QUINLAN™ May 10, 2017 | Volume 11 | Issue 9

Zoning Bulletin

in this issue:

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Mat #41945590

Signs/First Amendment—State's Billboard Act regulates signs based in part on a distinction between "off-premises" signs and "on-premises" signs

Billboard owner argues Billboard Act is an unconstitutional, content-based regulation of

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ISSN 0514-7905

speech, in violation of the First Amendment

Citation: *Thomas v. Schroer, 2017 WL 1208672 (W.D. Tenn. 2017)*

TENNESSEE (03/31/17)—This case addressed the issue of whether a state statute, which regulated both commercial and non-commercial speech by banning some forms of both on the basis of content, violated the First Amendment.

The Background/Facts: William H. Thomas ("Thomas") operated a business that involved posting outdoor advertising signs on various tracts of real property Thomas owned throughout Tennessee. Since approximately 2006, the State of Tennessee (the "State") had sought to remove Thomas'signs that did not comply with Tennessee's Billboard Regulation and Control Act of 1972 (the "Billboard Act").

The Tennessee Department of Transportation ("TDOT") promulgates and enforces billboards and outdoor advertising signs under the Billboard Act and the Federal Highway Beautification Act of 1965, as amended. Under the Billboard Act, regulated billboards and signs are subject to location and/or permit and tag restrictions. For example, regulated signs may not be "within six hundred sixty feet (660') of the nearest edge of the right-of-way and visible from the main traveled way of the interstate or primary highway systems . . . without first obtaining from the commissioner a permit and tag." (T. C. A. § 54-21-104(a).) Notably, under the Billboard Act, some signs, may be exempted or qualify as exceptions under the Billboard Act's location and/or permit and tag restrictions. (See T.C.A. §§ 54-21-103(1)-(3) and §§ 54-21-107(a)(1)-(2).) For example, billboards and signs may be exempted from certain regulations if they are advertising something related to the premises on which they are located. (See T.C.A. §§ 54-21-103(1)-(3) and §§ 54-21-107(a)(1)-(2).) In practice, State agents label signs regulated under the Billboard Act as "off-premise" signs and label unregulated signs as "on-premise" signs. (See Rule of Tennessee Department of Transportation Maintenance Division, Control of Outdoor Advertising, 1680-02-03.06).

The State denied permits for Thomas's signs, including a sign located off Interstate-40 West in Memphis (hereinafter the "Crossroads Ford sign") for failure to meet certain distance regulations under the Billboard Act. Thomas' Crossroads Ford sign had displayed various messages over the years, including: in 2012, an American Flag with Olympic rings; and later that year, an American Flag. Over time, the State removed some of Thomas' other outdoor advertising signs.

Eventually, Thomas sued the State, naming multiple Tennessee state officials in their official capacities. Among other things, Thomas alleged that the Billboard Act was unconstitutional in violation of the First Amendment. The First Amendment prohibits laws that regulate or restrict expression based on content, providing greater protection from

regulation for non-commercial speech. Here, Thomas argued that his Crossroads Ford sign was entitled to First Amendment protection as a display of non-commercial speech. He claimed that removal of his billboards under the Billboard Act violated his First Amendment rights.

DECISION: Order finding Billboard Act an unconstitutional, content-based regulation of speech

The United States District Court, W.D. Tennessee, Western Division, found that the Billboard Act was an unconstitutional, content-based regulation of speech, in violation of the First Amendment.

In so holding, the court first explained that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Content-based laws are those that apply to a particular speech because of "the topic discussed or the idea or message expressed," said the court. Further, explained the court, "[w]hen a content-based regulation affects both commercial and non-commercial speech, the speech's nature determines the appropriate level of scrutiny."

Here, the court found that the Billboard Act was subject to strict scrutiny (i.e., the most stringent review) because it was a content-based regulation that implicated Thomas's non-commercial speech. The State had argued that the Billboard Act was content neutral—entirely based on the location of the signs with on-premises versus off-premises restrictions. The court recognized that it was possible for a restriction that distinguishes between off- and on-premises signs to be content neutral, but not where, as it found here, the off-premises/on-premises distinction hinges on the content of the message. Here, the Billboard Act imposed location, permit, and tag requirements on signs, unless they qualified as an exception or exemption. The language of the Billboard Act required the State to assess the sign's content to determine if it was exempt. Signs that advertised activities conducted or the sale/lease of the property on which they were located were exempted from the location, permit, and tag requirements (as "on-premises" signs). (T.C.A. §§ 54-21-103(1)-(3), 54-21-107(a)(1)-(2).) In practice, noted the court, the State also used a two-step inquiry known as the "premise and purpose test," which required that the sign's content identify an activity/sale/lease on the property where the sign was located before it qualified for exemption. (Rule 1680-02-03-.06(2)). Applied to Thomas, the court found that the State required regulation of Thomas's sign because its non-commercial message did not "speak[ ] up for the things going on there at that premise." "Even 'though [the on-premises/off-premises distinction appeared] facially content neutral, [it ultimately] [could] not be 'justified without reference to the content of the regulated speech,' " and thus [was] a content-based regulation," found the court. Thus, concluded the court, because the Billboard Act was a content-

based regulation that applied to both commercial and non-commercial speech, and because the nature of the speech at issue (i.e., Thomas's sign) was non-commercial, the Billboard Act had to survive strict scrutiny to be found constitutional.

The Court went on to find that the Billboard Act did not survive strict scrutiny; and thus, the Billboard Act was unconstitutional. The court explained that strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." Here, the court found that the State's interests were not compelling, but even if they were, the Court found the Billboard Act was not narrowly tailored to those interests.

The court found that the interests that that the State sought to protect under the Billboard Act were aesthetics and traffic safety. Those interests were not "compelling interests," said the court. While the Sixth Circuit (the appellate court with jurisdiction here) had held that aesthetics and highway safety were "substantial or significant" governmental interests, neither the Sixth Circuit nor the United States Supreme Court had ever held that those interests were "compelling" under strict scrutiny, noted the court. Moreover, the court noted that the government's compelling interest must be related to the speech-based distinctions the regulation makes in order to withstand strict scrutiny. Here, the court found that aesthetics and traffic safety were non only "general and abstract interests generally not considered so compelling as to justify content-based sign restrictions, but also, they [were] unrelated to the distinction between signs with on-premises-related content versus other messages." In fact, in practice, the court found that distinction undermined the State's interests. For example, said the court, a small non-commercial, off-premises sign with muted colors and few words would require a permit and a tag and be restricted to a certain distance from the roadway, while an on-premises, bigger, brighter sign with more words would require no permit or tag and could be placed closer to the roadway.

Despite concluding that the State's interests were not compelling, the court's analysis continued, with the court finding that, even assuming the State's interests were compelling, the Billboard Act was not narrowly tailored to those interests. Arguably, the Billboard Act was "overinclusive," said the court, because in practice, while it could regulate off-premises signs that were highly distracting, it also regulated off-premises signs that were not highly distracting. In any case, the court found the Billboard Act was "underinclusive"—regulating less speech than necessary to advance the State's interests. The State failed to show how instituting permit, tag, and location requirements for signs displaying non-premises-related content was necessary to eliminate threats to traffic safety and aesthetics, "but that [having the same requirements] for other types of signs [was] not,' " found the court.

Moreover, the court found that "the provisions at issue are not narrowly tailored because they are not the least restrictive means by which the State may further its interests." The court noted there were "multiple effective, less restrictive" alternatives to the on-premises/off-premises distinction of the Billboard Act, which would further the State's compelling interests," such as: a non-commercial/commercial distinction (which could be "less effective but not ineffective"); a size regulation; distance/spacing restrictions; and presentation-related regulations.

In sum, the court found that the State's interests were not compelling, and even if they were compelling, the Billboard Act's exemption and exception provisions were not narrowly tailored to achieve their purpose because they were underinclusive and did not constitute the least restrictive means available. For those reasons, the Court concluded that the Billboard Act was an unconstitutional, content-based regulation of speech.

See also: *Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2226 192 L. Ed. 2d 236 (2015).*

See also: *Wagner v. City of Garfield Heights, 2017 WL 129034 (6th Cir. 2017).*

Case Note:

The court was not persuaded that the Billboard Act was written in such a way that the unconstitutional on-premises/off-premises distinction was severable from the rest of the Act. Thus, the court declared the entire Act unconstitutional.

Authority—Newly seated county commissioners repeal ordinance passed two weeks prior that had allowed for rezoning of property

Landowner argues commissioners lacked authority to rescind the prior rezoning approval

Citation: *Boomer v. Waterman Family Limited Partnership, 2017 WL 823712 (Md. Ct. Spec. App. 2017)*

MARYLAND (03/02/17)—This case addressed the issue of whether a county had the authority to rescind a previously adopted ordinance, thus reversing its own action.

The Background/Facts: The Waterman Family Limited Partnership

("Waterman") owned approximately 140 acres of land (the "Wheatlands Farm property" or the "Property") in Queen Anne's County (the "County"). The Property, which was located across from a commercial development, was zoned "Countryside," a designation which permitted agricultural and low density uses. Waterman had a goal of rezoning the property to "Planned Regional Commercial," which permitted commercial and high density uses. As a first step toward that goal, in June 2014, Waterman petitioned the Town of Queenstown (the "Town"), seeking to have the Wheatlands Farm property annexed into the Town. The Town Commissioners voted to annex Property, and later adopted an ordinance rezoning the Property from Countryside to Planned Regional Commercial. The effective date of the rezoning ordinance depended upon a waiver from the County Commissioners because Maryland statutory law—Md. Code § 4-416(b) of the Local Government Article ("LG")— provided that the property could not be rezoned to permit development for uses substantially different from previously authorized uses or uses at a substantially higher density, for a period of five years, unless the County Commissioners granted express approval and waived the five-year period.

On November 25, 2014, the County Commissioners passed Resolution 14-31, which granted the express approval needed to allow for rezoning of the Property to a classification that was substantially different and at a higher density. The approval of Resolution 14-31 allowed development consistent with the "Planned Regional Commercial" classification without having to wait the five-year period referred to in LG § 4-416.

Shortly thereafter, newly elected commissioners took office. On December 9, 2014, the new County Commissioners adopted Resolution 14-33, which rescinded the express approval that previously had been granted under Resolution 14-31.

In response to that action, Waterman and the Town Commissioners filed actions in Circuit Court. They alleged that the County Commissioners lacked authority to rescind Resolution 14-31.

The County Commissioners, along with an interested party which had intervened—the Queen Anne's Conservation Association ("QACA")—contended that under Article XI-F, Section 6 of the Maryland Constitution, the County did have the legal authority to adopt Resolution 14-33, thereby rescinding Resolution 14-31.

Maryland's Constitution provides that "[a] code county may enact, amend, or repeal a public local law of that county by a resolution of the board of county commissioners. . . ." Md. Const. art. XI-F, § 6. The Constitution defines "public local law" as "a law applicable to the incorporation, organization, or government of a code county and contained in the county's code of public laws" (with exceptions).

Waterman and the Town Commissioners disagreed. They argued that, in this context, the County Commissioners' sole source of authority to act was LG § 4-416, which was a public general law. Thus, they contended, Resolution 14-33 could not be a public local law under the Maryland Constitution. Pointing out that LG § 4-416 did not contain an express right to rescind and relying on language in the statute providing that, once waiver has been granted, the Town Commissioners have "exclusive jurisdiction" over zoning, Waterman and the Town Commissioners argued that the plain language of the statute prohibited the rescission of Resolution 14-31.

The County Commissioners and QACA countered, arguing that both Resolutions were public local laws, not public general laws. They contended that LG § 4-416 could not restrict the County's power under the Maryland Constitution to repeal a public local law like Resolution 14-31. Further, they argued that, even absent an express power to rescind a resolution, the County Commissioners had the inherent power to do so.

Ultimately, the circuit court concluded that the County Commissioners "had no authority to repeal and rescind Resolution 14-31." Finding there were no issues of material fact in dispute, and deciding the matter on the law alone, the circuit court granted summary judgment in favor of Waterman and the Town Commissioners.

The County Commissioners and QACA appealed (though, subsequently, the County Commissioners dismissed their appeal).

DECISION: Judgment of Circuit Court reversed.

Agreeing with QACA, the Court of Special Appeals of Maryland held that Resolutions 14-31 and 14-33 were public local laws (rather than public general laws), adopted pursuant to Article XI-F, Section 6 of the Maryland Constitution, and subject to rescission.

In so holding, the court discussed the process of determining whether a law is general or local. The court explained that "[t]he classification of legislative action as general or local is based on 'subject matter and substance and not merely on form,' . . . and is determined by applying 'settled legal principles to the facts of particular cases.' " "Enactments that apply to a single subdivision of the state regarding a subject of local import are considered local laws," said the court. Comparatively, "[e]ven an enactment that appears local in nature is a general law if it affects the interests of more than one geographical subdivision or the entire state."

Here, the court found that both Resolutions applied to the Wheatlands Farm property that was located "within a single subdivision of the state," and had "no consequence on any land outside of [the County]" and was a "matter of purely local import." Finding the Resolutions were public local laws (and not public general laws), the court agreed with

QACA that LG § 4-416 could not restrict the County's power under the Maryland Constitution to repeal a public local law like Resolution 14-31. The court found there was "nothing that restricts the power to rescind a local law adopted pursuant to the power granted to the County [under the Constitution]."

Moreover, noted the court, again agreeing with QACA's argument, "even absent an express power to rescind a resolution, the County Commissioners had the inherent power to do so." "It is a general rule . . . that a Municipal Corporation has the right to reconsider its actions and ordinances, and adopt a measure or ordinance that has previously been defeated or rescind one that has been previously adopted before the rights of third parties have vested," said the court. The court acknowledged that rule is limited by the presence of a statute or a rule to the contrary, and subject to limitation such as when rights vest during the interim between enactment of a resolution and its rescission. Here, the court found there was no assertion that any rights vested during the two-week period between the adoption of Resolution 14-31 and the adoption of Resolution 14-33.

Accordingly, the court concluded that the County Commissioner's rescission of the approval previously granted which had allowed for rezoning of Waterman's Property was permitted.

See also: *Kent Island Defense League, LLC v. Queen Anne's County Bd. of Elections, 145 Md. App. 684, 806 A.2d 341 (2002).*

See also: *Dal Maso v. Board of County Com'rs of Prince George's County, 182 Md. 200, 34 A.2d 464 (1943).*

Variance—Zoning board of adjustment grants variance for open-air parking space

Neighbors appeal, arguing variance applicant lacked the prerequisite "unnecessary hardship" for a variance because there was no physical circumstance unique to applicant's property

Citation: *In re Chestnut Hill Community Association, 2017 WL 835411 (Pa. Commw. Ct. 2017)*

PENNSYLVANIA (03/03/17)—This case addressed the issue of whether a zoning board of adjustment erred by finding that denial of a variance would result in unnecessary hardship.

The Background/Facts: Jonathan Bernadino ("Bernadino") owned property (the "Property") in a Residential Single-Family Attached-3 Zoning District ("RSA-3") in the City of Philadelphia (the "City"). The Property consisted of a 126' by 25' lot improved with a semidetached, single-family home. Bernadino wanted to construct a single-car, open-air parking space (i.e., a driveway) in the Property's front yard. The City's Zoning Code (with exceptions not applicable here) prohibited such surface parking spaces in "required front, side, and rear yards." Because the parking space that Bernadino sought was expressly prohibited on his Property, it was necessary that he seek a variance. Bernadino applied to the City's Department of Licenses and Inspections (the "Department") for a zoning/use registration permit (i.e., a variance). The Department refused Bernadino's request. Bernadino appealed to the City's Zoning Board of Adjustment ("ZBA").

The ZBA granted Bernadino's variance request. In doing so, the ZBA determined that Bernadino's proposal "[met] the requirements for grant of the required variance."

Under the City's Zoning Code, an applicant seeking a variance had to prove that "unnecessary hardship" would result if the variance was denied and that the proposed use was "not contrary to the public interest." The ZBA, in addressing variance requests "must also consider the factors set forth in the [Zoning Code]." Essentially, and in summary, "an applicant seeking a variance pursuant to the [Zoning Code] must demonstrate that: (1) the denial of the variance will result in unnecessary hardship unique to the property; (2) the variance will not adversely impact the public interest; and (3) the variance is the minimum variance necessary to afford relief."

Here, the ZBA found that "due to the configuration of the Property and the location of the existing structure, rear[-]access parking [was] not possible at the site." The ZBA also determined that "[t]he proposed parking, because set back from the street and sized to accommodate only one vehicle, require[d] the least variance necessary to afford relief." Further the ZBA concluded that, "based on the evidence of record, that denial of the requested variance would result in unnecessary hardship." The ZBA "additionally conclude[d] that the remaining criteria for grant of a variance [were] satisfied," and that "the proposed use not have a negative impact on the public health, safety or welfare, . . . [as the ZBA found that] the proposed parking space [was] consistent with surrounding uses, [was] supported by the immediately adjacent neighbors, and [would] result in a net gain in the number of parking spaces on the block."

Chestnut Hill Community Association, along with a number of individuals, (collectively, "Chestnut Hill") appealed the ZBA's decision.

The trial court affirmed the ZBA's decision, and Chestnut Hill again appealed.

DECISION: Judgment of Court of Common Pleas reversed.

The Commonwealth Court of Pennsylvania held that the ZBA erred in granting the variance to Bernadino because the ZBA had "improperly concluded that denying the variance would result in hardship due to physical circumstances or conditions unique to the property"—one of the necessary criteria for the granting of a variance.

The court explained that, pursuant to the City's Zoning Code, to find an unnecessary hardship in the case of a use variance, such as in the case at hand, the ZBA had to make various findings, including that the hardship was due to physical circumstances or conditions unique to the Property, and "not to circumstances or conditions generally created by the provisions of this Zoning Code in the [RSA-3 Zoning District where the Property was located.]" (See Philadelphia Zoning Code § 14-303(8)(e)(.2).) The court emphasized that the hardship "must be unique to the property at issue, not a hardship arising from the impact of the zoning regulations on the entire district."

Here, the court found the evidence showed clearly that every property in Bernadino's neighborhood was "hampered by parking limitations and [was] bound by the same surface parking restrictions set forth [the Zoning Code]." The court found that there was "nothing unique about the Property's physical circumstances or conditions that create[d] an unnecessary hardship" here. Thus, finding that Bernadino failed to satisfy the Zoning Code requirement that the unnecessary hardship not be "[due] to circumstances or conditions generally created by the provisions of [the Zoning Code in the RSA-3 Zoning District]," as mandated by the Zoning Code, the court concluded that there was no evidence before the ZBA of an unnecessary hardship unique or peculiar to the Property. Accordingly, the court concluded that the ZBA had improperly granted the variance to Bernadino.

See also: *Singer v. Philadelphia Zoning Bd. of Adjustment, 29 A.3d 144 (Pa. Commw. Ct. 2011).*

Zoning News from Around the Nation

CONNECTICUT

The state's Department of Housing has "proposed a statewide inclusionary zoning bill requiring a percentage of units in a newly created development to qualify as affordable housing." If House Bill 7298 is adopted, "Connecticut will be the first state in the nation to have statewide inclusionary zoning." Provisions of the proposed bill include: "[r]eserving a set percentage of units in all newly created multifamily

developments, with five or more units, as affordable to person's making below the Area Median Income (AMI). . . . Under the bill, developers must meet one of the following criteria: 15% affordable housing for those who do not exceed 30% AMI, 20% affordable housing for those not exceeding 60% AMI, or 30% for those not exceeding 80% AMI." In early April, the bill had not made it out of the House's Planning & Development Committee.

Source: *Darien Times*; www.darientimes.com

ILLINOIS

In early April, the State Senate passed House Bill 1133, "which would prevent local government from banning the Airbnb-style [short-term rental] businesses, [and] would give municipalities the ability to require short-term rental hosts to pay [up to $200 annually] for a permit in order to host guests." Under the bill, rental sites with three zoning ordinance violations per calendar year would have their permit revoked.

Source: *Indianapolis Business Journal*; www.ibj.com

NEVADA

The State Legislature is considering a bill—Assembly Bill 277—which would, among other things, "freeze existing municipal zoning laws for land within national conservation areas and national recreation areas," as well as within five miles of a national conservation area. In early April, the bill was still in committee.

Source: *Las Vegas Sun*; https://lasvegassun.com

QUINLAN™ May 25, 2017 | Volume 11 | Issue 10

Zoning Bulletin

in this issue:

THOMSON REUTERS®

Mat #41945593

Standing/First Amendment—City zoning ordinances restrict location of tattooing shops and require conditional use permit for shop operation

Tattoo artist challenges zoning ordinances as violating the First Amendment

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ISSN 0514-7905

Citation: *Real v. City of Long Beach, 852 F.3d 929 (9th Cir. 2017)*

The Ninth Circuit has jurisdiction over Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon and Washington.

NINTH CIRCUIT (CALIFORNIA) (03/29/17)—This case addressed the issue of whether a tattoo artist, who needed but had not applied for a conditional use permit to operate a tattoo shop in a city, had standing to bring a facial and/or as-applied First Amendment challenge to the city's zoning ordinance. The case also addressed whether the tattoo artist raised a cognizable claim (i.e., made the allegations necessary to try the claim) that the city's zoning ordinance, which restricted locations of tattoo shops and allowed them only with a conditional use permit, constituted an "unlawful prior restraint on speech" and/or an "unlawful time, place, or manner restriction on speech" in violation of the First Amendment.

The Background/Facts: James Real ("Real") was a tattoo artist who sought to open a tattoo shop in Long Beach, California (the "City"). The City's zoning ordinances disallowed tattoo shops in most locales, required at least 1,000 feet between tattoo shops and taverns or other tattoo shops, and required a conditional use permit ("CUP") to operate. Eventually, Real brought a legal action against the City, arguing that the City's zoning ordinances "unduly restricted his First Amendment right to engage in tattooing by (1) limiting the areas in which tattooing [was] permitted, including by requiring that there be at least 1,000 feet between tattoo shops and taverns or other tattoo shops, and (2) requiring permitting through a CUP process that vest[ed] excessive discretion in city officials and impose[d] excessive fees."

The district court held that Real did not have standing (i.e., the legal right to bring the claim) because he suffered no "injury" since he had never applied for a CUP in order to operate a tattoo shop in the City.

Real appealed. On appeal, he argued that he had standing to bring both facial (i.e., a challenge to the constitutionality of the ordinances, on their face) and as-applied (i.e., a challenge to the constitutionality of the ordinances as applied to Real) First Amendment challenges to the City's relevant zoning ordinances. He also argued that the ordinances operated as both unlawful prior restraints on speech and unreasonable time, place, or manner restrictions on speech in violation of the First Amendment.

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

The United States Court of Appeals, Ninth Circuit, held that Real had standing to bring both facial and as-applied First Amendment challenges against the City. The court remanded for the district court to try the City's defense that the ordinances were reasonable time, place, and manner restrictions and not unlawful prior restraints on speech.

With regard to the matter of standing, the court explained that "a plaintiff has standing to vindicate his First Amendment rights through a

facial challenge when he 'argue[s] that an ordinance . . . impermissibly restricts a protected activity." Specifically addressing the fact that Real had brought the challenge to the zoning ordinances without first applying for a CUP, the court explained: "when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." The court said this was because, without standards to restrict the City's discretion, "the difficulties of proof and the case-by-case nature of 'as applied' challenges" would otherwise render the City's action "in large measure effectively unreviewable."

Here, the court noted that tattooing—including the tattoo, the process of tattooing, and even the business of tattooing—was a "purely expressive activity fully protected by the First Amendment." The court found that Real had "plainly challenged" the City's zoning ordinances on the grounds that they impermissibly restricted an activity protected by the First Amendment (e.g., tattooing) and vested excessive permitting discretion in the City (i.e., through the CUP permit approval process). Thus, the court concluded that Real had standing to bring a facial challenge to the zoning ordinances. "He was not required to first apply for, and then be denied, a CUP to bring [his] claim under a permitting system that allegedly gives City officials unfettered discretion over protected activity."

The court went on to note that facial challenges to zoning ordinances "may be paired with as-applied challenges." The court held that Real also had standing to bring an "as-applied" challenge to the City's zoning ordinances. The court explained that to establish such standing to bring a claim in federal court (i.e., "Article III standing") to challenge a law as applied to him, Real had to allege: (1) "a distinct and palpable injury-in-fact" that is (2) "fairly traceable" to the challenged zoning ordinance and (3) would "likely be redressed by a favorable decision."

The Ninth Circuit concluded that "Real was not required to apply for a CUP to operate anywhere in Long Beach to suffer an injury." Rather, said the court, Real satisfied the injury-in-fact requirement because: "(1) he alleged an intention to open a tattoo shop without a CUP"; (2) "tattooing is purely expressive activity fully protected by the First Amendment"; and (3) "the zoning ordinances proscribe[d] his intended conduct." The court also found that Real "sufficiently alleged a credible threat of prosecution," as he had argued that "the threat of [zoning] enforcement against [him] [was] substantial," because the City "ha[d] vigorously defended its zoning ordinances in this case, and [he] ha[d] been explicitly told that he [would] be subject to zoning enforcement processes if he open[ed] except as permitted by the zoning scheme."

Having found that Real had standing to bring his claims, the Ninth Circuit remanded the matter to the district court to try the claims. In doing so, the Ninth Circuit found that Real's claims were "cognizable" (i.e.,

made with sufficient allegation to try the claim). With regard to Real's claim that the City's zoning ordinances constituted an unlawful prior restraint on speech, the court explained that, in order for Real to bring the claim, it was not necessary for the City's zoning ordinances to outright prohibit tattooing; rather, "a [licensing] scheme that places unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." Additionally, noted the court, "a prior restraint that fails to place limits on the time within which the decisionmaker must issue [a] license is impermissible," because "a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license."

Here, Real had alleged that the City's zoning ordinances: (1) vested excessive permitting discretion with the City to issue or deny a CUP; and (2) did not contain adequate procedural safeguards because no time limits were placed on CUP decisions. The Ninth Circuit agreed with Real that the City's zoning ordinances supported those allegations. The court pointed to the fact that "the criteria to issue a CUP includes the open-ended determination that the use 'will not be detrimental to the surrounding community including public health, safety or general welfare, environmental quality or quality of life.' " The court also noted that the City's zoning ordinances did not include a deadline for City officials to grant or deny a CUP.

Real had also argued that the City unconstitutionally restricted a protected means of expression (e.g., tattooing) through unlawful time, place, or manner restrictions on that speech. The court explained that time, place, or manner restrictions are reasonable if they are: "(1) [ ] justified without reference to the content of the regulated speech; (2) [ ] narrowly tailored to serve a significant governmental interest; and (3) leave[ ] open ample alternative channels for communication of the information." Further, the means of meeting the identified government interests must not be "substantially broader than necessary" and must "promote[ ] a substantial government interest that would be achieved less effectively absent the regulation." The district court had not addressed whether the City's zoning ordinances constituted permissible time, place, or manner restrictions on tattooing, and so the Ninth Circuit now remanded the matter for the district court to try.

See also: *City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771, 15 Media L. Rep. (BNA) 1481 (1988).*

See also: *Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014).*

See also: *Anderson v. City of Hermosa Beach, 621 F.3d 1051, 67 A.L.R.6th 681 (9th Cir. 2010).*

Validity of Regulations/Use—County ordinance limits marijuana cultivation to specific zoning districts

County resident challenges ordinance as invalid, arguing it violates county's comprehensive plan and is not a "reasonable regulation" on marijuana as required by state law

Citation: *Diesel v. Jackson County, 284 Or. App. 301, 2017 WL 920353 (2017)*

OREGON (03/08/17)—This case addressed the issue of whether a county zoning ordinance, which established the types of land on which medical and commercial marijuana cultivation would be permitted, and prohibited it on land zoned rural-residential, conflicted with the county's comprehensive plan, which encourage a variety of types of agriculture on land zoned rural-residential. The case also addressed whether a county board of commissioners, in adopting that zoning ordinance, was required to show that it was a "reasonable regulation" of marijuana production by demonstrating a "substantial government interest."

The Background/Facts: In 1998, Oregon voters approved the Oregon Medical Marijuana Act ("OMMA"), legalizing the production and sale of marijuana for medical purposes, under state law. In 2014, Oregon voters approved Ballot Measure 91, legalizing the production and sale of marijuana for recreational use under state law. Oregon statutes govern medical and recreational marijuana. Among those statutes, ORS 475B.370 establishes that marijuana is a "crop." ORS 215.203 authorizes local governments to adopt "exclusive farm use" zones. ORS 475B.340 authorizes local governments to "adopt ordinances that impose reasonable regulations" on businesses licensed to produce or process marijuana or sell marijuana wholesale or retail under Oregon's recreational marijuana scheme.

Following enactment of those statutes, Jackson County (the "County") adopted an ordinance (the "Ordinance") that amended the County's Land Development Ordinance ("LDO"). The LDO regulated land use within the county. The Ordinance amended the LDO to include various regulations on marijuana-related land use. Among other things, the Ordinance established the types of land on which medical and recreational marijuana production would be allowed and on which types it would be prohibited. Stating that, as a result of recent state legislative enactments, "recreational

and medical marijuana production are considered a 'farm use,' " the Ordinance amended the LDO to allow marijuana production on lands zoned exclusive farm use (EFU), forest, and general and light industrial. Marijuana production was not authorized on lands zoned rural residential, rural use, urban residential, and commercial.

Sandra Diesel ("Diesel"), a resident of the County, opposed the adoption of the Ordinance. She appealed the adoption of the Ordinance to the state Land Use Board of Appeals ("LUBA"). Diesel argued that "[t]o the extent the Ordinance prohibits marijuana production (a farm use) on rural residential lands within the County, the Ordinance conflicts with the County's comprehensive plan," and is therefore invalid. Diesel argued that the County's comprehensive plan "requires that marijuana be allowed to be grown on rural residential lands." In support of her argument, Diesel pointed to a paragraph from the comprehensive plan that discussed the benefits of small-scale agriculture in rural areas where "parcelization and/or residential development" has occurred. That paragraph "encourage[ed] a variety of types of agriculture in the [C]ounty . . . ."

Diesel also argued that the Ordinance was "invalid because the [C]ounty failed to make a finding that identified 'any substantial government interest' advanced by the zoning decision." Diesel pointed to ORS 475B.340, which authorized local governments to adopt ordinances that imposed "reasonable regulations" on marijuana production and sale. Diesel cited case law that had established that "reasonable" regulation that restricts First Amendment rights must advance a "substantial government interest." Diesel maintained that the County therefore was required to show such a "substantial government interest" in order to establish the reasonableness of the Ordinance.

LUBA ultimately rejected Diesel's arguments and affirmed the County's adoption of the Ordinance.

Diesel appealed.

DECISION: Judgment of Land Use Board of Appeals affirmed.

The Court of Appeals of Oregon also rejected Diesel's arguments, and affirmed the County's adoption of the Ordinance.

The court first held that the Ordinance did not, as Diesel had argued, conflict with the County's comprehensive plan, which encouraged a variety of types of agriculture on land zoned rural-residential in the County. Again, Diesel had pointed to a paragraph of the County's comprehensive plan, which touted the benefits of small-scale agriculture in rural areas and "encourag[ed] a variety of types of agriculture in the [C]ounty . . . ." The court held that paragraph was "not language of requirement—neither grammatically or substantively." In other words, the court found that the language of the comprehensive plan did not "require" the County to allow marijuana production on rural residential-zoned land and that the County's decision to prohibit it on those land was not inconsistent

with the comprehensive plan. Moreover, the court found that even if that paragraph of the County's comprehensive plan did require the County to encourage "a variety of types of agriculture" in areas where "parcelization and/or residential development has already occurred," the County's "decision not to allow marijuana production on rural residential lands—just one type of agricultural use—would not violate that command, because requiring the [C]ounty to encourage 'a variety of types of agriculture' is not the same as requiring the county to permit all types of agriculture."

The court next held that, contrary to Diesel's argument, the County Board of Commissioners was not required to demonstrate a "substantial government interest" to reasonably regulate marijuana production on rural residential lands. The court found Diesel's citation to First Amendment case law was unavailing. LUBA had concluded that Diesel's argument failed because she had not established that marijuana production was a protected interest under the First Amendment. On appeal, the court agreed. Moreover, the court noted that the County zoning Ordinance was authorized, "both generally and specifically, by statutes that [Diesel] [did] not contend were unconstitutional or otherwise invalid." (See ORS 215.050(1) (authorizing county governments to adopt and revise zoning ordinances); ORS 475B.340 (authorizing local governments to "adopt ordinances that impose reasonable regulations" on the production and sale of recreational marijuana, and listing as an example of such regulations "[r]easonable limitations on where a premises for which a license [to produce marijuana] may be located.")

Finally, the court held that the Ordinance was a "reasonable regulation"—under ORS 475B.340—of the production of commercial recreational marijuana cultivation in the County. The court found that Diesel had not argued that the property in the zoning districts where marijuana production was authorized under the Ordinance was unsuitable for marijuana production such that the owners of the land could not engage in that use. Moreover, the court found that the County was "actively encouraging those who [were] growing on rural residential and rural use lands to make application with the county for a 'non-conforming use verification permit' in order to make legal grow operations located on these lands," and that the Ordinance included measures intended to allow marijuana cultivators on rural-residential land an opportunity to come into compliance with the Ordinance.

Case Note:

In its decision, the court made note that it was not deciding what was a "reasonable regulation" of marijuana under ORS 475B.340.

Vested Rights—After developer seeks to develop property, town rezones property

Property owner sues, claiming vested right in zoning classification

Citation: *McKee Family I, LLC v. City of Fitchburg, 2017 WI 34, 2017 WL 1337663 (Wis. 2017)*

WISCONSIN (04/12/17)—This case addressed the issue of whether a property owner has a vested right in a zoning classification. It also addressed whether a zoning classification creates a contractual expectation upon which a property owner may rely.

The Background/Facts: In 1989, McKee Brothers Partnership ("McKee Brothers") dedicated approximately 60 acres of farmland to the City of Fitchburg (the "City"). The farmland was donated to fulfill a park land dedication requirement for a variety of McKee Brothers' projects, including the property known as "Lots 53 and 54." Credit for the parkland allocation was determined by a settlement agreement, which gave McKee Brothers the right to build 600 dwelling units on a variety of lands it owned.

McKee Brothers later transferred Lots 53 and 54 to MAF Development, Inc. ("MAF"). The lots were zoned residential-medium ("R-M"), but MAF applied for and received approval for rezoning to a planned development district ("PDD") classification.

Pursuant to Wisconsin statutory law, municipalities could use a PDD zoning classification to establish planned mixed-use developments with a higher density than allowed under an R-M classification. (Wis. Stat. § 62.23.) The City's General Ordinances required that a property owner seeking to develop PDD-zoned land first submit a general implementation plan ("GIP"). The General Ordinances further required that if the GIP was approved, the property owner would then need to submit a specific implementation plan ("SIP"), which, if approved, would be followed by the property owner's building permit application.

Here, after receiving the PDD zoning classification, MAF submitted a GIP for a multi-family housing development for "mature adults." The City approved the GIP.

In 2007, MAF deeded Lots 53 and 54 to McKee Family I, LLC ("McKee"). McKee later entered into negotiations for JD McCormick Company, LLC ("McCormick") to purchase Lots 53 and 54. At this point, more than a decade had passed since the PDD zoning classification and the GIP approval. The purchase agreement was contingent on Mc-

Cormick's ability to obtain approval from the City to build 128 apartment units on the lot.

McCormick prepared a PDD-SIP application for the 128-unit apartment complex. Over 600 City residents opposed the proposed development. The residents' primary concern with the proposal was that it did not comport with the original PDD-GIP to develop senior housing.

While the PDD-SIP application was pending, the City adopted an ordinance (the "Ordinance"), which rezoned Lots 53 and 54 (the "Property") from PDD-GIP to R-M. That rezoning limited McCormick to the potential development of 28 dwelling units, compared to a maximum of 132 dwelling units allowable under the PDD zoning classification.

McKee and McCormick filed a legal action. They asked the court to declare that the rezoning of the lots was unlawful.

Finding no material issues of fact in dispute, and deciding the matter on the law alone, the circuit court issued summary judgment in favor of the City. It concluded that the Property was rezoned in accordance with Wisconsin statutory law.

McKee appealed. On appeal, McKee asserted that it had a vested right in the PDD zoning classification. McKee also asserted that a PDD classification creates a contract that gives rise to expectations on which developers may rely.

The court of appeals determined that McKee did not have a vested right in the PDD zoning classification when the City rezoned the lots. In so holding, the court pointed to the fact that Wisconsin follows the "bright-line building permit rule." Under that rule, a property owner's rights do not vest until the developer has submitted an application for a building permit that conforms to the zoning or building code requirements in effect at the time of the application.

McKee again appealed. On appeal, McKee argued that even though it had not submitted an application for a building permit, it nevertheless had a vested right in developing the land under the PDD zoning classification because it had made substantial expenditures or incurred substantial liability based upon reasonable expectations established by the City's actions. McKee urged the court to drop the bright-line building permit rule, and to instead apply a case-by-case analysis based on whether "significant expenditures" were made in reliance on government action.

McKee further argued that "to the extent the zoning classification is contractual in nature it also creates expectations upon which developers may rely." McKee relied on language in the City Ordinances that referred to a PDD zoning classification as an "agreement [that] is reached between the property owner and the [City]." McKee thus argued that the court should decline to apply the building permit rule because a PDD is a form of negotiated zoning that a developer may rely upon once adopted by the City.

DECISION: Judgment of Court of Appeals affirmed.

The Supreme Court of Wisconsin rejected McKee's arguments and declined McKee's invitation to approach vested rights cases with a case-by-case analysis.

The court maintained that the bright-line building permit rule was the preferred analysis for vested rights cases because it "creates predictability for land owners, purchasers, developers, municipalities, and the courts." In contrast, the court found that the rule proposed by McKee, which would require a case-by-case analysis of expenditures would "create uncertainty at various stages of the development process."

Here, the court concluded that McKee did not have a vested right in developing the Property under the PDD zoning classification because it did not apply for a building permit. Moreover, the court noted that even if it was to apply a substantial expenditure rule here, as proffered by McKee, McKee's claim "would fail because [McKee had] not introduced evidence supporting its claims of substantial expenditures."

Additionally, the court determined that a PDD zoning classification does not, as McKee had argued, create contractual expectations upon which developers may rely. The court explained that there is "a very strong presumption that legislative enactments do not create contractual or vested rights." Further, said the court, "there must be a clear indication that a legislative body intends to bind itself contractually in order to overcome the presumption." Here, the court concluded that McKee had not overcome the presumption that the City did not intend to enter into a binding contract when it enacted the Ordinance approving the PDD zoning classification.

See also: *Lake Bluff Housing Partners v. City of South Milwaukee*, 197 Wis. 2d 157, 540 N.W.2d 189 (1995).

See also: *National R.R. Passenger Corp. v. Atchison Topeka and Santa Fe Ry. Co., 470 U.S. 451, 105 S. Ct. 1441, 84 L. Ed. 2d 432 (1985).*

Case Note:

McKee had also claimed that the rezoning ordinance—which rezoned the Property from PDD to R-M—constituted a taking under the Fifth Amendment to the United States Constitution. The court did not consider that claim because McKee had conditioned its takings claim on its claim for vested rights, which the court had determined failed. Because McKee has no vested right in a PDD zoning classification, it could not succeed on its asserted contingent takings claim, concluded the court.

Zoning News from Around the Nation

ILLINOIS

In early April, the Indiana Senate voted "to approve a bill that would prevent local governments from banning Airbnb and similar short-term rental services." House Bill 1133 would also "limit owners from renting their rooms for 30 consecutive days or more than 180 days per year." The state House of Representatives approved a similar version of the legislation in February. Reportedly, the bill will now "go to a House-Senate conference committee to hammer out a final version."

Source: *Indianapolis Star*; www.indystar.com

MARYLAND

Baltimore County is reportedly facing "a pair of federal lawsuits alleging religious discrimination after it denied proposals for two new houses of worship—a Baptist church in Hunt Valley and a synagogue in Pikesville." Each claims that the zoning denials violate their congregations' exercise of freedom of religion.

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

WISCONSIN

The state Assembly "has voted to make it easier for towns to withdraw from county zoning, although the change would only apply to Dane County. . . . Currently, towns that want their own zoning can withdraw from the county policy only after its approved in a referendum or at annual town meetings. The bill would also allow those votes to happen at special town meetings, with 30 days notice." The measure now heads to the state Senate for consideration.

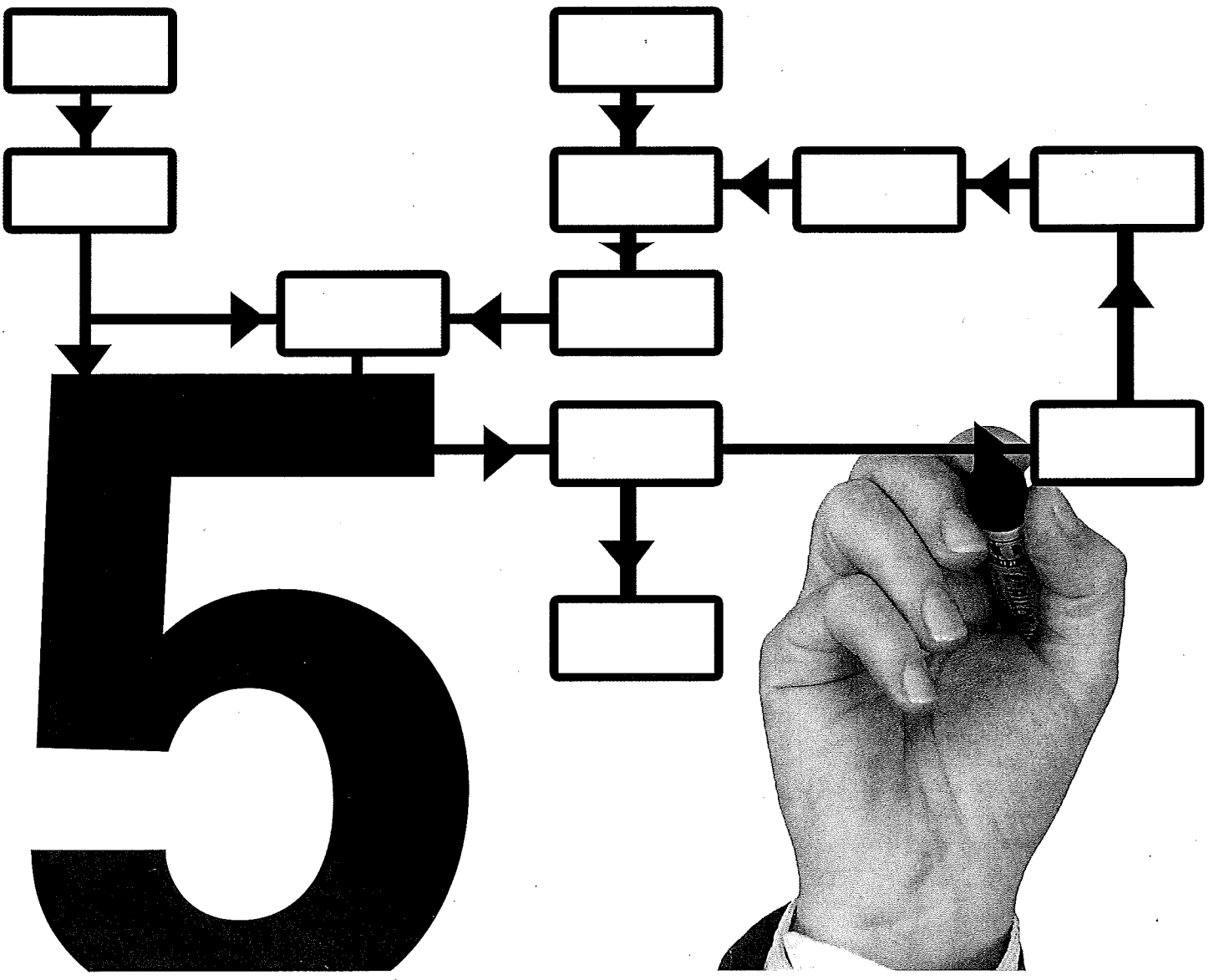
Source: *Wisconsin Radio Network*; www.wrn.com

ZONING PRACTICE MAY 2017

AMERICAN PLANNING ASSOCIATION

ISSUE NUMBER 5

PRACTICE PROCESS IMPROVEMENT



Development Review Process Improvement

By Norman Wright, AICP

Many practitioners have inadvertently found themselves to be part of a development review process that has become cumbersome and frustrating to all.

Imagine a scenario: An applicant comes to city hall seeking a permit to install a new awning above her store's entrance. She discovers that, because the awning's overhang extends over the sidewalk, she needs public works staff to review the request. Also, because the awning is for a building in a historic district, her request must be reviewed by the district's design committee. Additionally, building safety staff must review it for proper construction. Before that review, however, she needs a variance because awnings of this size aren't allowed by the zoning district. But the planning department cannot process a variance application until she has a conceptual review meeting with staff, and the application for a conceptual review meeting requires a building elevation to illustrate the effect of a new awning on the current architectural design. Which the applicant lacks.

These requirements, by themselves, do not bother the applicant. All the same, she soon makes an angry call to the mayor because this simple visit to city hall led to her being sent to five different department offices where each reviewing authority has given her its own process and time line. Combined, all review processes and requirements add up to at least a nine-month total review time in order to potentially receive a permit. The commensurate fees are also more expensive than the awning itself.

Sound familiar? Over the course of decades, the work we do to review projects and issue approvals has grown in complexity, much as our regulations have. The negative effect this has on customer experience is becoming more apparent. But inefficient processes not only cause frustration, they also contribute to greater delay and expense in the construction process, and worsen the economic conditions we planners seek to remedy.

In the current analysis of zoning's impact on the housing market, much work has been done to identify the need for new policies that respond more dynamically to the growing demand for supply. We've explored the potential of "tiny homes," inclusionary zoning, and accessory dwelling units, and have authored a shift to form-based standards in exchange for more flexible density requirements. These and other improvements are designed to allow our zoning practice to be more conducive to the need for housing in a broader set of forms and options.

Such policies move us forward. But this is only half of the challenge. Every great new policy requires an equally responsive implementation process. This was one of the major findings provided by a 2016 report from the Obama administration, which stated two important effects from a lack of focus on process improvement: "Unnecessarily lengthy permitting processes restrict long-run housing supply responsiveness to demand, and also present an inefficiency for city planners and reviewers whose time could be more effectively spent on essential tasks" (The White House 2016, p. 15).

A more efficient process for administering our zoning ordinance is a relief to frustrated applicants and overburdened planners; it is also a key element of our response to the housing affordability crisis seen in many regions of the country. Improving this facet of our work provides tremendous benefit to virtually everyone. This issue will explain how to conduct such an effort in a way that yields immediate results.

THE PRINCIPLES OF PROCESS IMPROVEMENT IN DEVELOPMENT REVIEW

In private-sector industries such as manufacturing, process improvement is a discipline unto itself. Two approaches form the bedrock of this practice: Six Sigma and Lean. Six Sigma focuses on reducing the defect rate of underlying processes associated with producing products. Its name is a reference to a statistical goal: A Six Sigma process is one where there are six standard deviations between the specified acceptable limits for a process and the process's mean result. This translates to one defect for every 3.4 million opportunities (iSixSigma n.d.). Lean is a process improvement approach that focuses on "cutting out unnecessary and wasteful steps in the creation of a product so that only steps that directly add value to the product are taken" (Villanova University n.d.).

Over the years, both approaches have effectively been combined to promote efficient (i.e., "lean") processes that create high-quality deliverables (i.e., meeting the Six Sigma standard). If the term "Lean Six Sigma" sounds familiar, know that it is a neologism for "efficient and high quality." For this article, we incorporate this dual approach. We start with the principles rooted in Lean.

The very first principle one must embrace with process improvement is value. Value in the sense that every process delivers something necessary and desired for those who enter it in the first place, including those who practice the process. In development review, that can be an entitlement (e.g., a rezoning, a conditional use permit, a variance). Consider the ultimate source of value—the one deliverable that allows someone to deliver their own value to the community—the building permit. To see value in the building permit from the applicant's standpoint, and to also see value in the process itself from the practitioner's standpoint, changes our view of the process and allows the next principle to make sense. The applicant gains the ability to construct

their project. The practitioner gains the assurance that the project will meet our regulations and thus promote the proper growth and change we seek to create.

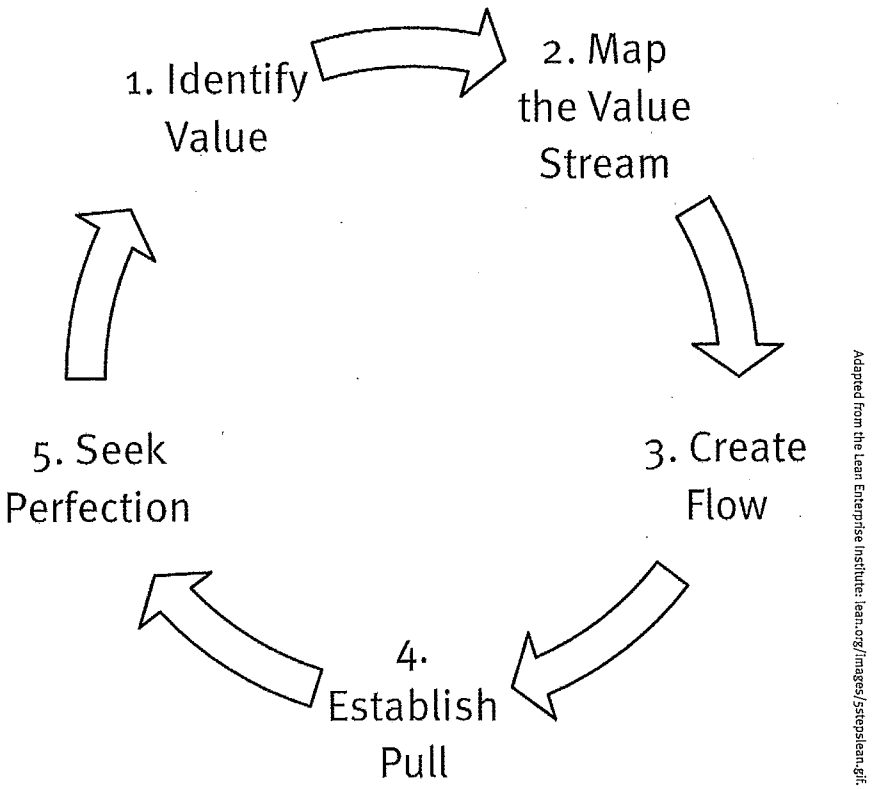
The next principle is mapping the value stream. In our case, it is the sequence of activities that blend together to create and deliver the permit. At minimum, this sequence starts at intake, when an application is received. Every progression through this stream creates a combination of work (people reviewing the permit request) and value (people finalizing the review and delivering their comments).

This progression is signified by the third principle: flow. When the process runs smoothly, it presumably has good flow in that there is no unnecessary delay. When a process is disjointed or bottlenecked in one area, the flow suffers. To even consider the notion of flow is to already think very differently about a review process. In this light, we no longer see the "silos" or "islands" where the planners review one thing, then another, ad infinitum with no care for what happens upstream or down with the engineers or building code reviewers. Instead, flow leads one to see his or her own work as one of the interconnected actions that deliver the overall value to the applicant. This concept of flow is intuitive to all review staff. But it takes a new meaning when considered with the next principle, establishing pull.

"Pull" refers to the value the customer draws from the process. Consider the fact that development review does not operate on its own, producing permits as inventory or stock for others to pick up if they want them. Our work is demand-driven, determined by the number of requests or customer demands we receive. As this relates to development review, the customer makes a request, we do the work, and the customer thus "pulls" value (i.e., a reviewed plan) according to our defined process.

In development review, we are often "pulled" to respond to increased volumes of permit requests in the spring and summer months when construction activity is its highest. The greater volume and demand strains our resources, and it becomes critical to balance quality versus quantity. This inevitably comes down to capacity. As lean as a process can be, it can still only serve so many customers until it either loses its timeliness or its quality. But what is the limit? How much becomes too much? Establishing pull is centrally focused on answering those questions.

The final concept is continuous improvement. When all other principles are applied and you begin improving your process, you do so with a vision in mind. This vision will naturally be specific (e.g., to reduce permitting times by 20 percent) and must be measurable by creating key performance indicators (KPIs) for the team to accomplish. When done right, something marvelous happens to a team. They start to meet their KPIs and fulfill the vision. Spurred by their success, they naturally seek to then improve it further. Every action in process improvement creates greater value, which leads to happier applicants, which leads to happier staff, which leads to even happier applicants, and a virtuous cycle is born.



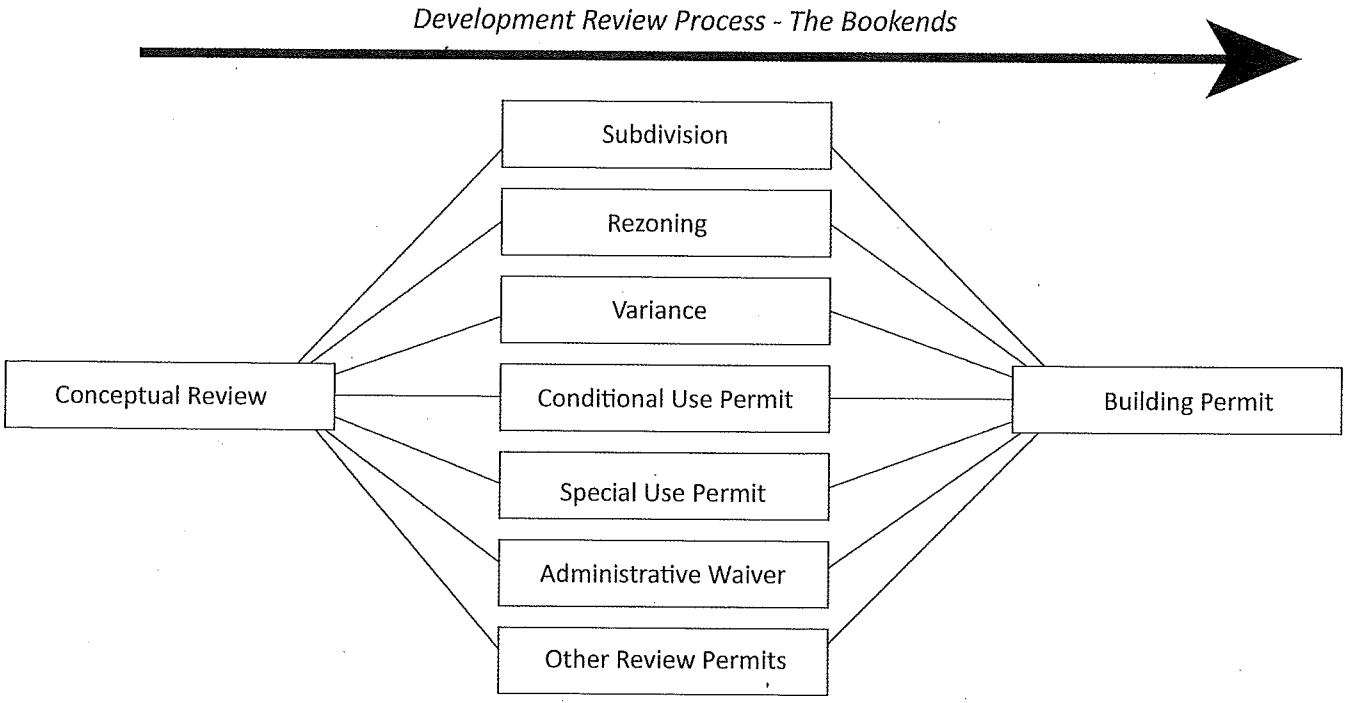
Adapted from the Lean Enterprise Institute: lean.org/images/jstepslean.gif.

The Five Principles of Lean from the Lean Enterprise Institute.

APPLYING THESE PRINCIPLES TO ADAMS COUNTY, COLORADO

To see the real strength of developing this approach, consider the transformation we've experienced in Adams County, Colorado. This is a jurisdiction of 500,000 in the Metro Denver region that is currently experiencing record-breaking volumes for development review. In past years, as recent as 2014, this volume would have crushed the staff. Time lines were not measured, but it wasn't uncommon to have basic plan reviews take six months to complete. Complaints were frequent, and the staff was beleaguered and divided. No elements of the system were consistently implemented using online case management software, and people had to hand off physical plan documents from one person to another like passing a baton in a relay race. Much of the delay in reviews came from an inability to pass the baton successfully. Or to even have to do such a thing at all.

In 2015, we identified our first two processes to improve. This decision required some definite strategy. We couldn't improve all processes at once so, in our case, we chose the two processes that either consumed the most volume or had the greatest ability to create "front-end impact" in a manner that could ensure smoother flow in later stages of development review. The rationale here is



The basic development review process from its origin in conceptual review to its completion with a building permit.

Norman Wright

that our system (and yours, too) has leverage points where relatively small changes can create huge improvement. This leveraging is best identified by the 80/20 rule, a phenomenon where 80 percent of your system's activity is influenced by 20 percent of the total system.

In terms of volume, building permit review consumes the majority of our review activity since it is the back-end process for all projects (nearly 5,000 cases in 2016). In terms of front-end impact, the conceptual review process best ensures a smooth flow with all other functions that operate downstream. Simply put, these are the critical bookends (i.e., the 20 percent).

Finding the Value

With the two processes identified, we applied our principles for improving each. To illustrate, let's consider conceptual review. We start with value: what is the value of this meeting? We define it from our standpoint as well as the client's. In both instances, value is generally defined by the *quality* of what we produce and the *time* in which it is delivered.

In terms of quality, the value of these meetings comes not just from the guidance we provide in the meeting but also, most especially, from the formal comments we provide afterward in document form. These meetings often generate a lot of information for an applicant. It can be hard to follow our message completely in the 30-minute window we provide. So our staff often tried to consolidate the comments into a document that was sent after the meeting—typically via email. That letter then represents the essential recipe for how the applicant can accomplish the project in accordance with our zoning regulations.

So again, the letter is the highest piece of value from this process. For the client and for us. In the past, however, our process didn't ensure that all the proper experts attended the meeting. The idea of "consolidated comments" was often a non-starter since we seldom had a building official, engineer, or code enforcement officer in the meeting. Even when members were in attendance, we didn't always ensure that our comments were consistent, clear, and in chronological order. So quality was often far less than what we knew it could, and should, be.

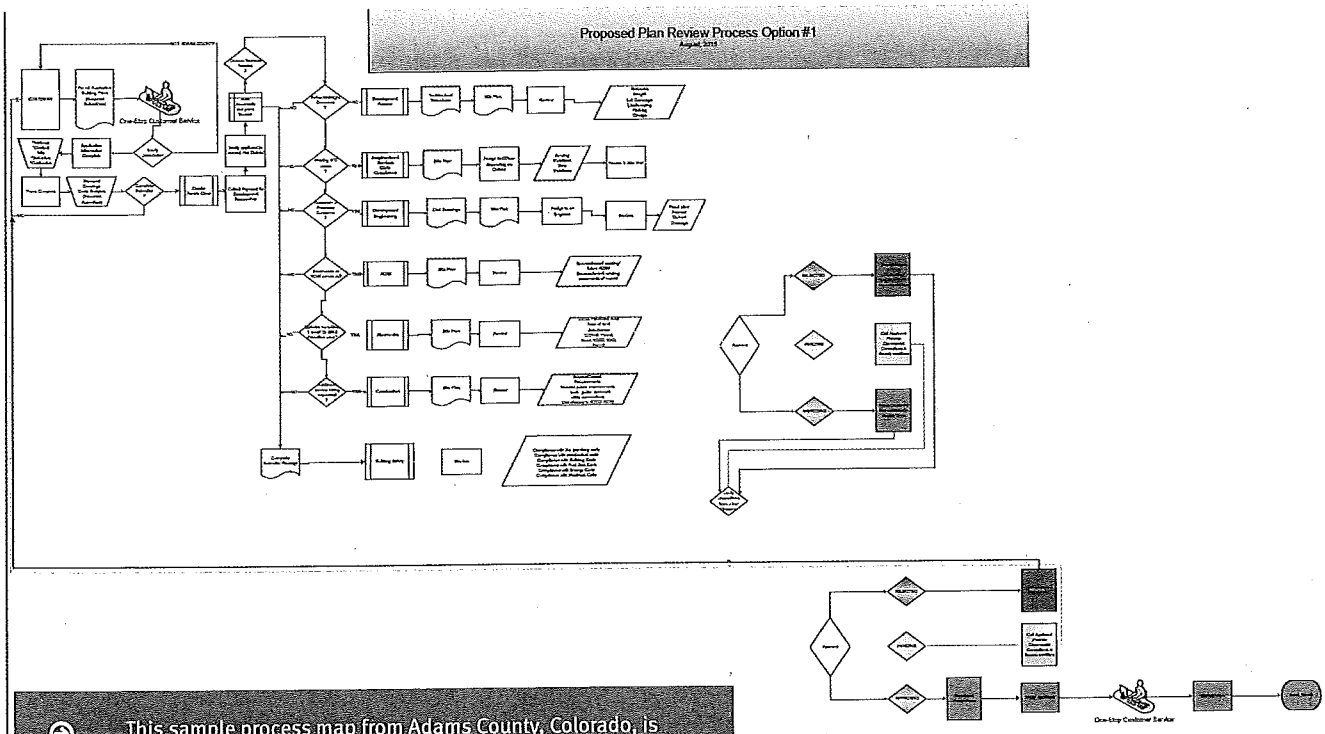
And as mentioned before, the value of these meetings is also built on time. If we failed to send these comments to applicants in a timely fashion, their experiences—and their projects—suffered. Traditionally, we told customers they would receive comments within 14 days. This was the hope but not the internal expectation. Thus the 14 days was seldom met. The time line was more like 70 days on average, which is embarrassing to consider. There were even instances where we didn't send the comments at all!

Mapping the Value

On paper, conceptual review is a small process. But when mapped through the rest of the value chain, it has a tremendous effect on the success of a project. If applicants do not receive a document of consolidated comments in a timely fashion after a conceptual meeting, they often fail to follow the rest of our process effectively. If the applicant does get comments, but they are inaccurate or incomplete or inscrutable, the plight is just as bad.

In every instance, this creates the classic problem of "garbage in, garbage out." Poor guidance leads to poor submittals and poor outcomes. Every planner is keen to this fact, and it makes more work for everyone.

It begs the question: How could something so simple as a conceptual review process be so inconsistent? Was our staff lazy? Irresponsible? Negligent? Like so many facets of work in large organizations, the truth of the



This sample process map from Adams County, Colorado, is significantly more granular than the more common critical path illustration. Each element factors in actions, inputs, conditions for advancing, and decision points. It also contains metadata on how each element is executed.

Adams County, Colorado

matter is that our staff members worked very hard to overcome the poor processes that were not designed to help them succeed. Our process simply didn't make it easy for them to do the right thing. Often, for the sake of delivering value in their jobs, our staff members simply operated outside of the process. They would go out of their way to avoid the process so as to prevent the cascade of bad effects that would follow if they kept to their scripts. This was readily apparent in the third stage of the effort: defining, and improving, our flow.

Achieving Great Flow

The action that best personifies process improvement is the mapping that comes during the flow stage. Symbolized by the flow charts that show the beginning, middle, and end of an effort, most practitioners can easily sketch the basic flow of any process in accordance to the critical path. But a critical path isn't enough to truly understand how your business is operating when it involves multiple people from multiple groups. The real flow from the start to finish of a process is surprisingly complex and full of hidden decisions, conditions, and bottlenecks that no single person can identify on their own. And often, it varies from person to person in the existing condition.

Mapping the flow, especially as it currently exists, requires significant time and effort. It is, essentially, an audit of the team's work: what they do, how they do it, and when they do it. And like any audit, their involvement is critical for success. For a large department such as ours, this meant bringing a staff of more than 20 people to an off-site conference room where they could define every step of the conceptual review process—as it currently exists and as they currently use it—and map the information on a whiteboard for all to see. The work took several hours, and the visual result wasn't pretty. But it painted a very compelling picture.

Within this basic illustration, not only does one find the critical path that serves as the backbone of any process, but also the smaller actions, inputs, and decisions that make it possible. Some of which are inconsistent from one participant to another. It is vital that the exercise of mapping the existing flow highlights these inconsistencies.

For example, the original process for initiating a conceptual review involved a planner receiving the request from an applicant or, more commonly, informing a would-be applicant that it was required. Sometimes, this occurred after a file had already been created in our case management software. If so, the conceptual review meeting was noted in the case file electronically. But not always. Many cases had no record that a conceptual review meeting had ever been conducted since different users acted in different ways without a process to dictate.

Even the simple matter of scheduling the meeting was often different from user to user. Some planners would schedule the meeting themselves in Microsoft Outlook. Others would ask a permit technician to schedule the meeting for them. And again, some would not schedule the meeting at all; they would adhere to the department's standard time for these meetings (Monday afternoons) but hold the meeting in any conference room that was available. In the grand scheme, we've hardly scratched the surface on the rest of the process and already find inconsistencies throughout.

One important note is that this effort can and should be categorized as a "blame-free autopsy." This is process improvement,

Elements of Value	Key Performance Indicators	Benchmark
(Quality) Comprehensive Comments	Percentage of staff participation from all divisions	100% on all documents
(Quality) Clear Language	Percentage of comments that provide citation or definition	100% on all documents
(Quality) Chronological	Percentage of comments completed with template	100% on all documents
Timeliness	Percentage of comments delivered within 14 days	100% of all review cases

not process disparagement. When teams get together to discuss this work, they often feel a sense of guilt at how convoluted the system has become. They think it's their fault. But unveiling all the hidden machinery and small foibles is vital to understanding how everything can work better. So as the staff members work to define their process—as it is, not as it should be—the conference room can start to feel more like a confessional. But again, as a "blame-free autopsy," this is a critical step to everyone's progress as part of a team. Not a time to point fingers.

When the various actions are defined and the map is clear, the next step is a return to the principle of value mapping. Only, in this case, the value mapping is far more fine-grained. Here, the team begins to analyze the dysfunctional process they see before them. They look at every step and consider whether it is worth keeping. Like editors searching for the next unnecessary adjective, the team becomes ruthless, cutting what isn't needed and keeping only that which is truly, deeply valuable.

Value in this much smaller sense goes back to the notion of the critical path. Not the more simplified version of "the big picture" but a version that shows how every step creates an action that gets the client closer to what they want: the final output. In our case, the final output is the timely delivery of a set of complete, consolidated, and chronological comments. If the team agrees that a certain step gets them closer to what the client wants, it is marked with a "Value-Added" designation.

Processes also have steps that are necessary even if they do not get a client closer to what they want. Such steps are marked as "Business Value-Added" in the sense that our work cannot function without certain actions taking place. In the instance of conceptual review, a prime example is the act of inputting one's comments into our case management system (Clayton n.d.). This does nothing for the client (they don't have access), but it is necessary for the business.

Every other remaining action is marked with a "Non Value-Added" (NVA) designation. One of the more satisfying aspects of this work is looking back at the number of NVA actions that are found in every original process map. This is the stuff of red tape bureaucracy and bad customer service. Each NVA item is removed from the future process, liberating staff and clients from things they never wanted to do in the first place.

Altogether, the value-, business value-, and non-value-added items are compiled by percentage so that one can see the overall picture of what often occurs in a process. It's not uncommon to find a development review process that has more than 50 percent of its actions classified as non-value added. Removing those items cuts a job's demands in half—an incredible improvement. In the case of our conceptual review process, we discovered 44 percent of all actions were unnecessary. On our other bookend, building permit review, we eliminated and revised even more steps, reducing our time line by 71 percent.

What's left is the lean, efficient process that the team has defined by simple subtraction. The team is thus a veritable Michelangelo, freeing the sculpture from the surrounding marble. As a result of their collaboration, they can understand the new process in a deep way that compels them to use it together in a consistent manner that imbues great team spirit. People are often excited to go back to work and try it. But a process, no matter how lean, can't be deemed effective until you know what you're trying to accomplish.

Establishing Pull

The old adage is true: What isn't measured isn't managed. And if value is determined by the quality and timeliness of what we deliver, we need to create measures that can help us create maximum value. One such measure should represent the quality element and another measure should represent timeliness. Working with your staff to establish these two measures together, collaboratively, is the key to creating ownership and buy-in.

In our case, we knew that quality was best achieved when we delivered comments that were comprehensive, clear, and chronological. We knew timeliness was best achieved when comments were delivered within 14 days. The table at left illustrates our basic KPIs.

Our new process ensures these benchmarks are met by establishing pull. We've designed a process that can easily ensure we "pull" our product through in a timely fashion, as demanded. But only to a certain extent. We don't have capacity to meet all possible demand. If we were to receive, say, 10 conceptual review meeting requests for a single week, and these requests were pulled through the process at the same time, we'd probably see quality suffer. We simply wouldn't be able to coordinate in a way that has everyone in the room consistently for those meetings. So instead, we set a cap based on time and space. We reserve a single conference room for four hours a week on Monday afternoons. This typically serves four such meetings a week. This allows our staff to coordinate their time, keep the meetings in a consistent space, and thus have all the critical elements up front for the rest of the process to be a success.

In order for applicants to receive the value we can offer in the time they deserve, we must adhere to this basic capacity limit. That's what establishing pull is all about. Backlogs can happen as a result, but that's a result of excess demand for the process, not excess waste within it—a critical difference.

Continuous Improvement

But these capacity limits don't last forever. The most enjoyable aspect of process improvement is that it ingrains a new way of

thinking that eventually leads to more improvements over time, especially to the "flow" of your team's work. Case in point: Our team found immediate success with their new process, hitting all benchmarks effectively. A few cycles into the effort, they began to capitalize on the rest of our case management software to standardize certain comments for certain case types. This was another big gain in efficiency. Now all conceptual review comments are easily delivered on time—with plenty to spare. This gives us the chance to either lower the time standard from 14 days to 10 or expand capacity by raising the cap on weekly meetings from four to six, having shorter, more efficient, use of the meeting time. With more refinements to our case management software, we suspect we'll simply do both.

In this mindset of continuous improvement, we've applied our approach to many other cases and processes. For example, with our other target process—building permits—we have further capitalized on our software capabilities to create what's known as the E-Permit Center. At this web portal, clients now submit their applications for all building permits and many other permits and applications online in a paperless system. This system is designed so that we can deliver all plan reviews within 10 days. This is a 200 percent improvement in efficiency from past efforts. Additionally, with these and other processes, we've begun to assess our performance from the client's standpoint. In our monthly polling, we achieve an average 90 percent customer satisfaction rating per month—a first for our organization.

We monitor these and other such processes each month with a performance report that highlights the effectiveness of our work. These reports are something of a scoreboard for our staff, letting them know when and how we're winning the game—and the work often does feel like a game when you have feedback of this sort. We also communicate these reports to the public so they can see how we're best serving them.

CONCLUSION

Though it often appears that the major impact of zoning is felt on the policy side, there is little doubt that much of the pain is felt—especially by practitioners—on the administrative side. And though policy can take years to develop and more years to truly apply, there is much we can do on the administrative side today that can create benefits almost immediately. Anything that allows our staff to do their jobs quicker, better, and easier is positive for all. And quite gratifying, too. Practicing process improvement can alter the public's view of our work, can build credibility in our profession, and can lead to great decisions.

To that point, there is one final improvement we've noticed in our efforts. As highlighted in the White House report, the greater quality and timeliness of our procedural work extends benefits to our non-procedural work. In the past year, we've gained more time for the analysis of public hearing cases and major development decisions. This process has led to greater influence with our boards and elected bodies so that over 90 percent of their decisions are in agreement with our recommendations. We thus have more credibility. And elsewhere, we now have better relationships with developers, community leaders, and the broader public. It's been a surprise, all this fanfare.

Most surprising of all, the approach detailed here has made the work exciting, too—especially when it involves actions we can take quickly, on our own, with immediate feedback. This is something we all need in our zoning practice.

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Cover: Geralt/Pixabay.com, CCo

Vol. 34, No. 5

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

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