QUINLAN™ December 10, 2016 | Volume 10 | Issue 23

Zoning Bulletin

in this issue:

THOMSON REUTERS

Mat #41853062

Fees, bonds, and in lieu payments—A tax approved by a developer, pursuant to the Mello-Roos Community Facility Act, seeks to cover city costs for providing services to proposed development

Contributors

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ISSN 0514-7905

Industry association challenges validity of tax

Citation: *Building Industry Association of the Bay Area v. City of San Ramon, 208 Cal. Rptr. 3d 320 (Cal. App. 1st Dist. 2016)*

CALIFORNIA (10/13/16)—This case addressed the issue of whether a tax approved by a developer, as landowner, pursuant to the Mello-Roos Community Facility Act to raise necessary revenue to cover the cost to the city for providing services to a new townhouse development complied with the Mello-Roos Act. It also addressed whether the tax was a valid special tax, or a general tax that violated the state constitution.

The Background/Facts: In 2013, the City of San Ramon (the "City") tentatively approved the subdivision of two parcels of land to create a 48-unit townhouse project known as the Acre Development ("Acre"). The approval process included a fiscal analysis that revealed that the cost of providing services to Acre would exceed revenue generated by Acre. Thus, as a condition of approval, the City required Acre's developer to provide a funding mechanism to mitigate the negative fiscal impact to the City.

California's Mello-Roos Community Facilities Act of 1982 (the "Mello-Roos Act" or the "Act") (Ca. Gov. Code § 53311 to 53317.5.) provides an "alternative method of financing certain public capital facilities and services, especially in developing area and areas undergoing rehabilitation." (Ca. Gov. Code § 53311.5.) The Act authorizes the creation of community facilities districts by "all local agencies," defined to include any city. (Ca. Gov. Code, §§ 53316 & 53317, subd. (h).) A community facilities district may be established to finance one or more types of specified services (Ca. Gov. Code § 53313) or facilities (Ca. Gov. Code § 53313.5), or both. Once a local agency has approved the formation of a district, the agency's legislative body must submit the levy of any special tax to the voters for approval. (Ca. Gov. Code § 53326, subd. (a).) If there are not at least 12 persons registered to vote in the proposed district on each of the 90 days preceding the election, the vote is by the landowners of the real property in the district. (Ca. Gov. Code §§ 53317, subd. (f) & 53326, subd. (b).) In both types of election, approval of the tax requires approval by two-thirds of the votes cast. (Ca. Gov. Code § 53328.)

Here, using the Mello-Roos Act, Acre's developer petitioned the city to create a "communities facilities district." Then, as the sole landowner and qualified elector, Acre's developer voted to approve a tax within the district to raise the necessary revenue. The City then adopted an ordinance, providing, among other things: "All of the collections of the special tax shall be used as provided for in the Act . . . ."

Subsequently, the Building Industry Association-Bay Area (the "Association") sued the City. The Association challenged the validity of the tax. The Association argued that: (1) the tax did not comply with the requirement of the Mello-Roos Act that services financed by a landowner-approved community facilities district must be "in addition to those provided in the territory of the district before the district was created" and "may not supplant services already available within that territory when the district was created" (Gov. Code § 53313); (2) the tax was an improper general tax, rather than a special tax, and therefore violated section 2, subdivision (a) of article XIII C of the Cali-

fornia Constitution, which prohibits a special purpose district from levying a general tax; and (3) the ordinance retaliated against landowners in the district who might in the future seek relief from the tax, because the ordinance improperly burdened their constitutional rights to petition the government and their statutory rights to seek relief through the courts.

Finding no material issues of fact in dispute, and deciding the matter on the law alone, the trial court granted summary judgment in favor of the City. The court ruled that: (1) the tax complied with the Mello-Roos Act because the services it funded would augment, not supplant, the current services in the territory; (2) the tax was a special tax, not a general tax; and (3) the ordinance was not unconstitutional.

The Association appealed.

DECISION: Judgment of Superior Court affirmed.

Looking at the plain language of the Mello-Roos Act, the Court of Appeal, First District, Division 2, California, first held that the tax approved by Acre's developer to raise revenue to cover City services to the Acres Development complied with the Mello-Roos Act in that it provided for "additional services" to meet an increased demand for existing services resulting from the Acres Development. The Act provided that a tax was permitted to finance services only to the extent that they were "in addition" to those previously provided in the territory of the community facilities district.

Moreover, as a matter of first impression (i.e., the first time the court addressed the issue), the court further held that, under the Mello-Roos Act, taxes approved by landowner votes could be used to fund an increased demand for existing services. The court explained that such services would be in addition to services provided in the area of the district before the district was created, and services that met increased demand would not supplant services available in the area of the district when the district was created because they would not replace those services.

The court also held that the tax approved by Acre's developer to raise revenue to cover City services to the Acres Development was a special tax, rather than a general tax, and thus did not violate the California Constitution. The court explained that under the California Constitution (Cal. Const., art. XIII C § 2, subd. (a)), a "special purpose district" has no power to levy general taxes." The court assumed, without deciding, that the community facilities district at issue here was a "special purpose district," and therefore was prohibited from levying general taxes. The court also explained the distinction made under the California Constitution between a "general tax" and a "special tax." A "general tax" is defined as "any tax imposed for general governmental purposes." A "special tax" is defined as "any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund." (Cal. Const., art. XIII C, § 1, subds. (a) & (d).) In finding the tax here was a special tax, the court noted: the tax would not be deposited into general funds; proceeds from the tax would not indirectly raise revenue that would be available for any and all governmental purposes; and the tax revenue would not cover existing costs that were previously paid from the general fund, but rather would cover new costs resulting from increased demand for facilities and additional services resulting from the Acres Development.

Finally, the court held that the City ordinance providing that services funded by the tax would not be provided if the tax was appealed did not retaliate against the community facilities district property owners in violation of due process. The court explained that a claim of retaliation in violation of due process required the Association to show that: (1) the landowners in the district were engaged in constitutionally protected activity; (2) the City's retaliatory action caused the landowners to suffer an injury that would likely deter a person of ordinary firmness from engaging in that protected activity; and (3) the retaliatory action was motivated, at least in part, by the landowner's protected activity. Here, the court found that there was no retaliation, and there was no injury, penalty or adverse action to property owners for exercising their rights. The court acknowledged that there would be "consequences if district property owners exercise[d] their rights and that exercise result[ed] in the repeal of the tax." However, the court found that while those consequences may be regarded as "adverse" by some, "they may well be precisely the consequences that are expected and desired by the property owners who take the actions." The consequences would not be triggered by the filing of petitions, initiative proceedings, or lawsuits, but rather, the consequences would "flow from the absence of the tax revenue that was to be collected to pay for services and facilities," said the court.

See also: *Tichinin v. City of Morgan Hill, 177 Cal. App. 4th 1049, 99 Cal. Rptr. 3d 661 (6th Dist. 2009).*

Rezoning—Township rezones one parcel of property

Objectors argue rezoning constitutes improper spot zoning

Citation: *DiMattio v. Millcreek Township Zoning Hearing Board, 2016 WL 5172669 (Pa. Commw. Ct. 2016)*

PENNSYLVANIA (09/21/16)—This case addressed the issue of whether a township's rezoning of property constituted improper spot zoning.

The Background/Facts: Jeffrey L. Braver and Marvin E. Gold (the "Owners") owned a 24-acre parcel of land (the "Property") in Millcreek Township (the "Township"). In 2014, the Owners applied to the Township's Planning Commission (the "Commission"), requesting that the Township rezone the Property from a mix of RR (Rural Residential) and R-1 (Single Family Residential) to R-2 (Low Density Residential). This "down-zoning" would allow for two-family dwellings (i.e., duplexes or townhouses) as an additional permitted residential use on the Property and would eliminate agricultural use on a portion of the Property.

In June 2014, the Township Board of Supervisors (the "Supervisors") granted the Owners' request and adopted an ordinance (the "Ordinance"), amending the Township's Zoning Ordinance to reflect a rezoning of the Property from RR and R-1 to R-2.

Subsequently, Michael DiMattio, Eileen Tighe, Drew Carlin, and Nadia Carlin (the "Objectors") challenged the validity of the Ordinance. Among other things, the Objectors argued that the rezoning of the Property constituted illegal "spot zoning."

Spot zoning is "a signaling out of one lot or a small area for different treatment from that accorded to similar surrounding land indistinguishable from it in character, for the economic benefit or detriment of the owner of that lot." Spot zoning is unconstitutional and invalid.

The Township's Zoning Hearing Board ("ZHB") determined that the rezoning was not improper spot zoning.

The Objectors appealed.

The trial court found that, in light of the characteristics of the Property and the surrounding area, the differentiation in zoning classification between the original R-1 zoning district and the change to R-2 was not so significant as to exceed the Supervisors' power to enact a zoning change. In the trial court's assessment, then, the Objectors failed to establish that the Ordinance affecting the zoning change constituted spot zoning.

The Objectors again appealed.

DECISION: Judgment of Court of Common Pleas affirmed.

The Commonwealth Court of Pennsylvania held that the Township's rezoning of the Property was not improper spot zoning.

In so holding, the court explained that "[t]he most determinative factor in an analysis of spot zoning is whether the parcel in question is being treated unjustifiably different from similar surrounding land, thus creating an 'island' having no relevant differences from its neighbors." Further, explained the court, "[t]o establish improper spot zoning, the challenger must prove that the provisions at issue are arbitrary and unreasonable and have no relation to the public health, safety, morals and general welfare."

Looking at the evidence and facts here, the court found that the Objectors failed to satisfy their burden of demonstrating that the Property was indistinguishable in character from the land immediately surrounding it. The court found that the land surrounding the Property included: an interstate to the east; a municipal golf course to the north and west; and property in another township to the south. The court found that the only characteristic of the subject property that the Objectors addressed was the size of the property, which they asserted was similar to other tracts in the area, and concerns regarding traffic.

Since the Objectors failed to show differential zoning treatment of adjoining tracts that were characteristically similar, the court concluded that the Objectors did not demonstrate that the rezoning of the Property reflected improper spot zoning.

See also: *Schubach v. Zoning Bd. of Adjustment (Philadelphia), 440 Pa. 249, 270 A.2d 397 (1970).*

See also: *In re Realen Valley Forge Greenes Associates, 576 Pa. 115, 838 A.2d 718 (2003).*

Case Note:

The Objectors had made additional claims that the rezoning here amounted to improper spot zoning because it had no relation to the public health, safety, morals and general welfare relating to the public health, safety, morals and general welfare. The court did not analyze that argument, noting such analysis was only necessary if the Objectors first satisfied their burden to prove a difference in the treatment of characteristically similar surrounding land—which the court found the Objectors failed to do.

Equal Protection—Zoning ordinance allows waiver exceptions to construction prohibitions for platted property but not for unplatted property

Landowners challenge ordinance as unconstitutional in violation of equal protection

Citation: *Ferguson v. City of Fargo, 2016 ND 194, 2016 WL 5939664 (N.D. 2016)*

NORTH DAKOTA (10/04/16)—This case addressed the issue of whether a zoning ordinance that allowed waiver exceptions on platted property but not on unplatted property to a prohibition on construction within certain setback areas of rivers was unconstitutional in violation of equal protection.

The Background/Facts: In May 2012, after historic flooding, the City of Fargo (the "City") enacted an ordinance (the "Ordinance") that prohibited construction within certain setback areas of the Red, Wild Rice, and Sheyenne rivers. The Ordinance created a distinction between platted and unplatted property regarding the ordinance's exceptions to the prohibition on construction. Platted property is property that has been subdivided into blocks and lots. Unplatted property is property that has not been subdivided. Under the Ordinance, owners of vacant property platted before the Ordinance's effective date could apply to the City commission for a waiver from the construction prohibition. The granting of a waiver would allow the property owner to construct new buildings or structures within the setback areas. Under the Ordinance, owners of unplatted property could not apply for a waiver allowing construction of new buildings within the setback areas.

Edward and Lavonna Ferguson (the "Fergusons") owned approximately six acres of unplatted property adjacent to the Sheyenne River that was partially within the Ordinance's setback areas. After the Ordinance went into effect, the Fergusons requested a waiver seeking to develop their property into multiple single-family duplexes. Per the Ordinance, the City commission denied the Fergusons' request because the property was not platted.

Subsequently, the Fergusons brought a declaratory judgment action against Fargo. The Fergusons asked the court to declare that the Ordinance violated the equal protection clauses of the North Dakota Constitution (N.D. Const. art. I, § 21) and the United States Constitution (U.S. Const. amend. XIV, § 1) because it treated platted and unplatted property differently. The City, on the other hand, argued that its distinction between platted and unplatted property was rationally related to a legitimate government interest in limiting new construction on property subject to flooding, and was therefore not in violation of equal protection.

The district court agreed with the Fergusons. It found that the Ordinance treated platted and unplatted property differently. The court noted that "[p]latting does not change the character of the land at issue" and "[w]hether land is platted or unplatted does not make it more or less likely to be subject to slumping or flooding." The court concluded that the Ordinance's distinction between platted and unplatted property was therefore not rationally related to the City's interest in preventing new construction on river bank lands subject to soil instability or flooding and the management of waiver requests. The court declared the Ordinance unconstitutional as applied to the Fergusons and others similarly situated.

The City appealed.

DECISION: Judgment of district court reversed.

Agreeing with the City, the Supreme Court of North Dakota held that the Ordinance, in making a distinction between platted and unplatted property, did not violate equal protection because it was rationally related to the legitimate government interest of limiting new construction on property subject to flooding.

In so holding, the court explained that "[t]he equal protection clause does not forbid classifications, but prevents 'government decisionmakers from treating differently persons who are in all relevant respects alike.' " The court further explained that when, as here with the Ordinance, "legislation regulates economic or social matters without using suspect classifications or involving fundamental rights," a rational basis test is employed when determining the constitutionality of the legislation. Under the rational basis test, a governmental classification (such as the distinction of platted and unplatted property here) will be sustained "unless it is arbitrary and bears no rational relationship to a legitimate governmental interest."

Here, the court found that the City's interest in distinguishing platted from unplatted property under the Ordinance was to "reduce damage to private property and city infrastructure from potential flooding." The court recognized that limiting new construction near river property was a way to achieve that governmental interest. The court found that the City had distinguished platted from unplatted property near rivers because there were "a finite number of vacant platted properties, and developers and owners h[ad] shown an intent to build in the future [and invested considerable time and money] by completing the platting process or purchasing a platted property." The court concluded that the City's distinction between platted and unplatted property under the Ordinance limited the amount of possible waiver applications under the Ordinance to a finite number and accomplished the City's goal of limiting new

construction near river property. Accordingly, the court concluded that the City's distinction between platted and unplatted property bore a rational relationship to a legitimate government interest of limiting new construction on property subject to flooding. Thus, the court held that the Ordinance and its distinction between platted and unplatted property satisfied the rational basis standard of scrutiny, and did not violate the equal protection clause of the North Dakota Constitution or the United States Constitution.

See also: *Teigen v. State, 2008 ND 88, 749 N.W.2d 505 (N.D. 2008).*

See also: *Hamich, Inc. v. State By and Through Clayburgh, 1997 ND 110, 564 N.W.2d 640 (N.D. 1997).*

Use—Zoning board determines ordinance's definition of "agriculture" use does not include a chicken processing facility

Farmer argues board misinterpreted ordinance and facility is allowed by right under ordinance's definition of "agriculture" use

Citation: *Balady Farms, LLC v. Paradise Township Zoning Hearing Board, 2016 WL 5724905 (Pa. Commw. Ct. 2016)*

PENNSYLVANIA (10/04/16)—This case addressed the issue of whether an ordinance's definition of "agriculture" permitted the processing of chickens raised on the property zoned to permit "agriculture" use.

The Background/Facts: Balady Farms owned approximately 23 acres of real property (the "Property") in the Rural Conservation ("RC") District of Paradise Township (the "Township"). Among other things, Balady Farms raised free-range chickens on the Property, with approximately 28,000 chickens on the Property at any one time. Due to the costs of off-site chicken processing, Balady Farms sought to convert an existing storage facility on the Property into a chicken processing facility. The proposed processing facility would process only chickens raised and bred on the farm.

In furtherance of its proposal, Balady Farms sought an answer from the Township's zoning authorities as to whether the Township's Zoning Ordinance (the "Ordinance") permitted the proposed conversion and use. More specifically, the question to be addressed was whether the Ordinance's definition of "agriculture" use—which was allowed by right in the Township's RC District where the Property was located—included a commercial chicken processing facility.

The Ordinance defined "agriculture" as follows:

"[a]n enterprise that is actively engaged in the commercial production and preparation for market or use of agricultural, agronomic, horticultural, silivicultural and

> aquacultural crops and commodities and/or livestock and livestock products. The term includes an enterprise that implements changes in production practices and procedures or types of crops, livestock, livestock products or commodities produced consistent with practices and procedures that are normally engaged by farmers or are consistent with technological development within the agricultural industry. . . ."

The Ordinance's definition of "livestock" specifically "include[d] poultry."

Balady Farms maintained that the proposed chicken processing facility met the Ordinance's definition of "agriculture." Ultimately, the Township's Zoning Hearing Board (the "Board") disagreed. The Board declared that the Ordinance did "not include [Balady Farms'] proposed use as a commercial chicken processing facility." More specifically, the Board opined that " 'processing' livestock and livestock products is not 'preparation and production for market' of livestock and livestock products. To the contrary, the preparation and production of livestock and livestock products deals more with getting the livestock and livestock products ready to be transferred to a processing facility." The court concluded that processing was a "commercial endeavor" and "not an activity normally engaged in by farmers in the area."

Balady Farms appealed, and the trial court upheld the Board's decision. The court held that it was not "against the weight of the evidence for the [Board] to find that find that a slaughtering and processing enterprise that may process an estimated 40,000 chickens per year is not a business in which most farmers engage, and that based on all the evidence presented, it falls outside the definition of agriculture."

Balady Farms again appealed.

DECISION: Judgment of Court of Common Pleas reversed.

The Commonwealth Court of Pennsylvania held that Balady Farms' proposed chicken processing facility fell within the Ordinance's definition of "agriculture," and, thus, was permitted as of right.

In so holding, the court looked to the Ordinance's plain language as "the best indication of legislative intent." The court looked specifically at the following language in the Ordinance's definition of "agriculture": "[a]n enterprise that is actively engaged in the commercial production and preparation for market or use of . . . [poultry] and [poultry] products." Since the Ordinance did not specifically define "commercial," "production" or "preparation," the court looked to dictionary definitions of those words. The court found commercial to include "relating to commerce," which was the "exchange of goods and services." The court found "production" defined, in pertinent part, as "the making of goods available for use[,]" and "preparation" defined, in part, as "the action or process of making something ready for use or service . . . ." Based upon the "ordinary context" of the words "commercial," "production," and "preparation," the court concluded that Balady Farms' proposed processing of its chickens on the Property fell "squarely within the Township's definition of 'agriculture,' and, thus, [was] permitted as of right in the Township's RC District."

In reaching that conclusion, the court emphasized that a zoning board "is not a legislative body, and it lacks authority to modify or amend the terms of a zoning ordinance." The court said that zoning boards "must not impose their

concept of what the zoning ordinance should be, but rather their function is only to enforce the zoning ordinance in accordance with the applicable law." Thus, the court said that the Board, here, was required to apply the terms of the Zoning Ordinance "as written rather than deviating from those terms based on an unexpressed policy." Moreover, the court said that the Board "also ha[d] an obligation to construe the words of an ordinance as broadly as possible to give the landowner the benefit of the least restrictive use when interpreting its own Zoning Code."

See also: *Riverfront Development Group, LLC v. City of Harrisburg Zoning Hearing Bd., 109 A.3d 358 (Pa. Commw. Ct. 2015).*

Zoning News from Around the Nation

FLORIDA

In early November, the Miami Beach Commission was expected to "debate an ordinance imposing a six-month zoning ban on medical-cannabis dispensaries, grow houses, delivery services, and any other medical-weed-related businesses." The 180-day ban would give the city time to enact laws related to "traffic, congestion, surrounding property values, demand for City services including inspections and increase police monitoring, and other aspects of the operation of dispensing facilities impacting the general welfare of the community."

Source: *Miami New Times*; www.miaminewtimes.com

MARYLAND

In late October, the Baltimore City Council gave preliminary approval to "the first overhaul of zoning rules in more than 40 years." The overhaul of the zoning code, known as "TransForm Baltimore," "has been written to usher in an era of faster, simpler development. It includes changes intended to promote the reuse of the city's old buildings and encourage walkable neighborhoods of homes and businesses suited to 21st-century tastes." "It also would add regulations for uses city officials want to deter." A final vote on the new zoning legislation was scheduled for November.

Source: *The Baltimore Sun*; www.baltimoresun.com

NEW YORK

Reportedly, the "U.S. Attorney's Office plans to sue the City of Port Jervis on the grounds that a zoning law passed late last year violates federal law by banning places of worship from two downtown commercial districts." The U.S. Attorney's Office believes that the city has violated the equal terms provision of the federal Religious Land Use and Institutionalized Persons Act by treating religious assemblies "on less than equal terms with non-religious assemblies." The City of Port Jervis maintains that it did not intend to violate the equal protection terms provisions of the federal statute, but determined

that allowing a place of worship in commercial districts would prohibit new business due to already scare parking and the fact that state law does not allow alcohol sales within 200 feet of a place of worship.

Source: *Times Herald-Record*; www.recordonline.com

QUINLAN™ December 25, 2016 | Volume 10 | Issue 24

Zoning Bulletin

in this issue:

THOMSON REUTERS

Mat #41853064

Proceedings—Applicant's proposed use meets all zoning requirements but board denies conditional use permit

Board contends it has discretion to deny use based on "general welfare" concerns

Citation: *Mustang Run Wind Project, LLC v. Osage County Board of*

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ISSN 0514-7905

Adjustment, 2016 OK 113, 2016 WL 6462378 (Okla. 2016)

OKLAHOMA (11/01/16)—This case addressed the issue of whether a county board of adjustment possessed the authority to grant conditional use permits, and whether a conditional use permit should have been granted to operate an energy facility run on wind turbines.

The Background/Facts: Mustang Run Wind Project, LLC ("Mustang") sought to construct 68 electricity-producing wind turbines on 150 acres of land. Mustang applied to the Osage County Board of Adjustment (the "Board") for a conditional use permit ("CUP") for the proposed project. Ultimately, without explanation, the Board denied Mustang's application.

Mustang appealed. (The Osage Nation moved to intervene in the case, and that motion was granted.)

A trial judge found for Mustang. The judge ordered the Board to issue a CUP to Mustang.

The Board and the Osage Nation appealed. On appeal, they argued that because the Legislature had not specifically, through any of the five "county zoning and enabling acts," empowered a county board of adjustment the authority to grant a special use permit, that the Board here "had no power or authority to approve a condition use permit." They also argued that the Board had authority to deny an application for a CUP—even when it satisfied applicable zoning ordinances, such as the County's Wind Energy Ordinance—based on concerns for the "general welfare" of citizens.

DECISION: Judgment of district court affirmed.

The Supreme Court of Oklahoma first held that the Board possessed the authority, under Oklahoma's City-County Planning and Zoning Act, to grant CUPs to owners of real property located in Osage County (the "County"), including Mustang. The court found that the City-County Planning and Zoning Act (19 Okla. Stat. § 866.23), which governs appeals to county board of adjustments, authorizes such boards to hear and decide requests for decisions on questions upon which they are authorized to pass by regulations adopted by the board. And, the court found that the County Planning and Zoning ordinances adopted by the County Board of County Commissioners authorized the Board to grant conditional use permits.

The court also rejected the Board's argument that its authority to consider the "general welfare" of citizens was sufficiently broad so as to give the Board discretion to deny Mustang's CUP even though Mustang had satisfied the requirements of all relevant County zoning ordinances. The court noted that neither the Board, nor Osage Nation had "pointed to any statutory authority that a board of adjustment possesses legislative power to rewrite a zoning ordinance approved by its

board of county commissioners." The court noted that a board of adjustment does not possess "unconfined and unrestrained freedom of action" to "depart from a comprehensive plan." Thus, the court found that a board of adjustment's authority to deny an application did not give it power to determine whether a permitted special use is a use beneficial to the community. Rather, said the court, that decision had been made by the County zoning ordinance in its allowance of the operation of the wind turbines as part of the comprehensive plan. In other words, the Board's power to deny the CUP here could only be based on facts concerning special or conditional use permits. Here, the County's Wind Energy Ordinance allowed wind turbines, so the use of turbines in the area and their affect on the "general welfare" of citizens was not an issue (as that "issue" had already been decided in the decision to allow them per the ordinance); rather, the issue for the Board was whether Mustang's *operation* of the wind turbines would meet certain conditions.

Finally, the court also concluded that the trial judge's findings, based upon application of the County zoning ordinances and an assessment of the reasonableness of Mustang's application as well as objections to the wind turbine project, was "not against the clear weight of the evidence."

Signs and Billboards—Finding billboard does not comply with county code, city orders its removal

Billboard owners contends state law preempts county code with regard to their billboard

Citation: *D'Egidio v. City of Santa Clarita, 4 Cal. App. 5th 515, 2016 WL 6208627 (2d Dist. 2016)*

CALIFORNIA (10/24/16)—This case addressed the issue of whether Section 5270 of California's Outdoor Advertising Act—which provides that the Act "shall be exclusive of all other regulations for the placing of advertising displays within view of the public highways of [California] in unincorporated areas . . . ."—precluded application of county or city billboard ordinances with respect to a billboard that was placed in an area that was unincorporated at the time of its placement.

The Background/Facts: In 1984, members of the D'Egidio family

(the "D'Egidios") purchased a parcel of property that currently is within the city limits of the City of Santa Clarita (the "City") in the County of Los Angeles (the "County"). Prior to the D'Egidios purchase of the property, and for three years after their purchase pursuant to an easement, the real estate developers from whom the D'Egidios purchased the property managed a billboard on the property to advertise their subdivision across the street. The billboard was nine feet from State Route 14. In 1987, the D'Egidios took over the management of the billboard and obtained an outdoor advertising permit from the California Department of Transportation ("Caltrans"). The D'Egidios then began leasing out the billboard for general commercial advertising.

Under County ordinances as they existed in 1987, signs of advertising subdivisions (as the billboard here did until 1987) were allowed to be placed on the subdivision property, oriented to be read from the street or highway, without any restriction as to the distance from the street or highway. (L.A. County Code, §§ 22.08.190 and 22.52.980.) A sign that advertised a business, profession, product, or service that was not offered or sold on the property on which the sign was placed (i.e., an "outdoor advertising sign"), however, could not be placed within 660 feet of the edge of right-of-way of a freeway or scenic highway if the sign was designed to be viewed primarily by persons traveling on that freeway or highway. (L.A. County Code, §§ 22.08.190 and 22.52.840, subd. (D).)

When the City incorporated in 1987, it adopted as the City's ordinances all ordinances codified in the Los Angeles County Code. In 1989, the City amended its sign ordinances to require a conditional use permit to erect or maintain any outdoor advertising sign, and to prohibit such signs within 1000 feet of the edge of right-of-way of a freeway or scenic highway if the sign was designed to be viewed partially or primarily by persons traveling on the freeway or highway. (Santa Clarita Ord. No. 89-17.) In 2003, the City again amended its sign regulations to provide that outdoor advertising signs were not permitted at all, except that such signs that were lawfully erected before the effective date of the amendment could be lawfully maintained as a legal nonconforming use. (Santa Clarita Ord. No. 03-17.) (See Santa Clarita Municipal Code § 17.51.080.) Then, in 2014, the City passed an ordinance that amended the regulations and required, among other things, the removal within five years of offsite signs that were lawfully erected before November 13, 1990. (Santa Clarita Ord. No. 14-01, amending Santa Clarita Mun. Code, § 17.05.050.)

In 2007, the City asserted that the D'Egidios' billboard was illegal because it was not properly permitted. After the parties failed to reach a settlement on the issue, the City sent the D'Egidios a letter advising that the billboard was required to be removed by April 24, 2019.

The D'Egidios thereafter filed a legal complaint, asking a court to

find that their billboard was legally permitted. The D'Egidios argued that § 5270 of California's Outdoor Advertising Act (the "Act") preempted any county code regulating billboards. Section 5270 provides in relevant part that the Act "shall be exclusive of all other regulations for the placing of advertising displays within view of the public highways of [California] in unincorporated areas . . . ." The D'Egidios argued that the Act therefore precluded application of county or city billboard ordinances with respect to a billboard (such as theirs) that was placed in an area that was unincorporated at the time of its placement.

The City filed a cross-compliant, alleging that the billboard was not lawfully erected under the Act and the County Code in effect in 1987, and therefore could not be deemed a legal nonconforming use. The City contended that the Act did not preempt local government regulations regarding billboards and that the undisputed evidence showed that the D'Egidios' billboard did not comply with the County Code when its use was modified in 1987 from a subdivision sales sign to an outdoor advertising sign. The City argued that because the D'Egidios' billboard was not lawfully erected, it was unlawful under the City's municipal code and therefore must be removed.

The trial court agreed with the City. Finding no material issues of fact in dispute, and deciding the matter on the law alone, the court issued summary judgment in favor of the City. The court ordered that the D'Egidios were permanently enjoined and prohibited from maintaining the billboard on their property.

The D'Egidios appealed.

DECISION: Judgment of Superior Court affirmed.

The Court of Appeal, Second District, Division 4, California, also agreed with the City's arguments and concluded that the D'Egidios' billboard was not lawfully erected and was therefore unlawful under the City's municipal code.

In so concluding, the court held that § 5270 of the Act, despite its "exclusivity" language, does not preempt local regulations that are more restrictive than the Act and does not preclude the application of local ordinances to billboards that were erected in unincorporated areas. In reaching that holding, the court noted that there were several other provisions (see §§ 5229, 5230, 5231, 5366) of the Act that "expressly allow, or contemplate, the enactment and enforcement by counties and/or cities of local regulations affecting the placing of advertising displays." "Given th[ose] provisions of the Act—which make no distinction between billboards in incorporated areas and in unincorporated areas," the court determined that it "seems clear that the Legislature did not intend that section 5270 would preclude the application of all local ordinances to billboards in unincorporated areas." Looking at

the history of the Act, and prior interpretations of the Act, the court concluded that § 5270 of the Act must be interpreted not to preempt local ordinances. Recognizing that interpretation gave "little effect" to § 5270's exclusivity provision, the court said it was not the court that limited the exclusivity provision, but it was the Legislature that had "expanded and made clear the authorities of counties to regulate billboards within its boundaries, including in unincorporated areas."

Finally, with specific regard to the D'Egidios' billboard, the court noted: "The Act specifically provides that when the use of a billboard is modified after it was erected in a manner that causes it to become illegal under state or local ordinances, the billboard no longer is 'lawfully erected.' " (§ 5216.1.) Therefore, the court concluded that "the trial court did not err in finding that, as of the change in use of the billboard in 1987, the billboard was not lawfully erected," and was therefore unlawful under the City's municipal code.

See also: *Viacom Outdoor, Inc. v. City of Arcata, 140 Cal. App. 4th 230, 44 Cal. Rptr. 3d 300 (1st Dist. 2006).*

Case Note:

The D'Egidios had also contended that the doctrines of estoppel or laches applied because the City's 17-year delay in enforcing the billboard as illegal "caused them prejudice." The court rejected this argument, finding the D'Egidios failed to show prejudice as a result of the City's inaction in that the D'Egidios failed to show evidence that they relied upon the City's inaction to their detriment. The only injury that the D'Egidios' alleged was loss of income they would earn from the billboard. The court found that injury was not caused by the D'Egidios' reliance on the City's inaction but was caused by the fact that their billboard was not lawfully erected and was therefore a public nuisance.

Constitutionality of zoning restrictions—Developers challenge zoning ordinance as unconstitutionally restrictive of apartment uses

Developers contend land zoned for apartments is inadequate to support the township's "fair share" of apartments given the ordinance's restrictions that make apartment construction "economically infeasible"

Citation: *KS Development Company, L.P. v. Lower Nazareth Township, 2016 WL 6242509 (Pa. Commw. Ct. 2016)*

PENNSYLVANIA (10/26/16)—This case addressed the issue of whether a zoning ordinance, which placed intensive restrictions on the manner in which apartments could be developed was *de facto* (i.e., in fact; in actuality) exclusionary in violation of substantive due process. More specifically, the case addressed whether a zoning ordinance deprived an apartment developer of its constitutionally protected property interest without due process of law by effecting a *de facto* exclusion of apartments as a use within the Township.

The Background/Facts: KS Development Company, L.P. and KS Development Company 2, L.P, and Woodmont Properties, LLC (collectively, the "Developers") sought to construct apartments in the Office Park District ("OP District") in the Lower Nazareth Township (the "Township"). The Township's Zoning Ordinance (the "Ordinance") provided for apartments by right in the Medium Density Residential District ("MDR District") in the Township and in a Mixed-Use Overlay Light Industrial District (the "Mixed-Use Overlay District"). The Developers contended that despite the Ordinance's facial allowance of apartments in those districts, the Township's zoning scheme affected a "*de jure* exclusion" (i.e., exclusion in accordance with law) of apartments in the Township because the Ordinance subjected apartment use to such stringent restrictions that the actual development of apartments was economically infeasible. The Developers argued that such a *de jure* exclusion was in violation of substantive due process in that it deprived the Developers of their constitutionally protected property interest without due process of law. The Developers sought to "cure the

alleged constitutional defect" of the total exclusion on apartment use with amendments to the Ordinance that would permit construction of apartments in the OP District.

The Developers made a request to the Township for their proposed curative amendment to the Ordinance. The Township's Board of Supervisors (the "Board") denied the request. The Developers appealed that denial to court. The court affirmed the Board's denial.

The Developers again appealed.

DECISION: Judgment of Common Pleas Court affirmed.

The Commonwealth Court of Pennsylvania first held that, contrary to the Developers' argument, the Township's Zoning Ordinance's stringent restrictions on apartments did not affect a *de jure* exclusion on apartments in certain districts in violation of substantive due process. The court further held that the Ordinance's stringent restrictions on apartments also was not a *de facto* exclusion that would require a curative amendment for the constitutional defect.

In so holding, the court first distinguished a *de jure* exclusion from a *de facto* exclusion. The court explained that "[i]f an ordinance totally excludes a particular use, such as mobile homes or billboards, then the ordinance is *de jure* exclusionary." On the other hand, "if an ordinance provides for a particular use but applies additional restrictions on the use that have the effect of excluding or making provision of the use illusory, then the ordinance is *de facto* exclusionary."

Here, the court found that the Ordinance provided for apartments in the MDR and Mixed-Use Overlay Districts. Therefore, the court determined that the Ordinance was not *de jure* exclusionary (i.e., did not exclude apartments under the law). Having made that conclusion, the court next addressed whether the Ordinance effected a *de facto* exclusion (i.e, exclusion in fact, though not necessarily under the law) of apartments as a use within the Township such that the Ordinance deprived the Developers of their constitutionally protected property interest without due process of law.

The court explained that where a challenge to a zoning ordinance alleges that the ordinance effects a *de facto* or partial exclusion of a class of housing, the courts employ a three-part test to determine the constitutionality of the zoning ordinance. First, the court determines "whether the community is in the path of growth and in a logical place for growth and development" by looking at factors such as: projected population growth; anticipated economic development; access by major roads or public transportation; the growth and development of neighboring municipalities; proximity to a large metropolitan area; and attempts by developers to obtain permission to build. Second, when it is demonstrated that a community is in the path of growth, courts determine the level of development in the area by looking at factors

such as: the municipality's population density data; the municipality's percentage of total undeveloped land; and the municipality's percentage of its land available for the class of housing alleged to be unconstitutionally constrained. Third, if it is determined that the community is situated in the path of population expansion and is not already highly developed, then the courts, in the final stage of the analysis, ask whether the municipality has provided for its "fair share" of land for the class of housing under consideration.

The Developers had produced evidence demonstrating that the land zoned for development of apartments within the Township was inadequate to support the Township's "fair share" of apartments given the Ordinance's restrictions that made apartment construction "economically infeasible"—such as minimum acreage requirements, and common open space requirements. The court said that "[w]here a *de facto* challenge is brought against an ordinance based upon economic infeasibility rather than a township's failure to account for its fair share of housing, the evidence must account for basic legal principles governing exclusionary challenges." The court explained:

> First, an ordinance may regulate the type and configuration of a use once it has provided for that use; limitations on the level of density permitted for the use, standing alone, do not establish that the ordinance land has been saturated by other uses. Second, where an ordinance has zoned sufficient land for a use but that land has been saturated by other uses, the inability to develop land does not amount to an unconstitutional prohibition of the use. Third, an ordinance will not be found unconstitutional merely because it deprives the owner of the most lucrative and profitable uses; as long as the property in question may be reasonably used for the purposes permitted under the ordinance, the owner may not legally complain. Finally, the fact that an ordinance applies a significant amount of restrictions to development of a particular use, standing alone, is insufficient to show that the ordinance is arbitrary, unreasonable and lacking a substantial relationship to the public health, safety and welfare; instead, evidence must be produced to demonstrate that the restrictions lack a legitimate purpose.

Applying that analysis here, the court found that the evidence presented by the Developers "failed to distinguish between the provision of a use and the provision for a host of variations on the configuration of that use, failed to show that any lack of development of the apartment use within the Township was due to the Ordinance rather than the development of other uses where apartments were permitted, and failed to demonstrate that the Ordinance rendered development of apartments within the Township infeasible rather than simply prevented development of apartments in a manner that would provide [the Developers] with the most profitable use of land." Most importantly, found the court, the Developers failed to demonstrate that the restrictions placed on the development of apartments within the Township's MDR and Multi-

Use Overlay Districts "were unreasonable and inconsistent with the stated purpose of those districts." In other words, the court found that while the Ordinance placed "intensive restrictions on the manner in which apartments are developed," those restrictions were "not shown to be unreasonable and unrelated to public health, safety, morals and general welfare." The court concluded that the Ordinance was not *de jure* or *de facto* exclusionary because the Township had provided for its fair share of apartment housing and had not used other restrictions within the Ordinance to render the development of apartments an illusory or economically infeasible prospect. Therefore, the court held that the Developers' challenge to the Ordinance as unconstitutionally restrictive of the development of apartments was "without merit."

See also: *Surrick v. Zoning Hearing Bd. of Upper Providence Tp., 476 Pa. 182, 382 A.2d 105 (1977).*

See also: *Stahl v. Upper Southampton Tp. Zoning Hearing Bd., 146 Pa. Commw. 659, 606 A.2d 960 (1992).*

Case Note:

The court made clear that its holding was based on the evidence presented in support of the Developers' request for a curative amendment to construct apartments within the OP District, "rather than the Ordinance as applied to a property within the area zoned for apartment use, and on the evidence of the growth and development of the Township as currently reflected in the record."

Zoning News from Around the Nation

CALIFORNIA

In the wake of the passage of the Adult Use Marijuana Act, the City of San Francisco is considering legislation to "establish interim zoning controls for the growing of marijuana." "The legislation would require a conditional use authorization for indoor agriculture uses, which would include the commercial cultivation of cannabis in Production, Distribution, and Repair (PDR) districts citywide."

Source: *San Francisco Examiner*; www.sfexaminer.com

CALIFORNIA

In response to "mini dorms" that have popped up in the city, San Diego city leaders passed a new zoning ordinance that limits the number

of bedrooms a home can have in any new construction or remodel. "A home that is on a lot less than 10,000 square feet is only allowed five bedrooms. Anything bigger than that is limited to six rooms." The new "neighborhood zoning law" reportedly does not affect existing structures

Source: *CW6 News*; www.cw6sandiego.com

FLORIDA

On November 8, voters in Florida legalized the use of medical marijuana for people with debilitating medical conditions. The next day, Miami Beach passed a four-month ban on the opening of marijuana dispensaries. The ban is reportedly "meant to give the city time to create regulations for where the dispensaries can be located."

Source: *Miami Herald*; www.miamiherald.com

MASSACHUSETTS

On November 8, the voters in the Commonwealth legalized recreational marijuana, effective December 15, 2016. The new law "requires the forthcoming Cannabis Control Commission to begin accepting retail license applications from established medical marijuana dispensaries by Oct. 1, 2017 and from others hoping to sell marijuana and associated products by Oct. 1, 2018." "Municipalities can vote by referendum to ban marijuana shops, but it is currently an opt-out model."

Source: *Dorchester Reporter*; www.dotnews.com

QUINLAN™ January 10, 2017 | Volume 11 | Issue 1

Zoning Bulletin

in this issue:

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Mat #41945566

Statute of Limitations/Regulatory Taking—Zoning regulations prohibit landowners' preferred commercial use of property as well as load limits of commercial vehicles that can access property

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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

Landowners claim zoning regulations amount to regulatory taking of property for which they are entitled to just compensation

Citation: *Strode v. City of Ashland, 295 Neb. 44, 886 N.W.2d 293 (2016)*

NEBRASKA (10/28/16)—This case addressed whether zoning regulations on the use of the property and on roadways leading to the property amounted to regulatory takings for which the landowners were entitled to just compensation. The case also addressed the issue of when an action for inverse condemnation based on a regulatory taking begins to accrue in determining timeliness of the action under a statute of limitations.

The Background/Facts: Randy and Helen Strode (the "Strodes") owned real property in the City of Ashland (the "City") in Saunders County (the "County"). Randy owned three lots, which were purchased in 1999, and together, the Strodes owned eight lots, which were purchased between 2000 and 2002. All of that real property was zoned Public ("PUB") by a 1998 City Ordinance. In a PUB zone, permitted uses included specified recreational uses, such as parks, swimming pools, ball fields, and trails, as well as other public uses such as cemeteries and fairgrounds.

Since their purchase of the land, the Strodes operated a business for the manufacture of agricultural fencing and the storage of salvage on the property. Between November 2002 and June 2003, the City zoning administrator repeatedly notified Randy that his use of the property was in violation of the City's code and regulations. Randy was requested to remedy his violation. Helen claimed that she was unaware of the violation notices until June 2003.

In September 2003, the City filed an injunction against Randy's nonconforming use of the property. The district court held that Randy's use of the property to store salvage was in violation of the zoning ordinance and granted the City's request for an injunction. The court also found that the manufacture of agricultural fencing on six of the lots was permitted as a continuing, nonconforming use.

Ten years later, in September 2013, Randy and Helen sued the City and the County for inverse condemnation (i.e., a taking of private property by the government without just compensation) based on both the zoning ordinance and a load limitation regulation of a bridge. Article I, § 21 of the Nebraska Constitution provides that the "property of no person shall be taken or damaged for public use without just compensation therefor." The Strodes argued that the zoning ordinance's limitation on their use of their land amounted to a regulatory taking for which they were entitled to just compensation. With regard to the load limita-

tion issue, the Strodes' property could be accessed by a railroad underpass and a bridge. In June 2004, the County notified the Strodes that their use of the bridge violated the posted weight. The Strodes claimed that because of the height limit of the railroad underpass and the weight limit of the bridge, they then had to transport bulk amounts from their business in small loads on smaller trucks, resulting in an increased cost of "two to three times more." The Strodes alleged that the City's and the County's actions through "limiting access to their property have substantially diminished the values of [their] land and business enterprises without compensation."

The district court found that Randy and Helen's zoning regulation inverse condemnation claims were barred by the statute of limitations. Under Nebraska law, there was a ten-year limitation on the commencement of an inverse condemnation proceeding. (Neb. Rev. Stat. § 25-202.) Also, finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the court issued summary judgment in favor of the City and County on the bridge load limit takings claim.

The Strodes appealed.

DECISION: Judgment of District Court affirmed.

The Supreme Court of Nebraska first concluded that both Randy and Helen were barred from bringing their zoning regulation inverse condemnation claims because they failed to bring the claims within the ten-year statute of limitations. As a matter of first impression (i.e., the first time the court ruled on the issue), the court held that a cause of action for inverse condemnation based on a regulatory taking begins to accrue "when the injured party has the right to institute and maintain a lawsuit due to a city's infringement, or an attempt at infringement, of a landowner's legal rights to property." Here, the court found that the Strodes had "the right to institute and maintain a lawsuit against the City for the infringement or attempt at infringement of the legal right to use the property as they wished" when the City acted to implement the zoning ordinance on the property through its 2002 and 2003 notifications of zoning violations to the Strodes. (The statute of limitations did not simply accrue at the time of the zoning regulation enactment in 1998, said the court.) It was at the time of notifications, noted the court, that "the City's actions had an adverse economic impact on the Strodes' right to use the property in the commercial manner that they wished." Therefore, concluded the court, at the latest, the statute of limitations began to run in June 2003. Since the Strodes filed their inverse condemnation claim more than 10 years later—in September 2013—the claim was untimely and barred by the statute of limitation.

The Strodes had argued that the statute of limitations on the zoning regulation inverse condemnation claim did not begin running for Helen

until the time at which she received "actual notice" of the "nature and extent of the damages," "ultimately provided by the 2003 district court decision." The Supreme Court of Nebraska rejected that argument, stating that the "relevant inquiry [was] when the City infringed or attempted to infringe upon Helen's right to use the property as she wished and gave right to her rise to institute and maintain a lawsuit, not when Helen received actual notice of the ordinance affecting the property."

Finally, the court also held that the load limit on the bridge to the Strodes' property did not constitute a "regulatory taking." In so holding, the court explained that the United States Supreme Court has identified two types of regulatory actions that constitute categorical or *per se* takings: "(1) where the government requires an owner to suffer a permanent physical invasion of his property, however minor, and (2) where regulations completely deprive an owner of all economically beneficial use of his property." Finding neither of those categories applied, here, the court said that the Strodes' regulatory takings challenge must then be analyzed using "essentially ad hoc, factual inquiries" governed by the following factors: "economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action."

The court added that land use regulations "do not effect a taking merely because the regulation caused a diminution in property value alone." Rather, diminution of property value due to regulation requires a greater showing of damages through injury different in kind, and not merely in degree, from that suffered by the public at large. In other words, it would be insufficient for a plaintiff, such as the Strodes here, to show that the regulations require that they must go "a more roundabout way" or be inconvenienced. Here, the court found that the fact that the Strodes had to transport their fencing in smaller loads on smaller trucks was a "more roundabout way" to perform the business; while they incurred some damages, it did not constitute an injury different in kind than the general public, only different in terms of degree. Moreover, the court found that the Strodes failed to present any evidence that the weight limit of the bridge decreased the economic value of the property. While Randy had testified that it cost two to three times more to transport materials in smaller loads rather than in bulk, the court found he failed to "conduct any analyses to either substantiate this claim or determine how the property has diminished in value by the weight limits on the bridge." The court also noted that the Strodes failed to prove that the load limit interfered with any of their investment backed expectations since the load limit was posted years prior to the Strodes' purchase of the land.

See also: *Western Fertilizer and Cordage Co. Inc. v. City of Alliance, 244 Neb. 95, 504 N.W.2d 808 (1993).*

See also: *Lindner v. Kindig, 285 Neb. 386, 826 N.W.2d 868 (2013).*

See also: *Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631, 11 Env't. Rep. Cas. (BNA) 1801, 8 Envtl. L. Rep. 20528 (1978).*

See also: *Kraft & Sons, Inc. v. City of Lincoln, 182 Neb. 187, 153 N.W.2d 725 (1967).*

See also: *Fougeron v. Seward County, 174 Neb. 753, 119 N.W.2d 298 (1963).*

Mootness/Billboards—City denies billboard company's application for a special use permit for billboard

Billboard company contends city's denial was arbitrary and capricious

Citation: *Dakota Outdoor Advertising, LLC v. City of Bismarck, 2016 ND 210, 886 N.W.2d 670 (N.D. 2016)*

NORTH DAKOTA (11/9/16)—This case addressed the issue of whether a city's decision to deny a special use permit was arbitrary, capricious, and unreasonable. The case also addressed the issue of mootness of an appeal when the zoning regulations have changed in the interim so as to prohibit the permit sought.

The Background/Facts: Dakota Outdoor Advertising, LLC ("Dakota") leased property in the City of Bismarck (the "City") with intentions to erect a digital billboard on the property. Because the sign would be digital and would be within 300 feet of a residential property, the City's Code of Ordinances (the "City Ordinances") required Dakota to obtain a special use permit before it could erect the sign. Dakota applied for a special use permit to erect the sign, and the City's Planning and Zoning Commission (the "Commission') denied Dakota's application. Dakota then appealed to the City's Board of Commissioners (the "Board"), which affirmed the Commission's decision. Dakota again appealed to the district court, which affirmed the decision of the Board. Dakota once again appealed.

On appeal, Dakota argued that the Board's decision to deny it a special use permit for its billboard was "arbitrary, capricious, and unreasonable." Under the City Ordinances in effect at the time of application, a special use permit for the placement of a digital billboard had to meet three requirements. The first two requirements were found to be met here. The last requirement—that the special use permit must

not adversely affect the health and safety of the public and the workers and residents in the area—was in dispute. Dakota argued that the studies it presented to both the Commission and the Board supported a grant of the special use permit, and that "no evidence was presented which supported a denial." On the other hand, the Board had found that a high incidence of accidents occurred on the street running next to Dakota's proposed billboard site. In fact, the North Dakota Department of Transportation reported that the subject incident was the seventh most dangerous in the State of North Dakota and the second most dangerous in the City. The Board had determined that those findings supported a conclusion that the granting of a special use permit to Dakota for the proposed billboard would "adversely affect the health, safety and welfare of [the City's] citizens."

Responding to Dakota's appeal, the Board also argued that Dakota's legal action was now moot because the City Ordinances had changed since the district court entered judgment in the case. The new ordinances no longer include a provision for obtaining a special use permit for a digital billboard at a distance of less than 300 feet from a residential area. Rather, under the new zoning regulations, Dakota would no longer be permitted to obtain a special use permit for the proposed site.

DECISION: Judgment of district court affirmed.

The Supreme Court of North Dakota first determined that Dakota's action appealing the denial of its special use permit for its proposed billboard was not moot. The court explained that it would not legislate retroactivity into the City Ordinances. The City Ordinances stated that no part of the code was retroactive "unless it is expressly declared to be so." The court noted that the new statute governing placement of billboards was not "expressly declared to be" retroactive. Accordingly, the regulations on billboards did not apply retroactively to Dakota's application for the special use permit for its proposed billboard, and thus, Dakota's appeal of the special use permit denial was not moot.

The court also concluded that the Board's denial of Dakota's application for a special use permit to erect its proposed digital billboard within 300 feet from a residential area was not arbitrary, capricious, or unreasonable. The court explained that the Board was "under no obligation to accept the studies presented by Dakota." Rather, Dakota carried the burden of proving to the Commission that its special use complied with the requirements specified in the City Ordinances, said the court. The court found that the Board had found the studies submitted by Dakota were "at best, inconclusive" and failed to address the "cumulative effect of driving distractions." The Board had given more weight to the other reports that indicated the dangerousness of the nearby traffic intersection. Dakota was now arguing that the studies it had submitted were stronger and should have been weighed more heavily.

The Supreme Court of North Dakota explained that the Board's conclusions would not be found to be "arbitrary, capricious, or unreasonable," and would stand, if they were shown to be the "product of a rational mental process by which facts and the law relied upon [were] considered together for the purpose of achieving a reasoned and reasonable interpretation." Here, the court found that the Board's conclusion, based on the facts before it, was "the product of a rational mental process in which the Commissioners exercised their discretion" under the City Ordinances regarding special permits.

Accordingly, the court affirmed the Board's decision to deny a special use permit to Dakota for its proposed digital billboard.

See also: *Dahm v. Stark County Bd. of County Com'rs, 2013 ND 241, 841 N.W.2d 416 (N.D. 2013).*

Use/Preliminary Injunction—City issues cease operations order to seasonal beer garden operating in a residential zoning district without a required zoning permit

Beer garden operators pursue preliminary injunction against cease order, saying city failed to establish prerequisites for cease order

Citation: *SPTR, Inc. v. City of Philadelphia, 2016 WL 6833074 (Pa. Commw. Ct. 2016)*

PENNSYLVANIA (11/21/16)—This case addressed the issue of whether reasonable grounds supported a preliminary injunction against a city's order to cease the operation of a commercial use in a residential zone that was operating without a required zoning permit. In relation, the court addressed whether a city met the prerequisites to issue such a cease order under the city code.

The Background/Facts: Point Breeze Fund, LLC owned a vacant lot (the "Property") in the City of Philadelphia (the "City"), which was located in a residential, multi-family zone ("RM-1"). Point Breeze Fund, LLC, as well as three other commercial entities licensed in the state of Pennsylvania to sell liquor—SPTR, Inc., Newbolds Brew, LLC, and the American Sardine Bar, Inc.—(collectively, the "Beer Companies") planned to operate a pop-up beer garden on the Property. A

"pop-up beer garden" is an outdoor bar that sells beer and food to customers on a seasonal basis. The Beer Companies obtained liquor licenses, off-premises catering permits, City Health Department permits, and City Department of Licenses and Inspections ("L & I") permits to serve food and nonalcoholic beverages at the Property. The Beer Companies' pop-up beer garden officially opened in May 2015.

In June 2015, an L & I inspector ascertained that the pop-up beer garden was being operated without a required zoning or use registration permit or zoning certification in violation of the City's Planning and Zoning Code. The inspector issued a "Notice of Intent to Cease Operations and Order," and on July 8, 2015, issued a cease operations order ("Cease Order").

In the meantime, the Beer Companies had filed a zoning permit application with L & I to use the property as a beer garden. The application was eventually denied as commercial uses were prohibited in the RM-1 residential zone. Although the City Code did not address temporary uses, such as a seasonal beer garden, the City Code clearly provided that "no land may be used [in the RM-1 zoning district], with the exception of single-family residential uses, without first obtaining a zoning permit." The Beer Companies appealed the denial to the City's Zoning Board of Adjustment. That appeal was pending, when, in the meantime, the Beer Companies sought a preliminary injunction with the trial court. (This summary addresses the outcome of the preliminary injunction. "A preliminary injunction is designed to preserve the subject of the controversy in the condition in which it is when the order is made, it is not to subvert, but to maintain the existing status quo until the legality of the challenged conduct can be determined on the merits." Meanwhile, at the time of the Commonwealth Court of Pennsylvania's decision here, the appeal of the zoning permit application denial was still pending.)

Under Pennsylvania law, a party must establish "six essential prerequisites" in order to obtain a preliminary injunction:

> (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interest.

Here, the Beer Companies alleged that the City, by issuing the Cease Order, "violated their due process rights, caused them to suffer irreparable harm without an adequate remedy at law, unlawfully preempted

licenses issued by the [Pennsylvania liquor board], and unlawfully commingled prosecutorial and adjudicatory functions."

The trial court granted the preliminary injunction. It found that the Beer Companies "demonstrated a clear right to relief because L & I did not meet the criteria to issue the Cease Order." The court noted that Cease Orders could only be issued "when a property owner engages in a use without one or more required permits and either the missing permits are required to protect the public health or safety or the continued use creates a public nuisance." Here, the trial court found the Beer Companies possessed the permits from the Health Department, liquor board, and L & I, "which are required to protect public health and safety." Significantly, the trial court found the operation of the beer garden did not create a public nuisance as: there had been no incidents requiring the police to be called to the premises; the State Police had found the beer garden in good standing; the latest the beer garden operated was until 11:00 p.m. on Saturday night; and local registered community organizations "supported the beer garden and benefited from its charity fundraising."

The City appealed the trial court's grant of the preliminary injunction. The City contended that the grant of the injunctive relief was in error because: the beer garden was a prohibited commercial use in the RM-1 residential zone; the Beer Companies did not have the required zoning permit to operate the beer garden; and operation of the beer garden created a public nuisance in the residential location. With regard to the latter argument, the City maintained that the beer garden was a pubic nuisance *per se* (i.e., in itself) because it was a prohibited commercial use in its location. The City maintained that it did not need to prove that the beer garden was a public nuisance in fact; it argued that the nuisance *per se* justified its Cease Order.

DECISION: Judgment of trial court affirmed.

The Commonwealth Court of Pennsylvania found that the trial court properly issued the preliminary injunction to the Beer Companies. The court acknowledged that seasonal beer gardens were not a permitted use in the RM-1 zoning district, and that the Beer Companies had failed to obtain a zoning permit for the use. Notwithstanding those acknowledgements, the court stated that in order for L & I to issue a Cease Order, it had to show that either: (1) the missing permit was required "to protect public health or safety;" or (2) the continued use was "creating a public nuisance." (Philadelphia Code § 14-306(1)(e)(.1).) The court found that L & I failed to establish either of those requirements.

With regard to the permits "to protect public health or safety," the court found that the health inspection licenses and catering licenses for the sale of food and beverages sufficed as permits protecting the public by "ensuring a safe and healthy food supply." "A zoning permit

authorizing [the Beer Companies] to serve otherwise permitted food and beverages, in a particular location, [was] not necessary to protect public health or safety," said the court.

The court also found that the continued beer garden use was not "creating a public nuisance." In support of that finding, the court cited: the lack of police calls to the Property; the fact that the State Police found the beer garden to be in "good standing;" the fact that the beer garden was only open four days a week, seasonally; and the fact that prior to the use as a beer garden the Property was "a vacant, trash-strewn lot."

As to the City's nuisance *per se* arguments, the court found them "unavailing." The court reiterated that in order for L & I to issue a Cease Order under the City Code, it had to satisfy those two prongs. And the court said that the City could not satisfy the nuisance prong "by simply showing lack of a permit." Rather, L & I had to show that the "continued" use, without a permit, "was creating a public nuisance," (which the court had held it was not, in fact, creating a public nuisance). Moreover, the court said that "a commercial use in an exclusively residential area does not automatically render it a nuisance *per se*." Rather, the court explained that in order to declare the use of the Property as a beer garden a nuisance *per se*, "it still must have certain recognized, unavoidable, inherent characteristics that make it injurious to health and property." Further, noted the court: "[a]lthough our courts have recognized inherent problems resulting from the sale and consumption of alcoholic beverages, they have not declared the sale, service or consumption of alcoholic beverages a nuisance *per se*."

The court concluded that the Beer Companies "showed a clear right to relief [with a preliminary injunction] because L & I did not meet the prerequisites to issue a [Cease Order] under the [City] Code." Thus, the court found there were reasonable grounds to support the preliminary injunction during the pendency of the zoning appeal.

See also: *Blue Mountain Preservation Ass'n v. Township of Eldred, 867 A.2d 692 (Pa. Commw. Ct. 2005).*

See also: *Reid v. Brodsky, 397 Pa. 463, 156 A.2d 334 (1959).*

Zoning News from Around the Nation

CALIFORNIA

In response to the passage of the Adult Use Marijuana Act (AUMA), the City of San Francisco plans "to establish interim zoning controls

for the growing of marijuana. The legislation would require a conditional use authorization for indoor agriculture uses, which would include the commercial cultivation of cannabis in Production, Distribution, and Repair (PDR) districts citywide."

Source: *San Francisco Examiner*; www.sfexaminer.com

MARYLAND

The Anne Arundel County Council is reportedly seeking "to expand zoning law so homegrown garden centers won't be uprooted from their communities. Council Bill 83-16 defines what constitutes a garden center and allows them as a conditional use in some residential areas. Council members will hear testimony on the legislation Monday. . . . The bill defines a garden center as a facility that sells plants, bushes or trees, grown on site or off site, as well as other items customarily used for plants and gardens including seeds, mulch, fertilizer, soil, gardening tools and pots. The legislation includes requirements that would safeguard against large businesses locating in residential areas," with hardware stores, home centers, and building supply stores not to be considered "garden centers," and with garden center lots restricted to between two and five acres and located along an arterial road.

Source: *The Baltimore Sun*; www.baltimoresun.com

PENNSYLVANIA

In late November 2016, the Pittsburgh City Council "passed legislation that creates zoning regulations for selling and growing medical marijuana." The new law was enacted "to ensure appropriate standards would be in place for soon-to-be-licensed businesses."

Source: *WPXI*; www.wpxi.com

ZONING PRACTICE JANUARY 2017

AMERICAN PLANNING ASSOCIATION

ISSUE NUMBER 1

PRACTICE ZONING ENFORCEMENT

Enforcing the Zoning Code

By Linda S. Pieczynski

If zoning violations seldom occur in a local jurisdiction, staff may struggle to determine when and how to take action. Consider these scenarios.

An owner of a single-family home with a large yard begins renting parking spaces to landscape companies, and the neighbors complain to the city. A rental unit in a strip mall that was supposed to be a church counseling center is being used for worship services attracting 200 people on the weekend, causing traffic issues and fire safety concerns. The owner of an office complex allows the storage of fireworks in a unit, disregarding the zoning code and safety of the other tenants.

All of these violations need to be addressed by enforcing the zoning code. But what are the best methods to achieve compliance? Will gaining compliance be expensive? How long will it take to reach a resolution?

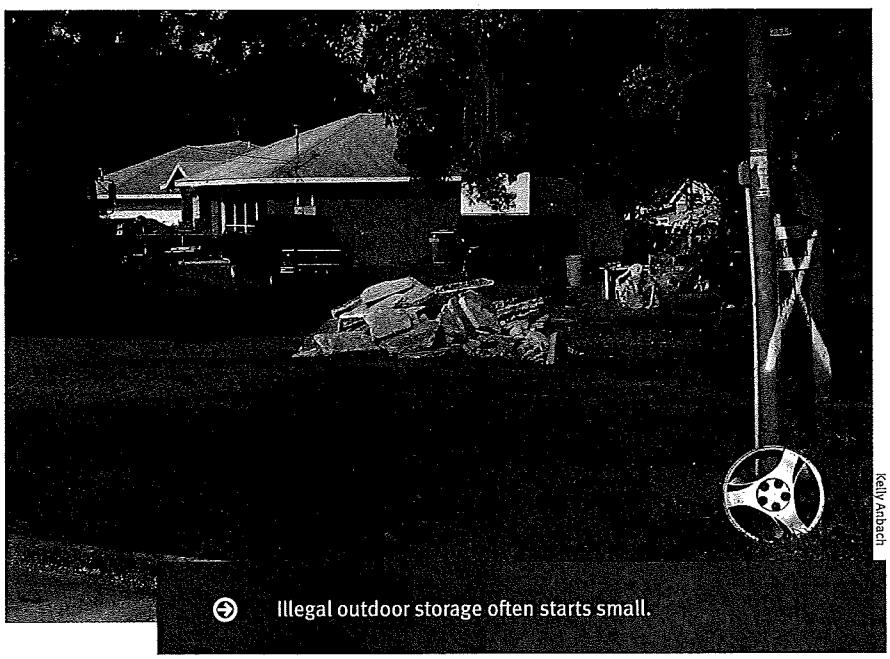
Sometimes the first reaction is to ignore the matter and hope it goes away. However, once a violation is brought to the attention of the zoning administrator, it is seldom a good idea to delay enforcement unless some type of written agreement for compliance is reached. Employees leave their positions, retire, or move away. Memories fade, and records become more difficult to retrieve. It is also difficult to argue in court that enforcement is urgent when there has been a 10-year delay before the jurisdiction takes legal action.

This article will explore the zoning enforcement practices and procedures most likely to achieve results in the shortest time possible based on my experience as a municipal prosecutor handling these kinds of cases.

CONSULTING THE CODE

Most zoning violations are straightforward, and a few photographs will convince a judge that the responsible party is in violation. However, there are procedural requirements that can derail a case if they are not followed properly. The first step, whenever there is a possible infraction, is to read the zoning code provisions relevant to the violation as well as any other local ordinance that may be important. For example, if an office building is converted into a day care center, not only will there be a zoning violation but there will probably be violations of the local building and fire codes as well. People who violate the zoning code seldom obtain building permits to do the alterations necessary for unlawful conversions.

The zoning code will not only describe the violation itself but will set forth requirements regarding who can enforce the code, what type of notice must be given, and pos-



Kelly Arbach

Illegal outdoor storage often starts small.

Addressing the Authority to Designate Enforcement Officers

This example from Burr Ridge, Illinois, shows how a zoning ordinance can give power to the zoning administrator to appoint enforcement officers:

> For the purposes of this Ordinance, the Community Development Director shall be that person or persons designated by the Village Board of Trustees as the head of the Community Development Department. The duties are as follows:
>
> 1. Enforcement Powers
>
> ....d. Issue violation notices requiring compliance and advising suspected violators of their right to appeal; to issue citations for violations of this Ordinance; and to designate enforcement officers with the same authority (§XIII(B)).

sible defenses (e.g., legal nonconforming use). If these procedural steps are ignored, the defendant may file a motion to dismiss the complaint. This delays enforcement and creates a possible due process challenge to the action.

The zoning code also determines who is responsible for abiding by the code. Usually it will be the owner of the property, but it might also be a tenant or agent of the owner. This is why reading the code is so important.

Kelly Anbach

Many municipalities prohibit parking commercial vehicles in residential districts.

POWER TO ENFORCE THE CODE

A few years ago, I was appointed as a special prosecutor on a zoning case that had been brought against a city official. The prosecution was unsuccessful because the zoning code required that the zoning official enforce the code. However, a code enforcement inspector who was not the zoning official had drafted the complaint. The zoning official had never appointed the inspector as a deputy zoning official nor did the code give the zoning official the power to delegate powers to another person. The only testimony available was from the code enforcement inspector. Consequently, a motion to dismiss was granted. The town did not wish to start the complaint process anew so the case ended. I advised the city to amend its code so that the zoning official had the power to appoint deputy zoning officials and inspectors to carry out his or her duties so the same problem would not reoccur.

It is not unusual for employees of local governments to wear multiple hats when enforcing local ordinances. The building official is often the zoning administrator. It is imperative that the local code allow enforcement of the code by multiple employees. If it does not, any action taken must be by the person designated for enforcement by the ordinance.

If the zoning administrator delegates certain duties based on the zoning code, it is wise to have written documents setting forth the appointment of such employees in their personnel files so that it is clear that an employee possessed the power to enforce the code prior to the date of the violation.

IDENTIFYING THE RESPONSIBLE PARTY

One of the most important tasks when enforcing the zoning code is to correctly identify the party that is responsible for the violation. While this sounds like an easy step, it can be complicated when the owner or tenant of the property is not an individual but a legal entity that exists only on paper. Because of liability, the preferred method of owning commercial property is to set up a corporation, limited liability corporation (LLC), limited liability partnership, or trust as the owner. Therefore, it is rare for the owner of a commercial building or large apartment complex to own the property in his or her name. One of the most common mistakes zoning inspectors make when enforcing the code is assuming the owner is a person instead of a legal entity.

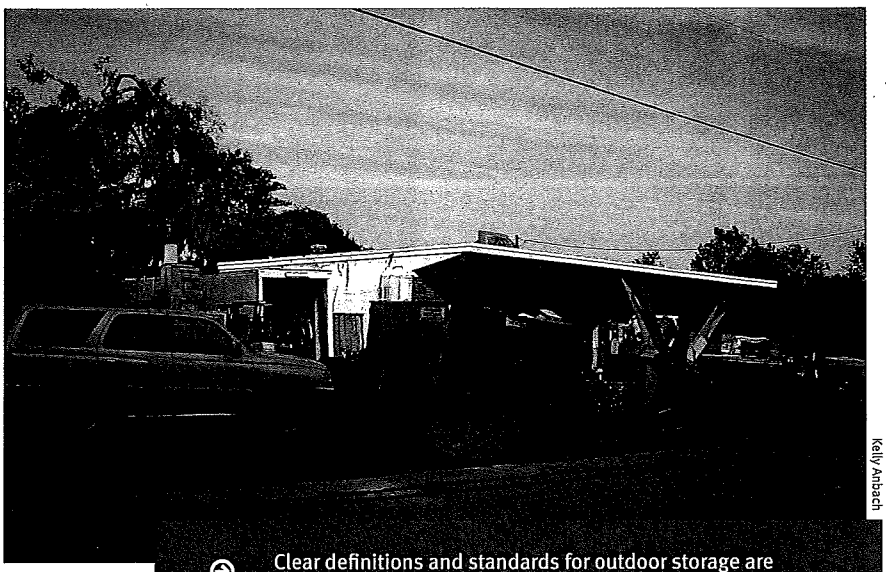
How do you determine who owns property? The gold standard is to check the records of the recorder of deeds in the county in which the property is located. The zoning official needs to determine who owns title to the property by examining the last deed that transferred title to the current owner. Many documents are now available online at the website of the county recorder of deeds. The website can be searched for ownership based on a property index number, address, or name. Title companies will perform an ownership search for a fee, and I recommend doing this before engaging in any complex litigation. The inspector should never skip verifying who the responsible party is. Relying on tax records or the assessor's files alone is dangerous because anyone can pay taxes on a property. While these records supply information, they are not sufficient to confirm ownership.

If the responsible party is a tenant (which is often the case when dealing with defendants that are businesses), it may be possible to uncover its identity using records from the local government, especially if the code or the local taxing authority requires a business license. The zoning inspector can always ask an employee for a business card of the entity or question him or her directly about the tenant's legal name. The owner of the property may cooperate to avoid being named as a codefendant or even file an eviction lawsuit for violation of the lease once the problem is brought to the owner's attention. For example, when "adult entertainment" is being offered at a place that is supposed to be a spa, landlords will often cooperate with law enforcement to evict the tenant to solve the zoning issue.

Unless the owner or tenant is an individual, the next step is to verify the legal existence of the entity in question. In most states, the business corporation division of the secretary of state administers the creation and existence of corporations and limited liability companies. Most of these public agencies have websites where the names of these companies can be searched. The websites verify the existence of the entity and whether it is in good standing. They list the name of the registered agent required for every cor-

poration or LLC as well as information on the president and secretary of the corporation. If the entity is an LLC, it may list the name of the manager(s). These valuable sites can be used to confirm that the entity exists and provide addresses needed for proper notice.

If a corporation or LLC is involuntarily dissolved, the officers and directors may be personally liable for the violation. If the registered agent cannot be served, most states allow service on the secretary of state as the default registered agent.



Kelly Anbach

Clear definitions and standards for outdoor storage are important for interpreting zoning violations.

NOTICES OF VIOLATION

The zoning administrator must be familiar with what the zoning code requires for notices of violation. If there is a procedure set forth in the code, it must be strictly followed, otherwise a motion to dismiss by the defendant would be proper due to the lack of due process.

The zoning official should also determine whether notice is required by the code. If so, who is entitled to serve the notice? What information must the notice contain? How must the notice be served?

Even if notice is not required, sending notice is a helpful step to take because most people will comply once they are educated about the problem (e.g., failure to obtain a zoning certificate of compliance). If it is required, notice should be sent individually to each responsible party (e.g., an owner and a tenant or spouses) to the place required by the code, often a last known address.

When multiple parties are responsible, everyone should receive a notice. This increases the odds of compliance if at least one of the responsible parties responds to the notice of violation.

If the code requires that the notice contain specific information, it must be in the notice. The zoning administrator can always add more information but never less than what is required. This usually includes the location's address, date of the inspection, the nature of the violation, the section of the code that was violated, date for compliance, and the process for an appeal.

If the code requires that the notice be served in a specific way, that procedure must be followed. Frequently, notice may be served by regular mail, certified mail, in person, by posting it on the property in question, or by notice in the newspaper if the responsible party cannot be found. A corporation or LLC can be notified properly by serving the registered agent. It is very important to consult the code to be sure the chosen method is allowed. Failure to serve the notice properly can result in a motion to dismiss and will delay compliance.

TYPES OF EVIDENCE

The most important evidence in a zoning enforcement case are the observations of the zoning administrator or inspector. This is why it is very important that the zoning administrator or inspector gathers the evidence in a systematic way. Good notes are crucial so they can be used to refresh the witness's testimony regarding statements made by the defendant to the witness. Admissions by responsible parties are important in proving the case.

Defendants often make admissions during conversations or while exchanging emails or texts with the inspector. These are admissible against the defendant as long as the inspector can testify about when the admission was made, who was present, and what was said.

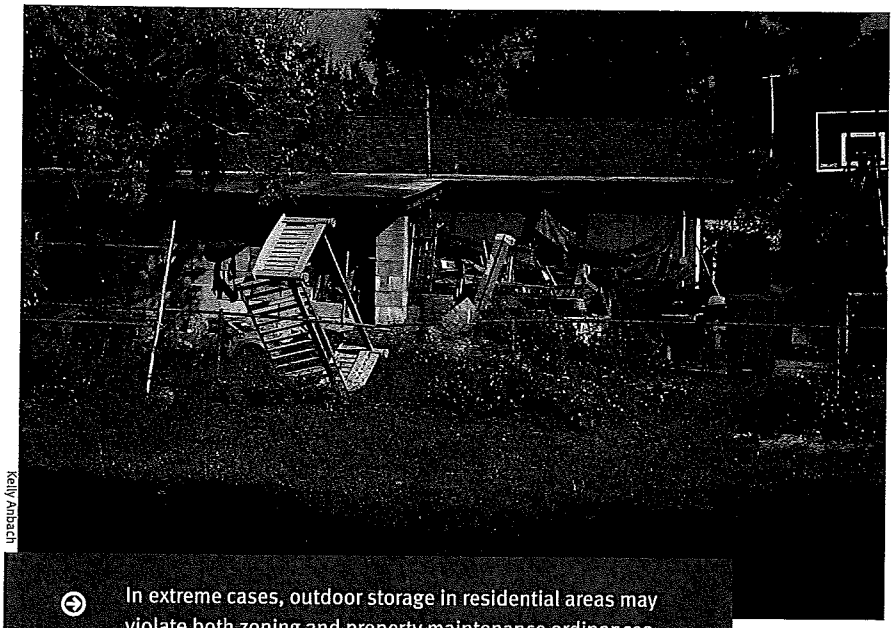
Photographs of the zoning violation can be used to corroborate the observations of the witness. Aerial photographs are frequently used in zoning cases, especially when it is alleged by the defendant that there is a legal nonconforming use. The photographs may show that the initial legal use of the property was expanded and changed over time, thereby cancelling the legal nonconforming use of the property. For example, an auto junkyard may have been legal when it was created as a business, but if the area where the salvage material is located has tripled in size since that time, the legal nonconforming use may have been extinguished.

A certified copy of the local government's zoning map can be used to prove the zoning classification of the area in question.

If business records are used as evidence, the inspector or another witness must establish that they were kept in the ordinary course of business and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter.

It is permissible to visit a business "undercover," that is, pretending to be a patron. For example, if a person is repairing vehicles at a single-family residence, and that is not a permitted home occupation, it is legal to ask the violator to perform a service on a vehicle, such as an oil change, and then use that as evidence of the illegal activity.

One of my favorite examples of undercover activity dealt with a salon that was illegally using the basement of a building for spa treatment rooms. The zoning certificate of occupancy did not cover that space because it was not protected by a sprinkler system. The owner denied using the space and said that all business was being conducted at the street level. The village sent a female inspector into the business to get a pedicure, which



Kelly Anbach

In extreme cases, outdoor storage in residential areas may violate both zoning and property maintenance ordinances.

took place in the basement treatment room, to demonstrate that the defendant was in violation of a court order. When the matter was heard in court a couple of days later, the inspector appeared in court to show the judge she had received the spa service. The defendant was held in contempt of court for violating the court order.

ISSUES OF CONCERN

There are a number of situations that require specific approaches. These include problems with violations of conditional or special use permits, certificates of zoning, illegal conversions, and legal nonconforming uses.

Special Use Permits

When there is a violation of a special use permit, there are two potential courses of conduct, and one or both of them can be pursued. The first involves filing a complaint in court for the specific violation of the ordinance establishing the special use if compliance is not forthcoming. The second action is to suspend or revoke the special use permit if the defendant is recalcitrant. The fear of losing the special use permit will usually convince the defendant to come into compliance and cease the illegal activity.

However, because this may be viewed as an aggressive posture, the philosophy of the local government usually determines which course of action to take.

Failure to Obtain a Certificate of Zoning

Most of the violations that end up in court deal with the failure to obtain a certificate of zoning before occupying a structure. These are easy cases to prove once the inspector gathers evidence showing that the defendant is engaged in a business for which no certificate of zoning exists.

In some of these cases no compliance is possible because the local government cannot issue a certificate of zoning. For example, the use must cease because it is not permitted in the zoning district in which it is operating. Or expensive fire code upgrades are required for the use, but the defendant doesn't have the financial resources to pay for them. In these types of situations, swift action is critical so the defendant is not allowed to establish the illegal activity for a lengthy period of time. Judges are reluctant to order the cessation of a use the longer it is allowed to continue.

There are times when seeking imposition of a daily fine is justified. When a defendant refuses to cease engaging in the illegal activity after repeated attempts to gain compliance, it may be necessary to make it too expensive to stay in business at that location by seeking a fine for every day the violation occurs. When people purchase property intending to engage in a particular business, they do not always hire attorneys who are familiar with land-use issues. Most real estate lawyers want to make sure that title passes to their clients at the closing. That is their most important goal. Unless the client tells the attorney about the plans for the business and the attorney knows that the zoning ordinances are important, no one does the research as to whether the use is permitted.

Owners who buy a property before performing due diligence to check for all of the possible regulations involved may end up with property they can't use as they intended. For example, I had to prosecute an individual for illegally crushing stone on a vacant lot. The zoning district regulations required that there be a physical building on the lot before that type of business was allowed. Because he had no building or resources to build one, he ended up with a piece of property that was of no use to him.

If a business has a certificate of zoning but then begins to engage in an activity not permitted by that certificate, suspending or revoking the certificate of zoning is a proper procedure to use if the business refuses to comply after receiving notice of the violation. An example would be a business that begins selling vehicles when it is only allowed to repair them.

However, no certificate of zoning should be suspended or revoked without giving the defendant the right to challenge the action. The defendant has the right to confront the witnesses and to present evidence before being deprived of a vested right. There should be a means to appeal the decision of the zoning administrator.

In tough economic times, a company may expand or even change its business to remain viable. This is an example of how businesses get into trouble if they don't pay attention to the zoning ordinances. Problems happen when a business expands into an activity not allowed in the zoning district where it is located. The city has a dilemma in that it doesn't want to put the owner out of business but also wants to maintain the integrity of its zoning code. In this type of situation, the community development office may be able to come up with an alternative plan for the owner if there is a location elsewhere in the city with the proper zoning classification for the use. This type of solution is better than litigation if it is feasible.

Illegal Conversions

Illegal conversions of buildings are common in residential areas—for example, a single-

family home that is converted into a three-unit apartment building. Multifamily buildings are generally not permitted in a single-family residential area unless there is a legal nonconforming use. The first step is to determine if the use was ever legal. Older buildings converted before the zoning ordinance took effect may be legal and grandfathered in under the zoning code.

If the building has been illegally converted to a use that is not permitted, a complaint can be filed, not just for the zoning violation, but also for any building code violations. Typically, when a building is converted improperly, the owner does not obtain building permits for the construction and often violates the building code by doing improper electrical or plumbing work. These types of buildings may also violate the fire code when people are living illegally in the attic and the basement. An emergency condemnation under the property maintenance code may be necessary if the occupancy constitutes an immediate hazard to the residents.

Once there is compliance, how does the local government assure there is no reconversion? One possibility is to record the notice of violation with the recorder of deeds so that a future purchaser knows that the building is a single-family residence. Once the defendant complies, a notice of compliance should be recorded. Anyone who buys the property after that cannot claim that they did not know the property was a single-family residence because it will appear on a title search at the real estate closing.

Legal Nonconforming Uses

In a city or county that contains older buildings, both commercial and residential, defendants will try to argue that their use is "grandfathered in." While the burden of proof in most jurisdictions is on the defendant to show that the use was legal when it began, it is important to have systems in place that can retrieve documents regarding the property decades later. Many of these cases go back decades, after three or more major revisions of the zoning code. If the zoning administrator cannot access the necessary information to show that the use was never legal or that the use was illegally expanded or intensified, it will hamper negotiations to resolve the issue. At times, the language used in the older zoning code is vague, which leads to disagreements over interpretation. Rather than rushing into litigation, the zoning administrator, with the proper legal advice, needs to honestly review whether the ambiguity in the old ordinance will make it unlikely that a court action will succeed. A rule of legal construction requires that any ambiguity in an ordinance be resolved against the party that wrote it (i.e., the local government).

Most zoning ordinances have a provision whereby a legal nonconforming use is abandoned if the structure is empty for a set period of time. The owner will usually counter with an argument that he or she always had an intent to resume the use and did not truly abandon the property. This becomes an issue of fact that the city or county needs to rebut. This is why casual conversations with owners can become critical evidence. These encounters need to be documented so that the inspector can refresh his or her recollection months or even years later.

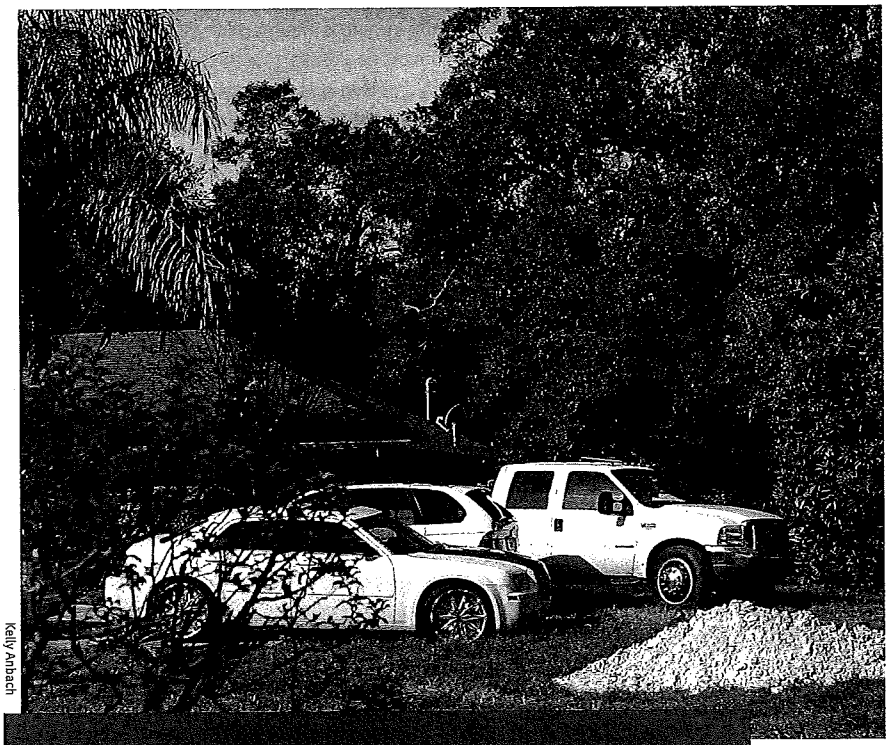
CHOOSING THE PROPER COURT VENUE

Whenever an enforcement action is brought against a defendant, there needs to be a decision as to whether the case should be brought as a simple complaint versus an action in the chancery division of the circuit court. Most

Establishing Clear Discontinuance Provisions

This example from Woodridge, Illinois, shows how a zoning ordinance can clarify when a nonconforming use is considered to be discontinued:

> A nonconforming building, structure or portion thereof, all or substantially all of which is designed or intended for a use which is not permitted in the district in which it is located, and in which the use has ceased by discontinuance or abandonment on the effective date hereof or thereafter is abandoned and remains unoccupied, or is not used for a continuous period of one year, shall not thereafter be occupied or used, except by a use which conforms to the use regulations of the district in which it is located (§9-9-2-5).



Kelly Anbach

Many zoning codes prohibit parking vehicles within front- or side-yard setbacks.

simple complaints are heard in courtrooms that deal with civil, quasi-criminal, or criminal violations of a minor nature. In some states, zoning violations are civil matters with a fine being the only punishment. In others, they are considered criminal matters for which a defendant can be sentenced to a fine or jail. The third classification of violations is quasi-criminal. These are civil in form but criminal in nature. In some jurisdictions, the court may have the power to order that the defendant comply with the code or be held in contempt of court. The court system determines in which courtroom the violations are heard. Typically zoning violations may share the docket with traffic tickets, building code violations, or other ordinance violations such as unlawful possession of alcohol by underage persons.

A chancery court, or court of equity, is a court that has special powers to force a party to conform to the law using its contempt powers as well as the power to impose fines. Parties can force each other through the process of discovery to reveal information pertinent to the case prior to trial. A local jurisdiction may apply for an injunction to immediately halt the illegal activity. Judges appointed to chancery court are usually more experienced in zoning matters than in the courts that hear simple complaints.

Some states may have criminal statutes that can be used in enforcement. For example, if someone is conducting a business that violates the use requirements of the zoning code and is polluting the environment, a criminal prosecution can be pursued in addition to any zoning action that is appropriate.

In deciding what type of action is appropriate, the following questions must be addressed. Will the defendant comply if a simple ordinance violation is brought? Will the court force the defendant to comply if an ordinance violation is charged? How complicated is the zoning violation? Can the local jurisdiction afford the cost of an action in chancery?

Unless it is clear that the issues are very complicated or the defendant is so defiant that compliance is unlikely, most local governments will choose to send a notice of violation and follow it up with a simple complaint against the defendant.

If the defendant still refuses to comply, charging the defendant for each day the violation exists and asking for daily fines is the next step. Fines motivate most defendants.

If compliance is not obtained with an ordinance violation prosecution, the local government still has the option of pursuing an action in chancery court seeking to force compliance on the defendant. Fortunately, most cases are resolved by filing an ordinance violation complaint, and few cases end up in chancery court.

However, there are situations when chancery court should be used. If there is a threat to the public, the city may need an emergency injunction to stop the illegal and dangerous use. If the facts are complicated and depositions of witnesses are necessary, chancery court is the proper venue.

Key Provisions for Zoning Enforcement

If the zoning code is not properly drafted, it will be a barrier to enforcement. If a law is vague, courts will decide against the jurisdiction that adopted it.

Well-functioning zoning codes and enforcement programs possess the following characteristics:

- Specific provisions regarding who can enforce the zoning code and how that power can be delegated
- Language that is clear and direct with definitions of critical concepts and land uses
- Comprehensive provisions dealing with legal nonconforming uses
- Clear standards regarding regular versus special uses
- Violation provisions that are sufficient to deter illegal behavior (e.g., provisions that make each day a new violation subject to a fine)
- Specific provisions for First Amendment activity (e.g., adult entertainment or noncommercial signs)
- Annexation provisions that adequately address nonconforming uses in annexed territory
- Uniform application of variance criteria

CONCLUSION

When a zoning violation occurs, enforcement should not be delayed in seeking compliance. The zoning official must understand the code provisions, follow the procedural requirements set forth in the code regarding who can enforce the code, gather the proper evidence, create and serve notice properly, and choose the proper venue for court. The zoning official should recognize that there are special considerations in cases involving conditional or special use permits, certificates of zoning, illegal conversions, and legal nonconforming uses in order to be ready for the types of defenses or delays in litigation that may occur.

ABOUT THE AUTHOR

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Cover: Logo vector designed by Freepik, tinyurl.com/zyqssw2

Vol. 34, No. 1

Zoning Practice is a monthly publication of the American Planning Association. Subscriptions are available for $95 (U.S.) and $120 (foreign). James M. Drinan, JD, Chief Executive Officer; David Rouse, FAICP, Managing Director of Research and Advisory Services. Zoning Practice (ISSN 1548–0135) is produced at APA. Jim Schwab, FAICP, and David Morley, AICP, Editors; Julie Von Bergen, Senior Editor.

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.

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