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Zoning Bulletin

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Vested Rights—New storm water regulations apply to projects approved prior to effective date of regulations

Several counties argue that required retroactive application to completed development applications violates the vested rights doctrine

Contributors

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Citation: *Snohomish County v. Pollution Control Hearings Board, 2016 WL 7495874 (Wash. 2016)*

WASHINGTON (12/29/16)—This case addressed the issue of whether Washington's vested rights doctrine—which entitles developers to have a land development proposal processed under the regulations in effect at the time a complete building application is filed, regardless of subsequent changes in zoning or other land use regulations—excuses compliance with the state-mandated requirements of a municipal storm water permit. In addressing that issue, the case addressed the issue of "[w]hat constitutes a 'land use control ordinance,' " and more specifically, whether a storm water regulation is a "land use control ordinance" subject to the vested rights doctrine.

The Background/Facts: Pursuant to the the Federal Water Pollution Control Act (also known as the Clean Water Act) ("CWA"), 25 U.S.C.A. §§ 1251-1388, and the National Pollutant Discharge Elimination System ("NPDES") permitting program established by the CWA, the Washington State Department of Ecology (the "Department") issued the third iteration of a municipal storm water permit (the "2013 Phase I Permit"). That latest iteration of the storm water permit required the owners or operators of large and medium municipal separate storm sewer systems to adopt and make effective a local storm water management program by June 30, 2015. The program could include local ordinances and "shall apply to all [development] applications submitted after July 1, 2015 and shall apply to [development] projects approved prior [to] July 1, 2015, which have not started construction by June 30, 2020."

Various permittees—including several counties—(collectively, the "Counties") appealed that portion of the permit to Washington's Pollution Control Hearing Board (the "Board"). They argued that the 2013 Phase I Permit violated the vested rights doctrine because it compelled them to retroactively apply new storm water regulations to completed development applications.

Originating at common law but now statutory, Washington's vested rights doctrine "entitles developers to have a land development proposal processed under the regulations in effect at the time a complete building permit application is filed, regardless of subsequent changes in zoning or other land use regulations." (See, e.g., RCW 19.27.095 (building permits) and RCW 58.17.033(1) (land division).)

The Department maintained that the vesting statutes were intended to limit the exercise of municipal discretion, and thus did not apply to municipal storm water permits because they were required under state action, not municipal action.

The Board agreed that the vested rights doctrine does not apply to storm water regulations permittees must implement as part of the

NPDES permitting program. More specifically, the Board concluded that storm water regulations required under the 2013 Phase I Permit are not "land use control ordinances" governed by Washington's vesting statutes.

The Counties appealed.

The Court of Appeals reversed. It found that the vested rights doctrine excuses compliance with the storm water regulations because those regulations are "land use control ordinances."

The Department (as well as several environmental groups, which had intervened) appealed.

DECISION: Judgment of Court of Appeals reversed.

The Supreme Court of Washington held that the storm water regulations that permittees were required to implement and apply to completed development applications as part of the NPDES permitting program (pursuant to the 2013 Phase I Permit) were not "land use control ordinances" subject to Washington's vesting statutes.

In so holding, the court explained that the vesting statutes apply only to "land use control ordinances." (See RCW 19.27.095(1); RCW 58.17.033(1)). The court concluded that the storm water regulations that municipal storm water permittees were required to implement and apply to completed development applications as part of the NPDES permitting program were not "land use control ordinances" subject to the vesting statutes. Looking at "the legislative history and the purpose of the vesting statutes, as well as [court] precedent," the court found that the vested rights doctrine "grew out of a concern that municipalities were abusing their discretion with respect to land use and zoning rules." Thus, the vesting statutes were intended to restrict municipal discretion with respect to local land use ordinances. Here, however, the storm water regulations were mandatory state regulations, rather than discretionary local regulations. In other words, the court found that the vested rights doctrine places limits on municipal discretion, and found that with mandates of federal and state environmental laws there was no "local" in the sense that municipalities had discretion to decide whether applicants must comply. (The only local discretion with regard to such environmental laws, found the court, was to include those mandates in a local ordinance.)

See also: *State ex rel. Ogden v. City of Bellevue, 45 Wash. 2d 492, 275 P.2d 899 (1954).*

See also: *West Main Associates v. City of Bellevue, 106 Wash. 2d 47, 720 P.2d 782 (1986).*

Case Note:

The holding in this case disapproved of Adams v. Thurston County, 70 Wash.

App. 471, 855 P.2d 284 (Div. 2 1993) (disapproved of by, Snohomish County v. Pollution Control Hearings Board, 2016 WL 7495874 (Wash. 2016)) and Victoria Tower Partnership v. City of Seattle, 49 Wash. App. 755, 745 P.2d 1328 (Div. 1 1987) (disapproved of by, Snohomish County v. Pollution Control Hearings Board, 2016 WL 7495874 (Wash. 2016)).

Case Note:

In discussing related case law as supporting the court's statutory interpretation here, the court noted that where a county develops the storm water requirements on its own rather than as a requirement imposed by the State through a municipal storm water permit—such a scenario is distinguishable from the present case. (See Westside Business Park, LLC v. Pierce County, 100 Wash. App. 599, 5 P.3d 713 (Div. 2 2000) (finding that storm water drainage ordinances developed by the county on its own were "land use control ordinances")).

Case Note:

The Counties had also presented a "finality" argument, which the court of appeals rejected. Under that argument, the Counties contended that building and development permits were "irrefutably valid" if not challenged under the Land Use Petition Act within 21 days of being issued." The court said the argument was "misplaced" because the deadline was for a judicial appeal of a land use decision and no party was challenging any land use decision here.

Standing—Neighboring municipality challenges zoning reclassification in adjacent municipality

Parties dispute whether neighboring municipality has "standing" to bring such a legal challenge

Citation: *Village of Willow Springs v. Village of Lemont, 2016 IL App (1st) 152670, 2016 WL 7380514 (Ill. App. Ct. 1st Dist. 2016)*

ILLINOIS (12/29/16)—This case addressed the issue of whether a neighboring municipality had standing to contest the zoning reclassification of property in another municipality.

The Background/Facts: Property on Grant Road (the "Property") in the Village of Lemont, Illinois ("Lemont") had been zoned by Cook County for industrial use. The Property was later annexed by Lemont and rezoned by default by Lemont to residential use. Eventually, the Property owners and prospective buyers of the Property (collectively, the "applicants") sought to develop the Property and applied to Lemont for rezoning of the Property from R-1 Single Family Residential to M-3 Heavy Manufacturing District. The applicants also submitted a development application for the Property.

The Village of Willow Springs ("Willow Springs") was adjacent to Lemont. Notably, Willow Springs did not own property adjacent to the Property. Willow Springs sought to enjoin Lemont from, among other things, approving the zoning reclassification and the development application. In its legal action against Lemont, Willow Springs argued, among other things, that Lemont's approval of the application for rezoning of the Property would be "arbitrary, unreasonable, and capricious," and would "bear no substantial relation to public health, safety or welfare[,] and would result in special injury and damage to [Willow Spring] in its corporate capacity." More specifically, Willow Spring alleged that unless restrained or enjoined, Lemont and the applicants would proceed with the application and a proposed "heavy industrial development," which would be "injurious to Willow Springs in that, among other things, it negatively affects the quality of life by the Village residents, property values within its borders, and the Village's growth and development." Willow Springs also alleged that approval of the development application would "result in irreparable harm to Willow Springs" because "the proposed development is inconsistent with the character of the adjoining area [,] . . . property values in [Willow Springs] will diminish[,] municipal property tax revenue will be lost[,] . . . roads will be more congested resulting in safety hazards[, and] the development will result in the degradation of air quality."

Lemont asked the court to dismiss Willow Springs' action. Among other arguments, Lemont maintained that Willow Springs lacked standing (i.e., the legal right to bring the action) because Willow Springs had not and could not allege that it owned or controlled any property contiguous to or even near the Property, and was therefore required to "allege and eventually prove that the rezoning would have a substantial, direct and adverse injury [on its] 'corporate capacity,' " which it had not done.

Willow Springs maintained that approval of the zoning reclassification and development application would "cause it to suffer the sort of injury recognized by Illinois courts as conferring standing on a municipality to challenge the zoning ordinances of other municipalities: 'a direct, substantial, and adverse effect upon the . . . performance of [its] corporate obligations.' "

While the lawsuit was pending, Lemont approved the zoning reclassification for the Property (but made no other determination as to the development application for the Property). Lemont continued to maintain that Willow Springs' action should be dismissed because Willow Springs lacked standing.

The circuit court agreed with Lemont. It held that Willow Springs lacked standing to challenge the rezoning of the Property. It also held that Willow Springs lacked standing to contest the development application at this time.

Willow Springs appealed.

DECISION: Judgment of circuit court affirmed.

The Appellate Court of Illinois, First District, First Division, agreed with Lemont and the circuit court that Willow Springs lacked standing to challenge the zoning reclassification of the Property. The court further concluded that dismissal of Willow Springs' claim in its entirety was proper because, since there had been no approval yet of the proposed development for the Property, there was no government action that could properly be challenged other than the zoning reclassification.

In so holding, the court explained that a municipality's standing to bring a constitutional challenge on another municipality's zoning ordinance, as Willow Springs had here, required "a clear demonstration that [the challenging municipality] would be substantially, directly and adversely affected in its corporate capacity." In other words, Willow Springs had to show an injury that was "(a) distinct and palpable, (b) fairly traceable to the [Lemont's] actions, and (c) substantially likely to be prevented or redressed by the grant of the requested relief."

The court found that Lemont had submitted evidence that Willow Springs would not be adversely affected by the zoning reclassification since industrial use of the Property was "compatible with surrounding land uses." Lemont had offered evidence that the Property: had previously been zoned for industrial use; was to be "industrial" under the Lemont 2030 Comprehensive Plan; was currently being used for a "[j]unk yard, home/office, truck parking, billboards"; and the surrounding property consisted of either unincorporated county land, forest preserve/public land, or land zoned for industrial or intensive industrial use. In other words, the court found that Lemont presented evidence that the zoning reclassification did not represent any change to the *status quo* but rather was in line with both the the current use of the property and the zoning prior to annexation. The court found that this indicated that there would be no "harm" to Willow Springs with the zoning reclassification for the Property.

Since Lemont had presented such evidence, the court found the burden shifted to Willow Springs to demonstrate some adverse affect

from the zoning reclassification. The court found that Willow Springs failed to meet its burden. Willow Springs had alleged harm from the zoning reclassification that involved "decreased tax revenue due to lower property values, increased municipal expenditures for road repairs, and lower air quality." The court found such "conclusory allegation[s]" were insufficient, and that Willow Springs had failed to submit specific evidence demonstrating that "it would suffer the substantial adverse effects necessary for it to have standing to challenge Lemont's ordinance." Willow Springs' alleged possibility of future harm that was dependent on specific ways in which the Property may be used, was not sufficient for standing, concluded the court.

See also: *Village of Barrington Hills v. Village of Hoffman Estates, 81 Ill. 2d 392, 43 Ill. Dec. 37, 410 N.E.2d 37 (1980).*

See also: *Village of Northbrook v. Cook County, 126 Ill. App. 3d 145, 81 Ill. Dec. 413, 466 N.E.2d 1215 (1st Dist. 1984).*

Case Note:

Willow Springs had also sought an injunction against the proposed development on the Property, alleging that the proposed development on the Property would be a "public nuisance." The court rejected that, finding the complaint lacked sufficient facts to state a claim. The court found it could not reasonably be inferred, from the mere filing of the development application or from other allegations in Willow Springs' complaint, that an injunction was appropriate.

Due Process—At one of a series of public hearings on her property, landowner is prohibited from cross-examining witnesses

Landowner contends this denied her due process, along with the bias of decisionmakers

Citation: *Beal v. Town of Stockton Springs, 2017 ME 6, 2017 WL 117293 (Me. 2017)*

MAINE (01/12/17)—This case addressed the issue of whether a landowner was denied due process in relation to a determination on the safety of a building on her property. More specifically, the case addressed whether a landowner was denied due process when she was

denied an opportunity to cross-examine witnesses. It also addressed whether comments made by decisionmakers prior to public hearings on the matter resulted in a bias that violated the landowner's due process rights.

The Background/Facts: In 2004, Hollie A. Beal ("Beal") acquired property in Stockton Springs (the "Town"). The property included a 556-square foot building that had been approximately 100 years earlier as a grain storage shed. The building had more recently been used as a residence. In 2014, after receiving complaints about the condition of the property, the Town's Code Enforcement Officer ("CEO") visited the property. The CEO had concerns about the safety of the building. Ultimately, the Town's Board of Selectmen (the "Board") set a public hearing to determine whether the building constituted a "dangerous building" within the meaning of Maine statutory law—17 M.R.S. § 2851.

Under 17 M.R.S. § 2851, municipal officers are authorized to, after notice and hearing, order "what disposal must be made" of a building that is deemed "structurally unsafe; unstable; unsanitary; constitutes a fire hazard; is unsuitable or improper for the use or occupancy to which it is put; constitutes a hazard to health or safety because of inadequate maintenance, dilapidation, obsolescence or abandonment; or is otherwise dangerous to life or property . . . ."

Prior to the hearing on the dangerousness of Beal's building, during informal negotiations with Beal, one of the members of the Board had stated that he believed that the building should be "condemned." Beal later requested that the three members of the Board recuse themselves from determining the dangerousness of her building because they "had already prejudged the case." The Board members then expressly stated on the record, at the public hearing, that "they had not already decided the issue and would base their decision on the evidence presented at the hearing." Each of the Board members declined to recuse themselves from participating in the hearing and from the subsequent decision-making on the safety of Beal's building.

During the hearing, the Board heard testimony from the CEO, Beal's general contractor, and Beal. The Board asked witnesses questions that were submitted, but did not allow Beal's counsel to question any of the witnesses by either direct or cross examination. Beal's attorney was permitted to submit written questions that the Board would then pose to the witness.

At the conclusion of the hearing, the Board members voted unanimously that the structure was a dangerous building. However, on a later date, the Board reopened the hearing "for the purpose of allowing additional testimony to be presented to ensure all areas of the definition of a dangerous building have been thoroughly explored." Beal attended

the reopened hearing, but declined to present any further information to the Board. At the conclusion of the hearing, the Board affirmed its decision declaring the building hazardous, and continued the hearing with regard to the issue of disposition of the building.

At the public hearing on the disposition of the Beal's building, Beal presented evidence, and was provided an opportunity to question the CEO and dispute his observations. Once again, at the close of the hearing, the Board unanimously concluded that the structure was a dangerous building. With regard to disposition of the building, the Board ordered Beal to have a licensed plumber and a licensed electrician bring the building up to code, and required her to "repair and/or replace all structural members" by August 26, 2015.

Beal appealed the Board's decision. Beal contended that the Board violated her due process rights in that the Board "denied her the opportunity to present evidence, to cross-examine witnesses; and to have an impartial fact-finder."

The superior court rejected Beal's arguments and affirmed the decision of the Board.

Beal appealed.

DECISION: Judgment of superior court affirmed.

The Supreme Judicial Court of Maine held that Beal failed to demonstrate that she was denied due process or that she was subjected to a decision by a biased decision-maker.

In so holding, the court explained that, when assessing whether an individual's due process rights have been violated, courts "must analyzed three distinct factors": (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Here, the court found there was "no dispute that declaring Beal's property a dangerous building affects an important private property interest or that the Town has an interest in limiting use of or eliminating dangerous buildings." Thus, the court found only the second factor of the required analysis was in play: "whether Beal was afforded the process she was due, including 'notice of the issues, an opportunity to be heard, the right to introduce evidence and present witnesses, the right to respond to claims and evidence, and an impartial fact-finder.' "

Despite restrictions on Beal's cross-examination of witnesses at the first hearing, the court concluded that Beal was afforded the due process that she was due in that: even at the first hearing Beal had an op-

portunity to respond to evidence presented against her through the presentation of rebuttal testimony and through the submission of written questions which could then be asked by the Board; and any such restriction on cross-examination had been rescinded for the remaining hearings. Moreover, the court found "forty years of precedent" showed that boards are not required to provide the opportunity for cross-examination at every local administrative hearing.

The court additionally found that Beal's bias claim failed because she failed to rebut "the presumption that the Board members acted with honesty and integrity." The court found that it was only at "informal negotiations" that one Board member had said the building should be "condemned." Whereas, at the formal hearings, the Board members had stated on the record that they had not prejudged the case, and they spent months hearing and deliberating before rendering their final decision.

See also: *Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).*

See also: *Hale v. Petit, 438 A.2d 226 (Me. 1981).*

Case Note:

The appellate court also concluded that the Board's decision on Beal's structure was supported by substantial evidence.

Zoning News from Around the Nation

INDIANA

Under a newly proposed bill, cities and towns in Indiana would be prohibited from banning short-term rentals (such as Airbnb rentals). House Bill 1131 "[s]pecifies requirements for local unit of government regulation of short term rental of residential property." The bill would allow regulation of short-term rentals only for certain, specified purposes, including: protection of the public's health and safety related to fire and building safety, sanitation, transportation, traffic control, and pollution control—"if enforcement [of such regulations] does not prohibit the use of a property as a short term rental."

Source: *Indiana General Assembly*; https://iga.in.gov

MASSACHUSETTS

Boston Mayor Marty Walsh is reportedly "looking to expand ten-

ants' rights, reward good landlords and expand affordable housing funding with a five-part legislative package." Among the legislation is a bill that "seeks to protect inclusionary zoning mandates that require developers to build affordable units when constructing 10 or more residential homes."

Source: *Metro.us*; *www.metro.us*

TEXAS

State Representative Gina Hinojosa has introduced House Bill 1175, which "confirms petition rights for community members living within 200 feet from unzoned land."

Source: *The Daily Texan*; *www.dailytexanonline.com*

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Constitutionality of Zoning Regulation/Right to Bear Arms—City zoning ordinances limit location of gun firing ranges

Ordinances are challenged as violating the Second Amendment to the U.S. Constitution

Citation: *Ezell v. City of Chicago, 2017 WL 203542 (7th Cir. 2017)*

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

SEVENTH CIRCUIT (ILLINOIS) (01/18/17)—This case addressed the issue of whether the combined effect of zoning restrictions that limited firearm ranges to a small percentage of a city's total acreage violated the Second Amendment's right to bear arms.

The Background/Facts: In 2011, the United States Court of Appeals, Seventh Circuit, held that a zoning ordinance enacted by the City of Chicago (the "City"), which banned firearm shooting ranges throughout the city was "incompatible with the Second Amendment." The Second Amendment of the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The City responded to the Seventh Circuit's decision by replacing the shooting range ban with regulations governing shooting ranges. Among those regulations were two zoning restrictions: (1) a zoning restriction allowing gun ranges only as special uses in manufacturing districts; and (2) a zoning restriction prohibiting gun ranges within 100 feet of another range or within 500 feet of a residential district, school, place of worship, and multiple other uses.

City residents and a builder of firing ranges, as well as several organizations dedicated to the promotion of gun rights, (collectively, the "Opponents") brought a legal action against the City, challenging the zoning ordinances as unconstitutional in violation of the Second Amendment. The City defended the zoning restrictions as being necessary to protect public health and safety. Specifically, the City maintained that firing ranges: attract gun thieves; cause airborne lead contamination; and carry a risk of fire.

The United States District Court judge found the City's arguments "inadequate to discharge the City's burden to justify relegating shooting ranges to manufacturing districts." Finding the City "failed to establish a connection between this zoning rule and the public interests it is meant to serve," the judge invalidated the manufacturing-district zoning restriction. The judge, however, upheld the 500-foot distance restriction finding it was "significantly less burdensome" when considered "standing alone." The judge likened the restriction "to a 'law forbidding the carrying of firearms in sensitive places such as schools and government buildings,' " which the United States Supreme Court had upheld as constitutional. (The judge did not specifically address the additional requirement of a 100-foot buffer zone between firing ranges.)

Both the City and the Opponents appealed. The City asked the United States Court of Appeals, Seventh Circuit, to reinstate the zoning restrictions limiting firing ranges to manufacturing districts. The Opponents argued that the distance restriction violated the Second Amendment.

DECISION: Judgment of United States District Court affirmed in part, reversed in part, and remanded.

The United States Court of Appeals, Seventh Circuit, held that the "combined effect" of the manufacturing-district classification and the distancing restriction violated the Second Amendment because those zoning regulations "severely restrict[ed] the right of Chicagoans to train in firearm use at a range."

In so holding, the court explained that constitutional challenges under the Second Amendment require the following inquiries: (1) whether the regulated activity falls within the scope of the Second Amendment; and (2) if it does, whether the government's justification for restricting or regulating the exercise of Second Amendment rights withstands a heightened standard of scrutiny. With regard to the second inquiry, the court explained that the government has the burden of justifying restrictions and regulations on the exercise of Second Amendment rights. That burden, said the court, requires a "very strong public-interest justification and a close means-end fit" (i.e., regulatory means and public-benefits end).

With regard to the first inquiry, the court held that firearm range training fell within the scope of the Second Amendment. The court said that the "core individual right of armed defense . . . includes a corresponding right to acquire and maintain proficiency in firearm use through target practice at a range."

Turning to the second inquiry, the court first determined that it was an error for the district court judge to analyze the two zoning restrictions separately. The Seventh Circuit found that the two zoning restrictions worked "in tandem to limit where shooting ranges may locate" and therefore would "stand or fall together." The court then returned to analyzing whether the City's justification for restricting shooting range locations demonstrated a strong public-interest justification and a close fit between the regulations and the intended public-interest benefits. The court found that the City failed to provide any evidentiary support for its claims that firing ranges attract gun thieves, cause airborne lead contaminants, and carry a fire risk. While the City and its witnesses made those assertions, the court found they failed to point to any data or empirical evidence to support those claims or establish that the zoning restrictions had any connection to reducing those claimed risks.

Having found that the City failed to satisfy its burden of justifying the shooting range zoning restrictions, the court concluded that the manufacturing and distancing restrictions were unconstitutional in violation of Second Amendment rights.

See also: *District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).*

See also: *Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011).*

Case Note:

In its decision, the court noted that the City had "room to regulate the construc-

tion and operation of firing ranges to address genuine risks to public health and safety." The City could, said the court, set rules about where firing ranges may locate, but it must do so with justification. For example, noted the court, "[a] different combination of zoning rules—say, a more permissive zoning classification and a less restrictive buffer-zone rule—may well be justified, if carefully drafted to serve actual public interests while at the same time making commercial firing ranges practicable in the [C]ity."

Case Note:

The case also addressed a non-zoning issue of whether regulations barring anyone under age 18 from entering a shooting range violated the Second Amendment. The court found that the City's such regulation did violate the Second Amendment. The court held that older adolescents and teens had a Second Amendment right to receive adult-supervised firearm instruction in a controlled setting, even if those minors lacked the general right to purchase or possess firearms. The court further found that the public safety benefits that the City had relied on in defending that age restriction could be addressed by existing environmental regulations and by more closely tailoring age restrictions so that the right of older adolescents and teens to obtain firearm training is not "completely extinguished."

Public and low-income housing—After executive agency fails to promulgate valid rules regarding municipality fair housing obligations, municipalities seek declaration of obligation from courts

Municipalities contend they have no obligation for housing needs arising during sixteen-year gap period without agency rules

Citation: *In re Declaratory Judgment Actions Filed By Various Municipalities, 2017 WL 192895 (N.J. 2017)*

NEW JERSEY (01/18/17)—This case addressed the issue of whether

New Jersey municipalities were required to address the need for low- and moderate-income housing that arose during a sixteen-year period of time during which New Jersey's Council on Affordable Housing failed to promulgate viable rules for construction of such housing. More specifically, the case addressed whether municipalities were constitutionally obligated to provide a realistic opportunity for their fair share of affordable housing for low and moderate-income household formed during that gap period of time and presently existing. The case further addressed how any obligations from that gap period of time must be accounted.

The Background/Facts: Municipalities in New Jersey have been found to have a constitutional obligation to provide their fair share of the affordable housing need of low and moderate-income households. More specifically, New Jersey law recognizes that municipalities have a constitutional obligation to use their zoning power in a manner that creates a "realistic opportunity for the construction of [their] fair share" of the region's low-and moderate-income housing. That obligation was first recognized by courts and then codified in 1985 by the New Jersey Legislature, which enacted the state's Fair Housing Act ("FHA") and created the Council on Affordable Housing ("COAH") to facilitate and monitor compliance with the constitutional mandate. COAH was tasked with determining and assigning municipal affordable housing obligations through promulgation of procedural and substantive rules for successive housing cycles. COAH adopted rules to govern its first and second housing cycles but failed to propose valid new rules for the third housing cycle. Having failed to produce valid rules from 1999 through 2015, in March 2015, the New Jersey Supreme Court declared COAH defunct. The court also eliminated the FHA's exhaustion-of-administrative-remedies requirement and provided for a judicial forum to adjudicate affordable housing disputes.

In 2015, in an attempt to ascertain their fair share obligation of affordable housing needs, thirteen Ocean County municipalities filed declaratory judgment actions in the courts. Those actions were consolidated. The municipalities argued that their fair share obligations only included "present need" and "prospective need," and that they had no obligation for the needs during the sixteen-year gap period (i.e., 1999-2015). Finding that the "fair share obligation is cumulative," the trial court held that the municipalities were constitutionally required to recognize needs that arose during the gap period. The court held that such need was not a part of "prospective need," but rather constituted a "separate and discrete component" of the fair share obligation. Accordingly, the trial court held that the municipalities' "Third Round" (i.e., third housing cycle) obligation consisted of four components: (1) prior (First and Second) round unmet obligations; (2) the need arising during the gap period; (3) a traditional present-need analysis; and (4) calculation of prospective need for the 2015-2025 period.

The trial court's decision was appealed. The Appellate Division re-

versed the decision. While the Appellate Division recognized that the affordable housing need that arose during the gap period was a responsibility of the municipalities, it held that "the FHA does not require a municipality to retroactively calculate a new 'separate and discrete' affordable housing obligation arising during the gap period." The court pointed to language of the FHA that prevents a retroactive calculation of "prospective need" (defined as a "forward-looking projection of household growth"). Rather, the court observed that, to the extent that "[low- and moderate-income] households formed during the gap period" might be living in overcrowded or deficient housing, the need that arose during the gap would be "partially included" in the calculation of present need (i.e., "the actual number of deficient housing units occupied by low- and moderate-income households").

That Appellate Division's decision was also appealed.

DECISION: Judgment of Appellate Division affirmed as modified.

Agreeing with both the trial court and the Appellate Division, the Supreme Court of New Jersey held that municipalities were required to address the need for low- and moderate-income housing that arose during the gap period (i.e., 1999-2015) during which COAH failed to promulgate viable Third Round rules. The court found it clear that the municipalities had a "constitutional obligation to address pent-up affordable housing need for low- and moderate-income household that formed during [the gap period]." Specifically, the court concluded that: "the need of presently existing low- and moderate-income households formed during the gap period must be captured and included in setting affordable housing obligations for towns that seek to be protected from exclusionary zoning actions under the process this Court has set up while COAH is defunct."

The Supreme Court of New Jersey agreed with the Appellate Division, with some modification, as to how to account for the affordable housing need that arose during the gap period. The Appellate Division had concluded that the "permissible categories within which to work, when considering how to accommodate need arising during [the gap period], were: unfulfilled prior cycle obligations, prospective need, and present need." The Appellate Division had rejected the trial court's addition of a "separate and discrete" category for recognizing needs that arose during the gap period.

In agreeing with the Appellate Division as to the three permissible categories for determining municipal affordable housing obligation, the Supreme Court of New Jersey noted that it had, in prior case law, expressly directed the first category—unfulfilled prior cycle obligations. It also agreed that "prospective need" was an "inapt fit" for the need arising during the gap period because the FHA definition of "prospective need" rendered the term "forward-looking": "a projection of housing needs based on development and growth which is reasonably likely to occur in a region or a municipality" within the next housing cycle. (N.J.S.A. 52:27D-304(j).) Finally, the court concluded that "present need offers the best approach to capturing the [gap period] need that must be addressed."

The court held that, in determining municipal fair share obligations for the Third Round, the trial courts must employ an expanded definition of "present need." The court directed that, in light of the need arising during the gap period, the present-need analysis must be expanded to "include, in addition to a calculation of overcrowded and deficient housing units, an analytic component that addresses the affordable housing need of low- and moderate-income households created since 1999, provided that the households remain income-eligible and situated in New Jersey, and are not calculated in a way that includes persons now deceased or whose households may be already captured through the historic practice of assessing deficient housing units within the municipality."

See also: *Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158, 456 A.2d 390 (1983).*

See also: *Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp., 67 N.J. 151, 336 A.2d 713 (1975).*

Case Note:

In its decision, the court recognized that COAH could be resurrected and/or the Legislature could dictate "alternative methods for calculating and assigning a municipal fair share of affordable housing."

Civil Rights/Religious Discrimination—Planning Board requires property owner provide, for its proposed mosque, a number of parking spaces far greater than that required by township's parking ordinance

Property owner alleges Planning Board's disparate application of the parking space requirement violates the Nondiscrimination Provision of the federal Religious Land Use and Institutionalized Persons Act

Citation: *Islamic Society of Basking Ridge v. Township of Bernards, 2016 WL 7496661 (D.N.J. 2016)*

NEW JERSEY (12/31/16)—This case addressed the issue of whether a planning board violated the Nondiscrimination Provision of the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) by applying a parking ordinance differently on the basis of religion. More specifically, it addressed whether or not the application of a parking ordinance was neutral and generally applicable with regard to religion. The case also addressed whether a provision in a parking ordinance, which allowed a planning board to change a 3:1 ratio between seats and parking spaces for churches, was unconstitutionally vague.

The Background/Facts: In 2011, The Islamic Society of Basking Ridge ("ISBR") purchased property (the "Property") in the Township of Bernards (the "Township") with the goal of building a mosque on the Property. In April 2012, ISBR applied for a preliminary and final site plan approval related to its proposed mosque. Among other things, the site plan provided for fifty parking spaces based on the mosque's estimated occupancy of 150 people. The Township's Parking Ordinance set forth a 3:1 ratio, between seats and parking spaces, as an acceptable standard for "churches."

After community opposition, and 39 hearings over a three-and-a-half year period, the Planning Board required ISBR to construct 107 parking spaces—which far exceeded the 3:1 ratio. ISBR ultimately revised its site plan to provide for 107 parking spaces, although it did not formally create a final site plan including that revision. Nevertheless, in January 2016, the Planning Board denied ISBR's application.

In denying ISBR's application, the Planning Board explained that it believed that the Parking Ordinance's 3:1 ratio for "churches" applied only to Christian Churches. The Planning Board also explained that the Parking Ordinance required the Board to engage in an individualized analysis of every applicant's parking need, regardless of the ratios set forth in the ordinance. Specifically, the Board pointed to language in the Parking Ordinance, which referred to a schedule of standards, which included the 3:1 ratio for "churches," and which further provided as follows:

> Since a specific use may generate a parking demand different from those enumerated [in the schedule], documentation and testimony shall be presented to the Board as to the anticipated parking demand. Based upon such documentation and testimony, the Board may: . . . Allow construction of a lesser number of spaces, [or] . . . In the case of nonresidential uses, require that provision be made for the construction of spaces in excess of those required . . . to ensure that the parking demand will be accommodated by off-street spaces.

ISBR challenged the Planning Board's decision. ISBR alleged that the Planning Board's disparate application of the off-street parking requirement between Christian churches and Muslim mosques violated the Nondiscrimination Provision of the federal RLUIPA.

RLUIPA prohibits discrimination and impermissible exclusion on the

basis of religion by prohibiting three distinct types of regulations: (1) land use regulations that treat a "religious assembly or institution on less than equal terms with a nonreligious assembly or institution" ("Equal Terms Provision"); (2) land use regulations that "discriminate[ ] against any assembly or institution on the basis of religion or religious denomination" ("Nondiscrimination Provision"); and (3) land use regulations that "totally exclude[ ] religious assemblies from a jurisdiction," or "unreasonably limit[ ] religious assemblies, institutions, or structures within a jurisdiction" ("Exclusions and Limits Provision"). (42 U.S.C.A. § 2000cc(b)(1)-(3).)

ISBR also contended that the language in the Parking Ordinance, which gave the Planning Board discretion to require parking spaces in excess of the 3:1 ratio based on presented "documentation and testimony" was unconstitutionally vague on its face in violation of the Due Process Clauses of the federal and state constitutions.

ISBR motioned, asking the court to issue partial summary judgment on the pleadings based on those two challenges.

DECISION: ISBR's motion granted.

The United States District Court, D. New Jersey, found in favor of ISBR on its challenges. The court first held that the Planning Board violated RLUIPA's Nondiscrimination Provision when the Planning Board applied the Parking Ordinance differently on the basis of religion.

In so holding, the court examined the language of the Parking Ordinance. The court found that the Parking Ordinance specifically set forth a 3:1 ratio between seats and parking spaces for "churches." Since the Ordinance failed to define "churches," the court looked to the dictionary definition of the word. The dictionary defined "church" as "a place of worship of any religion ([e.g.] a Muslim [mosque])." The court concluded that the 3:1 ratio in the Parking Ordinance applied not only to Christian churches, as the Planning Board had concluded, but also to synagogues and mosques. Thus, the court found that, on its face, the Parking Ordinance was neutral and generally applicable and therefore was not a "facial" violation of RLUIPA's Nondiscrimination Provision. The court however, found that the "application" of the Parking Ordinance by the Planning Board to ISBR constituted discrimination on the basis of religion in violation of RLUIPA's Nondiscrimination Provision.

The court explained that the Planning Board's intent to apply the 3:1 ratio differently on the basis of religion was sufficient to establish discriminatory intent under RLUIPA's Nondiscrimination Provision. The court said it was unnecessary for ISBR to prove that the Planning Board harbored hostility toward Muslims. The court further explained that, where a government expressly discriminates on the basis of religion, RLUIPA's Nondiscrimination Provision does not require a showing of a similarly situated comparator. Accordingly, the court found that, here, ISBR, did not need to show how the Parking Ordinance treated other

religious applicants that had the same effect on the Parking Ordinance's policy for provision off-street parking in order to prove violation of RLUIPA's Nondiscrimination Provision. (In any case, the court said that even if ISBR had to point to similarly situated comparators in order to show that the Planning Board's application of the Parking Ordinance violated RLUIPA's Nondiscrimination Provision, it could show that a Jewish congregation, Jewish center, and Baptist church were all similarly situated and had received site plan approval from the Planning Board in accordance with the Parking Ordinance's 3:1 ratio.) Finally, the court concluded that the Planning Board discriminatorily applied the Parking Ordinance on the basis of religion when it applied the 3:1 parking ratio to Christian churches and Jewish synagogues but not to Muslim mosques. The Planning Board had claimed that disparate application was based on legitimate differences in parking needs, and not on religion, but the court rejected that argument. The court said it would not consider the Planning Board's proffered justification for its discriminatory application of the Parking Ordinance because a strict liability (rather than a strict scrutiny) standard applied to RLUIPA's Nondiscrimination Provision.

The court also held that the language in the Parking Ordinance that allowed the Planning Board discretion to require parking spaces in excess of the 3:1 ratio based on presented "documentation and testimony" was unconstitutionally vague on its face in violation of the Due Process Clauses of the federal and state constitutions. The court explained that to establish that a law is impermissibly vague under the Federal and New Jersey Constitutions, the law: (1) must fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly"; or (2) "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." Here, the court found that the Parking Ordinance allowed the Planning Board "to require additional parking spaces without having to abide by any specific guidelines as to what constitutes sufficient off-street parking." The court concluded that language "unambiguously" provided the Planning Board with "unbridled and unconstitutional discretion."

See also: *Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015).*

See also: *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253,269 (3d Cir. 2007).*

See also: *Fowler v. State of R.I., 345 U.S. 67, 73 S. Ct. 526, 97 L. Ed. 828 (1953).*

Zoning News from Around the Nation

IDAHO

In late January, House Bill 66 was introduced in the state Legislature. Under the bill, municipalities would be prohibited from adopting "an ordinance restricting or regulating short-term rentals, except as related to codes enforcing building, fire, noise, property maintenance and nuisance standards." Municipalities would also be permitted to prohibit short-term rentals used to "house sex offenders or sell drugs, pornography, nude or topless dancing or 'other adult-oriented businesses.' " The proposed legislation would also require marketplaces such as Airbnb to register with the Idaho Tax Commission and receive a license.

Source: *Idaho Mountain Express*; www.mtexpress.com

MASSACHUSETTS

Reportedly, a bill is being prepared for introduction in the state Legislature that would allow the City of Boston to "amend the zoning code in order to strengthen the Inclusionary Development Policy, a policy which raises funds for affordable housing. Currently, the policy comes into play when a residential development project of 10 or more units requires a zoning variance, but this proposed Inclusionary Zoning Article would insure that affordable units are created based on the size of the project, and not the need for zoning relief."

Source: *Jamaica Plain Gazette*; http://jamaicaplaingazette.com

VIRGINIA

A state Senate Committee has passed onto the full Senate a bill that aims to regulate short-term rentals such as Airbnb. SB 1578 would require people who rent out their homes through Airbnb and other online platforms to register their names and addresses with their cities. Cities could charge a fee for such registration, and could impose a penalty of up to $500 for failure to register.

Source: *The Virginian-Pilot*; http://pilotonline.com

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PRACTICE COMMUNITY ASSOCIATIONS

Community Associations, Hazard Mitigation, and Development Regulation

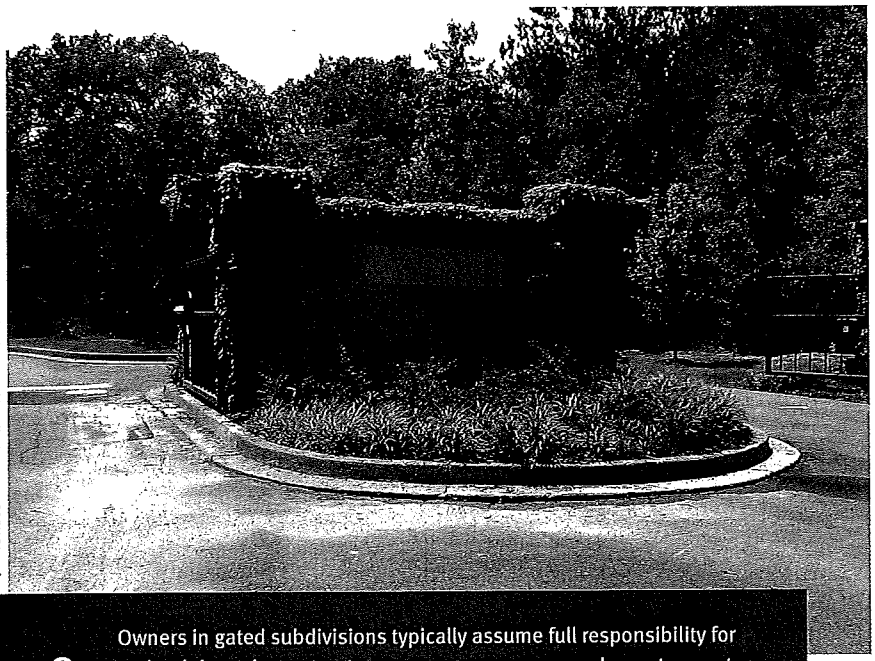
By Tyler P. Berding and Joseph DeAngelis

Common-interest community associations, including home owner associations (HOAs), condominium associations, and housing cooperatives, play a critical role in the maintenance of local infrastructure.

Over the past few decades, a growing number of cities and counties have delegated the responsibility for long-term maintenance of common infrastructure associated with new residential development to community associations. This often includes maintenance of common open space and may include maintenance of private streets and sidewalks, stormwater facilities, or other infrastructure that plays a role in hazard mitigation.

For healthy and stable associations, requiring home owners to maintain their own common open space can reduce the fiscal burden on the local government. But do community associations have the expertise to manage complex critical infrastructure such as levees, retention basins, and stormwater infrastructure? What about cases where community associations fail? Are cities and counties ready, willing, or able to assume control over long-neglected infrastructure?

This article will: (1) lay out the increasing role that community associations play in the maintenance of critical disaster mitigation infrastructure; (2) provide an overview of the risks of delegating maintenance responsibilities to community associations; (3) discuss the role of performance guarantees in the development process and their impact on long-term infrastructure maintenance; (4) make recommendations for local development regulations to ensure that community associations are capable of long-term disaster mitigation infrastructure maintenance; and (5) present three examples that potentially illustrate "better" practices in dealing with community association responsibilities for critical disaster mitigation infrastructure maintenance.



Thomas R. Machnitzki (The Preserve Lakeland TN 1, Wikimedia Commons CC BY-SA 3.0)

Owners in gated subdivisions typically assume full responsibility for maintaining private streets, common open areas, and any stormwater or flood control infrastructure.

THE INCREASING ROLE OF COMMUNITY ASSOCIATIONS IN HAZARD MITIGATION

What is different today from subdivisions built four or more decades ago is that most will be built and incorporated as community associations. In many cases, the engineered facilities to protect these developments from storms, rising tides, and sea levels will not be maintained by cities or states, but will be the responsibility of the home owners who live there.

Since the early 1960s, community associations have served as surrogates for cities and counties to manage new infrastructure. To conserve tax dollars that would otherwise be necessary to maintain streets, parks, and public utilities in new developments, many local governments shifted fiscal responsibility for that infrastructure to the small group of owners living within that new subdivision. The community association provided a useful way for developers to entice municipalities to approve their projects—generating new tax dollars without the consequent public works expense.

Statutes in most states and hundreds of municipal ordinances provide the authority for this shift. They cover the gamut from what is required in the governing documents to how a community association is to maintain the resulting infrastructure. They generally assume that the financial wherewithal and necessary expertise will follow. These assumptions might be untrue, but that misunderstanding is usually not corrected by the enabling ordinances. Statutes and ordi-

nances promote the *creation* of a community association to own and maintain certain facilities, but are sorely lacking in requiring the oversight or enforcement to make sure that maintenance happens.

Streets, levees, storm sewers, parks, parking lots, and sidewalks in old developments are owned and maintained by cities and counties using tax dollars raised from a broad tax base. In many newer projects the community association is responsible for maintaining most "common areas" as well as critical facilities like levees, berms, pumps, riprap, and retaining walls. Developers and municipalities thereby avoid long-term responsibility for such projects. The homes and units within the development are sold off in the near term. The developer takes the profits and is protected from long-term liability not only by the assessment or taxing arrangement that moves the cost of future repairs to owners, but also by various statutes of limitation that cut off legal liability within a few years of projected completion.

After that, the property owners within the association are on their own. What will happen when sophisticated, critical improvements are maintained solely with owner assessments? Levees and seawalls in marine coastal areas, and critical mitigation facilities in flood-prone lowlands elsewhere, will depend upon the willingness of individual home owners to assess themselves to provide adequate funding and to provide the necessary management.

It's one thing to let the landscaping go to seed or to allow chuckholes to exist in the parking lot, but a crumbling dam or bay levee is at another threat level altogether.

Relatively few cities and counties include provisions in their subdivision codes that indicate how the locality will ensure that a required community association is actually created. In practice, the developer remains on the hook for infrastructure and common space completion and maintenance until he can provide evidence that he has transferred responsibility to a community association. Some cities and counties do, however, require evidence of the formation of an association before issuing either a preliminary or final plat approval.

In these cases, the developer must produce documentation (e.g., articles of incorporation, bylaws, and recorded covenants) showing s how and when ownership of common facilities will be conveyed to the new association. When localities explicitly address the timing of the transfer of responsibility from the developer to the association, the language is typically vague. For example, a number of cities and counties require association bylaws or covenants to contain a schedule for the transfer to owners and stipulate that developers must disclose the timing of the transfer to prospective buyers.

La Citra Vita (residential community), Wikimedia CC BY-SA 2.0)

A stormwater retention pond serving a residential subdivision in Prince George's County, Maryland.

A few communities set out a specific threshold that triggers the transfer (e.g., a percentage or number of units sold).

THE RISKS OF DELEGATING INFRASTRUCTURE MAINTENANCE TO COMMUNITY ASSOCIATIONS

Planning decisions involving community associations are usually based on three assumptions: (1) The association will have an infinite life; (2) During that period the owners will assess themselves as necessary to properly maintain critical facilities; and (3) The owners and their managers have the expertise to maintain critical facilities or know how to get it. Each of these assumptions will usually prove false.

Generally speaking, local governments require community associations in order to ensure that common (private) property and infrastructure is maintained in perpetuity. If the association fails to adhere to maintenance requirements, the local government has the authority to perform the maintenance itself and bill the owners (often by creating property liens). In reality, though, every community association has a limited "service" life because it is not self-sustaining over time. Most community associations will eventually become obsolete because funding for normal and extraordinary maintenance is not sufficient, leading to increasing deferred maintenance until the property becomes uninhabitable. This is more pronounced in attached housing, but will also occur in single-family home developments eventually. Critical infrastructure within these subdivisions will suffer a similar fate. The timing of obsolescence is the only question. We're talking decades, but with many older projects, we're already there.

Because owners determine the cash contributions to long-term maintenance reserves, and because most plan for a near horizon, owners will reject assessment increases to bring long-term reserves to an acceptable level or to specially assess themselves for emergency repairs brought on by normal deterioration. If a natural disaster occurs, and insurance or government assistance is not available, the owners may not fund a rebuild.

Owners and most community managers have no experience with sophisticated infrastructure like floodgates, damns, levees, and weirs. They might not understand what those

facilities are or how they operate—especially decades later. The owners may not realize that a lake is part of a regional flood and stormwater control facility. To them, a lake is a lake, not a reservoir, and when the lake silts up from years of neglect and loses capacity to hold back floodwaters, downstream communities may be damaged. A levee can be riddled by critters that weaken it, but if the problem is not recognized, or if the funds to strengthen or rebuild the levee are not available, a critical piece of infrastructure may fail. Owners are not engineers, and they can't draw on the services of city engineering staff or tax dollars to help them fix a facility for which the municipality has no responsibility.

In local government, decision makers consider the long-term interests of their city or county when they set revenue goals. They plan for a far horizon. With community associations, the interest of the individual owner rarely extends beyond five to seven years—a near horizon. Owners determine how much to assess themselves for such things as maintenance reserves based on their individual interests, which are usually short-term. There is no third-party oversight, so long-term maintenance obligations rarely receive the funding to sustain the subdivision.

If all we were concerned about were paint, roofs, asphalt, or landscaping, that could be handled. But developments managed by associations have grown in size. They are in floodplains, abandoned quarries, and landslide-prone hillsides, and endowed with levees, damns, debris fences, lakes intended as holding ponds, weirs, and other disaster mitigation facilities. And there has been too little attention given to whether the proposed association will have the financial capability and expertise to manage these critical facilities for decades. Usually, it won't.

The planner is presented with a professional package created by a developer which anticipates most questions the planner might ask. Too often, the problem is that no one present then is asking all of the right questions. A developer is the ultimate short-timer. Its horizon is maybe three to four years, depending on the size of the project and its ability to sell out. No one representing the ultimate user—the community association—is present when critical decisions are made.

COMMUNITY ASSOCIATIONS AND PERFORMANCE GUARANTEES

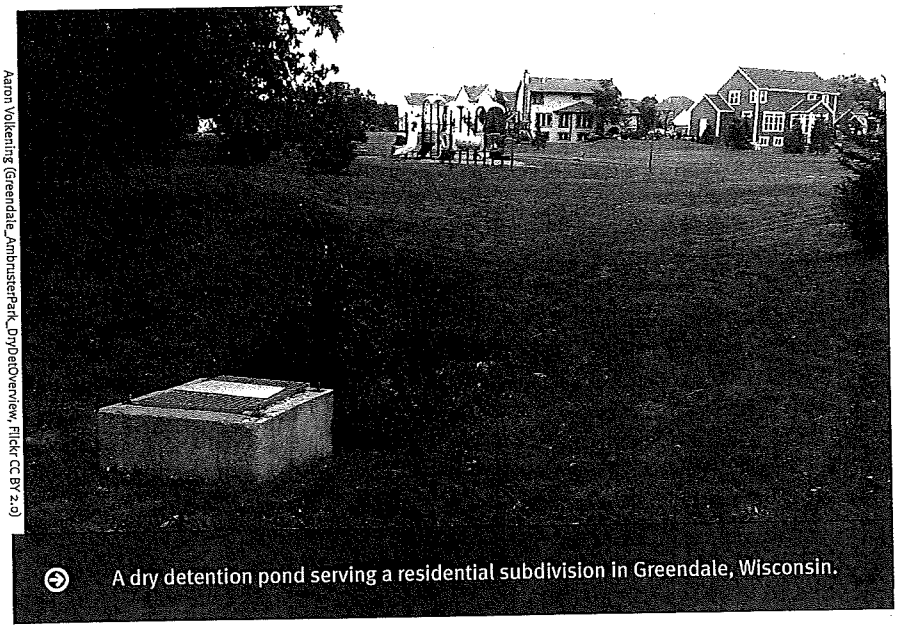
Traditionally, cities and counties have relied on performance guarantees to minimize the risk associated with delegating infrastructure development and maintenance to subdivision developers. But conventional approaches to performance guaranteeing may be of limited utility for ensuring long-term infrastructure maintenance by community associations.

Performance guarantees are "legal and financial tools used to increase permittees' compliance with regulations" (Feiden and Burby 2002). They are often used by cities and counties in the subdivision development process to ensure developer compliance with agreed-upon infrastructure development responsibilities and in order to avoid complex and expensive litigation. There are two general categories of performance guarantees: financial and non-financial. Financial performance guarantees require that funds necessary to complete agreed to development (including infrastructure) are obligated before construction or permitting. This is a useful tool to avoid half-finished "zombie" subdivisions in the event that the developer defaults. Non-financial performance guarantees do not rely on the availability of funds, but seek to ensure continuity of operations and adequate attention to the municipal permitting process. Requiring the formation of a community association or the use of special assessments are common non-financial performance guarantees. However, there are significant risks and downsides of this approach.

According to Feiden and Burby, HOA covenants can grant the government the right to perform required infrastructure maintenance and later charge the association for the work performed (2002). The local municipality controls an escrow account on behalf of the association, or has the authority to place liens on properties to ensure eventual reimbursement of maintenance costs.

However, this is no guarantee that critical infrastructure such as levees or stormwater storage will be maintained effectively. In the event that a common-interest development fails, there is neither a means to locally manage infrastructure (as there will be no HOA), nor the possibility of the municipality to recoup costs for necessary maintenance. This impact can be mitigated if there is a maintenance guarantee (a financial performance guarantee that ensures adequate maintenance of infrastructure over a required time period) in place with the developer. But if there is still no HOA in place upon conclusion of the maintenance guarantee, the municipality will still be on the hook for maintenance costs.

In the event that a community association is formed, there are still significant barriers to guaranteeing adequate infrastructure maintenance. New improvements or maintenance work may be opposed by residents who were not properly informed about the responsibilities of the association. Further, residential turnover can have a detrimental impact on the overall stability of an association, and newer residents may be less willing to contribute toward shared maintenance.



Aaron Volkening (Greendale_AmbrusterPark_DryDetOverview, Flickr CC BY 2.0)

A dry detention pond serving a residential subdivision in Greendale, Wisconsin.

Raymond Shobe (Flood water retention pond with broken levee, Flickr CC BY-SA 2.0)

Heavy rains in 2010 revealed flaws in the maintenance of this levee protecting the Mission Lakes subdivision in Desert Hot Springs, California.

Without strong and stable association management, what had once been a "guarantee" between the developer and the municipality risks becoming an unsustainable burden for owners.

RECOMMENDATIONS FOR CODE REFORM

Require a maintenance plan for any subdivision proposal that includes flood control or stormwater management facilities that would be managed and maintained by owners. This plan must identify what expertise will be necessary, where it can be obtained, what maintenance will be required, and the annual cost likely to be incurred by the owners of the subdivision to carry out those obligations. Cost estimates and work scope should be based on an evaluation by an estimator independent of the developer just as if the city itself were taking ownership.

If the funding proposed for maintenance and repair of critical infrastructure relies on assessments levied only on homes within that subdivision, the proponent must demonstrate not just adequate funding for construction, but at least a 30-year funding plan that includes allowances for inflation, delinquent assessments, expert assistance, a disaster contingency, and a realistic reserve for long-term maintenance and replacement. The city or county should have the authority to step in and levy additional assessments to pay for inspections, maintenance, or repair, and the authority to make emergency repairs. Adequate funding may mean owner assessments must be set higher than the proponent wants to qualify enough buyers. Assessment underfunding to attract sales is a popular tool, but that can leave the subdivision unable to address long-term maintenance of critical facilities and force the city or county to advance its own funds to do it.

If a critical improvement's projected cost to repair or rebuild is greater than, say, 15 percent of the market value of all of the lots in the subdivision and if there isn't adequate insurance or government assistance, the owners may not voluntarily raise the funds to rebuild it, and there won't be sufficient equity to support a special assessment secured by a lien. Cities and counties should not count on the equity in the homes for reimbursement for emergency repairs. There is always an upper limit on emergency funds that any community association can raise by assessing its owners, and the equity in the homes may be illusory. Lenders usually have priority to whatever equity there is, and equity does not always increase with time—especially where the project has been damaged by a natural disaster.

Public officials not experienced with the long-term management of a community association may ask why ordinances or provisions in an association's governing documents can't be used to enforce compliance with a community's obligation to properly maintain critical infrastructure. They can be, but someone has to know that enforcement is necessary. A jurisdiction that rarely inspects private facilities may not know of the condition until the facility fails. When that happens, years of neglect will cost much more to remedy than if the city or county itself had conducted regular inspections and performed necessary maintenance.

The local municipality can reserve for itself, by ordinance or conditions of approval, the right of reimbursement from the owners in the subdivision for any funds it has to spend to maintain or repair critical facilities.

But even if that right exists, it may not be useful. To realize cash would require foreclosure and a dispute with lenders with superior rights. In some states, associations enjoy priority lien status over lenders, but they are in the minority. Usually lenders' rights come first, and there may well be nothing left after that. If it should come to that, the municipality should instead take ownership of the infrastructure in the beginning and use its expertise and taxing authority to maintain it, rather than wait to see if the lay owners will do the job properly. There is definitely a "tipping point" where a critical piece of infrastructure is too expensive or too sophisticated to be maintained by lay home owners. The trick is recognizing that in the beginning and convincing the municipality it is a better candidate to own it.

TOWARD 'BETTER' PRACTICES

The examples below discuss steps three specific jurisdictions have taken to minimize the risks associated with delegating maintenance responsibilities to community associations. While these approaches do not address every potential problem, they do show how some cities and counties are going beyond the status quo.

Lake County, Illinois: Requiring Maintenance Plans

Effective management of flood mitigation infrastructure requires regular inspections, specialized upkeep, and dedicated funding. A community association that is unfamiliar with or unwilling to dedicate the time, funds, or expertise to proper maintenance of critical disaster mitigation infrastructure is likely to suffer significant impacts in the event of a flood.

Berding & Weil LLC

An HOA is responsible for maintaining this complicated hillside stabilization and stormwater infrastructure, but silt-laden runoff has clogged the drainage inlets behind the lower retaining walls, causing polluted water to run into the San Francisco Bay.

Local officials in Lake County, Illinois, recognized some of the primary issues and solutions associated with HOA-managed stormwater best management practices (BMPs). Lacking the budget for a dedicated maintenance program, maintenance of stormwater BMPs in Lake County is often the responsibility of the local HOA. Rather than relying solely on guidance or trusting in the good faith of the home owners association, the Lake County Stormwater Management Commission developed a multistep process focused on codifying maintenance in plan approval procedures, education, and outreach for HOAs, and direct collaboration with the HOA in BMP inspections.

Lake County engages with the developer early in the permitting process, requiring that a dedicated source of funds be allotted to stormwater infrastructure maintenance in perpetuity. Often, this funding source is HOA dues. Next, the stormwater plan is incorporated into the subdivision plat. The commission then develops a maintenance plan along with the HOA, clearly spelling out the roles and responsibilities of the association and the necessary maintenance schedule. Finally, the commission performs regular inspections of the infrastructure, and directly involves a representative of the HOA in the inspection. This allows the commission and the HOA to address any issues on site.

Outside of this formal permitting and maintenance process, the commission holds workshops and education sessions with HOAs to increase local expertise in local stormwater maintenance issues (Rafter 2000).

Roanoke County, Virginia: Proactive Inspections and Service Districts

A recent public outreach process undertaken by the Roanoke County Department of Stormwater Management sought to address some of the primary issues of HOA management of stormwater infrastructure. The Roanoke County Stormwater Advisory Committee (RCSWAC) developed a report highlighting the primary improvements that should be made to the permitting, inspection, and long-term maintenance process. While conclusions were wide-ranging, the committee also directly addressed crucial gaps in how stormwater infrastructure is (or isn't) managed by HOAs, and how that process can be improved.

Enforcement of stormwater infrastructure maintenance has traditionally been undertaken by the HOAs themselves. Inspections were rare as they tended only to follow reports of violations. RCSWAC suggested that proactive and regular inspections by county staff are necessary to ensure proper maintenance procedures are being followed.

Additionally, as many HOAs simply lack the expertise to perform BMP maintenance, the advisory committee recommended the use of a local service district in order to fund direct county maintenance of HOA stormwater infrastructure. Under this plan, a service district fee would allow the program to be cost-neutral for the county (cost being one of the primary reasons for HOA-managed infrastructure in the first place) and absolving the HOA of maintenance responsibilities. As proposed, this would be a voluntary program. An alternative proposal would allow the county to serve as a contractor for the HOA, performing required maintenance and directly billing the association (Roanoke County 2014).

In 2014, the county updated its stormwater management ordinance with provisions refining the process of transferring stormwater facility maintenance responsibilities to HOAs and establishing a five-year schedule for county inspections of all HOA-maintained stormwater facilities (§23-1 et seq.). However, the county has not yet implemented the service district proposal outlined in the RCSWAC draft stormwater program.

Gadsden, Alabama: Establishing Clear Responsibilities

Gadsden, Alabama, directly addresses maintenance of private stormwater infrastructure in its stormwater management regulations. According to the code, property owners (and HOAs) served by on-site stormwater management facilities must: (1) agree to and execute a deed-restricted maintenance plan; (2) provide for defined and periodic inspections by a registered professional engineer; (3) provide minimum maintenance and repair according to the standards outlined in the BMP manual; (4) perform repairs according to a city-determined time line; and (5) allow for city-performed maintenance, should maintenance not occur in a timely manner at the expense of the association or property owner (§108-5.g).

This transparent process allows the city to communicate clearly with subdivision developers and subsequent HOAs on the rules and responsibilities governing stormwater infrastructure maintenance and repair. Direct codification of clear rules and responsibilities is an approach that can be clearly replicated in other municipalities nationwide, though the efficacy of this approach relies heavily on funding for enforcement and inspections.

CONCLUSION

For planners and local officials aiming to mitigate hazard risk associated with new

development, development regulations addressing community association responsibilities are where the rubber hits the road. A review of a subdivision proposal based on aesthetics, compliance with existing zoning, traffic, the availability of public utilities to service it, and similar criteria is typical.

With a large subdivision, a street and trail plan, open space management, parks, schools, and similar facilities add challenges that are nothing unusual. If a community association with "normal" improvements—streets, parks, tot lots, and open space—fails in its job or its funding, the place will look bad but won't threaten someone's health or well-being.

When you add to that mix critical flood or stormwater control facilities, the planner must question owner capability. If the development includes engineered improvements—dams, levees, landslide mitigation measures such as debris fences or large retaining walls, recreational lakes that are part of a regional stormwater management system, or any similar improvement—which, if they fail, will endanger other property or human life, the planner should carefully analyze the situation before responsibility is delegated to lay owners for maintenance and repair.

If the planner cannot with confidence say that the future owners of a proposed subdivision can fund the proper maintenance and repair of a critical piece of infrastructure, serious consideration should be given to rejecting the project outright, recommending that the mitigation facilities be publicly owned and maintained using broad-based tax revenues, or requiring the developer to post a financial performance guarantee calculated to underwrite at least half of the cost of failure, while bearing interest to guard against inflation.

If the planner cannot with confidence say that the future owners of a proposed subdivision can fund the proper maintenance and repair of a critical piece of infrastructure, serious consideration should be given to rejecting the project outright . . .

In many jurisdictions, any of the foregoing options will elicit objections from the developer, the planning commission, or both. But unless we realistically evaluate the capability of the eventual owner to properly care for critical facilities, the planner will leave too much to chance and the local government may inherit it anyway, but at a much less opportune time.

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