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Zoning Bulletin

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Authority—County board of education issues zoning exemption for proposed use of property for charter school

School district argues statutory authority to issue such exemptions is limited to school districts and not provided to county boards of education

Citation: *San Jose Unified School District v. Santa Clara County Office of*

Contributors
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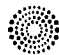

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Education, 7 Cal. App. 5th 967, 213 Cal. Rptr. 3d 241 (6th Dist. 2017)

CALIFORNIA (01/24/17)—This case addressed the issue of whether California Government Code § 53094(b) authorizes county boards of education to issue zoning exemptions for charter schools. Section 53094(b) authorizes the "governing board of a school district" to issue zoning exemptions to a "proposed use of property by the school district."

The Background/Facts: In California, public education is provided by local school districts. Each county has a county office of education, which provides support services to the county's school districts. The county superintendent is the head of the county office of education. The county board of education, an elected governing body, is the governing board of the county office of education.

Since 1992, the California Legislature has authorized the creation of charter schools, which are part of the public school system, but which "offer an alternative to district-run schools." Under California Proposition 39, since 2000, school districts are required to share their facilities with charter schools so that charter school students have access to facilities "reasonably equivalent" to those available to other public school students.

Rocketship Education ("Rocketship") is a network of elementary charter schools. The Santa Clara County Board of Education (the "County Board") has granted Rocketship a countywide charter to operate up to 25 charter schools. Rocketship sought to locate one of those charter schools on property (the "Property") owned by the City of San Jose (the "City"). The Property was located in the San Jose Unified School District (the "District") and in the jurisdiction of the Santa Clara County Office of Education (the "County Office"). Use of the Property for a school was not permitted under the City's General Plan or the City's zoning ordinance. Under the City's General Plan, the Property was designated as open space, parklands, and habitat. Under the City's zoning ordinance, the Property was zoned light industrial. Rocketship requested that the County Board and the County Office exempt the Property from the City's General Plan and zoning ordinance pursuant to Government Code § 53094(b). Section 53094(b) authorizes the "governing board of a school district" to issue zoning exceptions to a "proposed use of property by the school district." In January 2013, the County Board approved a resolution (the "Resolution") exempting the Property from the City's General Plan and zoning ordinance pursuant to § 53094(b).

Thereafter the District filed a writ of mandate, seeking a rescission of the Resolution and a declaration that only school districts, not county boards of education, have the authority to invoke § 53094.

In March 2014, a trial court ruled that the County Board lacked the authority to invoke § 53094. The court concluded that school districts and county boards of education are "tasked with generally different responsibilities." Given those differences, the court concluded that the Legislature would have specifically stated an intent "to grant the power to override local zoning to county boards of education" if it had so intended. Since no such power was specifically stated in the statute, the court concluded that county boards of education lacked such power. The court directed the County Board to rescind the Resolution or take official action denying Rocketship's request for an exemption from local zoning requirements.

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The County Office, County Board, and Rocketship appealed.

DECISION: Judgment of Superior Court affirmed.

The Court of Appeal, Sixth District, California, held that county boards of education have no authority to issue zoning exemptions under § 53094.

In so holding, the court looked at the plain meaning of the statute, as well as the intention of the state Legislature in drafting it. Again, the language of § 53094 provides in relevant part: "the governing board of a school district . . . by a vote of two-thirds of its members, may render a city or county zoning ordinance inapplicable to a proposed use of property by the school district. . . ." At issue in this case was the meaning of the phrase "the governing board of a school district," and whether it included county boards of education. The County Office, County Board, and Rocketship contended that "the governing board of the school district" referred "to any public agency that operates public schools, including county boards of education." The District maintained that the language referred "more narrowly to the governing boards of local school districts, as they are described in the [state's] Education Code." (A number of provisions in the Education Code indicate that a county board of education is the governing board of a school district in only limited circumstances.)

Here, the Court of Appeal found that Government Code § 53094 was drafted with the recognition that school districts were to be treated uniquely (as compared to other local agencies) with regard to zoning because "school construction was subject to almost complete control by the state." The court found that, in enacting § 53094, the Legislature accorded to school districts "immunity from local regulation" in an effort "to prevent local interference with the state's sovereign activities of school construction and school location." In other words, "the Legislature intended to forestall local obstruction of state-sanctioned school construction and school location," said the court.

Here, the County Board had sought to use that immunity under § 53094 in connection Rocketship's proposed location of a charter school. The court rejected this attempt. It noted that "[w]hile county boards of education are authorized to issue charters and oversee charter schools, it is local school districts that are obligated to provide facilities to charter schools" (under the state's Education Code, § 47614, subd. (b).) Thus, noted the court, under the statute, the state had not tasked county boards of education with acquiring sites for charter schools. Moreover, to the extent county boards of education do acquire sites for charter school, the court said they are "not carrying out a sovereign activity on behalf of the state." Thus, the court concluded that it "follows, then, that empowering county boards of education to issue zoning exemptions for charter school facilities does not advance the purpose of section 53094—namely, preventing local interference with the state's sovereign activities." Accordingly, the court was convinced that, pursuant to legislative history and intent, § 53094 "does not authorize county boards of education to issue zoning exemptions for charter school facilities."

See also: *Hall v. City of Taft, 47 Cal. 2d 177, 302 P.2d 574 (1956).*

See also: *Town of Atherton v. Superior Court In and For San Mateo County, 159 Cal. App. 2d 417, 324 P.2d 328 (1st Dist. 1958).*

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Case Note:

In its decision, the court also rejected several other arguments proffered by the County Office, County Board, and Rocketship in support of their position.

Special Exception—Based on residential neighbors' opposition testimony to monopole, zoning board denies wireless company's special exception application

Wireless company appeals, arguing substantial evidence did not support zoning board's decision

Citation: *Northeast Pennsylvania SMSA Limited Partnership v. Throop Borough Zoning Hearing Board, 2017 WL 56124 (Pa. Commw. Ct. 2017)*

PENNSYLVANIA (01/05/17)—This case addressed the issue of whether a zoning hearing board erred when denying an application for a special exception use.

The Background/Facts: Northeast Pennsylvania SMSA Limited Partnership d/b/a Verizon Wireless ("Verizon") sought to construct a wireless communications facility with a 120-foot monopole in the Throop Borough (the "Borough"). Verizon sought to construct the facility and monopole in an effort to improve poor wireless service in portions of the Borough. In furtherance of that effort, Verizon leased land (the "Property") in the Borough's Light Industrial (I-l) Zoning District. The Property was located adjacent to residential properties in a Residential Zoning District.

In March 2015, Verizon filed a zoning permit application (the "Application") to construct a new communications facility, including a 120-foot monopole on the Property. Verizon also sought a special exception to allow construction of the 120-foot monopole. Section 507(3)(d) of the Borough's Zoning Ordinance (the "Ordinance") permitted "[r]adio and television transmission or receiving towers" by special exception in the Borough's I-1 Zoning District.

The Borough's Zoning Hearing Board ("ZHB") held a hearing on the Application. At the hearing, Verizon presented expert testimony as to the planned construction materials and landscaping of the monopole, as well as the lack of alternative locations for the monopole to achieve coverage and reduce capacity issues. Several neighbors (the "Objectors") who owned residential property near the proposed facility and monopole also testified. The Objectors expressed their concern that the facility and monopole would result in depreciation of their property values, and expose the neighborhood to noise

via a generator (that was to run up to 45 minutes twice monthly and during power outages).

Ultimately, the ZHB denied Verizon's request for a special exception. The ZHB noted that the Property was surrounded by residential neighborhoods and found that "the height of the proposed structure would not be in line with the character of those adjoining neighborhoods." The ZHB also recognized the concerns of the neighbors with regard to noise from an on-site generator.

Verizon appealed. A trial court affirmed the ZHB's decision denying Verizon's Application.

Verizon again appealed. On appeal, Verizon argued that substantial evidence did not support the ZHB's decision that Verizon's proposed use would substantially affect the community's health, safety, and welfare (a necessary finding to overcome a special exception use which is presumptively consistent with the health, safety and welfare of the community).

DECISION: Judgment of trial court reversed, and matter remanded.

The Commonwealth Court of Pennsylvania agreed with Verizon, holding that substantial evidence did not support the ZHB's decision that Verizon's proposed use would substantially affect the community's health, safety, and welfare. Accordingly, the court found that the ZHB erred in denying Verizon's special exception request.

In so holding, the court noted that "[a] special exception is neither special nor an exception, but a use expressly contemplated that evidences a legislative decision that the particular type of use is consistent with the zoning plan and presumptively consistent with the health, safety and welfare of the community." "A special exception is a permitted use to which the applicant is entitled if the applicant demonstrates compliance with the specific, objective requirements contained in a zoning ordinance and if the [ZHB] determines that the use would not adversely affect the community." Once the applicant (i.e., here, Verizon) shows that its application complies with the specific criteria delineated in the ordinance, it thus establishes that the proposal is presumptively consistent with the promotion of the public health, safety, and welfare, said the court. The burden, explained the court, then shifts to the objector (i.e., here, the Objectors) to overcome that presumption. "[A]n objector must prove to a high degree of probability that the impact from the proposed use will substantially affect the health, safety and welfare of the community to a greater extent than would be expected normally from that type of use," said the court.

Here, the court found that the Borough's Zoning Ordinance required that the ZHB grant an approval for a special exception if adequate evidence showed that the proposed use met both general and specific requirements (outlined in the Ordinance) for such use. "Although the ZHB did not expressly conclude that Verizon met its burden of proving that the proposed Facility would meet [the Zoning Ordinance's specific requirements related to fencing and boundary line setbacks,]" the court found that the ZHB must have so concluded "since the ZHB's conclusion was based solely upon the Facility's effect on the neighborhood, which is only relevant after the ZHB determined that Verizon met the Ordinance's objective special exception criteria." The court said that

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"[b]ecause the ZHB determined that Verizon satisfied the Ordinance's objective special exception requirements, Verizon's proposed Facility is a 'use that is expressly permitted by the [Ordinance], absent a showing [by the Objectors] of a detrimental effect on the community.' " Such evidence from the Objectors could not be "mere speculation," said the court; the Objectors "must prove to a high degree of probability that the impact from the proposed use will substantially affect the health, safety and welfare of the community to a greater extent than would be expected normally from that type of use."

Here, the court found that the Objectors failed to meet their burden, and offered only general, speculative testimony that the monopole's height and the generator's noise "would not be in line with the character of th[e] adjoining neighborhoods." "Therefore, absent substantial evidence of 'a high degree of probability that the impact from the [Facility would] substantially affect the health, safety and welfare of the community to a greater extent than would be expected normally from that type of use[,]' the ZHB was required by the Ordinance to grant the Application," concluded the court.

See also: *Blancett-Maddock v. City of Pittsburgh Zoning Bd. of Adjustment, 6 A.3d 595 (Pa. Commw. Ct. 2010).*

Case Note:

In its decision, the court noted that "protection of neighborhood aesthetics and property values are insufficient bases upon which to deny special exceptions."

Case Note:

In its decision, the court noted that a ZHB's interpretation of its own zoning ordinance is entitled to "great deference and weight." However, the court cautioned that, since a ZHB is not a legislative body, it "must not impose [its] concept of what the zoning ordinance should be, but rather . . . only . . . enforce the zoning ordinance in accordance with the applicable law." Here, the court found that the ZHB "departed from its function in determining whether the proposed use fell within the terms of the [Ordinance] and focused instead on implementing goals that it believed fell within the spirit of the [Ordinance]."

Use—Zoning board approves town's proposed use of property as permitted "municipal use"

Neighbor contends proposed use may also be characterized as other, prohibited use, and argues that since both use categories may not be harmonized, use must be prohibited

Citation: *Estate of Robbins v. Town of Cumberland, 2017 ME 16, 2017 WL 370887 (Me. 2017)*

MAINE (01/26/17)—This case addressed the issue of whether a town's proposed development was permitted as a "municipal use" under the terms of the town's zoning ordinance.

The Background/Facts: In 2014, the Town of Cumberland (the "Town") purchased property (the "Property") located in Cumberland. The Property was located in the Low Density Residential zoning district (the "LDR zone"). In the spring of 2015, the Town submitted to the Cumberland Planning Board (the "Board") an application for site plan review for a proposed development involving Property. The Town stated that the purpose of the development was "to provide low-impact passive recreation along the Casco Bay shoreline for the residents of Cumberland." Specifically, on the Property, the Town sought to construct public access walking trails, construct a parking lot, and relocate an existing bathhouse.

The Town's Code Enforcement Officer (the "CEO") determined that the Town's proposed use was a "municipal use," which was permitted in the LDR zone. The Board agreed and approved the Town's application.

Thereafter, the Estate of Merrill P. Robbins (the "Estate"), which owned land abutting the Property, appealed the decision. The Estate argued that the Town's proposed development actually amounted to an "outdoor recreational facility," which was not a permitted use in the LDR.

The Town's Board of Adjustment and Appeals agreed with the CEO's interpretation and determined that the Town's proposed facility was permissible within the LDR zone as a "municipal use."

The Estate appealed to the Superior Court. The court affirmed the CEO's interpretation and the Board's decision. It concluded that "the plain language of the ordinance" supported the finding that the Town's proposed use of the Property was for a "municipal use," permitted in the LDR zone.

The Estate again appealed. The Estate contended that the Town's proposed use could be characterized as either "municipal use" or "outdoor recreational facility." The Town's zoning ordinance defined a "municipal use" as "[a]ny use or building maintained by the Town of Cumberland." It defined an "outdoor recreational facility," in pertinent part, as

"[a] place designed and equipped primarily for the conduct of nonmotor-

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ized outdoor sports, leisure-time activities, and other customary and usual recreational activities, excluding boat launching facilities, amusement parks, and campgrounds." The Estate argued that since "outdoor recreational facilities" were not permitted in the LDR, while "municipal uses" were permitted in the LDR, the Town's proposed use could not be harmonized under both categories of uses and must therefore be found to be an "outdoor recreational facility" and thus prohibited in the LDR zone.

DECISION: Judgment of Superior Court affirmed.

The Supreme Judicial Court of Maine held that, under the "clear and unambiguous" language of the Town's zoning ordinance, the Town's proposed use of the Property was a "municipal use," and was thus permitted in the LDR zone. In fact, looking at the language of the Town's zoning ordinance, the court found that "any use" by the Town would qualify as a "municipal use." There were "no carveouts or exceptions." Therefore, even though some uses that are "municipal" might be defined elsewhere in the ordinance, they would still qualify as "municipal uses." "[L]imiting permissible 'municipal uses' in the LDR zone to only those uses that are otherwise explicitly permitted within the zone," as the Estate had argued, would require the court to have to read additional language into the ordinance's provisions—which it could not do—explained the court.

Special Exception—Opponents of proposed fuel station/convenience store contend zoning board improperly evaluated special exception application

Opponents dispute both extent neighborhood must be defined and burden of proof of parties

Citation: *Attar v. DMS Tollgate, LLC, 2017 WL 366341 (Md. 2017)*

MARYLAND (01/23/17)—This case addressed the issue of whether and to what extent the boundaries of the neighborhood in which a proposed special exception use is to be located must be defined before the special exception can be approved. The case also addressed the extent of any burden of proof that opponents to a special exception must meet.

The Background/Facts: William and Mary Goff, along with DMS Tollgate, LLC, (collectively, the "Applicants") sought to operate a fuel service station with a convenience store ("Wawa") on property (the "Property") located in Baltimore County (the "County"). In furtherance of that, the Applicants applied to the County for a Special Exception. Under the County Zoning Regulations § 502.1(A), a special exception use is prohibited if it is: "detrimental to the health, safety or general welfare of the locality involved;" and "tend[s] to create congestion in roads, streets or alleys therein[.]"

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The County's Office of Administrative Hearings ("OAH") held a hearing on the Special Exception application. At that hearing, several individuals (the "Opponents") appeared in opposition to the Special Exception application. The Opponents testified how the proposed Wawa would "cause traffic congestion, a harmful environmental impact, and a detrimental effect upon the economic stability of the neighborhood." OAH found that those "impacts are inherent in the operation of a gasoline/convenience store," and granted the Special Exception with conditions.

The Opponents appealed. The County Board of Appeals (the "Board") affirmed, granting the Special Exception.

The Opponents again appealed. The circuit court affirmed the grant of the Special Exception.

The Opponents further appealed. The Court of Special Appeals affirmed the decision of the circuit court.

The Opponents once again appealed. On appeal, the Opponents argued that the Board erred when it failed to define the boundaries of the Wawa neighborhood. The Opponents maintained that an applicant for a special exception must establish the boundaries of the neighborhood, and that the Board's written decision had to satisfy Maryland law, requiring articulation of the facts found regarding the neighborhood's boundaries. The Opponents also argued that the Board erred when it assigned the burden of proof to the Opponents (as opposed to the Applicants) and then concluded that the Opponents' evidence failed to "rebut the presumption of validity of the Special Exception use in this case."

The Court's Decision: Judgment of Court of Special Appeals affirmed.

The Court of Appeals of Maryland rejected the Opponents' arguments and affirmed the grant of the Special Exception to the Applicants.

In its decision, the court first addressed the Opponents' argument that the Board was required to, and failed to, delineate the boundaries of the Wawa neighborhood before it could approve the Special Exception. The court acknowledged that the law required that the Board's task here, in evaluating the Special Exception application, was to "determine if there [was] or likely [would] be a detriment to the surrounding properties." Citing prior, related case law, the court explained that the description of those surrounding properties—or neighborhood—impacted by a special exception use "must be precise enough to enable a party or appellate court to comprehend the area that the Board considered." The Objectors had contended that the Board, in evaluating special exception applications, had to precisely delineate the affected neighborhood and its boundaries, such as it is required to do in rezoning matters. The court rejected that argument. The court said that such a precise delineation of the neighborhood was not required with regard to special exception evaluations because special exceptions, unlike rezoning matters, are presumed to be in the interest of the general welfare and enjoy a presumption of validity. The court reiterated that the area of the neighborhood affected by a special exception need only be described by the Board precisely enough so that a party or the court may comprehend the area. Here, reviewing the evidence in the record, as referenced in the Board's opinion, the court concluded

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that there was "ample evidence of record" for the court to "appreciate the area considered by the Board." The court found that the Board had referenced: testimony concerning roads and intersections surrounding the property; testimony regarding commercial development surrounding the property, including other gas stations within a one-mile radius from the Property; and testimony regarding the flood plain surrounding the property.

The court also rejected the Opponents' argument that the Board erred in assigning the burden of proof to the Opponents. The court said it was "undisputed that 'both the burden of production and the burden of persuasion on the issue of whether the special exception should be granted [ ]' fall on the applicant, whereby the applicant must persuade the Board 'by a preponderance of the evidence that the special exception will conform to all applicable requirements.' " Still, explained the court, "[w]hile an applicant for a special exception bears both the burden of persuasion and of production, the concurrent presumption in favor of a special exception applicant is not a mutually exclusive evidentiary burden." Rather, "the party favored by the presumption" (i.e., the Applicant) "is not relieved of the requirement of presenting evidence to establish a prima facie case as to those issues for which he bears the burden of proof if the adverse party sufficiently rebuts the presumption," said the court.

Here, the court found that the Opponents failed to "set forth sufficient evidence to indicate that the proposed fuel service station would have any adverse effects above and beyond those inherently associated with such use." Thus, here, the court found that the Board had "simply stated that, in light of the Applicants having presented sufficient evidence demonstrating compliance with BCZR § 502.1 and the general presumption of validity enjoyed by special exception uses, the evidence as a whole did not warrant denial of the petition for the special exception." The court concluded that the Board's opinion did not inappropriately assign the burden of proof to the Opponents; rather, the Board had properly opined that the evidence presented by the Opponents was not sufficient to rebut the presumption of the validity of a special exception.

See also: *Schultz v. Pritts, 291 Md. 1, 11, 432 A.2d 1319 (1981).*

See also: *Alviani v. Dixon, 365 Md. 95, 775 A.2d 1234 (2001).*

See also: *People's Counsel for Baltimore County, et al. v. Loyola College in Maryland, 406 Md. 54, 956 A.2d 166 (2008).*

Zoning News from Around the Nation

INDIANA

House Bill 1133, which "would have prevented local communities from banning Airbnb and similar services has failed at the Indiana General Assembly." Reportedly, lawmakers may move to consider the bill again.

Source: *IndyStar*; www.indystar.com

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MASSACHUSETTS

Cambridge City Councilors have reportedly modified existing zoning ordinances regarding medical marijuana dispensaries, permitting the establishment of potentially "five or six" new dispensaries in the city. The City Councilors also passed an amendment that increases the permitted distance between marijuana dispensaries from 1,500 to 1,800 feet.

Source: *The Harvard Crimson*; www.thecrimson.com

VIRGINIA

The state Senate has passed legislation—SB1292—"that would restrict the ability of Virginia localities from regulating equipment to boost wireless communications." The bill, which limits the ability of cities and counties to amend local zoning ordinances to regulate installation of "small-cell facilities" in public right-of-way, will now be considered in the House of Delegates.

Source: *Charlottesville Tomorrow*; www.cvilletomorrow.org

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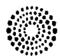

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Vested Rights—After developer files application for conditional use variance, township adopts ordinance which prohibits use sought

Developer argues vested rights to variance under "time of application rule," but Township says developer's incomplete application failed to trigger rule

Citation: *Dunbar Homes, Inc. v. Zoning Board of Adjustment of the Township of Franklin, 2017 WL 586506 (N.J. Super. Ct. App. Div. 2017)*

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NEW JERSEY (02/14/17)—This case addressed, as a matter of first impression, the issue of when a submission to a municipal planning board of an "application for development" triggers the time of application rule, which provides that regulations in effect "on the date of submission of an application for development" govern the review of the application.

The Background/Facts: Dunbar Homes, Inc. ("Dunbar") owned a garden apartment complex in the General Business ("GB") zone in the Township of Franklin (the "Township"). Dunbar sought to construct 55 additional apartments on 6.93 acres that it owned adjacent to the garden apartment complex. Because the Township's zoning ordinance required a minimum of 10 acres for garden apartments as a conditional use in the GB zone, Dunbar needed to seek a conditional use variance.

On May 27, 2013, Dunbar filed a submission with the Township's Planning Board, seeking a variance under New Jersey statutory law—N.J.S.A. 40:55D-70(d)(3) (the "(d)(3) variance"). (A (d)(3) variance may permit a "deviation from a specification or standard.") The next day, the Township introduced an ordinance that would delete "garden apartment developments" from permitted conditional uses in the GB zone (the "amendment ordinance"). The amendment ordinance became effective August 5, 2013.

On August 7, 2013, the Township's Senior Zoning Officer (the "ZO") notified Dunbar that it's application failed to include three items required by § 112-300 of the Township's Zoning and Subdivision Ordinance (the "Ordinance"): "[f]our additional copies of the site plan application, use variance application, site plans set and architectural set," "3 copies of the drainage calculations," and "[c]opy of submittal letter to [Department of Transportation]." The ZO also notified Dunbar that, pursuant to the newly adopted amendment ordinance—which deleted garden apartment developments from conditions uses allowed in the GB zone—Dunbar was now required to seek a (d)(1) variance, and not a (d)(3) variance. (A (d)(1) variance may permit "a use or principal structure in a district restricted against such use or principal structure.")

Dunbar appealed to the Township's Zoning Board of Adjustment (the "Board"). Dunbar argued that because it had submitted its application before the effective date of the amendment ordinance, only a (d)(3) variance was required. Dunbar pointed to New Jersey's "time of application rule." Pursuant to N.J.S.A. 40:55D-10.5, regulations in effect "on the date of submission of an application for development" govern the review of the application. Dunbar argued that its submission need not be "deemed complete" for the "time of application rule" to apply, but only had to be "a substantial, bona-fide application . . . which gives the Township sufficient notice of the application and an understanding of the development being proposed."

The Board affirmed the ZO's decision. It found that Dunbar's submission was not an "application for development" until October 29, 2013, when Dunbar provided the missing items required by § 112-300 of the Ordinance.

Dunbar appealed to superior court. The trial judge reversed the Board's resolution. The judge found that neither the Ordinance or New Jersey statutory law required "completeness" for a submission to qualify as an "application for development" protected under the "time of application rule."

The Township appealed.

DECISION: Judgment of Superior Court reversed.

The Superior Court of New Jersey, Appellate Division, concluded that the "time of application rule" was not triggered in May 2013 when Dunbar first filed its submission for a (d)(3) variance. Although the court concluded that Dunbar's application for development "need not be complete" to trigger the time of application rule, the court found that to trigger the time of application rule, the application did have to include certain documents required by the Ordinance. Since Dunbar's application failed to include some of those Ordinance-required documents at the time of initial submission, the court concluded that Dunbar's application did not trigger the time of application rule prior to the effective date of the amendment ordinance.

In so holding, the court looked at the plain language of the statute and the legislative history of the statute and found that a submission for an "application for development" as used in N.J.S.A. 40:55D-10.5 "need not be a 'complete' application." Looking at New Jersey's Municipal Land Use Law ("MLUL"), the court found that the MLUL definition for "application for development," N.J.S.A. 40:55D-3, is "mandatory in construing the time of application rule" because the law requires "uniform and efficient procedures." The court found that the language of the MLUL's "application for development" definition made clear what a submission of an application must include to constitute an "application for development" protected by the time of application statute: "the application form and all accompanying documents required by ordinance for approval of a . . . site plan. . . conditional use, zoning variance or direction of the issuance of a permit." Thus, said the court, the documents that are necessary to satisfy this standard for a submission to constitute an "application for development" protected by the time of application rule are "dictated by the nature of the application(s) sought and the requirements for each application in effect at the time the submission is made."

See also: *Jai Sai Ram, LLC v. Planning/Zoning Bd. of Borough of South Toms River, 446 N.J. Super. 338, 141 A.3d 407 (App. Div. 2016), certification denied, 2016 WL 6301506 (N.J. 2016).*

See also: *Rumson Estates, Inc. v. Mayor & Council of Borough of Fair Haven, 177 N.J. 338, 828 A.2d 317 (2003).*

Case Note:

In its decision, the court acknowledged that N.J.S.A. 40:55D-10.3 does state that "[a]n application for development shall be complete for purposes of commencing the applicable time period for action by a municipal agency. . . ." (emphasis added). The court said that the "shall be complete" language defined "when the clock starts ticking for automatic approval provisions" related to a municipal agency's inaction after a complete application is submitted; it (completeness) did not define when the clock starts ticking for the time of application rule protections.

Case Note:

The court noted that should a municipal agency require additional information—above and beyond that required by the applicable ordinance—an application would not be deemed "incomplete" for purposes of time of application rule because it lacked that additional information. Only those documents required by the ordinance for submission are

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necessary for the submission to be deemed an "application for development" protected by the time of application rule, said the court.

Use—Township says property owner's vacation rentals of single-family home amount to prohibited "tourist home" use

Property owner maintains her use does not fit definition of "tourist home" and is permitted

Citation: *Shvekh v. Zoning Hearing Board of Stroud Township, 2017 WL 474028 (Pa. Commw. Ct. 2017)*

PENNSYLVANIA (02/06/17)—This case addressed the issue of whether the vacation rentals of a single-family home amounted to the use of the home as a "tourist home," prohibited under a township's zoning ordinance.

The Background/Facts: Irina Shvekh ("Shvekh") and her son-in-law owned a single-family home with five bedrooms (the "Property") in the Special and Recreational Zoning District ("S-1 District") in Stroud Township (the "Township"). The Property was being advertised on websites for vacation home rentals and had been rented 20 to 25 times. According to Shvekh and her daughter, their family occupied the Property approximately one week every month.

Following complaints from neighbors, in May 2015, the Township's Zoning Officer (the "ZO") issued a notice of violation to Shvekh. The notice asserted that the Property was being used as a "tourist home"—a use which was not permitted within the S-1 District, per the Township's Zoning Ordinance (the "Ordinance"). Under the Ordinance, the S-1 District permitted "single-family dwellings," but prohibited "hotels, motels, resorts, and other lodging services." The Ordinance defined a "tourist home" as "[a] dwelling in which at least one but no more than six rooms are offered for overnight accommodations for transient guests for compensation." The ZO opined that because the Property was rented out for short periods of time, it was being used as a tourist home.

Shvekh appealed the notice of violation to the Township's Zoning Hearing Board (the "Board"). Shvekh argued that she used the Property for "vacation rentals," which, under a "liberal construction of the Ordinance," was a permissible use of a "single-family dwelling." The Ordinance defined "single-family dwelling" as "[a] detached building, designed for or occupied exclusively by one family . . . ." The Ordinance defined "family" as: "Any individual, or two (2) or more persons related by blood, marriage, legal adoption, foster placement, or a group of not more than three (3) persons who need not be related by blood or marriage, living together in a dwelling unit."

The Board concluded that the Property was being used as a "tourist home" because the lease agreement Shvekh used with renters did not limit the renters to a single family or a group of no more than three unrelated persons.

Shvekh appealed to the trial court. The court affirmed the Board's decision.

Shvekh again appealed. On appeal, she argued that, in holding that the Property was being used as a "tourist home," the Board misconstrued the Zoning Ordinance.

DECISION: Judgment of Court of Common Pleas reversed.

The Commonwealth Court of Pennsylvania agreed with Shvekh. The court held that the vacation rental of Shvekh's Property did not meet the definition of an unpermitted "tourist home." Rather, the court agreed with Shvekh that the vacation of her Property was permitted as a single-family use.

In so holding, the court acknowledged that in the concept of a single-family dwelling is "a certain expectation of relative stability and permanence in the composition of the familial unit." The court noted that since the Property was occupied at least once a month by the Shvekh and her family, it was not used in a "purely transient" way that would undermine that familial unit composition.

Further, looking at the language of the Ordinance, the court found that it did not define occupancy of a single-family dwelling in a way that precluded vacation rentals. More specifically, the court found no provision in the Ordinance that prohibited the owner of a single-family home—such as Shvekh—from "renting it out from time to time to vacationers." Moreover, the court found that the vacation rental of an entire home (such as Shvekh's rental of the Property) bore "no relation to the bedroom-by-bedroom rental that is the hallmark of a tourist home." The court found it clear that the ZO and the Board had sought to expand the definition of "tourist home" to include any short-term rental. The court admonished that a municipality "cannot advance a new and strained interpretation of its zoning ordinance in order to effect what it would like the ordinance to say without an amendment."

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

See also: *Marchenko v. Zoning Hearing Board of Pocono Township, 147 A.3d 947 (Pa. Commw. Ct. 2016).*

Authority—Board of zoning appeals grants special exception application subject to setback requirement

Applicant contends board exceeded authority in requiring setback distance greater than that set forth in zoning ordinance

Citation: *Flat Rock Wind, LLC v. Rush County Area Board of Zoning Appeals, 2017 WL 586487 (Ind. Ct. App. 2017)*

INDIANA (02/14/17)—This case addressed the issue of whether a board of zoning appeals exceeded its authority when it imposed a setback condition that was greater than the minimum setback distance specified in the county zoning ordinance.

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The Background/Facts: Flat Rock Wind, LLC ("Flat Rock") sought to develop a 180-megawatt commercial Wind Energy Conversion System ("WECS") located on more than 29,000 acres of land in Rush and Henry Counties. In March 2015, Flat Rock filed an application for approval of a special exception to the Rush County zoning ordinance (the "Zoning Ordinance") to construct and operate the portion of the WECS located in Rush County (the "County"). Under the Zoning Ordinance, a WECS is a special exception, subject to approval of the County's Board of Zoning Appeals ("BZA"). In the special exception application, Flat Rock certified that the proposed wind turbines would meet the Zoning Ordinance's requirement of a 1,000-foot setback from residential dwellings.

The BZA held public hearings on Flat Rock's application. At those hearings, landowners and "other remonstrators" provided evidence on the "adverse health effects and negative impact to property values resulting from Flat Rock's proposed WECS." Among other things, the remonstrators presented evidence of a paper by acoustical engineering experts that addressed "the long-term adverse health effects documented to result from residing in the proximity of a commercial wind turbine." In that paper, those experts "proposed increasing the distance between a rural residence and the current industrial grade wind turbines" to at least 3,280 feet. Relying on that paper, the remonstrators requested the BZA to impose, as a condition to any grant of Flat Rock's application, increased setback distances "to a much more safe distance of 2,640 feet" between the turbines and residences of non-participating owners (i.e., those who had not leased their land to Flat Rock). Eventually, the BZA approved Flat Rock's WECS special exception with a 2,300-foot setback condition (the "Setback Condition"), "as measured from the center of the WECS turbine to the property line of the non-participating property owner's land." The BZA found that setback distance was necessary "[i]n order to protect health and safety."

Flat Rock appealed the BZA's zoning decision to superior court. Among other things, Flat Rock argued that the BZA exceeded its authority when granting the WECS special exception subject to the Setback Condition, which was both greater and measured differently than the Zoning Ordinance's minimum setback requirement. Section 6.4.6.4.1 of the Zoning Ordinance provided that the distance from a "[r]esidential dwelling, measured from the center of the WECS to the nearest corner of the structure" must have a "minimum setback distance" of "one thousand (1,000) feet for nonparticipating landowners."

The trial court affirmed the BZA's zoning decision. The court concluded that the BZA acted "within its broad authority and discretion in imposing the Setback Condition . . . ," and that the substantial evidence in the recorded supported the Setback Condition.

Flat Rock again appealed. On appeal, Flat Rock argued that affirming the BZA's action would grant "the BZA carte blanche to re-write the Zoning Ordinance at the BZA's whim and has allowed the BZA to impose a poison pill condition that effectively kills a wind energy project that meets the objective setback requirements in the Zoning Ordinance." Flat Rock contended that because it met the "objective setback requirement" of 1,000 feet under Section 6.4.6.4.1 of the Zoning Ordinance, its petition should have been granted. Flat Rock argued that "to impose the Setback Condition now creates an illegal, arbitrary, and ad hoc situation that is 'non-uniformly measured only for Flat Rock's WECS project' and that creates ambiguity for future wind turbine investments."

DECISION: Judgment of superior court affirmed.

Looking at the language of the Zoning Ordinance, the Court of Appeals of Indiana held that the BZA did not exceed its authority by creating the Setback Condition, as well as a new method for measuring that setback.

In so holding, the court noted that the Zoning Ordinance delegated to the BZA "the authority to interpret and enforce the [Z]oning [O]rdinance, as well as the exclusive power to hear and decide applications for special exceptions." The court noted that an applicant for a WECS special exception—such as Flat Rock here—bears the burden of satisfying both Section 10.2 of the Zoning Ordinance, which sets forth general criteria applicable to all special exceptions, and Section 6.4 of the Zoning Ordinance, which pertains specifically to the construction of WECS in Rush County. Section 10.2 of the Zoning Ordinance provides that the BZA is authorized "to decide such questions as are involved in determining whether special exceptions should be granted" and "to grant special exceptions with such conditions and safeguards as are appropriate under this ordinance, or to deny special exceptions when not in harmony with the purpose and intent of the ordinance." With regard to setback requirements, Section 6.4.6.4.1 of the Zoning Ordinance again provided that the distance from a "[r]esidential dwelling, measured from the center of the WECS to the nearest corner of the structure" must have a "minimum setback distance" of "one thousand (1,000) feet for nonparticipating landowners."

The Court of Appeals concluded that the BZA had the authority to impose "the enlarged Setback Condition," and that such authority derived "squarely" from Section 6.4.6.4.1 of the Zoning Ordinance by its reference to a "minimum setback distance." Further, the court found that Section 10.2 of the Zoning Ordinance "explicitly reinforce[d] the BZA's discretionary power under Section 6.4 while at the same time defining the boundaries of this discretion as the 'condition and safeguards as are appropriate under this ordinance or to deny special exceptions when not in harmony with the purpose and intent of this ordinance.' "

Finally, in response to Flat Rock's argument that there would be ambiguity for future wind turbine investments if the BZA was allowed to impose setback requirements greater than the objective requirements in the Zoning Ordinance, the court found that Flat Rock (and future wind turbine investors) was placed on notice by the insertion of the word "minimum" that the setback would be evaluated by the BZA in light of Section 10.2 of the Zoning Ordinance.

In summary, the court concluded that the BZA had the authority to view the Zoning Ordinance's siting setback as a "minimum" guideline, which was subject to "reasonable restrictions" to preserve the health and safety of the public. (Zoning Ordinance, Sec. 6.4.2 and Zoning Ordinance, Sec. 10.2). The court found that the BZA imposed the Setback Condition on Flat Rock's WECS to promote the Zoning Ordinance's and the WECS' special exception's stated purpose to promote the public interest.

See also: *Fulton County Advisory Plan Com'n v. Groninger, 810 N.E.2d 704 (Ind. 2004)*

Case Note:

Flat Rock had also argued that the trial court abused its discretion in permitting a group of landowners to intervene in the judicial proceedings. The Court of Appeals rejected that argument, finding that those intervening satisfied a legal three-part test required to intervene.

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Signs/Religion—Town denies church a permit for electronic sign

Church alleges violation of First Amendment and equal protection rights, as well as violation of federal Religious Land Use and Institutionalized Persons Act

Citation: *Signs for Jesus v. Town of Pembroke, 2017 DNH 16, 2017 WL 394493 (D.N.H. 2017)*

NEW HAMPSHIRE (01/27/17)—This case addressed the issue of whether the denial of a church's request for a permit to install an electronic sign on the church's property violated the church's First Amendment and equal protection rights under the United States Constitution and the New Hampshire Constitution, as well as the federal Religious Land Use and Institutionalized Persons Act (RLUIPA).

The Background/Facts: Hillside Baptist Church (the "Church") wanted to install an electronic sign next to the road on its property in the Town of Pembroke (the "Town"). The Church's property was located in a Limited Office ("LO") zoning district. Under the Town's sign ordinance, electronic signs are barred in the LO district, as well as all other districts in the Town except for the Commercial District. Two other electronic signs were located on the same road as the Church in districts that did not permit such signs. One of the signs was on property owned by a gas station and predated the adoption of the Town's sign ordinance. The second sign was on property owned by a public school—a political subdivision of the state over which the Town had no zoning authority.

In April 2015, the Church applied for a permit to install an electronic sign. The Town Code Enforcement Officer ("CEO") denied the Church's permit application because the proposed sign was to be erected in a district where electronic signs were prohibited.

The Church then filed an administrative appeal. The Town's Zoning Board of Adjustment (the "Board") rejected the Church's appeal, finding that, under the Town's sign ordinance, an electronic sign was not permitted at the Church's location.

The Church appealed to federal district court. The Church argued that the Board's denial of its request for an electronic sign permit violated: its First Amendment right to free speech; its First Amendment right to freely exercise its religion; its state and federal constitutional rights to equal protection; its Fourteenth Amendment right to procedural due process; and its rights under the undue burden and equal terms provisions of the federal.

Both the Church and the Town moved for summary judgment, asking the court to find there were no material issues of fact and to decide the matter in their favor on the law alone.

DECISION: Church's motion for summary judgment denied and Town's motion for summary judgment granted.

The United States District Court, District of New Hampshire, held that the Town, in denying the Church an electronic sign permit did not violate the First

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Amendment, or state and federal constitutional rights to equal protection, or the Church's constitutional due process rights, or RLUIPA's undue burden and equal terms provisions.

First addressing the Church's allegations that the electronic sign permit violated its right to free speech under the First Amendment, the court applied an intermediate scrutiny standard. The court explained that content-neutral regulations, such as the electronic sign ordinance, are subject only to intermediate scrutiny, which permits the government to "impose reasonable restrictions on the time, place, or manner of protected speech," so long as "they are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information." The Church had argued that the Town's decision to deny its request for an electronic sign was subject to strict scrutiny because it drew "speaker-based distinctions that improperly permit[ed] some speakers to have an electronic sign but not others." The court acknowledged that speaker-based laws demand strict scrutiny, but disagreed that strict scrutiny should be applied here. The court found that the distinction for grandfathered speakers (such as the gas station that had an electronic sign before the town enacted the sign ordinance) (per a state law that exempted all preexisting nonconforming uses of property from local zoning requirements) did not directly or indirectly regulate users on the basis of the content of affected speech, and therefore did not trigger strict scrutiny even though the sign ordinance treated some speakers differently from others. The court also found that the distinction for government land owners (like the public school that had an electronic sign) (per state law that exempts government land users from local zoning ordinances) similarly did not discriminate on the basis of content of affected speech and therefore did not warrant strict scrutiny.

The court concluded that the sign ordinance here survived intermediate scrutiny as it served the government interests of aesthetics and traffic safety, and did so without being "overinclusive" and burdening "substantially more speech than [was] necessary." The court found there were still "ample alternative channels for communication of the information" that the Church wished to convey—such as manually changeable signs.

Finding the Town's ban on electronic signs in certain zoning districts was valid and neutral, the court found there was no evidence that the ban targeted religion. Accordingly, the court also rejected the Church's argument that the Town's sign ordinance infringed on the Church's First Amendment right to the free exercise of religion.

The court also rejected the Church's claim that the electronic sign ban violated the Church's federal and state constitutional rights to equal protection when it denied the Church's request for an electronic sign while allowing the public school to keep its electronic sign. The court found that the Church's claims failed as a threshold matter because the Church and the public school were not similarly situated. The court explained that "[t]o establish a viable equal protection claim under either federal or state law, the Church must prove, among other things, that it was treated differently from other 'similarly situated' entities." The court found that the Church was not similarly situated to the public school because, unlike the Church, the public school was a subdivision of the State of New Hampshire that the Town had no authority to regulate, while the state had expressly empowered municipalities to regulate land uses by nongovernmental entities such as the Church.

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The court also rejected the Church's claims that the Town violated RLUIPA's substantial burden and equal terms provisions. The court explained that RLUIPA's substantial burden provision states that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution," unless doing so "is the least restrictive means of furthering [a] compelling governmental interest." (42 U.S.C.A. § 2000cc(a)(1).) The equal terms provision provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." (42 U.S.C.A. § 2000cc(b)(1).)

The court found the Town did not substantially burden the Church's religious exercise by denying it an electronic sign because the Church still had an existing sign at the same location, at the end of its driveway, whose message was capable of being changed manually. The court found "the Church's assertions that it lacked the manpower to change the sign every single day, and that occasional inclement weather is an impediment," were insufficient to amount to substantial burdens of the Church's religious exercise.

The court found that the Town did not violate RLUIPA's equal terms provision by denying the Church an electronic sign while allowing a nearby gas station and public school to have electronic signs. The court concluded that the Church failed to prove that it had been treated less well than "a similarly situated secular comparator." The gas station was not "valid comparator" as its sign was grandfathered—and the Church was "ineligible for grandfathering based on chronology, not religious identity." The public school also was not a "valid comparator" as the state prohibited the Town of power to regulate governmental land uses such as the public school, and the Church was not a governmental land use.

Finally, the court rejected the Church's due process claims, finding that the Church failed to allege that constitutionally adequate state law remedies—such as an ordinary zoning appeal of the Board's decision to state superior court—were unavailable.

Accordingly, the court granted summary judgment in favor of the Town.

See also: *Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984).*

See also: *Naser Jewelers, Inc. v. City Of Concord, N.H., 513 F.3d 27 (1st Cir. 2008).*

See also: *Medeiros v. Vincent, 431 F.3d 25, 35 Envtl. L. Rep. 20251 (1st Cir. 2005).*

See also: *Vision Church v. Village of Long Grove, 468 F.3d 975 (7th Cir. 2006).*

See also: *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295 (11th Cir. 2006).*

Case Note:

An appeal to this decision was filed on February 22, 2017, in the United States Court of Appeals, First Circuit.

Zoning News from Around the Nation

KENTUCKY

The Kentucky House of Representatives has passed HB 72, which is aimed at discouraging "frivolous" appeals of zoning decisions. Under the bill, a plaintiff that challenges a zoning decision and loses in circuit court, would be unable to appeal the case to the Kentucky Court of Appeals without posting an appeal bond that could be as high as $100,000 to $250,000. The bill now heads to the state Senate for consideration.

Source: *Insider Louisville*; http://insiderlouisville.com

NEW YORK

The City of Buffalo's Common Council is considering legislation aimed at creating more affordable housing. No specific inclusionary zoning measure has been proposed, but any such legislation would reportedly "require the owners of new multiple-unit developments—especially those benefiting from public financing or tax breaks—to set aside a portion of their units as affordable housing or below market rate."

Source: *The Buffalo News*; https://buffalonews.com

VIRGINIA

The House of Delegates has passed House Bill 1766, which would allow "certain electric utility substations and other facilities to sidestep local planning and zoning approval." The bill "applies only to 138 kilovolt transmission lines that are almost exclusively used by Appalachian Power in their Southwestern Virginia service area. The Senate is considering a companion bill, Senate Bill 1110.

Source: *Richmond Times-Dispatch*; www.richmond.com

WASHINGTON

The state Senate passed Senate Bill 5212, which would "prohibit rules changing on a developer or home builder in the middle of their project." The bill would "vest building and permit applications for zoning, environmental and land-use regulations." The state House of Representatives will now consider the bill.

Source: *The Columbian*; www.columbian.com

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Proceedings—Homeowners appeal grant of neighbor's variance by requesting a writ of mandamus

City argues challenge to variance decision must come by a petition for certiorari

Citation: *City of Cumming v. Flowers, 2017 WL 875041 (Ga. 2017)*

GEORGIA (03/06/17)—This case addressed the issue of whether a quasi-judicial decision of a zoning board may be appealed by certiorari

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even if the local ordinance does not so provide. It also addressed whether local ordinances can create means of zoning appeal to the superior court that are not authorized by state statute.

The Background/Facts: Kerley Family Homes ("Kerley") was building townhouses on property it owned in the City of Cumming (the "City"). Apparently based on a surveyor mistake, Kerley discovered that it was constructing buildings closer to adjoining property than the City's Zoning Ordinance setback permitted. Kerley filed a variance application to change the required setback for some of the buildings on its property. After the City's Planning Board denied the variance application, the City's Board of Zoning Appeals ("BZA") granted it with several conditions.

Thereafter, neighboring homeowners (the "Homeowners") appealed the grant of the variance to superior court. The Homeowners complaint requested a writ of mandamus to compel the BZA "to comply with the law." The City, joined by Kerley (collectively, the "Defendants"), filed a motion to dismiss the Homeowners' complaint. The Defendants argued that the Homeowner's challenge to the variance decision was required under state statutory law—OCGA § 5-4-1—to come to the superior court by a petition for certiorari. Thus, the Defendants argued that since the Homeowners' action should be dismissed because the Homeowners erred in brining the challenge by a writ of mandamus.

OCGA § 5-4-1(a) provides that "[t]he writ of certiorari shall lie for the correction of errors committed by any inferior judicatory or any person exercising judicial powers, including the judge of the probate court, except in cases touching the probate of wills, granting letters testamentary, and of administration." Thus, "[c]ertiorari is not an appropriate remedy to review or obtain relief from the judgment, decision or action of an inferior judicatory or body rendered in the exercise of legislative, executive, or ministerial functions, as opposed to judicial or quasi-judicial powers."

The parties agreed to treat the motion to dismiss as a motion for summary judgment, and the superior court ultimately denied the summary judgment. In ruling that the Homeowners could proceed on their petition for mandamus, the superior court relied on the procedural direction of the Supreme Court of Georgia, which had, in prior case law, provided that "where the zoning ordinance does not provide a means of appeal from the denial of a request for a variance, the landowner travels to superior court by writ of mandamus" (the "local-ordinance requirement").

The Defendants appealed. They argued that "the local-ordinance requirement" was unfounded and asked the appeals court to "disapprove" it. The appeal was transferred to the Supreme Court of Georgia.

DECISION: Judgment of Superior Court reversed.

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The Supreme Court of Georgia agreed with the Defendants, concluding that the "local-ordinance requirement" must be disapproved. Local ordinances cannot create means of appeal to the superior court that are not authorized by statute, held the court. The court also held that an administrative zoning body's quasi-judicial decision comes within the scope of OCGA § 5-4-1 and thus is subject to appeal to the superior court by petition for certiorari only.

Prior to this holding, the local-ordinance requirement had directed that a BZA's quasi-judicial decision may be appealed by certiorari only if the City's Zoning Ordinance so provided. Under the local-ordinance requirement, when the zoning ordinance failed to prescribe a method for judicial review, mandamus was deemed to be the proper method to appeal a variance decision. The court determined that an evaluation of factors weighed "strongly in favor of disapproving the local-ordinance requirement." The court found that the local-ordinance requirement conflicted with OCGA § 5-4-1 and the court's interpretation and application of that statute in non-zoning contexts. "The most troubling consequence of the local-ordinance requirement," said the court, "is that it allows local ordinances to effectively preempt the general certiorari statute [OCGA § 5-4-1]." The court explained that "scheme does not comport with our Constitution, under which general laws are supreme over local ordinances, including in the field of zoning." "[J]ust as a local government cannot control by ordinance whether a direct appeal may be brought in the superior court, neither can a local government control by ordinance whether certiorari may be brought in the superior court under OCGA § 5-4-1," concluded the court.

With regard to the facts of the case at hand, the court found that the BZA's variance decision was quasi-judicial. The variance decision "required the zoning board to 'determine[ ] the facts and appl[y] the ordinance's legal standards to them,' which is a 'decision-making process . . . akin to a judicial act,' " found the court. The court additionally noted that the variance decision was clearly quasi-judicial here because the BZA's discretion was "tightly controlled by the ordinance." Whenever a variance issue was brought to the BZA, §§ 113-48 and 113-49 of the Zoning Ordinance required that the BZA "hold a hearing that is open to the public, give 'due notice to the aggrieved party' of the hearing, and inform all parties of its decision in writing within a reasonable time."

The Homeowners had argued that the BZA's decision was not quasi-judicial and thus not required to be appealed by petition for certiorari. The Homeowners had argued that because the BZA "disregarded" conditions of the Zoning Ordinance related to variances, the BZA "actually exercised their legislative power by granting a variance that was not permitted under the current zoning regulations." The Supreme Court of Georgia rejected that argument. The court noted that the BZA

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"may well have abused its discretion in concluding that all of the conditions were met and thus in granting the variance to Kerley, but that is a question of the correctness of the BZA's decision, not its nature." "A quasi-judicial decision does not become a legislative decision simply because it was wrong," said the court.

See also: *Haralson County v. Taylor Junkyard of Bremen, Inc., 291 Ga. 321, 729 S.E.2d 357 (2012).*

Case Note:

The Homeowners had also sought an injunction restraining and enjoining Kerley and the City from "violating the Zoning Ordinance." The Supreme Court of Georgia denied that injunction. It noted that an injunction is an equitable remedy available only when "no adequate remedy is provided at law." (OCGA § 9-5-1.) In this case, a petition for certiorari provided that adequate legal remedy, said the court.

Case Note:

The holdings in this case disapproved Dougherty County v. Webb, 256 Ga. 474, 350 S.E.2d 457 (1986) (disapproved of by, City of Cumming v. Flowers, 2017 WL 875041 (Ga. 2017)); Jackson v. Spalding County, 265 Ga. 792, 462 S.E.2d 361 (1995); Shockley v. Fayette County, 260 Ga. 489, 396 S.E.2d 883 (1990) (disapproved of by, City of Cumming v. Flowers, 2017 WL 875041 (Ga. 2017)); City of Atlanta v. Wansley Moving & Storage Co., 245 Ga. 794, 267 S.E.2d 234 (1980).

Preemption—State Commission permits waste oil treating plant in county, but county zoning laws prohibit plant

Parties dispute whether county zoning laws are preempted by state law governing oil and gas development

Citation: *Environmental Driven Solutions, LLC v. Dunn County, 2017 ND 45, 890 N.W.2d 841 (N.D. 2017)*

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NORTH DAKOTA (03/07/17)—This case addressed the issue of whether state laws regulating oil and gas development preempted county zoning laws with regard to the siting of a waste oil treating plant.

The Background/Facts: In August 2013, Environmental Driven Solutions, LLC ("EDS") received a permit from North Dakota's Industrial Commission (the "Commission") for a waste oil treating plant in Dunn County (the "County"). The permit allowed EDS to recycle and treat waste crude oil. The permit noted that the treating plant "must comply with all applicable local, state, and federal laws and regulations."

After EDS began constructing the plant, the County issued notices of "violation and order to abate." The County maintained that the treating plant could not be constructed on EDS' property because such a facility was not an allowed use in the zoning district in which the property was located. EDS then applied to the County to rezone the property, but the County rejected that application. EDS then applied for a conditional use permit, but that too was denied.

Eventually, EDS brought a legal action against the County. EDS asked the court to declare that the Commission, rather than the County, had jurisdiction to determine siting of the plant. The Commission intervened in the action.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the district court issued summary judgment in favor of EDS. The court concluded that the Commission had exclusive jurisdiction to determine the location of the oil and gas waste treating plant and that the County's zoning ordinances were preempted by state law governing oil and gas development.

The County appealed. The County argued that the Commission did "not have the power to permit oil waste treating facilities that are barred by a county's 'properly-enacted zoning ordinance and land use comprehensive plan.' "

DECISION: Judgment of district court affirmed.

The Supreme Court of North Dakota held that state laws regulating oil and gas development preempted county zoning laws, and that the Commission had the ultimate jurisdiction to determine siting of waste oil treating plants, including EDS' plant.

In so holding, the court explained that, as with federal preemption analysis, North Dakota law recognizes three forms of preemption: express preemption; field preemption; and conflict preemption. Describing express preemption and field preemption, the court said that a county ordinance contravenes state law: "(1) when there is an explicit state law or rule restraining the county's authority;" and "(2)

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when the industry or activity involved is already subject to substantial state control through broad, encompassing statutes or rules." The court described conflict preemption by noting that "a local governing body cannot validly enact a zoning ordinance that contravenes federal or state law." The court admitted that while it is not always clear "which type preemption is being considered," it is "clear that a local governing body's actions and decisions may be preempted by state or federal law."

Looking at the applicable state law here—Chapter 38-08, N.D.C.C., the "Act for the Control of Gas and Oil Resources," the court noted that law equipped the Commission "with comprehensive powers to regulate oil and gas development" in North Dakota. Section 38-08-04, N.D.C.C., provides in part:

> The commission has continuing jurisdiction and authority over all persons and property, public and private, necessary to enforce effectively the provisions of this chapter . . . [including] [t]o regulate . . . all other operations for the production of oil or gas[, and to] consider . . . safety of the location and road access to . . . treating plants . . . .

The court found section 38-08-04(2), N.D.C.C., to be unambiguous and to clearly provide that "the Commission has statutory authority to regulate treating plants." The court found it clear that "the North Dakota legislature intended that the North Dakota Industrial Commission would 'occupy the field' of the regulation of oil and gas waste treatment plants and, therefore, has exclusive jurisdiction of the issue of the location of oil and gas waste treating plants."

The County had argued that it had "shared jurisdiction" with the Commission "over the location of the treating plant based in part on the permit's requirement that the treating plant 'comply with all applicable local . . . laws and regulations.' " The court rejected that argument, saying that "the Commission's order nevertheless would supercede any county zoning requirements." Thus, the court concluded that, here, the County's zoning requirements were preempted by state law and the Commission's order in this case.

See also: *State ex rel. Stenehjem v. FreeEats.com, Inc., 2006 ND 84, 712 N.W.2d 828 (N.D. 2006).*

See also: *Ramsey County Farm Bureau v. Ramsey County, 2008 ND 175, 755 N.W.2d 920 (N.D. 2008).*

Case Note:

The County had also argued that, for various reasons, it was "better suited than the Commission to regulate the location of treating plants within the [C]ounty." The court responded, saying that "[p]ublic policy is declared by the legislature's action, and the public policy arguments raised by the County here are issues for the legislature to consider."

Validity of Zoning Ordinance/Non-conforming Use—Zoning ordinance required exercise of any vested rights for non-conforming uses within one year of adoption of the zoning ordinance

Landowner with vested right for non-conforming use challenged the ordinance as unconstitutional as applied

Citation: *Southern States-Bartow County, Inc. v. Riverwood Farm Homeowners Association, 2017 WL 765890 (Ga. 2017)*

GEORGIA (02/27/17)—This case addressed the issue of whether a zoning ordinance that required exercise of any vested rights for non-conforming uses within one year of adoption of the zoning ordinance was unconstitutional as applied to a particular landowner.

The Background/Facts: Southern State-Bartow County, Inc. ("SSBC") owned property in Bartow County (the "County"). In 1989, SSBC filed an application with the Georgia Department of Natural Resources, Environmental Protection Division ("EPD"), to develop and operate a landfill on its property. In May 1990, SSBC requested from the County a certificate of zoning compliance indicating that the zoning district in which its property was located permitted the operation of a landfill. That zoning approval had been provided to the previous owners of SSBC's property. The County denied SSBC's request for a certificate of land use approval on the ground that the then-controlling zoning ordinance did not allow a landfill on the site. SSBC appealed (the "zoning litigation").

In the meantime, in 1991, the Supreme Court of Georgia declared the County's zoning ordinance invalid because it had not been enacted in accordance with the law. In September 1993, the County enacted a new zoning ordinance (the "Ordinance"). A provision of the Ordinance—Section 6.1.4—required exercise of any vested rights for non-conforming uses within one year of Ordinance adoption.

SSBC's zoning litigation continued until 1994, when the superior court concluded that, in the absence of a valid zoning ordinance in existence at the time of its application to the EPD (in 1989), SSBC

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acquired a vested right to obtain a certificate of the right to use its real property without county use restrictions. Thereafter, the County issued a certificate of zoning compliance to SSBC. For another 20 years, the County continued to issue certification letters confirming SSBC's vested right to use the property as a landfill.

Eventually, in 2013, the EPD finally issued a solid-waste handling permit to SSBC, allowing SSBC's property to be developed into a landfill. A group of private property owners (the "Landowners") then filed a legal action, asking the court to declare that the approved landfill violated the County zoning ordinances.

The trial court granted partial summary judgment in favor of the Landowners.

SSBC appealed. The Court of Appeals concluded, among other things, that: SSBC's vested right to use the land as a landfill was acquired as of the date of its May 1989 application to the EPD; and the vested right was governed by Section 6.1.4 of the Ordinance. The Court of Appeals concluded that, under the plain language of Section 6.1.4, SSBC's vested right had lapsed after SSBC failed to commence the non-conforming use of its property "within one year—or even within ten years—of the adoption of the [O]rdinance." SSBC had also argued that Section 6.1.4 was unconstitutional as applied to SSBC, and the Court of Appeals remanded the case to the trial court for it to consider that argument.

The trial court once again granted partial summary judgment in favor of the Landowners, concluding that SSBC's as-applied challenge was "unavailing in light of the fact that [SSBC] had not commenced the non-conforming use of its property for a decade after the enactment of the 1993 [O]rdinance."

SSBC again appealed, arguing that Section 6.1.4 was unconstitutional as applied to SSBC.

DECISION: Judgment of Superior Court reversed.

Agreeing with SSBC, the Supreme Court of Georgia held that Section 6.1.4 of the Ordinance, which required exercise of any vested rights for non-conforming uses within on year of the Ordinance adoption, was unconstitutional as applied to SSBC.

In so holding, the court explained that the Georgia Constitution "prohibits a legislative exercise of the police power that results in the passage of retrospective laws which injuriously affect the 'vested rights' of citizens." (See Ga. Const. of 1983, Art. I, Sec. I, Paragraph X.) That "prohibition against retroactive impairment of vested rights extends to the enactment of zoning regulations, which is an exercise of police powers," said the court. The court further explained that a law would be "unconstitutional in operating retrospectively" if it "takes

away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new liability in respect to transactions or considerations already past."

Here, the court noted, SSBC had acquired a vested right for a nonconforming use of its County land in May 1989, and realized that right in September 1994. The court also noted that Section 6.1.4, which was enacted in 1993, applied to SSBC's previously-acquired vested right, and that Section 6.1.4 acted "to divest [SSBC] of its vested right." Based on those determinations, the court found its conclusion as to constitutionality here was "inescapable": "Section 6.1.4, as applied in this case, affects 'rights which accrued before it became operative' and 'impairs vested rights acquired under existing laws or creates a new obligation.' " Section 6.1.4 was "not a mere minimal condition on [SSBC's] vested rights which is permitted under Georgia law," but rather acted to eliminate a previously acquired vested right if the nonconforming use was not commenced within one year "irrespective of the intent of the vested right holder, any possible financial outlay, and, relevant here, the feasibility of use within that time frame." (Here, commencing use of the property as a landfill within the full year was "simply unfeasible.")

In summary, the court held that Section 6.1.4 could not "merely be read and applied prospectively," but rather, here, was "retrospective and injuriously impair[ed] [SSBC's] vested right to develop its land free from county use restriction."

See also: *DeKalb DeKalb County v. State, 270 Ga. 776, 512 S.E.2d 284 (1999).*

Power and Authority—Zoning board imposes condition on use of land, saying use does not run with the land and is allowed by current landowners only

Neighboring landowner challenges use as illegal and contends zoning board exceeded its authority with that condition

Citation: *Preston v. Zoning Board of Review of Town of Hopkinton, 2017 WL 752600 (R.I. 2017)*

RHODE ISLAND (02/27/17)—This case addressed the issue of whether a zoning board could impose a condition on the use of land dictating that the authorized use of the land did "not run with the land."

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The Background/Facts: Todd and Tina Sposato (the "Sposatos") owned property in a residential "R-1" zone in the Town of Hopkinton (the "Town"). The Sposatos owned four alpacas which they kept on their residential property. In May 2011, the Town's Zoning Officer ("ZO") issued to the Sposatos a notice of violation of the Town's Zoning Ordinance. The ZO had concluded that the alpacas were "farm animals," which were not permitted in an R-1 zone in the Town.

The Sposatos appealed the ZO's notice of violation to the Town's Zoning Board. The Sposatos argued that their alpacas were pets—or domestic animals—which were allowed in an R-1 zone. The Town's Zoning Board agreed, concluding that the alpacas were "domestic animals" permitted in the R-1 zone. However, the Zoning Board imposed four "conditions" on the Sposatos with respect to the continued presence of alpacas on the property, including a condition that "[t]he right to keep alpaca on [that] property does not run with the land; that is, if the Sposato's [sic] sell [their] property the next owners are not permitted to keep alpaca" (the "Condition").

The Sposatos' neighbor, Amber Preston ("Preston"), appealed the Zoning Board's decision. A justice of the Superior Court affirmed the Zoning Board's decision, concluding that "the keeping of alpacas as pets [is] an accessory use in an R-1 zone."

Preston again appealed.

DECISION: Judgment of superior court quashed, and matter remanded.

The Supreme Court of Rhode Island concluded that the Condition imposed by the Zoning Board—that the right to keep alpaca on the property did not run with the land—violated the Zoning Board's authority and "settled principles in the law of land use."

The court explained that it is "well settled that the law of zoning governs the use of the land itself, not those who occupy it." A zoning authority is not free to impose a condition on the use of land that does not run with the land, said the court. Rather, emphasized the court, zoning conditions, which are designed to regulate the land itself, must run with the land and must not be used to regulate the person who is exercising the use or be limited to specific individuals.

Accordingly, the court concluded that "the presence of so flawed a condition require[d] that the decision of the [Zoning Board] be vacated."

See also: *Olevson v. Zoning Bd. of Review of Town of Narragansett, 71 R.I. 303, 44 A.2d 720 (1945).*

Case Note:

In a footnote to its decision, the court noted that the Condition imposed on the

Sposatos here in effect granted a personal license.

Zoning News from Around the Nation

FLORIDA

The Florida Legislature is considering House Bill 17, which would "prohibit[ ] new laws or regulations on businesses, professions or occupations not specifically authorized by the general laws of Florida after July 1, 2017, and [would] nullif[y] all existing laws or regulations not specifically authorized by law on July 1, 2020." Reportedly, opponents of the bill cite the following examples of laws currently not specifically authorized by Florida law that would be abolished on July 1, 2020, under the proposed law: noise regulations on noise generated by businesses; medical marijuana siting and security regulations; adult entertainment/sexually oriented business regulation; height restrictions in municipal charters adopted by voters; parking of commercial vehicles in residential areas; and home-based business regulations such as traffic, parking, and employees not residing at the home. Proponents of the law argue that zoning is authorized by Florida statutory law, but opponents maintain such authority instead comes from the state Constitution.

Source: *Florida Today*; www.floridatoday.com

GEORGIA

The City of Atlanta is considering legislation that would amend zoning laws so as to allow "tiny homes"—which are homes defined as being 750 square feet or less. The proposed amendments would allow tiny homes in areas that already allow duplexes.

Source: *WABE*; http://news.wabe.org

WISCONSIN

Wisconsin lawmakers are reportedly considering a proposed Assembly Bill 109, which would "take[ ] away the provision for electors to vote on the opt-out [of county zoning] at an annual meeting or by referendum."

Source: *The Cambridge News*; www.hngnews.com

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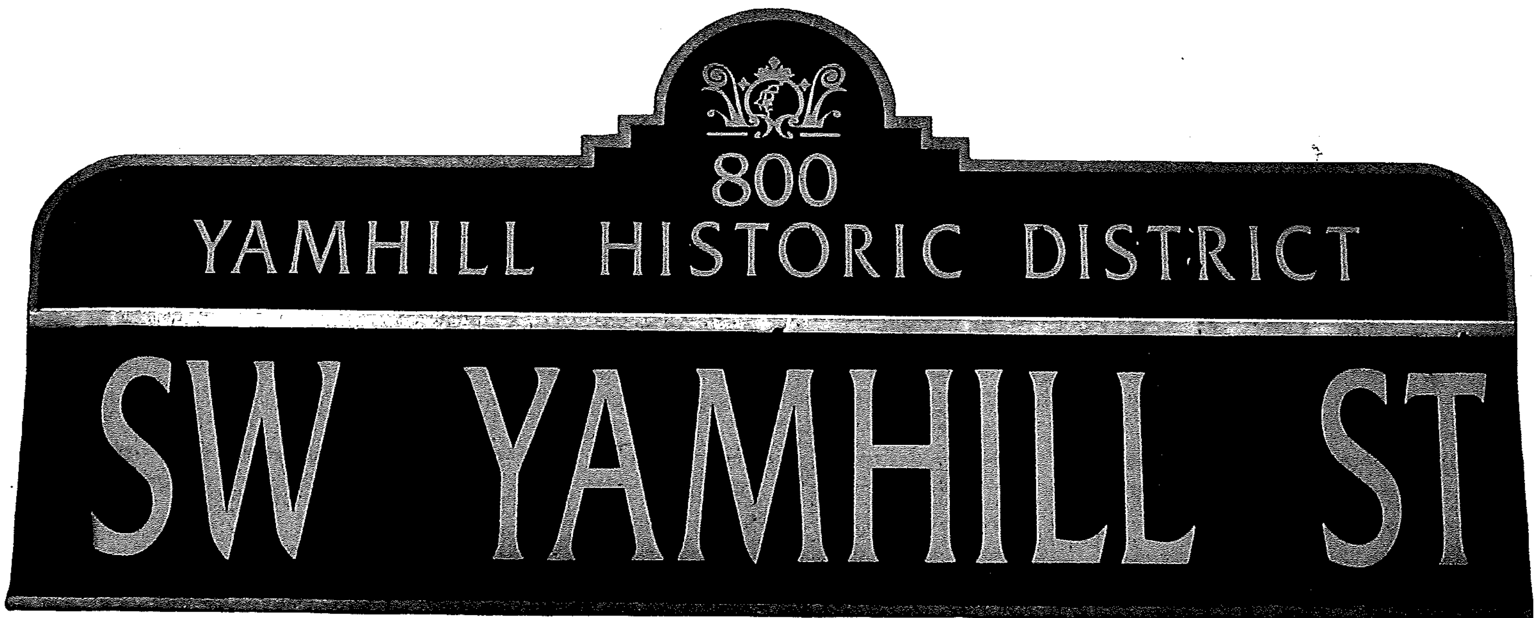
PRACTICE HISTORIC PRESERVATION



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Protecting Value Through Historic Preservation Regulations

By Lane Kendig

Most communities recognize the need to protect historic and cultural sites, buildings, or neighborhoods, yet many qualifying places remain vulnerable across the country.

Clearly, the preservation of a community's historic assets enhances the community's attractiveness as a place to live and work and assists in providing a unique character that differentiates it from its neighbors. As with any new regulation, though, historic preservation regulations can raise fears. For example, landowners commonly fear that these regulations may adversely affect property values and destroy their freedom to do as they wish with their property. While such fears are largely groundless, it is important in developing regulations to seek to address these concerns. The landowner's fears are best addressed by recognizing that preservation may require continued investment that needs to be offset by an enhanced property value.

PLANNING

Ideally, each jurisdiction would have a historic preservation chapter in its comprehensive plan that links preservation to community character and economic development. Where such plans do not exist, there needs to be a significant planning effort in coordination with historic zoning updates. In cities, planning generally focuses on historic neighborhoods or streets. In counties, the focus is more commonly on individual historic structures or historically or archaeologically significant sites. These present different challenges for zoning, as they may involve preserving land in its current agricultural or natural state as well as protecting buildings. With sites that are subject to development, it is more important to recognize owner concerns about economic value.

The traditional goal of historic preservation planning has been to add candidate buildings, sites, or districts to national or state historic registers. There are two distinct advantages of being listed on the National Register of Historic Places. First, Section 106 of the National Historic Preservation Act requires federal agencies to consider the effects of federally funded projects on historic properties. Second, commercial properties on the register are eligible for 20 percent federal tax credits. Meanwhile, state statues may provide additional incentives for historic preservation.

The research, planning, and public participation associated with adding properties to national or state registers is often time consuming and costly. Buildings must be carefully analyzed for age, style, or other historic elements. The federal rules are not that onerous, but historic preservation planning requires design or architectural expertise. This is not quickly learned on the job, so planners without this expertise need professional consultants or volunteer assistance.

For historic districts, additional work is necessary to define boundaries. With most zoning districts, boundaries follow differences in land use or lot size. Meanwhile, historic preservation focuses on individual properties meeting the historic guidelines. In practice, there are difficult choices to make about including non-historic buildings or vacant land in order to minimize having very irregular district boundaries. Inclusion can trigger property owners' fears and result in opponents. Too irregular a district reduces the protection on the edge of the district. Advocates for a purist approach to historic preservation can make this worse by stoking landowner fears that the regulations will be overly strict.

LANDOWNER CONCERNS

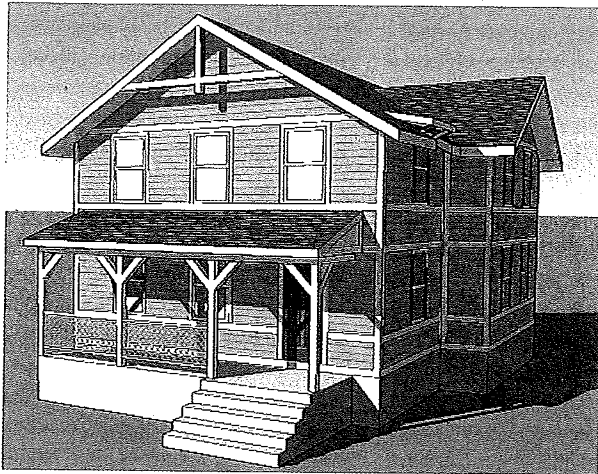
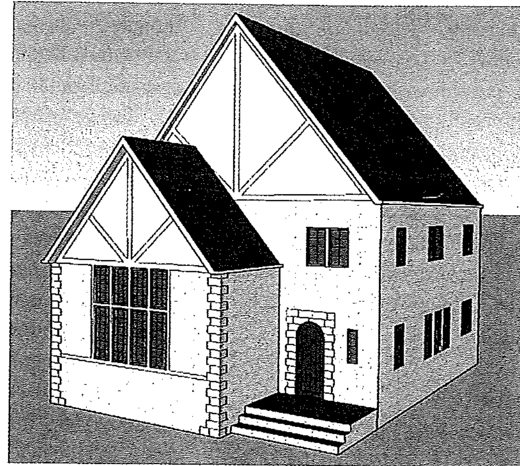
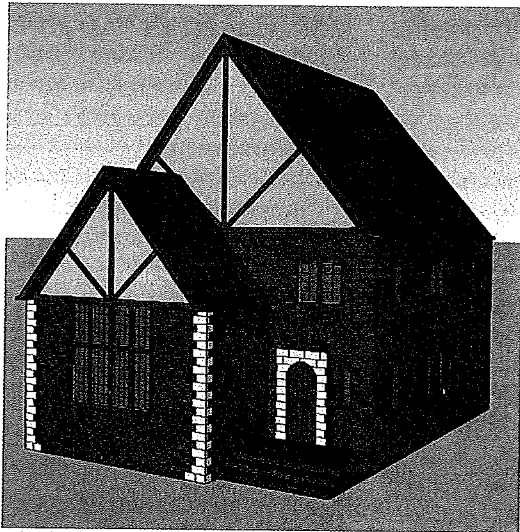
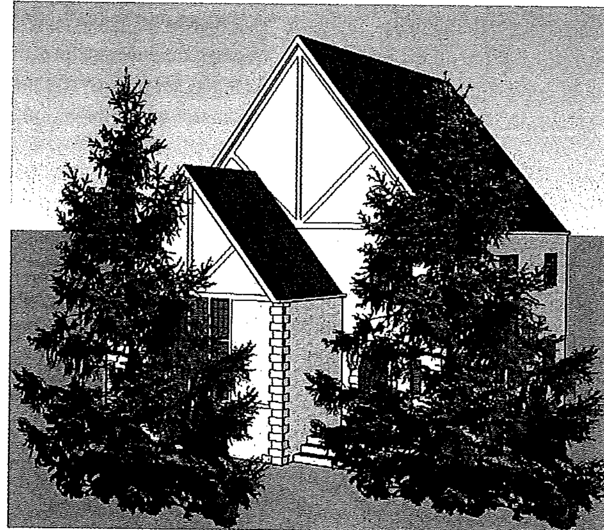
The primary concern of landowners is that historic preservation regulations will adversely affect the value of their property. The owners of non-historic buildings within a proposed historic district often fear regulations will impose major burdens on their property. For historic buildings one problem is that the interior may be unsuited to modern use. Another is that the building's maintenance costs may exceed economic returns.

Outside of urban areas, preservation of historic farms or estates typically requires the preservation of some surrounding land—which would otherwise be suitable for subdivision—and this can greatly alter property value. A means of preserving without reducing value is needed.

Old homes may be expensive to heat or cool, or to reconfigure for modern living needs. Large dwellings may be under pressure to convert to multiple residences because they have too much space for a single family. Small, older homes often require extensive remodeling or additions to adapt to modern lifestyles. Without regulatory protections, teardowns are common.

Old buildings of stone, brick, log, or wood frame may be very expensive to maintain. Landowners may be fearful that these costs cannot be offset by enhanced value under a historic designation. If these concerns are not addressed, owners will fight the designation and ultimately seek demolition.

Individual historic structures scattered in urban areas raise additional concerns. Commercial historic buildings are typically relatively small. When historic buildings are small in comparison to the size of the building that could be built if they were torn down, there may be considerable redevelopment pressure. For commercial historic buildings located in

Lane Kendig

In a historic district with houses similar to the stick Victorian at the top left, the Tudor at the top right is clearly out of character. What should be done if the building seeks an addition? Since it cannot feasibly be made to look like a stick Victorian, mitigation is necessary. A color change would draw less attention from the contributing historic homes (bottom left). And adding landscaping to screen the Tudor home from the street enhances the effect (bottom right).

residential neighborhoods, the designed use may be nonconforming under current zoning, which can limit property investment.

HISTORIC DISTRICTS

The historic district mapped to contiguous properties is the most common historic preservation zoning technique. Often jurisdictions apply these districts as an overlay to an existing base zoning district. Essential elements of a historic district are mapped boundaries, a description of the historic style, design guidelines, the appointment of a board to review and approve applications in the district, and criteria for approval.

District Boundaries

The boundaries are generally easy when all the buildings in a block or group of blocks are historic. The difficulties arise when buildings that do not meet the criteria for designation or vacant lots are interspersed with historic properties. Districts with vacant lots or non-historic buildings require design standards or guidelines that work for historic buildings, new construction, and non-historic buildings.

If the district cannot be mapped to whole blocks of historic properties, reduce the number of vacant or non-historic structures as much as possible, consistent with effective district boundaries. While there is a general rule to avoid spot zoning, it is possible exclude lots within a historic district because there is an existing reason for the exclusion and their inclusion is likely to create major issues for the landowners.

Style Description

The description of style should be straightforward. If it is a national register district, the district documentation will contain detailed information about the architectural styles in the district, materials, and other elements contributing to its historic merit. For a locally designated district there is a need for original classification work. The recommended

resource for this work is *A Field Guide to American Houses,* first published by Alfred A. Knopf in 1984 and revised in 2013. This book has numerous drawings, photos, and descriptions of the styles that can be used as the basis for the code language and in evaluation of existing buildings. It is important in doing this to specifically identify style or styles in the district. This makes it easy to review any proposed exterior change to determine if the changes are consistent.

Design Guidelines

Design standards and guidelines are intended to preserve the existing historic character and prevent any exterior activities that would destroy or be inconsistent with that style. The design rules for exterior modifications to historic properties should derive from the documentation of the historic styles in the district. They should address style, colors, materials, and landscape elements that create the district's character, while avoiding overtly subjective elements. The task of developing design standards and guidelines for new construction and non-historic buildings is more difficult.

Most current development has an architectural style that is neo-eclectic. The homes are modern interpretations of past styles like colonial, Tudor, or Victorian; while they have some historic style elements, they will never be like the historic structures. For new construction, what is needed is a detailed list of the elements that must be incorporated to conform to the desired historic character. The design rules should contain a list of mandatory elements and a group of optional elements, from which a certain number must be chosen. The jurisdiction should consult with local home builders to ensure the guidelines produce a compatible building that will be marketable in the neighborhood. With builder support it is easier to include vacant lots in a district.

Meanwhile, the development of design guidelines for existing non-historic buildings requires a very careful analysis of each such building in the district for style, materials, color, use, type of construction, massing, and existing condition. Condition is important because it provides information about the likelihood that a building will need permits that require the historic board's approval. An assessment of each such building should be developed using the same style and design elements used in the historic analysis. Formulate a design strategy for each type of non-historic building that might seek to add a room or do minor exterior work.

The design guidelines should provide clear policy to apply in approving applications for major repair or additions on these buildings. It a mistake to require them to choose between disinvestment and meeting impossibly expensive conversion costs. The experience with nonconforming uses is a cautionary lesson. Planners originally thought that nonconforming buildings would be torn down. History shows they rarely disappear, and they generally suffer from disinvestment that lowers all property values in the neighborhood. In drafting standards, a list of enhancements that have reasonable costs should be developed so landowners have several options. For example, a porch across the entire front is an expensive requirement, but adding some trim to a small existing porch is a more acceptable solution. Avoid requiring major façade and roof changes, as they are very expensive.

When style and massing are dramatically different, consider mitigation that seeks to hide the incompatibility. Two mitigation strategies are obvious: color change and landscaping. Painting eliminates a sharp color contrast that draws attention to the building's differences. Greenery can hide a multitude of sins because it represents a mass that screens the view of the building from the street. Requiring the planting of canopy trees and large evergreens in the front yard will screen the view of the upper stories of the building. Foundation plantings and understory trees can reduce the ground-level view. The sidebar includes language that can be used to provide the desired level of mitigation in the design guidelines.

Mitigation assumes that non-historic buildings are likely to remain. The idea is to provide actions that allow an owner to make needed exterior repairs or reinvest in the dwelling. It hides the incompatibility rather than eliminating it. These strategies do not involve major costs for a land owner. In all cases the effort to address incompatible buildings in the districts should be designed to encourage reinvestment to preserve the economic value of the district.

Developing design guidelines for commercial areas can be easier as the focus is on street-facing facades. Many historic commercial district buildings will be largely compatible, with only modest style or height differences. An analysis should look at block faces. If more than 15 percent of a block face is out of the style, the suitability for a historic district is questionable, and the community may want to consider design guidelines without a historic designation. An exception is a building whose facade was "modernized" in the last century. If the business community can be convinced that historic designation and restoring facades will enable the area to generate substantially more revenue, such restoration may be supported. Government grants to assist in the cost makes this more feasible.

For new buildings, only the street facade needs review. Height, general window proportions, floor to floor heights, colors, and materials are elements that should be the primary focus, as these can be addressed easily in new buildings. The cost of making a new building compatible should not be too great. Some style elements like terra cotta details are very expensive and should be avoided. Commercial uses often use false facades to produce a desired skyline, so this can be a reasonable approach to achieving a matching style.

Sample Mitigation Provisions

Mitigation. Lots XX, XX, and XX in the historic district have been identified as so different from the styles and character of the district that there is no practical means of making them compatible in style. When any such lot applies for a building permit that involves an increase in the floor area of the building or substantial structural repair, the historic preservation board may approve the application provided the following mitigation steps are undertaken:

1. One plant unit shall be planted in the front yard for every 1,600 square feet of land area in that front yard. The board shall count existing canopy trees and evergreen trees that are in good health and over 40 feet tall toward the requirements. The shrubs and understory trees shall be installed to maximize the screening of the lower levels of the building.
2. The building shall be painted in approved colors for the district to better match the adjoining buildings.

Administration

State statutes generally will specify the composition of a historic preservation board. It is critical that these boards have the technical capability to help landowners gain approval of an application that permits construction. Historic preservation requires architects or design professionals who have considerable experience in designing buildings and the skills to guide applicants to a satisfactory solution. Two other groups are desirable as members: builders and people who understand market dynamics and project financing. In large cities or urban counties, this expertise is likely to be available. In smaller cities and more rural areas, finding these people may be difficult. If the board does not have the expertise, the regulations should delegate reviews to staff and consultants.

Approval Criteria

The most basic approval criterion for proposed changes to historic structures, vacant land development, or improvements to existing nonhistoric structures is that the proposal would enhance the character of the historic district by meeting all required design criteria. If the proposal requests any exceptions from these design criteria, the regulations should require applicants to submit a detailed report indicating the economic, architectural, or other reasons for the deviation from strict adherence.

Demolition of an existing structure requires a different approach. One reason for approval would be that the structure is unsafe for habitation, and the cost of restoring it to a safe condition is so high that it is likely that the owner will let it continue to decline. In this case the historic board needs to explore with the owner whether there are things the jurisdiction can do that will alter the economics (see flexibility discussion below). To approve demolition, the board must find that denial would create a severe hardship and cause the structure to become blighted. That the owner can make more money through demolition is not an acceptable criterion for approval.

REGULATORY FLEXIBILITY

In many cases, historic districts will need to incorporate flexible zoning techniques to overcome landowner concerns about the impact of historic district designation on property values. These include flexible use permissions and incentives for maintenance.

Change of Use

If the existing use of a historic property fails to meet current demand, and rents do not support maintenance and reinvestment, consider allowing changes of use. Permitting large, older homes in a single-family district to be converted to two, three, or more residences is often a good solution. Jurisdictions can accomplish this by modifying the district density standard or incorporating special rules for historic structures in the district, allowing more units in those structures. Neighbors will need to be convinced that preserving the old homes is better than allowing disinvestment and teardowns.

For residential uses adjacent to downtown or on major streets where nonresidential uses are more valuable than housing, consider permitting the conversion of residential buildings to office or institutional uses. In these cases, additional parking may be necessary. This parking should be to the rear, where a drive or alley provides access. Parking in the front yards should be prohibited. If they are on the National Register, commercial structures may be eligible for a 20 percent tax credit, making preservation easier.

Sample Incentive Provisions

Pro forma: A pro forma shall be submitted by the developer justifying the proposed incentive. It shall document the costs of acquisition, improvements, and long-term maintenance. It shall indicate projected changes in revenue due any change in use. These costs shall be summarized and included in a proposed value with the change in use and density permitted. The pro forma shall demonstrate that the incentive provides additional revenue to pay for the maintenance and improvement costs and reasonable profit.

The planning director in conjunction with the historic commission or board shall evaluate the pro forma and its documentation to determine if the proposed incentive is adequate to persuade the landowner to invest but not so large as to provide increases in income over that of neighboring property. They are empowered to grant such incentives.

Brian Stansberry (Laurel-terrace-knoxville-tn1.jpg, Wikimedia CC BY 3.0)

This historic home in Knoxville, Tennessee, has been subdivided into apartments without undermining its contribution to the Fort Sanders Historic District.

URBAN HISTORIC SITES

Name	Existing Building Tsf*	Existing FAR	Zoned TDR	Site Area Tsf (Existing Building Tsf / Existing FAR)	Maximum Floor Area (Site Area x Zoned FAR)	TDRs (Maximum Floor Area—Existing building Tsf)
Oreo Factory	200	0.31	0.44	645	283.9	83.9
Richfield Mansion	13	0.40	1.00	32.5	32.5	19.5
5th Street Church	15	0.18	2.50	83.3	208.3	193.3

*Tsf = thousands of square feet

Incentives for Maintenance

Stone, brick, log, or wood frame structures often have high maintenance and upkeep costs. This is particularly true of rural buildings or where disinvestment has already occurred. The absence of insulation and obsolete heating, air conditioning, kitchen, and bath facilities are also potential costs associated with preservation. These costs may be addressed by a change in use; if not, other incentives are needed to encourage landowners to invest. The question becomes how much of an incentive should be provided. Incentives can include an increase of density on the property or transferable development rights (TDR). If this cannot be worked out before a district is created or a property designated, incorporate a process in the regulations to guide the historic board in evaluating the need for incentives on a case-by-case basis. Provide what is needed and don't offer too little or too much. See the sidebar on page 5 for an example.

SCATTERED-SITE PRESERVATION

Preserving individual historic structures and sites located outside of historic districts presents a distinct set of challenges. For these properties, existing development densities may be far below permissible densities for their zoning districts, and carefully calibrated incentives are necessary to gain landowner support for preservation.

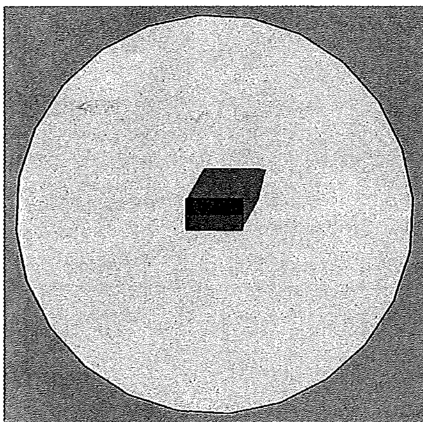
Urban Historic Structures

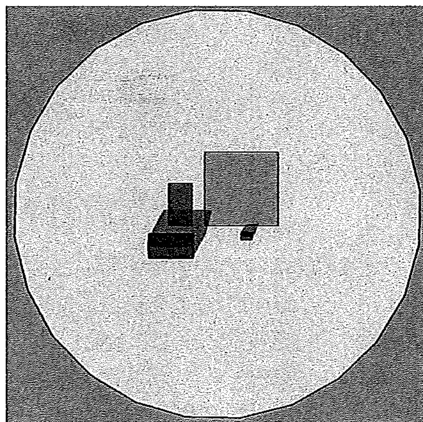
A common problem in urbanized areas is that individual historic structures often have floor areas well below the maximum permissible floor area or density of their zoning districts. For example, a historic structure with only 15 percent of the maximum floor area permitted creates a strong economic argument for demolition and redevelopment. The historic site is burdened by higher maintenance costs and less income potential compared to neighboring properties. TDR is the ideal tool for this situation, as upheld by the Supreme Court in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

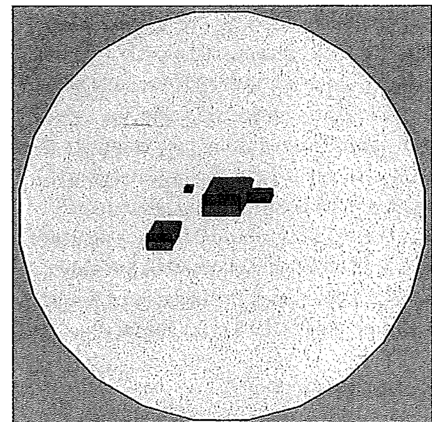
The table above illustrates how this system would work in a hypothetical community. The TDRs available are determined by subtracting the existing floor area of the site from the maximum permitted by the zoning. The measurements are in thousands of square feet, so one TDR is based on 1,000 square feet. To ensure a willing buyer and willing seller, the purchaser would be able to build 1,100 feet for each TDR.

Historic Sites

Historic sites require a different focus. The preservation of the historic buildings is only part of the job. Just preserving the buildings ignores their function and the setting for which they were built and robs visitors of the purpose and context of the historic site. Many







Lane Kendig

Left: A historic building (e.g., a plantation, homestead, leading citizen's home, or historic event). Middle: A historic building with important landscape and gardens. Right: A site with multiple historic buildings (e.g., farm, ranch, or plantation with multiple outbuildings).

of these sites are on largely rural or urban fringe sites.

A major part of a site's historic value is seeing the building in its historic setting of farmland, gardens, or yards. For example, a Greek revival plantation house with 10 acres of gardens surrounded by 200 acres of farmland needs at least the home and gardens to be preserved. If the grounds around the house and garden contained many mature live oaks or other large trees, this would be the critical area to preserve, while the farmland would not be as important.

Too often a historic building is preserved on an acre or so and surrounded by a subdivision of much smaller lots. This only preserves the home, but the site's value—mature trees and gardens that provided the historic context—is lost. The building simply becomes a large old home, and its visibility to the community lost in the subdivision. This sort of preservation does nothing to make it a historic attraction. Historic sites need to have surrounding land preserved as well as the buildings to provide the context of their original function to make it an attraction.

The illustrations on page 6 show several versions of historic sites. The idea is to preserve enough land to display them in context for visitors. Preserving the surrounding land lowers property value for development. Tools such as clustering, alternative uses, incentives, and TDR applied individually or in combination represent ways to restore the property's value. In suburban or rural environments, where the size of the property is adequate, clustering is an ideal tool to allow the needed open space to be protected without causing a loss of value.

How much land is needed for context? Key variables in determining this are historic use, ancillary buildings, vegetation, or type of event. In a forested area, a relatively small site that retains the trees to screen future uses will suffice. There is no definitive measure, but in general a radius of 200 to 500 feet is desirable. Trees, topography, property lines, existing homes on nearby property, and current use of surrounding land need to be evaluated in setting the protected area.

Also consider the approaches to the site via roads. Clustering allows the site to be protected as common open space while allowing the district's maximum density to be achieved. The size of the parcel is critical. If the protection area is no more than 30 percent of the site in suburban character areas, clustering is a viable option. Up to 50 percent open space will provide a suburban character. In estate character areas the percentage of open space is 45 to 65 percent. Clustering will be very difficult in urban areas unless the property is very large.

With smaller sites, additional incentives will be required. Consider permitting farm buildings to change uses; for example, the barn or other buildings may be converted to residential use to increase development value. Additional incentives may be needed to ensure maintenance. Since old farm buildings or homes may require costly work to make them habitable, a pro forma can be used to determine the degree of an incentive that is needed to achieve preservation. When a site is just slightly too small for clustering to work, the code could allow a 10 percent density increase as an incentive.

TDR is the most efficient way to provide an incentive when the property is too small for clustering to work. Allowing a 10 percent density bonus with the purchase of TDRs is typically workable. Clustering must be a permitted use in the district, not a conditional use. The ordinance should provide a receiving zone with five times the potential to use TDRs than there are TDRs available on the historic site so that there is an ample market for the TDRs. Ensuring a market for TDR also requires consideration of the value a seller wants and what a buyer is willing to pay. TDR works on a willing seller, willing buyer basis.

It works best when the buyer is willing to pay more than the seller asks. Permitting 1.1 units for each TDR is a way to ensure purchasers want to buy TDRs. TDR makes creating larger open areas around the historic site feasible.

CONCLUSIONS

In drafting historic preservation regulations, it is important to try to offset the concerns of the landowners with incentives. A variety of approaches can be used to address specific concerns. Allowing a change in use is a simple strategy that is widely adaptable. A more complex problem is addressing the concerns about the costs of preserving and maintaining structures, which requires very specific zoning regulations that enable landowners to recoup these costs.

Preserving historic sites in rural or urban fringe areas is a very different problem. When preserving a substantial amount of open land is essential to providing the historical context, regulations that allow or require clustering are important.

Finally, transfer of development rights is useful for preserving individual buildings in urban environments and for greenfield development.

ABOUT THE AUTHOR

Lane Kendig is the founder and former president of Kendig Keast Collaborative. He has been practicing and writing about the relationship between community design, planning, and regulatory tools for more than 45 years. In addition to the recent books *Community Character* and its companion, *A Guide to Planning with Community Character,* Kendig is the author of *Performance Zoning* and the PAS reports *Too Big, Boring, or Ugly* and *Traffic Sheds, Rural Highway Capacity, and Growth Management.*

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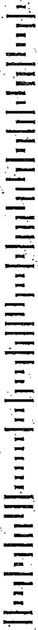

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