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# Zoning Bulletin

## in this issue:



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# Agreements/Zoning Power—Under settlement agreement, city agreed to exempt certain billboards from billboard ordinance

City later claims agreement is void because it contracts away the City's police powers

Citation: *The Lamar Company, LLC v. City of Columbia, 2016 WL 7094040 (Mo. Ct. App. W.D. 2016)*

Contributors

Corey E. Burnham-Howard



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MISSOURI (12/06/16)—This case addressed the issue of whether an agreement prohibiting a city from enforcing its billboard ordinance was void *ab initio* (i.e., of no legal effect).

**The Background/Facts:** The Lamar Company ("Lamar") is an outdoor advertising company. In 1999, Lamar acquired Whiteco Metrocom, Inc. ("Whiteco"), another outdoor advertising company. Prior to its acquisition, Whiteco had been involved in a legal dispute with the City of Columbia (the "City") with regard to four applications for permits to erect new billboards in the City. That legal dispute was resolved with in a May 1998 Stipulation for Settlement Agreement (the "Agreement") between Whiteco and the City. Pursuant to that Agreement, among other things, the City agreed to issue permits for three new billboards subject only to compliance with City's electrical and wind load requirements and state statutes. Whiteco and the City also agreed that 42 of Whiteco's billboards (39 existing billboards and the three new billboards promised by the Agreement) would be subject to a "cap and replace" agreement. Whiteco would be permitted to rebuild in the same location, or remove and relocate to a new location, any of the 42 billboards identified in the Agreement, subject only to compliance with state statutes and City wind load and electrical requirements. Whiteco could apply to build additional billboards beyond the 42 described in the Agreement, but those applications would be subject to compliance with the City's then existing billboard ordinance.

As Whiteco's successor, Lamar assumed Whiteco's rights and obligations under the Agreement. In May 2014, Lamar applied for permits to either rebuild in the same location, or to remove and relocate to new locations, eight of the 42 billboards described in the Agreement. The City denied the applications because the proposed billboards did not meet the requirements of City's billboard ordinance.

Lamar appealed those denials. Lamar argued that the Agreement exempted permits to replace any of the 42 signs from the City's billboard ordinance. Lamar maintained that the Agreement required the City to approve its applications. The City denied Lamar's request for an appeal.

Lamar then sued the City. Among other things, Lamar sought a declaratory judgment that the Agreement was valid and enforceable, and entitled Lamar to the permits for which it had applied.

The City asserted an affirmative defense that the Agreement was void *ab initio* (i.e. without legal effect) because "it impermissibly contracted away [the] City's police powers."

Lamar responded that the City, which had benefitted from the Agreement, was equitably estopped from denying the validity and enforceability of the Agreement.

The trial court held that the Agreement violated Missouri statutory law, RSMo § 432.0709, because it exceeded the scope of the City's powers by contracting away the City's police powers. The court concluded that the Agreement was therefore void *ab initio*. The court further concluded that the doctrine of equitable estoppel, argued by Lamar, could not be relied on to enforce a void municipal contract. Finding no material issues of fact, and deciding the

 

matter on the law alone, the court issued summary judgment in favor of the City and against Lamar on all of Lamar's claims.

Lamar appealed.

**DECISION: Judgment of Circuit Court affirmed.**

The Missouri Court of Appeals, Western District, first held that the Agreement exceeded the scope of the City's powers in violation of RSMo § 432.070 and was therefore void and unenforceable. The court explained that § 432.070 imposes three requirements on government contracts. It requires a contract must be: (1) within the scope of the governmental entity's powers; (2) for proper consideration: and (3) and duly authorized and in writing. A contract that fails to satisfy any one of those mandatory requirements is not only voidable, but wholly void, and of no legal effect, said the court.

Here, only one of those three requirements was implicated—the requirement that a contract "shall be within the scope of [a city's] powers or expressly authorized by law." The court explained that under settled law, a city cannot contract away its governmental functions and police powers. If a city does so, then it exceeds the scope of the city's powers and the contract is void.

The court noted that zoning ordinances constitute an exercise of a state's police power, and here the City's billboard ordinance was enacted pursuant to its delegated zoning police power. Here, found the court, "[t]he plain language of the Agreement prohibited the City from enforcing its billboard ordinance, save wind load and electrical requirements," and thus had "the effect of interfering [with the proper exercise of City's police power], [and] must necessarily give way to an appropriate exercise of [City's] police power." In other words, because the City had no authority to contract away future enforcement of its zoning ordinance against rebuilt or relocated billboards, the Agreement exceeded the scope of the City's powers in violation of § 432.070, and was therefore void.

Lamar had contended that the City was equitably estopped from denying the validity and enforceability of the Agreement, having accepted the benefits of the Agreement, and "because to conclude otherwise would result in a manifest injustice." Lamar noted that the City accepted the benefit of the Agreement, and that Lamar, in reliance on the Agreement, removed several signs because the "cap" provision of the Agreement necessitated that it do so before applying to "replace" the removed signs in the same or a new location. The court rejected Lamar's argument, noting that "[i]t is a long settled principle in Missouri that '[c]ities cannot be made liable, either on the theory of estoppel or implied contract, by reason of the accepting and using [of] the benefits derived from void contracts.' " In summary, the court found there was "no reasoned authority for the proposition that the doctrine of equitable estoppel can be employed to enforce a municipal contract that is void *ab initio* pursuant to section 432.070, even in the face of 'exceptional circumstances." Rather, said the court, it is a "well-recognized rule that the doctrine of estoppel is not applied in cases . . . where the city had no power under any circumstances to make the . . . contract in question," such as here. Accordingly, the appellate court concluded that the trial court did not err in concluding that as a matter of law, the Agreement could not be enforced against the City, or otherwise remediated, pursuant to the doctrine of equitable estoppel because

 

the Agreement was void *ab initio* as it exceeded the scope of City's powers pursuant to § 432.070.

See also: *Stewart v. City of Springfield, 350 Mo. 234, 165 S.W.2d 626 (1942).*

See also: *State ex rel. Kansas City v. Public Service Commission, 524 S.W.2d 855 (Mo. 1975).*

See also: *Fleshner v. Kansas City, 348 Mo. 978, 156 S.W.2d 706 (1941).*

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*Case Note:*

*In its decision, the court acknowledged that the policy rule prohibiting the application of the doctrine of estoppel in cases where the city had no power to make the contract in question "doubtless impose[d] a severe hardship on [Lamar]." "However," said the court, "one may not deal with those representing municipal governments without taking notice of the limitations of their powers and authority."*

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# Use—Town finds private school's proposed use of lots as an outdoor classroom and administrative offices qualified as "Secondary School" use permitted in the zoning districts

## Abutting property owner argues neither proposed lot use qualifies as "Secondary School" use

Citation: *Fryeburg Trust v. Town of Fryeburg, 2016 ME 174, 2016 WL 7010513 (Me. 2016)*

MAINE (12/01/16)—This case addressed the issue of whether a private academic academy's proposed use of an agricultural lot and residential lot fell within a zoning ordinance's definition of "School, Public or Private Elementary or Secondary" such that the uses were permitted on those lots under the ordinance.

**The Background/Facts:** Fryeburg Academy (the "Academy") is a private secondary school located in the Town of Fryeburg ("Fryeburg"). In October 2014, the Academy applied to the Town's Planning Board for permits authorizing changes in use of two parcels of leased land. The Academy proposed to use an agricultural lot "to teach—primarily outdoors—environmental science, conservation studies, agricultural studies, physical education, and recreation, and also for related storage." The Academy also proposed to use a residential lot for "offices for its admissions and advancement departments and for related storage."

Pursuant to the Town's zoning ordinance (the "Ordinance"), the use of "School, Public or Private Elementary or Secondary" (hereinafter "Secondary School") was permitted, with prior authorization from the Planning Board, in the zoning districts of the agricultural lot and the residential lot. The Ordinance defined Secondary School as a "place where courses of study which are sufficient to qualify attendance as compliance with State compulsory education requirements for grades Kindergarten through 12 are taught." State of Maine education requirements include programs of instruction in: "career and education development, English language arts, health education and physical education, mathematics, science and technology, social studies, visual and performing arts and world languages."

The Planning Board determined that the Academy's proposed uses on each of the parcels qualified as a Secondary School uses under the Ordinance. The Planning Board approved the Academy's applications for both parcels.

Thereafter, Fryeburg Trust (the "Trust"), which owned property abutting both lots, appealed the Planning Board's decisions. The Trust contended that the Academy's proposed use of each of the parcels did not qualify as a Secondary School use permitted in the lot's zoning district under the Ordinance. The Trust contended that since "[n]o complete courses . . . much less all mandated courses" would be taught in the outdoor classroom, then the outdoor classroom did not qualify as Secondary School use. The Trust also contended that since the administrative offices would be for administration and not teaching, the administrative office use did not qualify as a Secondary School use.

The Town's Board of Appeals (the "BOA") denied the Trust's appeals.

The Trust then filed appeals in superior court.

The Superior Court affirmed the Planning Board's decision to grant the permit for the outdoor classroom. The court concluded that, pursuant to the Ordinance, the proposed use of the agricultural lot was an educational use because classes would be taught there. The court, however, vacated the Planning Board's decision to grant the administrative office use permit. The court concluded that the proposed administrative office use was not an educational use because classes would not be taught there.

The Trust appealed from the court's decision affirming the outdoor classroom use permit. The Academy and Town cross-appealed from the court's decision vacating the administrative office use permit.

**DECISION: Judgment of superior court affirmed in part, vacated in part, and remanded.**

The Supreme Judicial Court of Maine held that both proposed uses—the outdoor classroom and the administrative offices—were within the definition of Secondary School and therefore permitted uses under the Ordinance.

In reaching its conclusion, the court looked to "construe the terms of [the Ordinance] reasonably, considering its purposes and structure and to avoid absurd or illogical results." "Reading the plain language of the Ordinance together with the State educational requirements," the court concluded that the Academy's proposed outdoor classroom use to teach courses, including physical education and science, to students attending a secondary school fit

 

"squarely within the definition in question." Responding to the Trust's argument, the court noted that "[n]othing within the text of the Ordinance required that all of the courses required by the State or the entirety of those courses be taught on each piece of property or in each building where a secondary school operates." Such a reading "would create an absurd result," said the court.

As for the administrative offices use, the court found that it was "so integral to the functioning of the school that it [was] indistinguishable from the school," and therefore permissible as a Secondary School use under the Ordinance. The Planning Board had interpreted the Ordinance to mean that "a 'school' is more than just a collection of classrooms and then found that the Academy's proposed use fell within this more fulsome view of 'school.'" The Supreme Judicial Court of Maine agreed.

See also: *Dickau v. Vermont Mut. Ins. Co., 2014 ME 158, 107 A.3d 621 (Me. 2014).*

# Special Exception—Company applies for special exception but fails to submit site plan as required by ordinance

## Company contends witness testimony during hearings satisfied all required ordinance criteria

Citation: *EDF Renewable Energy v. Foster Township Zoning Hearing Board, 2016 WL 6873015 (Pa. Commw. Ct. 2016)*

PENNSYLVANIA (11/22/16)—This case addressed the issue of whether a renewable energy company satisfied objective requirements of a special exception in an ordinance such that the special exception should have been granted.

**The Background/Facts:** In July 2014, EDF Renewable Energy ("EDF") sought to construct approximately 25 wind turbines, as well as roads, collection cables, and a substation on properties located in Foster Township's C-1 (Conservation), A-1 (Agricultural), and I-1 (General Industrial) zoning districts. A wind turbine use was neither specifically permitted nor denied in those districts. A Township ordinance provided that whenever a use was neither specifically permitted nor denied in a district, the zoning hearing officer had to refer an application for such use to the Township's Zoning Hearing Board (the "ZHB") to hear and decide as a special exception. Pursuant to that provision, EDF's proposal was submitted as an application for a special exception to the ZHB.

Ultimately, the ZHB denied EDF's application. The ZHB denied the application, in relevant part, on its determination that EDF failed to comply with the objective criteria of the ordinance. Specifically, the ZHB found that EDF failed to file with its application for a special exception a site plan to the scale, and with detailed information, as required by the ordinance. The ZHB also

determined that the proposed wind turbine use was "not similar to or compatible with permitted uses in the district"—a criteria required for special exception approval.

EDF appealed the denial of its special exception application. The trial court denied EDF's appeal on the grounds that EDF failed to comply with the objective criteria of the ordinance (i.e., the site plan), and failed to carry its burden of persuasion (as required by the ordinance), to demonstrate that the proposed use of wind turbines was similar to or compatible with the comprehensive plan for the Township.

EDF again appealed. On appeal, EDF argued that "the ZHB capriciously disregarded evidence and thus erred in denying the special exception application." EDF argued that it presented sufficient evidence, in its application and through witness testimony at hearings on the application, to satisfy all applicable ordinance criteria for the grant of a special exception. More specifically, EDF contended that it presented expert testimony regarding many details of the proposal, including the effect of the wind farm on neighboring property values and its compatibility with adjoining development and the character of the zoning districts. EDF emphasized that it submitted a 36? x 24? map with its application and that the map was used by witnesses to identify specific locations and geographical issues. EDF maintained that its evidence was not rebutted, and, therefore, the ZHB abused its discretion in denying the requested special exception.

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

The Commonwealth Court of Pennsylvania held that EDF failed to satisfy the objective requirements for a special exception under the ordinance.

In so holding, the court first explained that a special exception in a zoning ordinance is "not an exception to a zoning restriction, but, rather, a use that is expressly permitted." The zoning ordinance itself enumerates the "rules that determine the grant or refusal of the exception," noted the court.

Here, the court noted that, per the Township's ordinance, EDF had the burden of proving that the proposed wind turbine use met the objective standards set forth in the zoning ordinance. The court found that EDF failed to meet that burden because it did not file a detailed site plan, as required by the ordinance, and failed to show that the proposed use was similar to and compatible with permitted uses in the district, as required by the ordinance. The court noted that EDF's failure to submit a site plan as required by the ordinance was, on its own, sufficient grounds to deny its special exception application.

Addressing, and rejecting, EDF's arguments that the evidence presented at the hearings provided all of the information required by the ordinance for a special exception, the court noted that EDF's regional development manager had testified that: "the number of wind turbines and the precise location of the turbines and other details could not be determined until the soil was tested"; there was uncertainty as to "whether the wind turbines' connection to the substation would be underground or above ground"; and there was uncertainty as to the extent that existing roads could be used versus the need for the construction of new roads. Moreover, the court found that neither a map submitted by EDF with its application nor the testimony of EDF's witnesses

 

satisfied the ordinance's requirement for: "a site plan that reflects the location of all structures, existing and proposed; all open space areas; means of traffic access and all streets; contours of the site for each five feet of change of elevation; and the location of any residential structure within 200 feet of any property boundary line of the subject site."

Accordingly, the court affirmed the denial of EDF's special exception application.

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*Case Note:*

*EDF had also argued that the Township's zoning officer's assurance that EDF's application was completed properly was evidence that the application complied with the ordinance, and therefore the application could not be denied by the ZHB for failure to comply with the ordinance (i.e., failure to submit a site plan). The appellate court observed that the ordinance "confers authority on the ZHB, not the zoning officer, to hear and decide requests for special exceptions." Further, the court noted that the zoning officer's statement on which EDF based this argument was made during the hearing, and EDF had failed to assert that it detrimentally relied on the zoning officer's acceptance of the application.*

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# Use—Applicant proposes use of a funeral home with accessory crematory use

## Despite applicant's claims, zoning board finds crematory (and not funeral home) is primary use, and thus prohibited in the zoning district

Citation: *River's Edge Funeral Chapel and Crematory, Inc. v. Zoning Hearing Board of Tullytown Borough, 2016 WL 6777976 (Pa. Commw. Ct. 2016)*

PENNSYVLANIA (11/16/16)—This case addressed the issue of whether a property's principal use, as proposed by the applicant, would in actuality be a funeral home (permitted in the zoning district) or a crematory (prohibited as a principal use in the zoning district).

**The Background/Facts:** River's Edge Funeral Chapel and Crematory, Inc. ("River's Edge") leased property located in a Light Industrial ("LI") Zoning District in Tullytown Borough (the "Borough'). The property contained an improved commercial building at which River's Edge sought to operate a funeral home and crematory. The LI Zoning District permitted a funeral home as a principal use in the district, but prohibited a crematory as a principal use; a crematory was permitted in the LI Zoning District as an accessory use.

In September 2013, seeking to operate a proposed "funeral home and crematory" at the property, River's Edge filed an application for a Use and Oc-

cupancy Certificate with the Borough. The Borough's zoning officer denied River's Edge's application. The zoning officer determined that although River's Edge had indicated that the proposed use was a funeral home with accessory crematory use, "[i]t appear[ed] that the crematory use [would] be the principal use at the property," which was prohibited in the LI Zoning District.

River's Edge appealed to the Borough's Zoning Hearing Board (the "Board"). The Board agreed with the zoning officer's conclusions and denied River's Edge's application. The Board explained that it found that the crematory use would, in fact, be the primary use—which was prohibited by the Borough's zoning ordinance in the LI Zoning District. The Board based those findings on the following determinations: the location and appearance of the building—a warehouse—was "not suitable for a funeral home use and clearly indicate[d] that the [River's Edge's] intention [was] to use the subject premises primarily for cremations"; and the property had been the subject of a prior appeal to the Board in which the applicant was seeking to use the Property solely as a crematory. Concluding that it was "clear that the crematory [was] intended to be the primary or principal use of the [p]roperty, which [was] not permitted in an LI-Light Industrial District," the Board concluded that it had to deny River's Edge's appeal of the denial of its application for a Use and Occupancy Certificate.

River's Edge again appealed. The trial court reversed the Board's decision and ordered

that a Use and Occupancy Certificate be issued as requested in River's Edge's application. The trial court found that the evidence the Board had relied upon when making its determination (i.e., the property's location, appearance, and the prior application to operate a crematory), "did not constitute substantial evidence that a reasonable mind would find adequate when viewed in light of the overall record." The trial court noted that River's Edge's plot plan indicated that the building would include a chapel, a greeting area, and public restrooms in addition to the crematory and other preparation rooms. The trial court also noted that only 12% of the building's total area would be allotted to the crematory operation and that River's Edge had indicated that it would offer various services at the property, including meeting with clients, making funeral arrangements, embalming, casketing, and dressing the deceased. Moreover, the trial court concluded that River's Edge would satisfy each element necessary to be a licensed funeral home in Pennsylvania.

The Borough appealed. On appeal, the Borough asserted that the record evidence showed that the property's principal use would be a crematory, not a funeral home, and therefore was not permitted in the LI Zoning District.

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

The Commonwealth Court of Pennsylvania concluded that River's Edge's proposed principal use of the property in the LI Zoning District would be a funeral home, which was permitted under the Borough's zoning ordinance, rather than a crematory, which was permitted as an accessory use but not as a principal use.

In so holding, the court looked to the definition of "funeral home." The term was not defined in the Borough's zoning ordinance, so the court looked

 

to its "plain meaning," resolving any doubt "in favor of the landowner and the least restrictive use of the land," as required by Pennsylvania law. The court found that the dictionary defined a "funeral home" as "an establishment with facilities for the preparation of the dead for burial or cremation, for the viewing of the body, and for funerals." Similarly, although it did not define a funeral home, Pennsylvania's Funeral Director Law (63 P.S. § 479.2(6)) defined a "funeral establishment" as "every place or premise approved by the State Board of Funeral Directors wherein a licensed funeral director conducts the professional practice of funeral directing including the preparation, care and funeral services for the human dead."

Based on those definitions of a funeral home and a funeral establishment, the court found it "apparent" that River's Edge's use of the property would constitute a funeral home. River's Edge's use of the property would, found the court: provide traditional funerals which would include a service, a viewing, and transporting of the body to a cemetery; and meet the elements necessary to constitute a licensed funeral home in Pennsylvania. Looking at the evidence, the court also concluded that the funeral home (and not the crematory) would be the principal use on the property based on the fact that the total area dedicated to the crematory was only 12% of the total building area. The remaining portion of the building space, found the court, would be dedicated to funeral home related services such as a room for viewing, a morgue, a room for embalming, a chapel, and a garage to accommodate the vehicles that would be transporting bodies.

Regarding the Borough's argument that the Board's determination was proper because the property's location and the building's appearance made it unsuitable for a funeral home, the appellate court disagreed. The court noted that the property's location, in the LI Zoning District, was where the Borough determined that a funeral home should be located (since it was permitted in such a zoning district). Similarly, the court found "no authority in the [o]rdinance or Pennsylvania law indicating that a building's appearance is a sufficient basis to deny a use-by-right or is even a valid consideration when determining whether a property's principal use constitutes a funeral home." Instead, the court again emphasized the minimal size of the crematory in the building as evidence that it would be the accessory, and not the principal use, as well as the fact that the River's Edge's proposal met the requirements to be a licensed funeral home in Pennsylvania.

See also: *H.E. Rohrer, Inc. v. Zoning Hearing Bd. of Jackson Tp., 808 A.2d 1014 (Pa. Commw. Ct. 2002).*

See also: *Galzerno v. Zoning Hearing Bd. of Tullytown Borough, 92 A.3d 891 (Pa. Commw. Ct. 2014).*

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*Case Note:*

*In its decision, the court addressed the Board's assertion that a 2011 application for a crematory use at the same property indicated that River's Edge's application for a funeral home was a "pretext to operate a crematory." The court rejected the Board's conclusion, noting that the 2011 applicant was: filed by a different applicant, for a different purpose, and was substantially different than River's Edge's application. More-*

*over, the court noted that unlike the 2011 application, here River's Edge indicated that it would offer services directly to the public and would offer a variety of funeral services at the property. The court concluded that the practical relevance of the 2011 application was "unclear and [was] not evidence a reasonable mind would find adequate to support the conclusion that the property's principal use would be a crematory."*

# Zoning News from Around the Nation

## GEORGIA

Atlanta City Council members are considering a proposed ordinance that would "require recording studios to be soundproofed when operating within 500 feet of residential areas."

Source: *UPROXX*; http://uproxx.com

## MARYLAND

The Anne Arundel County Council recently approved an amendment to Bill 73-16, which aims to provide more public notice for some proposed changes during the comprehensive zoning process. "The amendment requires property owners who request a zoning change through a council member (rather than through the county's Office of Planning and Zoning) to post a sign on their property giving notice of the change after it has been added to the comprehensive zoning bill." The Council also passed Bill 75-16, "which allows certain kinds of composting on land zoned rural agricultural." Meanwhile, the Council is still considering a bill that "would designate half of Anne Arundel County's land for conservation," but would allow such designated land to "still be eligible for low-density development allowed under the current zoning code."

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

## PENNSYLVANIA

Pittsburgh's City Council has unanimously approved legislation that would require medical marijuana distributors to operate only in commercial zones and would limit medical marijuana production facilities to areas zoned as industrial.

Source: *Tribune-Review*; http://triblive.com

 

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# Zoning Bulletin

## in this issue:



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# Preemption/Marijuana—Local county zoning officials refuse to issue zoning documentation for medical marijuana dispensary applicant

## Officials contend zoning actions would conflict with the federal Controlled Substances Act,

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## while dispensary applicant argued failure to take actions violated the Arizona Medical Marijuana Act

Citation: *White Mountain Health Center, Inc. v. Maricopa County, 2016 WL 7368623 (Ariz. Ct. App. Div. 1 2016)*

ARIZONA (12/20/16)—This case addressed the issue of whether the actions that the Arizona Medical Marijuana Act ("AMMA") required the State of Arizona (the "State") and municipalities to take with regard to processing process medical marijuana dispensaries ("MMDs")—specifically approving zoning for specific areas for MMDs, processing zoning documents, and taking action pursuant to zoning laws to ensure MMDs meet other zoning ordinances, and processing MMD applications to operate—created "significant and unsolvable obstacles" to the federal Controlled Substances Act ("CSA") (under which marijuana use is illegal) such that the AMMA was preempted by the CSA. The case also addressed the issue of whether the CSA preempted the AMMA under a theory of impossibility preemption in that it was impossible for the municipal employees to comply with both the CSA and AMMA when the AMMA required issuance of necessary zoning documents for MMD operation applications. The case also addressed the issue of whether a county zoning ordinance that limited MMDs to zones in which uses could only be "for industrial use not in conflict with any federal law," violated the AMMA by effectively prohibiting MMDs in the county.

**The Background/Facts:** In 2010, Arizona voters passed Proposition 203, now codified as the AMMA. Among other things, the AMMA decriminalizes and provides protections against discrimination under state law for the medical use and possession, cultivation, and sale of marijuana under the circumstances described in the AMMA. (See, e.g., A.R.S. §§ 36-2802, -2811, -2813, -2814.) Under the AMMA, the Arizona Department of Health Services ("ADHS") is authorized to promulgate regulations in order to implement and administer the AMMA. The AMMA also authorizes cities, towns, and counties to "enact reasonable zoning regulations that limit the use of land for [MMDs] to specified areas in the manner provided in [the AMMA]." (A.R.S. § 36-2806.01.)

Both the AMMA and ADHS regulations require an entity seeking to become a MMD to first register with ADHS by filing an application for a "registration certificate." (A.R.S. § 36-2804; A.A.C. R9-17-304.) The application must include, among other things, "a sworn statement certifying" that the MMD is in compliance with zoning restrictions "[i]f the city, town or county . . . has enacted zoning restrictions."

 

(A.R.S. § 36-2804(B)(1)(d).) ADHS regulations also require that an application must include "[d]ocumentation from the local jurisdiction where the [MMD]'s proposed physical address is located [stating] that: a. There are no local zoning restrictions for the [MMD's] location, or b. The [MMD's] location is in compliance with any local zoning restrictions." (A.A.C. R9-17-304(C)(6).)

In response to the AMMA, Maricopa County (the "County") amended its zoning ordinance (the "MCZO") to permit MMDs in Industrial 3 ("IND-3") zones in unincorporated Maricopa County. The MCZO also contained a provision that specified that, as to IND-3 zones, a "building or premise shall be used only for industrial use not in conflict with any federal law, state law or Maricopa County Ordinance" (the "MMD Amendment").

In May 2012, White Mountain Health Center, Inc. ("White Mountain") applied to the ADHS for a registration certificate for a MMD. ADHS rejected the application because White Mountain failed to submit the necessary zoning documentation from the County confirming that either no local zoning restrictions existed or that White Mountain was in compliance with applicable restrictions.

White Mountain then filed a lawsuit against the County and ADHS. It alleged that it could not obtain the necessary zoning documentation because the County refused to issue it. The County had refused to issue zoning verification for MMDs, citing the fact that doing so could "potentially subject the County and its employees to prosecution under federal law. . .." Under the federal CSA, marijuana use remains illegal. (21 U.S.C.A. §§ 801 to 971).

White Mountain asked the court to issue injunctive relief regarding its need for compliance with the zoning verification requirement and/or an order directing the County to issue the zoning documentation. The County, and the State, which had intervened in the case, argued that: (1) White Mountain's requested relief was preempted by the CSA under a theory of "impossibility preemption" because the County and its employees could not comply with both the AMMA and the CSA; and (2) the AMMA's authorization of MMDs was preempted by the CSA under a theory of "obstacle preemption."

The superior court held that neither obstacle preemption nor impossibility preemption applied here. The court ordered the County to issue the required zoning documentation to White Mountain.

White Mountain also argued that the County's MMD Amendment was a "poison pill provision" that violated the AMMA by effectively banning MMDs in the County. The County defended the MMD Amendment and argued that the AMMA did not preempt local regulation with respect to land use for MMDs.

 

The superior court agreed with White Mountain, finding the MMD Amendment violated the AMMA by essentially prohibiting MMDs in the County.

The State and County appealed.

**DECISION: Judgment of Superior Court affirmed in part.**

The Court of Appeals of Arizona, Division 1, first held that the AMMA was not conflict preempted by the CSA under a theory of "obstacle preemption" or "impossibility preemption." In so holding, the court explained that, under the Supremacy Clause of the United States Constitution, when a state law and a federal law are in conflict, the federal law prevails because "state action cannot circumscribe Congress' plenary commerce power." The court further explained that federal preemption can be either express or implied. Express preemption occurs when Congress explicitly defines the extent of preemption. Implied preemption occurs by: (1) federal occupation of the field ("field preemption"); or (2) a conflict between the state and federal law that either (a) creates an obstacle to federal law ("obstacle preemption"), or (b) makes it physically impossible to comply with both state and federal law ("impossibility preemption"). The latter two types of conflict preemption were argued here by the County and the State.

With regard to the State and County's obstacle preemption argument, the court held that AMMA's requirement that municipalities, such as the County, approve zoning for specific areas for MMDs and requiring the State to process applications to operate MMDs, did not amount to a "significant and unsolvable obstacle to enforcement" of the CSA, such that the AMMA was conflict preempted by the CSA. The court determined that "Arizona voters' approval of medical marijuana under a regulated state law system in no way conflicts as an obstacle with federal enforcement of the CSA." Nothing in the AMMA precludes the United States from enforcing the CSA, found the court. While the AMMA differed from the CSA with regard to the "scope of acceptable medical use of marijuana," the possession and use of marijuana not in compliance with AMMA remained illegal under Arizona law." Moreover, the court noted that the federal government is free to enforce the CSA in Arizona and cannot require the state to enforce the CSA.

With regard to the State and County's "impossibility preemption" argument, the court similarly held that the AMMA was not preempted by the CSA on the basis of impossibility. The court explained that, in issuing zoning documents pursuant to the AMMA, the County would "not be authorizing or sanctioning a violation of federal law," but rather would be recognizing that the County had a duty to issue such

 

documents by statute. The court said that "impliedly rejects an impossibility argument because the CSA does not expressly prohibit a county official from abiding by the AMMA in issuing zoning documents, and the state law requires such conduct."

The court also rejected the County's argument that County officials' processing of zoning permits for MMD applications amounted to "aiding and abetting" in violation of the CSA. The court noted that the CSA expressly provided that municipal officers who lawfully engage in the enforcement of any law or municipal ordinance relating to controlled substances are immune from civil and criminal liability. Here, found the court, County officials were "engaged in the enforcement" of state statutes by processing applications for the zoning permits and promulgating reasonable regulations to permit MMDs pursuant to state law, and thus were immune from prosecution under the CSA. In sum, the court concluded that the County failed to show how the relief ordered here (i.e., to issue the necessary zoning documentation) made it impossible to comply with the AMMA due to a risk of prosecution under federal law and specifically the CSA. The County's broad contention that any act which is in any way related to fulfilling duties mandated by the AMMA is somehow criminal under federal law, did not persuade the court that the AMMA was preempted under a theory of impossibility preemption.

Finally, the court also held that the County's MMA Amendment, which limited MMDs to zones in which uses could only be "for industrial use not in conflict with any federal law," was inconsistent with the provision of the AMMA allowing local jurisdictions to enact "reasonable zoning regulations that limit the use of land for [MMDs] to specified areas . . . ." Looking at the plain language of that provision of the AMMA (A.R.S. § 36-2806.01), the court found it did not preempt local zoning restrictions on MMDs but authorized "reasonable" zoning regulations limiting the use of land for MMDs to specified areas. As such, the court said that "a local jurisdiction cannot adopt a zoning regulation that is self-defeating by banning MMDs" because a ban on MMDs could not be a "reasonable zoning regulation[ ] . . . limit[ing MMDs] to specified areas . . . ." To interpret the statute otherwise, said the court, "would nullify the basis for the AMMA, to permit use of marijuana for medical purposes consistent with the AMMA's terms and provide for a regulatory system of dispensaries to operate in compliance with the terms of the AMMA." Thus the court found that § 36-2806.01 limited local jurisdictions' zoning powers to ensure those zoning decisions comply with the AMMA.

Because the MMD Amendment's provision barring any conduct in violation of federal law as applied to MMDs was in conflict with the

 

limitation on zoning authority under the AMMA, the court concluded that the superior court properly struck that portion of the MMD Amendment as it applied to MMDs.

See also: *Reed-Kaliher v. Hoggatt, 237 Ariz. 119, 347 P.3d 136 (2015).*

See also: *Ter Beek v. City of Wyoming, 495 Mich. 1, 846 N.W.2d 531 (2014).*

See also: *County of San Diego v. San Diego NORML, 165 Cal. App. 4th 798, 81 Cal. Rptr. 3d 461 (4th Dist. 2008).*

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***Case Note:***

*The Superior Court had issued a $5,000 sanction against the County, which the appellate court reversed. The appellate court found the sanction unwarranted upon finding that the County had not acted in bad faith.*

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# Church and Religious Uses—City finds homeless housing is a permitted "house of worship" use

## Adjacent property owner challenges that determination

Citation: *Sullivan v. Board of Zoning Appeals of City of Albany, 144 A.D.3d 1480, 2016 WL 6883676 (3d Dep't 2016)*

NEW YORK (11/23/16)—This case addressed the issue of whether the proposed use of a church parsonage to house 14 homeless individuals was consistent with the permitted "house of worship" use under the city's zoning code.

**The Background/Facts:** Bethany Reformed Church (the "Church") owned property in the City of Albany (the "City"). The Church's property was located in an "R-1B single-family medium-density residential" zoning district. In that zoning district, the principal permitted uses were single-family detached dwellings and houses of worship. Houses of worship were defined under the City's zoning code (the "Code") as: "[a] structure or part of a structure used for worship or religious ceremonies." The Code did not define the terms "worship" and "religious."

 

The Church sought to partner with—and provide space in its parsonage for—Family Promise of the Capital District, Inc., a not-for-profit corporation, to establish a "home base" for up to 14 homeless individuals. In December 2014, the Church asked the City's Board of Zoning Appeals (the "Board") to interpret the Code and determine whether the planned use of its property to house homeless individuals was a permitted use within the applicable zoning district. The Board determined that the Church's proposed use was "consistent with. . .[the] mission and actions of a house of worship, which logically includes a structure or part of a structure used for worship or religious ceremonies." The Board further concluded that "[n]o additional zoning exemption(s) or permission(s) [were] necessary" for the church and Family Promise to begin using the parsonage for the proposed use.

Joseph P. Sullivan ("Sullivan") owned property adjacent to the Church's property. In May 2015, Sullivan asked a court to annul the Board's determination. Finding, among other things, that the proposed use of the parsonage could not reasonably be interpreted as a "house of worship" as defined under the Code, the Supreme Court annulled the Board's determination.

Church appealed.

**The Court's Decision: Judgment of Supreme Court reversed.**

Agreeing with the Board's interpretation of the City's zoning Code, the Supreme Court, Appellate Division, Third Department, New York, held that the Church's proposed use of the parsonage as a "home base" for homeless individuals was consistent with the permitted "house of worship" use under the Code.

Since "worship" was not defined under the Code, the court looked to its plain and ordinary meaning found in dictionaries. The court found that worship was broadly defined as "[a]ny form of religious devotion, ritual, or service showing reverence"—especially with respect to "a divine being or supernatural power"—and includes "an act of expressing such reverence." The court acknowledged that the term "house of worship" "often is synonymous with a building or other structure where formal, organized religious services take place." However, the court also emphasized that New York courts "have been very flexible in their interpretation of religious uses under local zoning ordinances" and have long recognized that "[a] church is more than merely an edifice affording people the opportunity to worship God." To that end, the court noted that "[s]ervices to the homeless have been judicially recognized as religious conduct" and that "the concept of acts of charity as an essential part of religious worship is a central tenet of all major religions."

 

Looking at those legal principals, here, the court was satisfied that the plain or ordinary meaning of "house of worship" permitted and encompassed the Church's proposed use of housing homeless individuals.

See also: *Community Synagogue v. Bates, 1 N.Y.2d 445, 154 N.Y.S.2d 15, 136 N.E.2d 488 (1956).*

See also: *Western Presbyterian Church v. Board of Zoning Adjustment of District of Columbia, 862 F. Supp. 538 (D.D.C. 1994).*

# Proceedings—After objectors appeal zoning decision, city maintains appeal is untimely

## Objectors say city's failure to issue decision in writing means time for appeal never commenced

Citation: *First Avenue Partners v. City of Pittsburgh Planning Commission, 2016 WL 7176946 (Pa. Commw. Ct. 2016)*

PENNSYLVANIA (12/09/16)—This case addressed the issue of whether a planning commission's approval without a written decision was sufficient to commence the 30-day appeal period in which an aggrieved individual must take their appeal.

**The Background/Facts:** Forza Fort Pitt, Inc. ("Forza") owned property (the "Property") in the City of Pittsburgh (the "City"). In 2009, Forza applied for a Project Development Plan (the "2009 Application") with the City's Planning Commission (the "Planning Commission"). Forza's application sought approval to construct a seven-story, 107-room hotel on the Property. At a public hearing on March 8, 2011, the Planning Commission approved the 2009 Application subject to certain conditions. The Planning Commission did not issue a written decision of its approval of the 2009 Application. Subsequently, in 2013, after the City's Planning Department (the "Planning Department") requested certain design changes to Forza's proposed building, Forza submitted a new Project Development Plan (the "2013 Application"). The Planning Commission approved the 2013 Application without a written decision.

First Avenue Partners, James D. Bolander and Mona A. Bolander, Barbara C. Johnstone, William R. Hartz, Paul Richard Bernthal, Christopher Ragland and April M. Ragland, Mary Ellen Purtell, and

 

Robert Crecine (collectively, the "Objectors") appealed the Commission's decision on the 2013 Application. Finding that the Planning Commission erred by not following proper procedure in reviewing the 2013 Application, the trial court reversed and remanded to the Planning Commission, directing it to conduct an evidentiary hearing and make written findings of fact. Meanwhile, in May 2015, Forza withdrew its 2013 Application and instead requested a zoning voucher for its 2009 Application. On July 6, 2015, the City notified the Objectors that the Planning Department had reviewed and approved Forza's 2009 Application and had issued Forza a zoning voucher on June 3, 2015.

On July 20, 2015, the Objectors appealed to the trial court. The trial court found that the Objectors failed to appeal the Planning Commission's March 8, 2011 decision within 30 days and, therefore, quashed the appeal.

The City's Zoning Code provided that "[a]ny party aggrieved by a decision of the Planning Commission, may, within thirty (30) days, appeal the decision to the Court of Common Pleas of Allegheny County under the Local Agency Law, 2 Pa.C.S. Sections 751-754." Per Pennsylvania statute governing judicial procedure, the 30-day time period begins to run "after the entry of the order from which the appeal is taken." (42 Pa.C.S. § 5571(b).) An order is deemed entered on the date of mailing. (42 Pa.C.S. § 5572.7.)

The Objectors again appealed. The Objectors argued that the appeal period begins to run when a written adjudication (i.e., written, formal judgment on the matter) is mailed or is personally served on the parties. Notably, Local Agency Law requires "[a]ll adjudications of a local agency shall be in writing . . . ." (2 Pa.C.S. § 555.) Since no written adjudication was made by the City's Planning Commission or Planning Department, the Objectors argued that the appeal period never commenced and that their appeal was therefore timely filed.

Forza and the City, however, maintained that the 30-day appeal period began to run on March 8, 2011, the date the Planning Commission voted without written decision to approve the 2009 Application.

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

The Commonwealth Court of Pennsylvania held that an appeal period does not commence until a Planning Commission's final order is issued in writing. More specifically, here, the court held that the Objectors' appeal was not untimely since the Planning Commission's approval of the 2009 Application without a written decision was not sufficient to commence the 30-day appeal period in which the Objectors had to take their appeal.

In so holding, the court looked to prior case law on the issue of

 

when appeals periods begin to run. While the appellate court had, itself, previously held that oral approval of a zoning plan was sufficient to commence the 30-day appeal period, the court found that holding had been effectively overruled by the Supreme Court of Pennsylvania. The Supreme Court had held that "all zoning decisions are not final until a written decision is issued, and until a written decision is issued, there is no order to appeal."

See also: *Narberth Borough v. Lower Merion Tp., 590 Pa. 630, 915 A.2d 626 (2007).*

See also: *Pendle Hill v. Zoning Hearing Bd. of Nether Providence Tp., 134 A.3d 1187 (Pa. Commw. Ct. 2016).*

# Zoning News from Around the Nation

## CONNECTICUT

A superior court judge has dismissed a lawsuit brought by the Connecticut Automotive Retailers Association against Tesla Motors Inc. and the Planning and Zoning Board of Appeals of the Town of Greenwich, CT. The suite alleged that the Town had allowed Tesla to operate a showroom which allegedly violated zoning regulations. Tesla had argued that the zoning approval was for an "educational gallery to spread awareness about [electric vehicles] and its technologies."

Source: *The County Caller*; www.thecountrycaller.com

## NEW YORK

The New York City Council is considering "[a] package of 10 zoning-related bills." Among those bills are ones that would: impose a $25,000 fine on anyone "who makes a materially false statement or causes a materially false statement to be made in connection with a zoning application" (Int. 1392-2016); require the Board of Standards and Appeals "to submit a written explanation of any decisions that are made contrary to the local community board" (Int. 418-2014); require the Board of Standards and Appeals to "establish rules for the consideration of arguments and evidence submitted by parties, and to refer to such arguments and evidence in final determinations" (Int. 282-2014); and propose that the Board of Standards and Appeals "create an interactive online map of all variants and special permits approved by the agency since Jan. 1, 1996" (Int. 1394-2016).

Source: *New York Press*; www.nypress.com

 

# NEW YORK

City of Buffalo Mayor Byron Brown signed into law the city's "Green Code," which is "the first major overhaul of city zoning laws since 1953" and was drafted over the court of nearly seven years. Buffalo's new "Green Code" is being described as one that zones more on "form" than on "use." So, for example, "those who seek to build something new will have to more carefully align it with what already exists in a given neighborhood." The Green Code goes into effect in February.

Source: *WGRZ*; www.wgrz.com

# OHIO

The Strongsville City Council has "unanimously rejected an ordinance that would have required new commercial businesses and buildings to preserve at least 25 percent of their land as green space." Two weeks prior, the council also defeated a companion ordinance that would have restricted new retail stores and buildings larger than 75,000 square feet to lots measuring at least 10 acres, and segregated them to two zoning districts. Reportedly, the green-space legislation would have applied to businesses and buildings in the local-business, general-business, shopping-center, motorist-service, and restaurant-recreational-services districts.

Source: *Cleveland.com*; www.cleveland.com

 

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# PRACTICE CLIMATE ADAPTATION

# Using Smart Growth to Adapt to Climate Change

*By Megan M. Susman*

Communities around the country, from rural places to major cities, are using smart growth and green building strategies to create more economic opportunities, offer more housing and transportation choices, promote equitable development, and improve quality of life. These same strategies, with some tweaks, can make neighborhoods and cities more resilient to current and projected climate change impacts, including flooding, sea-level rise, extreme heat, drought, and wildfire.

The multiple benefits that smart growth and green building approaches bring can help build public support for actions that also help communities adapt to a changing climate. For example, making streets safer for all users and adding green elements that reduce stormwater runoff accomplish climate change-related goals such as reducing greenhouse gas emissions by making less-polluting transportation options more appealing, lowering ambient air temperatures, and reducing localized flooding. For residents, these actions also create a more pleasant, safer place to walk and bike, and for businesses, a more attractive street brings more customers.

Zoning and building codes and related policies provide a particularly useful vehicle for working climate change considerations into regular municipal processes. When the codes are updated, the local government can incorporate the most up-to-date climate observations and projections. Provisions in these regulations that support smart growth and green building can also provide a foundation for climate change adaptation.

The U.S. Environmental Protection Agency (EPA) recently released *Smart Growth Fixes for Climate Adaptation and Resilience*, a guidebook to help local government officials, staff, and boards identify smart growth strategies that can help them prepare for and adapt to climate change. This article introduces some of the land-use and building policy and code changes that are discussed in the publication, which communities across the country are using to meet their needs and circumstances. Policy options include overall strategies that can help communities adapt to multiple climate change impacts. Others are more specific to a single hazard. All can help communities achieve multiple environmental, economic, health, or social goals.

## OVERALL STRATEGIES

Determining appropriate locations for development and conservation helps communities prepare for climate-driven changes, and flexible zoning can help communities respond to these changing conditions. Furthermore, renewable energy can both improve resilience and reduce greenhouse gas emissions.

**Federal Resources**

A number of federal resources can help communities explore regional and local climate change projections:

- The 2014 national climate assessment report, *Climate Change Impacts in the United States*, includes observed changes and projected impacts on regions and sectors (nca2014.globalchange.gov).
- The U.S. Climate Resilience Toolkit links to climate change resources across the federal government (toolkit.climate.gov).
- The National Oceanic and Atmospheric Administration's Climate Explorer tool offers graphs, maps, and data of observed and projected temperature, precipitation, and related climate variables for every county in the contiguous United States (toolkit.climate.gov/tools/climate-explorer).
- EPA's Scenario-Based Projected Changes Map, an easy-to-use mapping tool, provides local projected changes in annual total precipitation, precipitation intensity, annual average temperature, 100-year storm events, and sea-level rise (tinyurl.com/hsc72ba).

### Designate Locations for Protection and for Growth

Including regional climate change projections—which local governments can get from a metropolitan planning organization or from federal tools—in planning documents and land-use maps will help communities understand where housing, transportation, businesses, and services could be vulnerable to flooding, sea-level rise, drought, or wildfire. The local government can use that information to identify land that is currently vulnerable or projected to become more vulnerable to these impacts. That land could be designated for protection or less intensive development. Areas that are less vulnerable—and well-connected to existing development—could be designated for growth and economic development.

For example, the Southeast Florida Climate Compact, a collaboration among Broward, Miami-Dade, Monroe, and Palm Beach counties, developed a *Regional Climate Action Plan* that suggested municipal and county comprehensive plans designate Adaptation Action Areas (the areas most vulnerable to sea-level rise and other impacts and prioritized for investment to reduce their risk), Restoration Areas (undeveloped areas that are vulnerable to climate change impacts and that should be prioritized for acquisition to keep them undeveloped), and Growth Areas (areas that are at a higher elevation and already have infrastructure, where growth should be directed) (SFRCCC 2012).

Local governments could also choose to locate new municipal buildings in less vulnerable areas that are close to the people they serve and easy for people to reach on foot, by bike, by public transit, or by car. Locating buildings with emergency functions—such as hospitals, police and fire stations, and emergency shelters—in places that are less likely to be hit by a flood or wildfire and that people can easily get to even without a car, improves access to critical services. Putting municipal buildings in places where they are less likely to be damaged by natural hazards also protects the public investment.

### Flexible Zoning

Flexible zoning codes, such as dynamic zoning or floating zones, can help communities adapt more nimbly to changing conditions. Dynamic zoning includes triggers in the code that change the code requirements automati-

cally when conditions hit a certain threshold (Elliot 2009). Dynamic zoning provisions let a community approve a code that fits its current conditions but that will change based on some empirical future condition. One law expert notes that, "gradual and adaptive regulations . . . can minimize harms and takings compensation requirements" while giving property owners some certainty about how they can expect to use their property once certain thresholds are passed (Byrne 2012).

A floating zone is a zoning classification that is not tied to a specific area (Blanchard and Nolan 2013). Developers can request to have the zone applied to their parcels, perhaps in exchange for financial or procedural incentives. Although it is not a floating zone, Keene, New Hampshire, has a Sustainable Design and Energy Efficient Development overlay zone (§§102-1430–1438) that promotes compact development and energy efficiency and could be a model for a floating zone in other communities.

### Local Renewable Energy

Reducing greenhouse gas emissions is an important climate adaptation strategy because it ultimately reduces our impact on the climate and thus the amount of change to which we will have to adapt. Local, clean, renewable energy resources have well-known greenhouse gas reduction benefits, but they can also be valuable in building resilience to disruptions to the power grid caused by natural hazards, or energy prices that might become volatile. Encouraging on-site renewable energy generation and storage gives people cleaner, more reliable electricity and can provide backup power if the grid goes down.

The Department of Energy's SunShot Solar Outreach Partnership worked with the American Planning Association to develop guidance on incorporating solar-friendly provisions into planning documents and regulations (Morley 2014). Amending codes or adopting ordinances that allow solar, solar thermal, wind, and other renewables on individual properties gives property owners clear direction on what is allowed, giving them peace of mind that their investment is legal and alleviating protests from neighbors. For example, Aurora, Illinois's Alternative Energy Systems ordinance defines and clearly illustrates solar, wind, and geothermal system generation limits, setbacks, permitted system heights, and noise limits (§4.4-9).

Solar gardens, small community installations that serve local customers who buy or lease shares, productively use lots that might otherwise be difficult to develop because of their shape, environmental contamination, or other factors. By one estimate, about half of households and businesses cannot install rooftop solar systems because they do not own the structure or do not have enough roof space to meet their power needs (Feldman et al. 2015). Shared solar installations give these people and businesses the chance to buy clean power that can keep running if the grid is disrupted. Pairing a solar installation with energy storage improves resilience even more. Local governments can encourage solar gardens by defining them as a specific use in the zoning code (Morley 2014).

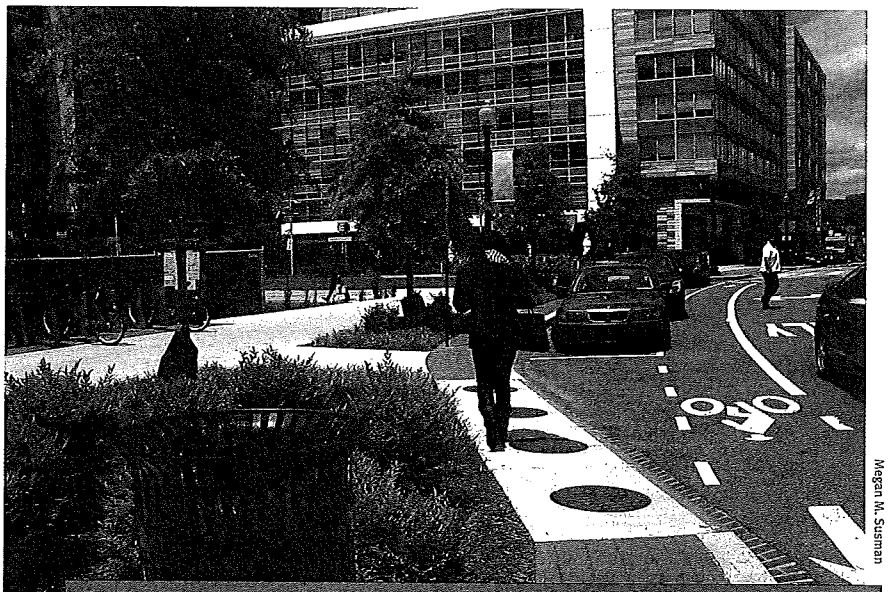
Fort Collins, Colorado, worked with Clean Energy Collective to build the Riverside Community Solar Array, a solar garden on the city-owned site of a demolished former pickle plant. The site lies at the edge of a compact residential neighborhood, but a railroad running through it as well as contamination from its industrial past made it impractical to develop. Using it for the solar garden and incorporating public art let the city turn it into a gateway welcoming people to Fort Collins. Before ground was even broken on the array, it was sold out, and its capacity was doubled to meet demand (Hois 2015).

### FLOODING AND EXTREME PRECIPITATION

Green infrastructure techniques can reduce localized flooding while also beautifying streets and helping developers meet stormwater retention requirements. In places that require elevation in floodplains, design guidelines can help maintain community character and ensure access to elevated buildings.

### Green and Complete Streets

Green and complete streets design standards make streets safe and comfortable for pedestrians, drivers, bicyclists, and transit users. Green and complete streets incorporate green infrastructure such as street trees, permeable pavement, curb inlets, and planter boxes to capture, slow, filter, and absorb stormwater runoff. These green features beautify the street and cool the air. Green and complete streets are designed to make walking and biking easier and more appealing, which reduces pollution from vehicles, helps people incorporate physical activity into their daily routines, and gives more transportation options to people who cannot drive or choose not to. Hundreds of communities across the country have adopted complete streets policies, and clear guidance on how to incorporate green infrastructure elements can help ensure that complete streets also reduce stormwater runoff. Boston's *Complete Streets Design Guidelines*, for example, have explicit guidance on



Megan M. Susman

Green and complete streets with bike infrastructure, trees, and planted areas are safer and more pleasant for all users.

how to incorporate elements such as street trees, stormwater planters, and rain gardens (Boston 2013).

### Retaining Stormwater On-Site

Local governments can require new development to retain all stormwater on-site through a site plan requirement. Developments could meet the requirement through green infrastructure elements and reducing the overall percentage of impervious surface. A stormwater runoff credit-trading program would allow new development projects to purchase credits for off-site mitigation.

In Washington, D.C., property owners who install green infrastructure can sell Stormwater Retention Credits to large development sites, which can use the credits to meet up to half of their regulatory stormwater reduction requirements. The city also buys some credits, as paying private property owners to install green infrastructure is more cost-effective than if the city government built the green infrastructure itself (Washington, D.C. 2016).

### Design Guidelines for Elevating Buildings

A well-established strategy for buildings in floodplains is to elevate the structure. In highly developed places, removing all development is not an option, and elevation might be the only way to protect people and property from floods. However, elevation is expensive, and it can create a false sense of security. People with limited mobility might have trouble getting into elevated buildings. Design guidelines or form-based standards that promote accessibility and a lively street can help mitigate some of the problems.

After Superstorm Sandy, New York City updated its zoning code to make new construction and retrofitted buildings more resilient to floods. The city planning department worked with the architecture and design community to develop principles for designing elevated, flood-resilient buildings (NYC Planning 2013). In 2013, the New York City Council adopted a flood resilience amendment to the zoning code that incorporated these design principles (New York 2013).

The principles are:

- Visual connectivity: Maintaining architectural elements such as doors, porches, stoops, and windows along the street
- Facade articulation: Ensuring that elevated buildings have interesting elements along the street instead of a blank wall
- Inviting access: Making sure that people with limited mobility can easily get in and out of the building
- Neighborhood character: Integrating elements of the existing neighborhood design when rebuilding or building new construction (NYC Planning 2013)

## SEA-LEVEL RISE AND STORM SURGE

Taking sea-level rise projections into account can help planners determine where development and infrastructure might be at risk now and in the future. Knowing where the shoreline is likely to change can help local governments tailor development standards. Communities with working waterfronts can use zoning and other strategies to protect these economic and cultural assets.

### Updating Flood Zone Hazard Maps

Local governments can add projected sea-level rise to flood zone hazard maps, currently based exclusively on historical events, to better plan for future conditions. This action would not affect flood insurance requirements, which would continue to use Federal Emergency Management Agency-created flood zone hazard maps. The extended coastal flood hazard zone would delineate potential inundation areas, critical emergency facilities, evacuation routes, road elevation projects, and culvert replacements. It's recommended to use minimum 50-year planning horizon that assumes a plausible range of sea-level rise projections and takes into account land subsidence and uplift a and local conditions.

The Rockingham Planning Commission is working with several communities on the New Hampshire coast to help them assess and prepare for the impacts of sea-level rise. For the town of Seabrook, the commission's vulnerability assessment included a recommendation to create a flood hazard overlay district that includes the areas projected to be at higher risk in the future in addition to the areas mapped by FEMA's Flood Insurance Rate Maps. This district would include performance-based standards to protect against flooding. The assessment also recommends using this overlay map to educate property owners about risks from sea-level rise and storm surge (Rockingham Planning Commission 2015).

### Context-Sensitive Designations

Context-sensitive shoreline classifications can set appropriate development standards for different settings. King County, Washington, updated its Shoreline Master Program land-use policies to include eight new classifications that fit the varied shoreline. Regulations for the classifications range from very low-impact development for sensitive lands to flood prevention measures in areas where higher levels of development are appropriate. These classifications are incorporated into the county's comprehensive plan (King County 2016). These context-sensitive levels of development protect the most sensitive areas while still allowing development where it makes sense.

### Working Waterfronts

Working waterfronts are often vital parts of a coastal community's identity and economy, and sea-level rise can threaten their viability. Recognizing and supporting these working waterfronts protects a sense of place and community history, and clusters similar industries together, which can spur innovation and collaboration. However, communities should be careful of concentrating noisy, polluting industries in low-income neighborhoods. Also, consider resilience provisions that protect active working waterfronts from pollution releases in a storm surge or temporary inundation. Measures might include elevated material storage or redundant flood protection measures to avoid exposing nearby populations or ecosystems to pollution releases.

Portland, Maine, has a historic working waterfront but found it challenged by aging infrastructure and the threat of sea-level rise. The city needed to find funding to keep infrastructure in good repair and prepare it for the rising sea. An overlay zone, adopted in 2010, allows compatible non-marine uses to locate on the working waterfront. The city also encourages incremental improvements where possible to prepare for sea-level rise (National Working Waterfront Network 2015).

## EXTREME HEAT

Communities can help protect their residents from extreme heat by identifying and improving the hottest parts of neighborhoods, helping particularly vulnerable people stay cool in a heat wave, and encouraging new development to use materials that cool hard surfaces.

### Mapping and Remedying Hot Spots

Extreme heat is exacerbated in built-up areas by the heat island effect. Buildings, roofs, and pavements absorb the sun's heat and create

hotter ambient air temperatures than surrounding areas. "Hot spots" are areas where temperatures are particularly high because of large expanses of dark, paved surfaces or a lack of vegetation. Once a local government has identified hot spots, it can prioritize pilot projects in these places to reduce ambient temperatures by adding trees and other vegetation and reflective, light-colored, or permeable pavement, which can also help reduce stormwater runoff. The projects can help the community figure out which materials and techniques work best for sites such as parking lots, alleys, and streets part of its climate adaptation actions, Chicago mapped its hot spots, including overlaying a map of heat-related 311 and 911 calls to "assess the correlation between urban heat islands and heat stress-related issues." The city directs cooling and energy efficiency efforts such as cool and green roofs to those places (Chicago 2008).

### Helping Vulnerable People and Neighborhoods

Extreme heat puts people at greater risk for heat exhaustion, heat stroke, and heat-related death, and it can exacerbate chronic illnesses such as respiratory and cardiovascular diseases. Pregnant women; children; and low-income, elderly, homeless, or chronically ill people are the most susceptible to these health risks (Sarofim et al. 2016). Many of the most susceptible are also the least able to adapt on their own, because they lack the money to better weatherize or even cool their homes, they have mobility issues that make it difficult to go somewhere safe during a heat emergency, or they aren't aware of how deadly an extended heat wave can be. Working with trusted messengers in communities with particularly vulnerable populations can help local government better understand what people need and work with them to develop strategies for heat waves and other emergencies.

Mapping hot spots in vulnerable neighborhoods can help a community prioritize locations for cooling centers where people can go to escape the heat. Cooling centers can be civic buildings such as libraries, community centers, or public pools; some private businesses might agree to let people spend the hottest hours of the day in their buildings. Cooling centers should be easy for even people with limited mobility to reach—for example, in or close to apartment complexes with many elderly residents or next to public transit stops. The local government should clearly mark cooling centers and do ongoing outreach to make sure vulnerable residents know where they are and how to reach them.

Cooling centers might also be emergency shelters in severe storms or other natural disasters, or their convenient location might make them a good rendezvous point in case of a city- or neighborhood-wide evacuation. Having a single location in the neighborhood would be easier for residents to remember, so local governments might want to consider strengthening cooling centers to withstand high winds, seismic damage, and flooding, as well as locating them outside of areas that are at high risk of flooding or wildfires. Cooling centers should have backup power or use passive survivability measures that will keep the building safe if the power goes out.

### Cooler Hardscapes

Hard surfaces don't have to generate a heat island. The community could amend its site plan requirements and design guidelines to better adapt hardscape areas to extreme heat. Requirements could include a certain amount of light-colored or permeable paving in hardscape areas or planting trees to shade sidewalks, streets, and parking lots and increase overall tree canopy. These elements would also capture and filter stormwater and beautify the public realm.

Glenview, Illinois, has design guidelines for trees and other vegetation in parking lots to clearly show what is acceptable. It includes guidance on tree placement, species, and maintenance (Glenview n.d.).

## DROUGHT

Development that is planned with an understanding of current and future water supplies, along with water efficiency and reuse strategies, can help communities continue to provide adequate water for new growth.

### Aligning Land-Use Planning and Water Management

Compact development uses less water per household and reduces the burden on existing water supply infrastructure, making water delivery more efficient. Shorter pipes mean less opportunity for leaks, and water pumped shorter distances does not have to be pumped as forcefully, which also reduces leakage. In addition, smaller lots use less water outdoors because they have less lawn to irrigate (U.S. EPA 2006). Integrating water resource management with land-use planning helps ensure adequate water for the growth the community has planned and that the growth happens in places that make the best use of the community's water infrastructure.

The Albuquerque Bernalillo County Water Utility Authority works with the city of Albuquerque, New Mexico, and surrounding Bernalillo County to help align water resources with growth plans. The water authority's Water Resources Management Strategy includes a policy to link land-use planning with water management. Specific actions under that policy include working with the city and county to update the comprehensive plan and other plans to ensure that development aligns with infrastructure, basing its capital planning on the city and county's growth plans, and supporting infill and compact development (ABCWUA 2016).

### Building Energy and Water Benchmarking

Benchmarking programs provide solid data on energy and water use that help municipalities set a baseline and determine progress toward reducing energy and water use. Communities can pass an ordinance or encourage building owners to use a benchmarking program by emphasizing the cost savings of using energy and water more efficiently and by offering incentives.

Denver's voluntary Watts to Water program encourages commercial buildings to use Portfolio Manager, an Energy Star online reporting system, to measure their energy and water use. The building owners get free technical support and educational programs, public recognition, and access to rebates and other programs to help improve building operations (Watts to Water 2016). After roughly four years, the program had signed up more than 140 participants representing 30 million square feet of commercial real estate and was saving more than one million gallons of water annually (Young and Mackres 2013).

### Rainwater Harvesting

To avoid using potable water for irrigation, some communities mandate rainwater harvesting for all new commercial construction. Keep in mind, however, that, some jurisdictions prohibit harvesting to keep local watersheds healthy or due to water rights conflicts.

Tucson, Arizona's Commercial Rainwater Harvesting Ordinance, a model other jurisdic-

tions have used, requires a new commercial development built starting in 2010 to meet at least half its landscape watering needs with captured rainwater. Developers must submit site plans that include a rainwater harvesting plan and a landscape water budget (Tucson 2008). The ordinance is part of a suite of initiatives aimed at conserving water, including educational programs, demonstration projects, and rebates for water-efficient appliances and practices, that have helped reduce Tucson's water consumption to its 1989 level even as its population grew by about 60 percent (Tucson Water 2015).

## WILDFIRE

In wildfire-prone areas, compact, well-connected development can be safer for residents and firefighters. Clustering development also makes it easier to maintain open space as a control line to protect developed areas from fire.

### Compact Development

As the devastating November 2016 fire in eastern Tennessee showed, drought greatly raises the wildfire risk by making vegetation drier and giving the fire more fuel. Communities generally develop fire hazard maps based on factors such as fuel loads and where fires have happened in the past. One study, however, found that homes that were in a more compact development pattern and located in already developed areas were less likely to be destroyed by a wildfire, and suggested that "empirically based maps developed using housing density and location better identify hazardous locations than fuel-based maps" (Syphard et al. 2012).

Promoting or requiring compact development in comprehensive plans, area plans, zoning codes, and subdivision regulations can keep more homes away from the wildland-urban interface, where they are more at risk. It also helps meet other community goals, including making it easier for people to get around without a car if they choose, mixing uses to strengthen the town center, and preserving land for agriculture, recreation, or ecological functions. (One cautionary note is that buildings that are closer together make it easier for a fire to spread, so fire-resistant materials and techniques are important in compact neighborhoods.)

Douglas County, Colorado, for example, promotes compact development in designated urban areas and encourages lower-intensity land uses in areas more susceptible to wildfires. Its comprehensive plan recommends siting facilities that serve many people, such as places of worship, schools, employment centers, and residential development, away from areas at high risk of wildfire (Douglas County 2014).

### Clustered, Well-Connected Development

Local governments often use zoning codes or subdivision regulations to require new development to be clustered, have good connections to existing development, have multiple entry/exit points, and be well-connected internally. Clustering allows homes to share defensible space such as a greenbelt around the development that can act as a control line to stop fire from spreading (Florida Department of Agriculture and Consumer Services 2010).

Internal and external connections make it easier for residents and visitors to walk and bike around the neighborhood and to get to destinations outside the immediate area. If a wildfire hits, these connections make it easier for residents to evacuate and give firefighters multiple routes into, out of, and around the development, which helps keep them safer by giving them more escape routes.

### Open Space as a Control Line

Local governments can also acquire open space between wildlands and developed areas to preserve as a control line. The state of Florida suggests a Community Protection Zone at least 100 to 300 feet wide that could be used for amenities such as hiking trails or community gardens (Florida Department of Agriculture and Consumer Services 2010). Making the green space an amenity for residents helps ensure that it will be properly maintained. If the space includes green infrastructure techniques, it could also help manage stormwater runoff and protect water quality.

## CONCLUSION

Keeping people safe and securing the community's future prosperity are goals everyone can agree on. The climate is changing and will continue to change. The development planned and built today will be on the ground for decades. Incorporating climate change projections into planning activities now can help make sure that the buildings approved today will be safe and pleasant for residents in a changed future climate. Using smart growth and green building strategies that use limited resources wisely, support economic opportunities, and protect our health, water, air, and land can help make the case even stronger by improving neighborhoods now and strengthening them for the future.

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