucial. Developers, architects, elected officials, the involved public, and the wider public are all different audiences with vastly different levels of understanding of zoning and land use. To complicate the matter, in many public forums, representatives of these groups are all likely to be in attendance. Still, there are opportunities to tailor the content of a Zoning 101 presentation to the needs of the audience. The examples below highlight some potential audience-specific needs and challenges that might influence how you develop your presentation to best inform stakeholders in your community.



Joseph DeAngelis

Consider your audience when presenting at a public meeting. Some residents may be far more informed about zoning than others.

The Public

You might be familiar with two groups of community members that comprise "the public." First, there is the wider public. They may be members of the community who don't often attend community meetings or forums, and are generally less involved in the community planning process. Alternatively, we also have the "involved public." These are those highly active participants who regularly attend meetings, may already have a relationship with your planning office, and have weighed in before on zoning discussions.

It is likely these groups are mixed at a community forum or public meeting. It is also likely that members of the wider public may have little understanding of zoning, and the involved public may be chronically confused about elements of the code or map.

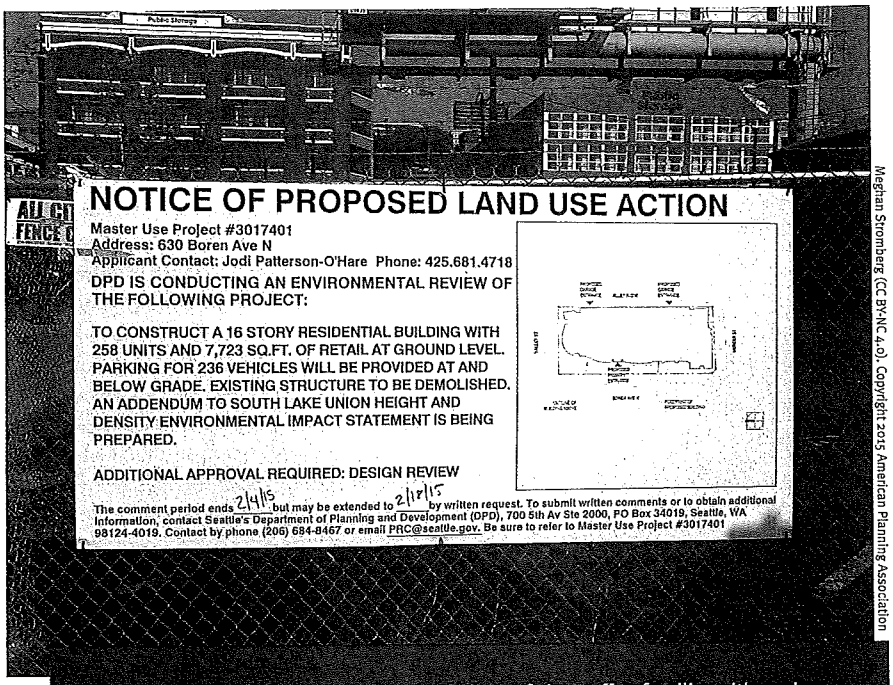
This is a fantastic opportunity to reestablish a baseline of zoning knowledge, and ensure that participants are on the same page. Again, illustrative examples of your zoning districts, simple maps, and vastly reduced jargon will be extraordinarily helpful in this case.

Elected Officials

Your office may find it helpful (or necessary) to discuss zoning with your local elected officials. Whether happens as an independent informational meeting or in advance of a presentation to a council or commission, it is likely that elected officials, like the public, will have a widely varying understanding of zoning. A mayor may have a broad understanding of the city as a whole, while a council member may have an idea of the appropriate density for their district with little knowledge of what the zoning actually permits.

Consider also what elected officials in your city may want to learn more about. Do they have a general understanding of the city map, but would like a better picture of the development process to better answer questions in the community? Then perhaps a walk-through of the development review process may be useful. Elected officials will often be the first to field a question or concern from the public on questions of zoning, land use, or development.

Therefore, arming them with a basic understanding of the code and the map is crucial.



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Recent development may spur questions of city staff unfamiliar with zoning. Educating administrators in your city may be helpful.

The Development Community

Developers and architects are likely to have a clearer understanding of the code, map, and development process than other stakeholders in your community. And for good reason—their business depends upon it. Still, chronic misunderstandings may repeatedly manifest in yet another set of misfiled plans, another month of delays due to missed steps in the plan review process, or another missing piece of information. Rather than a more general presentation you may give to members of the public or local elected officials, you may want to highlight or mentally note those areas where confusion most often tends to manifest. A presentation based primarily around these topics is apt to be useful for you and the developer or architect.

City Staff and Administrators

Zoning confusion doesn't spare your colleagues or other city administrators. The last contact your local transportation planner may have had with zoning may have been years earlier in planning school. The fire chief may understand her role in the development review process, but might have only the barest understanding of the local zoning map. Ensuring your colleagues have a working knowledge of the map, the districts in your city, and what the development process looks like is vital. This is especially true if they are in regular contact with the public or regularly present at community meetings. The public may not distinguish between a building inspector, your land-use director, or an environmental planner. Cut down on misinformation and educate your colleagues in city government by developing a Zoning 101 presentation or course that is most pertinent to their role.

WHAT IS THE FORMAT?

Now that you have considered the context and the audience, think about the format and the content. What will you present? The code? The map? Your city's plan review and approval process? Will you be talking about zoning more conceptually?

At the outset, remember your ultimate goal: empowering your audience with the necessary tools and knowledge of zoning, land use, and the development process to offer informed feedback. This will require rational organization, simplifying concepts (aided heavily by visuals), and reducing or eliminating jargon. Planners interested in reducing jargon are highly encouraged to reference the January 2015 issue of *Zoning Practice*, "Zoning Codes in Plain English" (Noble 2015). One of the primary barriers to zoning for those who aren't planners is the "legalese" that makes up many zoning codes. This language often finds its way into presentations and discussions with the community or elected officials, leading to either more questions or looks of blank confusion. Planners may be seen as hiding behind overly complicated text. Avoid this fate by taking the time to prepare clear, plain English explanations in your Zoning 101 presentation.

Organizing Your Presentation

An hour-long workshop for a civic organization will be quite different from a roundtable Q&A with a group of local developers. Yet both may require similar information. Therefore, you may find it useful to draw up a standard presentation that can be used for a number of different circumstances. Slides should be modular, allowing for sections to be easily removed or reorganized based on the needs of a specific audience.

I suggest an order that starts with an explanation of the concept of zoning and proceeds through your local zoning code and districts, the zoning map, and finally the development process.

Part 1: What Is Zoning?

We don't want to scare people off from the very first slide, but it is unavoidable that conceptually, zoning can be complicated.

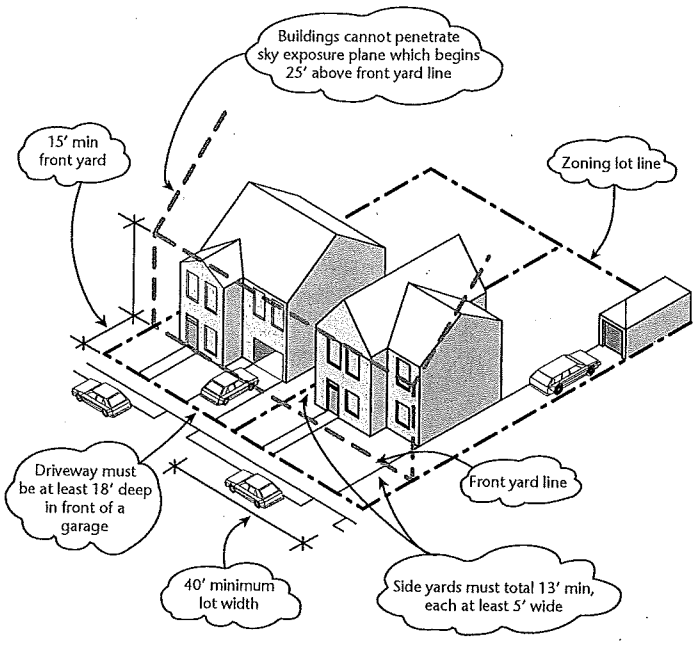
Try to strip away as much of the excess baggage that has (often inevitably) glommed onto zoning over the years.

Feel free to begin from your municipality's definition of zoning, which you can usually find in the Planning and Development section of your city's website. But also consider paring that definition down and focusing explicitly on what zoning looks like in your community.

For instance, this definition of zoning from Cornell University's Legal Information Institute is relatively succinct, but might be a bit too legalistic for your audience:

> (Zoning is a . . .)legislative act dividing a jurisdiction's land into sections and regulating different land uses in each section in accordance with a zoning ordinance.

Here, from New York City's Department of City Planning, we have a more naturalistic explanation of the purpose of zoning and how it may impact people's lives:



New York City Department of City Planning

Single-Family Detached Residences

	Lot Width (min)	Lot Area (min)	FAR (max)	OSR (percent)	Front Yard (min)	Rear Yard (min)	Side Yards (min)			Building Height (max)	Required Parking (min)
							#	Total	Each		
R2[1]	40 ft	3,800 sf	0.5	150.0	15 ft	30 ft	2	13 ft	5 ft	na[2]	1 per dwelling unit

[1] *Regulations may differ in Lower Density Growth Management Areas*
[2] *Height controlled by sky exposure plane, a sloping line that begins at a height of 25 feet above front yard line*

New York's *Zoning Handbook* broadly outlines what can be built in each zoning district, along with simple graphics illustrating bulk, setbacks, and parking.

Zoning is the language of the physical city. It aims to promote an orderly pattern of development and to separate incompatible land uses, such as industrial uses and homes, to ensure a pleasant environment.

Illustrate your definition with a graphic, drawing, or map to give the reader context. Try to do this for all foundational concepts you might be presenting up front.

Part 2: The Zoning Code and Zoning Districts

It will likely be useful to order your city's zoning districts as they are presented in the zoning code. However, if you find your code's layout to be unintuitive, consider ordering by the intensity of use, starting with your residential zoning districts. Be sure to use to use basic diagrams illustrating what is permitted in each district. Consider developing these diagrams if you don't already have them (SketchUp is a free and useful tool for this) or scour the Internet for good illustrative examples. For example, the New York City Department of City Planning publishes the extraordinarily helpful *Zoning Handbook*, which marries simple axonometric drawings with photographs of conforming buildings and clear explanations of the district (2016). I have used this handbook as a model for basic Zoning 101 discussions with communities in Staten Island, New York. There are clear benefits in having archetypal "blank" buildings to illustrate zoning.

Organize your presentation so that attendees can clearly see the differences between districts as you progress through the presentation. This visual contrast will be helpful for your audience, and will help to contextualize your zoning map. This is why ordering your presentation by intensity of use is beneficial. Your audience should be able to clearly see the progression of building type, size, and form as you progress from a low-intensity rural or suburban residential district to a higher-intensity neighborhood or urban center district.

Part 3: The Zoning Map

Presenting your zoning map again offers the community a chance to put the zoning districts in context. You may want to use your existing zoning map for this portion, though I would caution against it if your local map is laden with lots of text, an endless series of crisscrossing black lines, and little if any color. If this is the case, opt for a radical simplification that relies on color, heavily weighted lines to divide districts, and a clear labeling scheme. This is not a replacement for your zoning map. Instead, it is a clear and simple representation of it in broad strokes. There are a number of tools that can be used to develop a map of this sort. ArcMap or other GIS applications may be most useful at the outset, especially if you already have zoning map data. Alternatively, the Adobe Suite of graphics applications (Illustrator especially) might be useful to either clean up maps created in ArcMap, or to draw directly on an existing orthophotography. There are also free tools built directly into Google Maps that allow you to create your own basic, color coded and labeled maps that I have found useful.

Take special care when noting zoning overlays and subdistricts. Adding them all from the very beginning has the potential to clutter your map with (to the layperson) arcane rules governing downtown districts and special environmental overlay areas. You can introduce these later, but ensure from the beginning that your audience is getting as clear a vision as possible of the base-level map.

Part 4: The Land-Use Review and Development Process

It will be useful to walk your audience through a basic representation of the land-use review and development process. A clear picture of how things get built in your city will be extremely helpful to residents who may have little idea about the layers of approval, negotiation, and review that make up the development process. In many cities this flowchart can get enormously complicated. As with our look at the zoning code and map, our goal is not the most precise representation possible of the process, but instead a broad-brush representation that allows the community to give informed feedback. Try not to pack your slide with an endless series of recursive ar-

rows, shapes, and diagrams. Ensure that your process *progresses* in a clear direction. Note departments and agencies clearly so that your audience knows who is responsible at a given stage in the development process.

GENERAL CONCEPTS TO REMEMBER

If you find yourself stuck or straying too far into the esoteric world of zoning and land-use planning, here are a few key takeaways to help you refocus on your goal.

Use Visuals

Visuals and graphics should be used to illustrate and contextualize pieces of text. For existing graphics (such as a zoning map) try to simplify them as much as possible. Use color and clear lines.

Rely on Plain English

Avoid using complicated phrasing, sentences, or jargon straight from the zoning code. Translate this information for your audience.

Use Existing Resources

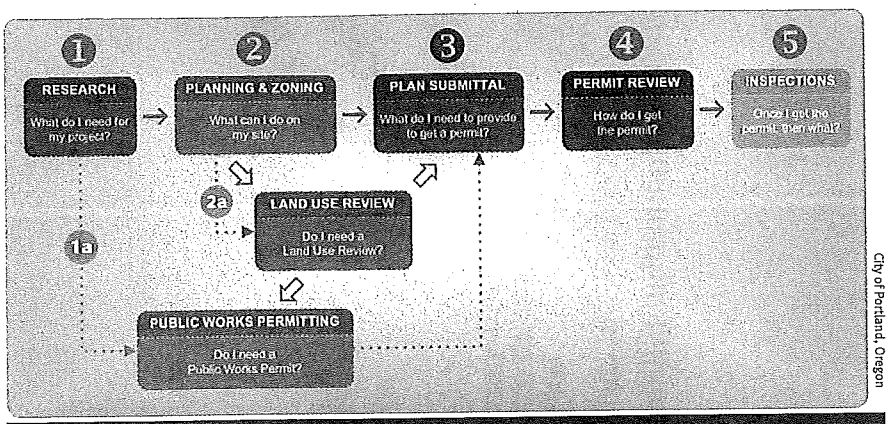
Rely on photographs, existing definitions, and statements of purpose (such as those on your city's website), or books you may still have from planning school. Scour the web for suitable illustrations, graphics, and explanations.

Tailor Your Message to Your Audience

Add or remove content based upon your audience. Develop your presentation for a general audience, but use your professional judgment to tailor this information for a room of developers, a sit-down with a council member, or a presentation to a local housing association.

CONCLUSION

A good Zoning 101 presentation can be deployed in a variety of venues and audiences. It can be tacked onto an existing presentation to prime an audience before discussing a new zoning proposal, or can become a stand-alone session with interested community groups. It can become a series of printouts, a section on your community's website, or compiled as a published handbook. It can help elected officials and city staff to accurately discuss issues of zoning and land use with the public. Most importantly, it can demystify a complex and often esoteric process. Zoning 101 can help to narrow the knowledge gap between a city and its citizens, and equip them with the tools and the confidence to make informed decisions.



City of Portland, Oregon

Portland, Oregon, illustrates its land-use review process with a simple flowchart.

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HOW WELL DOES YOUR COMMUNITY KNOW ITS ZONING?

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