QUINLAN™ October 10, 2017 | Volume 11 | Issue 19

Zoning Bulletin

in this issue:

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Mat #41945620

Jurisdiction—Homeowners file petition in error, challenging city approval of rezoning and special use permit

City and homeowners dispute whether city's simultaneous action on rezoning and special use permit was a legislative or judicial act (thus

Contributors

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ISSN 0514-7905

impacting the court's jurisdiction over the petition in error)

Citation: *Landrum v. City of Omaha Planning Board, 297 Neb. 165, 899 N.W.2d 598 (2017)*

NEBRASKA (07/14/17)—This case addressed the issue of whether a city council acted legislatively or judicially when it simultaneously faced requests for rezoning and a special use permit (thus determining whether a court had jurisdiction over a petition in error, challenging the city council's zoning actions).

The Background/Facts: Daryl Leise; Redbird Group, LLC; and Ray Anderson, Inc. (collectively the "Developers") proposed the construction of a convenience storage and a warehouse facility on property in the city of Omaha (the "City"). The property was zoned "community commercial" ("CC"). The City's Municipal Code (the "Code") allowed for special "overlay districts" to be "overlaid" upon a property in addition to its base zoning district. For the Developers to proceed with their proposal, they needed three zoning approvals from the City: a conditional use permit, which could be issued by the City's Planning Board; a special use permit, which could be issued by the City Council after a recommendation from the Planning Board; and a rezoning to place the subject property within a "major commercial corridor" ("MCC") overlay district, which also could be granted by the City Council after a recommendation from the Planning Board.

The Developers applied for those zoning approvals. Residents (the "Homeowners") who owned property near the Developers' property opposed their approval. Among other things, the Homeowners expressed concern about the impact of the proposed construction on property values, views, and the compatibility with the nearby residential neighborhood.

After public hearings, the Planning Board voted in favor of the Developers' conditional use permit, thus approving it subject to conditions. The Planning Board also voted in favor of the special use permit and MCC overlay rezoning, forwarding those applications to the City Council for final action. After more public hearings, the City Council ultimately voted to approve the MCC rezoning and passed an ordinance to implement it. The City Council also approved the special use permit, subject to conditions.

The Homeowners appealed by filing an amended petition in error. They requested vacation or reversal of: (1) the Planning Board's approval of the conditional use permit; (2) the City Council's passage of the resolution that approved the special use permit; and (3) the City Council's passage of the ordinance implementing the MCC overlay district. The Homeowners claimed that the decisions of the City Council

and the Planning Board were "illegal, not supported by the evidence, and thus arbitrary, unreasonable, clearly wrong, and a violation of due process." Specifically regarding the special use permit and the MCC overlay district, the Homeowners alleged, among other things, that the Developers had failed to provide accurate information about the ownership of the subject property or the authority to develop it.

The City denied the allegations. The City also challenged the Homeowners standing (i.e., legal right or interest in the case). The City further argued that the court lacked subject matter jurisdiction to hear the Homeowners claims (i.e., the legal authority of the court to hear the case on the subjects raised), alleging that: (1) the Homeowners' challenge of the conditional use permit was untimely; and (2) the City's rezoning of the property was not reviewable by an error proceeding because rezoning was a legislative function, which is not a proper subject of an error proceeding.

The district court affirmed the determinations of the City Council and the Planning Board, and dismissed the Homeowners' petition in error. The court found that the Planning Board and City had acted within their jurisdiction and that their determinations were supported by sufficient relevant evidence.

The Homeowners appealed. The City also appealed, again presenting arguments of standing, timeliness, and subject matter jurisdiction.

DECISION: Judgment of District Court affirmed in part, vacated in part, and dismissed.

The Supreme Court of Nebraska first concluded that the Homeowners had standing to bring their claims. The court explained that an adjacent landowner generally has standing to object to the rezoning of property if the landowner shows some special injury separate from the general public. Here, the court found that presence of a special injury was shown by the fact that the Homeowners owned property within 300 feet of the proposed project, and were thus entitled to notice of the proposed project under Nebraska statute (Neb. Rev. Stat. § 14-420). A finding of special injury (and thus standing) was also supported by expert testimony that the proposed project would diminish property values in the area, found the court.

The Supreme Court of Nebraska also held, as a matter of apparent first impression (i.e., the first time Nebraska courts addressed the issue), that the City Council acted as a legislative body when it granted the zoning overlay and special use permit. The court noted that Nebraska case law had not previously addressed the categorizing of municipal action (either as legislative or judicial) when the municipality deals with a simultaneous rezoning and special use permit—as in this case. The Homeowners had contended that, by conducting simultaneous hearings on the special use permit and the rezoning, the City Council had acted

judicially—and that therefore, the petition in error was the proper means to seek review of such action. In rejecting that argument, the court found that "the record reflect[ed] that the special use permit and rezoning applications proceeded at the same hearing pursuant to separate agenda items," and that no "evidence was offered and received or that testimony was offered." The court explained that "a zoning ordinance constitutes the exercise of a governmental and legislative function and that a city council adopting a rezoning ordinance which amends a general zoning ordinance acts in a legislative capacity." The court said that "parties cannot transform an otherwise legislative proceeding into a quasi-judicial function or establish a quasi-judicial record by simply presenting arguments and handing documents to the presiding body." Thus, in light of the nature of the proceedings at issue here, the court concluded that the City Council acted as a legislative body in granting the rezoning request and in granting the special use permit.

The court further explained that "an appeal or error proceeding does not lie from a purely legislative act by a public body to which legislative power has been delegated" and that "the only remedy in such cases is by collateral attack, that is, by injunction or other suitable action." In other words, the court explained that legislative actions cannot be challenged through a petition in error—such as that brought by the Homeowners here. Accordingly, the court concluded that the petition in error brought by the Homeowners was therefore an improper means to seek review of the City's approval of the rezoning and special use permit. A request for a permanent injunction, not a petition in error, was the proper means to seek review of both determinations, said the court. Because the Homeowners filed a petition in error to review both the rezoning and special use permit approvals by the City Council, the court did not have jurisdiction to proceed on those issues.

As to the Homeowners' remaining claim challenging the City approval of the conditional use permit, the court first rejected the City's argument that the claim was untimely. Under Nebraska statutory law (Neb. Rev. Stat. §§ 25-1905 and 25-1931), proceedings in error must be brought within 30 days after the final judgment or order that is challenged. Here, although the Homeowners had filed their petition in error with the district court more than 30 days after the Planning Board approved the conditional use permit, the court found that the conditional use permit did not become a "final order" until the City Council approved the zoning overlay for the proposed facility. The court found that the Homeowners filed their petition in error within 30 days of that final order. The court ultimately concluded that the Homeowner's challenge of the conditional use permit failed because, "[a]lthough the Homeowners raised valid concerns," the Planning Board "had sufficient evidence to approve the conditional use permit and had provided the Homeowners with due process of notice and an opportunity to be heard."

See also: *Application of Frank, 183 Neb. 722, 164 N.W.2d 215 (1969).*

Use—Property owner is issued zoning violation notice for raising fowl in a residential zoning district

Property owner claims zoning ordinance, which permits "livestock" in residential zones is "unconstitutionally vague" as to inclusion of fowl

Citation: *Hatfield v. Board of Supervisors of Madison County, 2017 WL 3452426 (Miss. 2017)*

MISSISSIPPI (08/10/17)—This case addressed the issue of whether a county determination that a property owner violated a zoning ordinance by keeping or raising ducks, geese, or fowl on the property was arbitrary and capricious. It also addressed whether the county zoning ordinance, defining uses permitted in agricultural and residential zoning districts, was "unconstitutionally vague" as to whether "livestock" or "grazing livestock" (permitted in residential zones) included poultry, fowl, and/or birds.

The Background/Facts: In July 2012, Arlin George Hatfield, III ("Hatfield") purchased property in a residential subdivision, in a residential zoning district ("R-1"), in Madison County (the "County"). Some time thereafter, Hatfield began raising chickens, guinea fowl, and ducks on the property. Eventually, in February, March, and April 2015, Hatfield was notified by a County zoning administrator that he was in violation of the County Zoning Ordinance (the "Ordinance") because "keeping or raising poultry" was neither a permitted or conditional use in an R-1 zoning district.

When Hatfield failed to correct the alleged zoning violation, the County Board of Supervisors (the "Board") took up the matter. The Board determined that Hatfield "had violated R-1 zoning by keeping or raising around sixty 'ducks, geese and other fowl' on his property." The Board found those "acts were neither a permitted nor a conditional use under R-1 zoning." The Board also denied Hatfield's request to continue keeping or raising fowl on the property.

Hatfield appealed the Board's determination. Hatfield argued that the Board's decision was arbitrary and capricious, not supported by substantial evidence, and was based on an unconstitutionally vague Ordinance section.

Article V, Section 501 of the Ordinance defined "land uses permitted" in a County agricultural district ("A-1") as including: the "[b]reeding, raising, and feeding of livestock (i.e. horses, cattle, sheep, goats, mules, pigs, etc.) . . . ;" and the "[b]reeding, raising and feeding of chickens, ducks, turkeys, geese, or other fowl[.]" Article V, Section 601 of the Ordinance defined "land uses permitted" in a County R-1 district as including: the "[b]reeding, raising, and feeding of grazing livestock (i.e. horses, cattle, sheep, goats, mules, etc.) . . . ."

Hatfield contended that, by not exclusively defining "livestock" or "grazing livestock," Section 601 could be interpreted to include poultry, fowl, and/or birds. He argued that Section 601 was "unconstitutionally vague" and lacked "clear notice and sufficiently definite warning of that which is prohibited."

Sitting as an appellate court, the circuit judge found the Board's decision was "fairly debatable, supported by substantial evidence, and not arbitrary or capricious."

Hatfield appealed.

DECISION: Judgment of Circuit Court affirmed.

The Supreme Court of Mississippi concluded that "[t]he Board's interpretation and decision, finding that Hatfield violated Section 601 by keeping or raising fowl on his R-1 zoned property, was reasonable and not arbitrary or capricious." The court also concluded that the Board's decision "was also, at a minimum, fairly debatable." Further, the court held that, "when read in light of the entire . . . Ordinance," Section 601 "gave Hatfield sufficient notice that keeping or raising fowl on his property was prohibited."

In so concluding and holding, the court explained that "[z]oning ordinances should be given a fair and reasonable construction, in the light of their terminology, the objects sought to be obtained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the zoning ordinance as a whole." "[I]n construing a zoning ordinance," said the court, "great weight should be given to the construction placed upon the words by the local authorities," although "courts are certainly not bound by a board's interpretation of a local ordinance if it is 'manifestly unreasonable.' " Further, explained the court, a court will affirm a board's zoning decision unless it is clearly "arbitrary, capricious, discriminatory, illegal, or without [a] substantial evidentiary basis." If a board's zoning decision is "fairly debatable[,]" the court will not reverse it.

With those standards in mind, the court found that the Ordinance was not "unconstitutionally vague," but rather "clearly define[d] the permitted uses" for A-1 and R-1 districts. While A-1 zoning included the permitted use of breeding, raising, and feeding chickens, ducks, or other

fowl, R-1 zoning did not. The court found that the Board's conclusion that "livestock" and "grazing livestock" (permitted in R-1 zoning) did not include fowl was "not 'manifestly unreasonable.' " The court further found that the Board's decision to deny Hatfield's request to continue keeping or raising fowl was neither arbitrary nor capricious because: the Board's decision was reasoned based on the differing language of Section 501 and Section 601 of the Ordinance as to permitted uses in the A-1 and R-1 districts; and the Board considered its past actions in interpreting and applying Section 601, which was consistent with the Board's decision in this case.

In making its determination, the court rejected Hatfield's argument that, by not exclusively defining "livestock" or "grazing livestock," Section 601 could be interpreted to include poultry, fowl, and/or birds. The court found that interpretation was "unreasonable," as the listed examples of "livestock" and "grazing livestock" were "obviously limited to large, four-legged, hoofed animals—not 'chickens, ducks, turkeys, geese, or other fowl.' " Thus, based on the Ordinance's listed examples and the differing permitted uses for A-1 and R-1 districts, the court held that the terms "grazing livestock" and "livestock" were sufficient to notify Hatfield that keeping or raising fowl on his property was prohibited—and thus were not unconstitutionally vague.

See also: *Mayor & Bd. of Aldermen, City of Clinton v. Welch, 888 So. 2d 416 (Miss. 2004).*

See also: *Nichols v. City of Gulfport, 589 So. 2d 1280 (Miss. 1991).*

Eminent Domain/Fees—Developers seek refund of unspent and impermissibly spent impact fees

Developers seek refund as unconstitutional taking and/or equitable reimbursement

Citation: *Alpine Homes, Inc. v. City of West Jordan, 2017 UT 45, 2017 WL 3445205 (Utah 2017)*

UTAH (08/10/17)—This case addressed the issue of whether developers had successfully brought claims for a refund of allegedly unspent or improperly spent impact fees under theories of unconstitutional taking and equitable reimbursement.

The Background/Facts: The City of West Jordan (the "City")

requires developers to pay impact fees before the City approves a development project. Those impact fees are designed to defray anticipated increased city expenditures caused by the proposed development, including increased expenditures for roads, water services, police protection, storm water infrastructure, and sewer services. Utah's Impact Fees Act regulates the manner in which cities may assess and spend such impact fees. (See Utah Code §§ 11-36a-101 to -705.)

Various developers (the "Developers") paid impact fees to the City between 2003 and 2006. In 2012, the Developers sued the city. They alleged that the City violated the Impact Fees Act by failing to spend or encumber all of the impact fees within six years of collection (see Utah Code § 11-36a-602(2)(a)), and by spending portions of the impact fees on impermissible uses (see Utah Code § 11-36a-602(1)). The Developers argued that those violations of the Impact Fees Act constituted "a taking of private property for public use without just compensation" in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution because: (1) any violation of the Impact Fees Act by the City also constituted a per se violation of the takings clause; and (2) the City's failure to spend all of the impact fees on statutorily mandated expenditures within six years violated the United States Supreme Court's unconstitutional conditions doctrine requiring monetary exactions in exchange for a land use permit have an essential nexus and rough proportionality between the amount of money requested and the social cost of the proposed development.

The Developers also asserted that the City's violations of the Impact Fees Act gave the Developers an "equitable" right to reimbursement of the impact fees they had paid.

The City filed a motion to dismiss the Developers' claims. The district court denied the City's motion to dismiss.

The City appealed.

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

The Supreme Court of Utah determined that the Developers' claims failed, and directed that the district court dismiss them on remand.

In dismissing the Developers' takings clause claims for "failure to state a takings claim for which relief can be granted," the court first explained that the Fifth Amendment of the United States Constitution provides that "[p]rivate property [shall not] be taken for public use without just compensation." The takings clause is applied against States through the Fourteenth Amendment, and encompasses physical takings and regulatory takings. Next, the court rejected the Developers' argument that any violation of Utah's Impact Fees Act was a per se violation of the takings clause of the United States Constitution, noting that it is the courts and not the legislature that establish "the bounds of protec-

tions afforded by the U.S. Constitution." The court also held that the Developers' allegation that the city failed to spend impact fees within six years or spent the fees on impermissible expenditures was inadequate to support a takings claim. The court concluded that none of the City's alleged violations of the Impact Fees Act implicated the United States Supreme Court's unconstitutional conditions doctrine, which requires a nexus and rough proportionality between the property demanded (i.e., the impact fees, here) and the projected social costs of the proposed development. The court held that "[t]he manner in which a city spends impact fees does not affect the constitutionality of the initial demand for fees, which is the focus of the [unconstitutional conditions] monetary exaction analysis." Thus, the allegation that the fee exacted from the Developers by the City were not spent within the time requirements of the Impact Fees Act or were spent impermissibly, did not, found the court, affect the analysis of whether there was a nexus or rough proportionality of the impact fees and social costs at the time the fees were exacted. With respect to whether such a nexus or rough proportionality existed at the time the fees were exacted, the court noted that Utah's Impact Fees Act provides a one-year statute of limitations on challenges to the validity of an impact fee. Had the Developers here brought a challenge to the impact fee assessed by the City within that time frame, they would have been able to seek a "refund of the difference between what the [Developers] paid as an impact fee and the amount the impact fee should have been if it had been correctly calculated," said the court. The Developers here, however, did not challenge the impact fee within that period, and their standing to file such an action was therefore barred. (See Utah Code § 11-36a-701.)

As to the Developers' claim for "equitable" reimbursement for the allegedly unspent or impermissibly spent impact fees, the court held that the Developers lacked standing (i.e., the legal right) to bring that claim. Since the Developers had no statutorily granted right to an equitable reimbursement claim, the Developers had to satisfy the common law requirements for standing, said the court. The court found that the Developers failed to establish standing under the "traditional standing test" as they did not establish a "distinct and palpable injury." The court found that the Developers failed to show that they had retained contractual rights with the purchasers of the homes they had developed to a refund of the impact fees if found excessive. The court also found that, contrary to the Developers' arguments, the Developers did not suffer an injury through the inability to recoup the impact fee paid in the purchase price of the homes they sold. "The impact fees, if constitutional at the time of exaction, are part of the price of doing business in real estate development, and developers assume the risk that they might not be recouped when individual lots are sold," said the court.

See also: *Koontz v. St. Johns River Water Management Dist., 133 S. Ct. 2586, 186 L. Ed. 2d 697, 76 Env't. Rep. Cas. (BNA) 1649 (2013).*

See also: *Nollan v. California Coastal Com'n, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677, 26 Env't. Rep. Cas. (BNA) 1073, 17 Envtl. L. Rep. 20918 (1987).*

See also: *Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304, 38 Env't. Rep. Cas. (BNA) 1769, 24 Envtl. L. Rep. 21083 (1994).*

Case Note:

The Developers had also alleged that the City's violations of the Impact Fees Act violated the Utah Constitution. Because the Developers failed to "undertake an independent analysis of the language of the Utah provision" (as compared to the relevant provisions of the United States Constitution), the court declined to conduct an independent analysis of the Utah takings clause.

Case Note:

In its decision, despite finding the Developers' claims failed, the court did offer suggestions for redress of misspent impact fees and/or violations of the Utah Impact Fees Act. The court noted that the residents of the City "retain the interest in having those fees used as designed," and that "[a]ny injury from misuse of impact fees would be to the residents, either from being underserviced for form increased taxes to cover costs of additional development that should e paid from the impact fees." The court, however, offered no opinion on the nature of any such injury or on what, if any, remedies for it might exist.

The court further offered that "[i]f the [D]evelopers want the right to a refund of unspent impact fees, or if they want an enforcement provision, or if they don't like the ways that impact fees are calculated or may be expended, they can seek legislative modification of the [Impact Fees Act]."

Zoning News from Around the Nation

CALIFORNIA

The state Legislature is considering several bills aimed at combating housing shortages. Among those bills is SB 35, which "seeks to force cities and counties to streamline the planning process for urban, multi-family projects."

Source: *KPCC*; www.scpr.org

ILLINOIS

A new state law "protect[s] individuals who speak out at public zoning appeal hearings from being sued." The new law, Senate Bill 731, "clarifies that only the zoning board of appeals and applicants that come before the board are considered a 'party of record' " that can be named as defendants in court cases where a plaintiff seeks administrative review of a zoning decision. The new law is effective Jan. 1, 2018.

Source: *Journal and Topics Newspapers Online*; http://www.journal-topics.com

NEW YORK

The New York City Council recently passed a bill to form an Office of Nightlife. The Office is to be composed of a Director of Nightlife, "who will serve as a representative for independent and DIY spaces as well as a liaison between the nightlife industry and City Hall," as well as a Nightlife Advisory Panel to be composed of individuals who are industry service workers and zoning experts. Among other things, the touted purpose of the Office of Nightlife is "to resolve ongoing issues between New York's DIY venues and residential communities, advocate for the protection and preservation of these spaces, and challenge the extreme measures that are posed against them by law enforcement."

Source: *The Fader*; www.thefader.com

TEXAS

State Rep. Roland Gutierrez has filed a bill, HB 362, "that would create a military zoning board in order to regulate development for 5 miles around military bases." The bill has reportedly been filed in direct response to two bills in the House and Senate (SB 6 and HB 6) that would "overhaul the state's annexation law." Under those bills, cities would be prevented from unilaterally annexing unincorporated areas. Military and city officials reportedly "fear these annexation bills could put military bases at risk for closure if land use around them can't be regulated." HB 362 has been referred to the Defense & Veterans' Affairs Committee.

Source: *San Antonio Express-News*; www.expressnews.com

QUINLAN™ October 25, 2017 | Volume 11 | Issue 20

Zoning Bulletin

in this issue:

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Mat #41945623

Vested Rights—Zoning administrator errs in approving application, allowing a use that is prohibited under the zoning ordinance

After several months, when successor zoning administrator issues notice of violation, property

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ISSN 0514-7905

owners argue their rights to use vested

Citation: *Board of Supervisors of Richmond County v. Rhoads, 803 S.E.2d 329 (Va. 2017)*

VIRGINIA (08/31/17)—This case addressed the issue of whether property owners had a vested right, under Virginia statutory law—Code § 15.2-2311(C), to the use of their property in violation of a zoning ordinance, when more than 60 days elapsed after the zoning administrator issued a determination which allowed that use, and the property owners materially changed their position in good faith reliance upon that determination. More specifically, the case addressed whether a certificate of compliance issued by a zoning administrator for a use that was in violation of the zoning ordinance was void *ab initio* (i.e., treated as invalid from the outset) and/or did not qualify as a "written order, requirement, decision or determination" necessary for the use to vest under the statute.

The Background/Facts: Janie Rhoads, Edmund Rhoads, Crystal Rhoads, and Meade Rhoads (collectively, the "Rhoadses") owned property (the "Property") in Richmond County (the "County"). In November 2013, the Rhoadses filed an application for a Zoning Certificate of Compliance (the "Application") to build a "2-story all unfinished detached garage" (the "Garage") on the Property. The County zoning administrator, Morgan Quicke ("Quicke"), visited the Property, which had a one-story primary dwelling, before checking the box for "Approved" on the Application and signing the Certificate of Compliance (the "Certificate") on November 18, 2013. The Certificate included instructions regarding how to appeal if the Application was denied. The Rhoadses completed the Garage in June 2014 at a cost of approximately $27,000.

In July 2014, Joseph Quesenberry, the new County zoning administrator ("Quesenberry"), informed the Rhoadses that the previously approved Garage was in violation of the County Zoning Ordinance Section 2-3-6 (the "Ordinance"), because it was taller than the primary structure on the Property. A written notice of zoning violation (the "Notice") was sent to the Rhoadses.

The Rhoadses appealed the Notice to the County Board of Zoning Appeals ("BZA"). In their appeal, the Rhoadses argued that under Virginia statutory law—Code § 15.2-2311(C), their "rights [had] vested and the permits for erection of the [Garage] [were] not subject to revocation or reversal."

Code § 15.2-2311(C) specifically provides:

"In no event shall a written order, requirement, decision or determination made by the zoning administrator or other administrative officer be subject to change, modification or reversal by any zoning administrator or other administrative officer after 60 days have elapsed from the date of the writ-

ten order, requirement, decision or determination where the person aggrieved has materially changed his position in good faith reliance on the action of the zoning administrator or other administrative officer unless it is proven that such written order, requirement, decision or determination was obtained through malfeasance of the zoning administrator or other administrative officer or through fraud . . . ."

The Rhoadses contended that they had a vested right to their Garage use because they had: received a Certificate from Quicke, more than 60 days prior to the Notice of zoning violation, and that they had relied upon the Certificate in building the Garage.

The BZA denied the Rhoadses' appeal, and affirmed Quesenberry's decision that the Garage violated the Ordinance.

The Rhoadses appealed to the County Circuit Court. The County Board of Supervisors (the "Board") filed an answer to the Rhoadses' appeal, and also asked the court to declare that the Garage was in violation of the Ordinance.

The Circuit Court held that, under Code § 15.2-2311(C), the Rhoadses had a vested right to the Garage use.

The Board appealed.

DECISION: Judgment of Circuit Court affirmed.

The Supreme Court of Virginia held that, under Code § 15.2-2311(C), the Rhoadses' right to build the Garage vested 60 days after Quicke had issued the Certificate approving their Application.

In so holding, the court noted that, by its plain terms, the prerequisites for Code § 15.2-2311(C) to apply are: (1) a "written order, requirement, decision or determination made by the zoning administrator;" (2) the passage of at least 60 days from the zoning administrator's determination; and (3) a material change in position "in good faith reliance on the action of the zoning administrator." Two of those prerequisites were not in dispute: It was agreed that more than 60 days had elapsed between Quicke's initial approval of the Garage and his successor's later assertion of a zoning violation. It was also undisputed that the Rhoadses materially changed their position in good faith reliance on Quicke's Certificate, as they built the Garage at a cost of nearly $27,000. The Board argued, however, that a third prerequisite was missing, and therefore that Code § 15.2-2311(C) did not apply to vest the Rhoadses' right to the Garage construction. The Board argued that: (1) Quicke "lacked the authority to approve a plain violation of the Zoning Ordinance, and the Certificate he issued was therefore void *ab initio*;" and (2) the Certificate issued by Quicke was not a "determination" within the meaning of the statute. Additionally, the Board asserted that Code § 15.2-2311(C) only applied to bar the subsequent actions of a zoning administrator or other administrative officer, and not those of any other body, such as the Board or a court.

The court rejected the Board's arguments.

The court determined that the Certificate issued by Quicke to the Rhoadses was not void *ab initio* because it granted a right to use property in a manner that otherwise would not have been allowed under the Zoning Ordinance. "Considering the plain language and remedial nature of the statute" (i.e., "to provide relief and protection to property owners. . .who would otherwise suffer loss because of their reliance on the zoning administrator's error"), the court held that "Code § 15.2-2311(C) manifestly creates a legislatively-mandated limited exception to the judicially-created general principle that a building permit issued in violation of applicable zoning ordinances is void."

The court also determined that the issuance of the Certificate by Quicke "clearly constitute[d] a decision or determination by the zoning administrator that the building plans complied with the Zoning Ordinance." The court found that the Certificate was a written determination that affirmatively approved the zoning for the Garage project, and was a "final determination," not simply a zoning interpretation.

Finally, the court held that Code § 15.2-2311(C) and its vesting provisions "must be considered and enforced by a BZA, a board of supervisors, or a court in making a zoning determination or reviewing its correctness, if the prerequisites for the application of the statute are satisfied." Rejecting the Board's assertion that Code § 15.2-2311(C) only applied to bar the subsequent actions of a zoning administrator or other administrative office, the court noted that a zoning administrator is a representative of the board of supervisors, and when he or she acts, that action also finds the board of supervisors.

Accordingly, the court concluded that the prerequisites for the application of Code § 15.2-2311(C) were present in this case. Quicke's approval of the Certificate was an action within the scope of the authority delegated by the Board to the zoning administrator, and the issuance of the Certificate constituted a determination within the meaning of Code § 15.2-2311(C). Also, more than 60 days had elapsed after Quicke issued his determination that the Garage complied with the Zoning Ordinance, and the Rhoadses had materially changed their position in reliance upon that determination. Thus, the Rhoadses' rights in constructing their Garage had vested and were not subject to alteration by the zoning administrator, the BZA or the Board.

See also: *Norfolk 102, LLC v. City of Norfolk, 285 Va. 340, 738 S.E.2d 895 (2013).*

See also: *James v. City of Falls Church, 280 Va. 31, 694 S.E.2d 568 (2010).*

Signs and Billboards/First Amendment—City planning code exempts noncommercial signs from advertising rules that apply to commercial signs

Billboard company argues that such a distinction violates the First Amendment

Citation: *Contest Promotions, LLC v. City and County of San Francisco, 867 F.3d 1171 (9th Cir. 2017)*

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

NINTH CIRCUIT (CALIFORNIA) (08/16/17)—This case addressed the issue of whether a section of a city planning code, which prohibited new billboards but allowed onsite business signs relating to activities undertaken on the premises and did not regulate noncommercial signs, violated the First Amendment to the United States Constitution.

The Background/Facts: The City and County of San Francisco ("San Francisco"), through Article 6 of its Planning Code, prohibits general advertising signs—like new billboards—that refer primarily to offsite activities, but allows business signs advertising activities undertaken on the same premises as the sign, subject to various advertising rules. Under the Planning Code, noncommercial signs are exempt from the advertising rules. Such noncommercial signs include, but are not limited to: "[o]fficial public notices," "[g]overnmental signs," "[t]emporary display posters," "[f]lags, emblems, insignia, and posters of any nation or political subdivision," and "[h]ouse numbers."

Contest Promotions, LLC ("CP") challenged San Francisco's sign-related regulations. CP rented advertising space from businesses and placed third-party advertising signs in that space, framed by text inviting passersby to enter the business and win a prize related to the sign. CP argued that the Planning Code's distinction between commercial and noncommercial signs violated the First Amendment. Specifically, CP argued that by exempting noncommercial signs from its regulatory ambit, Article 6 of the Planning Code violated the First Amendment.

San Francisco asked the district court to dismiss CP's action. The district court entered a judgment of dismissal.

CP appealed.

DECISION: Judgment of district court affirmed.

The United States Court of Appeals, Ninth Circuit, held that the distinction between commercial and noncommercial signs in Article 6 of San Francisco's Planning Code survived "intermediate scrutiny" and therefore did not violate the First Amendment.

In so holding, the court first explained that the proper level of scrutiny for this First Amendment challenge was intermediate scrutiny. The court determined that because noncommercial signs were exempted from its regulatory framework, Article 6 of the Planning Code was a regulation of commercial speech. Restrictions on commercial speech, said the court, are subject to intermediate scrutiny. Under that standard, explained the court, the regulation will withstand judicial scrutiny, and be found to not be in violation of the First Amendment, if it meets four criteria: (1) the regulated speech "must concern lawful activity and not be misleading;" (2) the asserted governmental interest in regulating the speech is "substantial;" (3) "the regulation directly advances the governmental interest asserted;" and (4) the regulation is "not more extensive than is necessary to serve that interest."

Applying that test here, the court found that the first two criteria were clearly met: (1) CP's advertisements concerned lawful, non-misleading activity; and (2) San Francisco's asserted interests in regulating commercial speech for "safety and aesthetics" was "substantial." The court next addressed the remaining two criteria by looking at the "fit" between San Francisco's "ends" (i.e., asserted interests) and the "means" (i.e., regulatory framework) chosen to accomplish those ends.

CP had argued that Article 6 of the Planning Code failed to meet those last two criteria to withstand intermediate scrutiny because the regulations "exempt[ed] noncommercial signs for reasons unconnected to [San Francisco's] asserted interests in safety and aesthetics." The Ninth Circuit disagreed.

The court concluded that, contrary to CP's argument, Article 6 was "not impermissibly under-inclusive" so as to undermine the interests San Francisco claimed for adopting the regulations in Article 6. Rather, the court found that San Francisco's choice to regulate commercial signs (but not noncommercial signs) had a substantial effect on San Francisco's interests in safety and aesthetics (thus meeting the third criteria of the test). The court found that Article 6's exceptions "ensure that the regulation will achieve its end, and the distinctions that it makes among different kinds of speech relate empirically to the interests that the government seeks to advance." In other words, the court concluded that Article 6 did not "impermissibly discriminate against commercial speech solely on the ground that it deserves less protection than noncommercial speech," but instead focused "on the unique risks to San Francisco's interests that commercial signs pose."

The court also found that the fourth criteria in intermediate scrutiny

was met, concluding that San Francisco had "gone no further than necessary in seeking to meet its ends," when regulating commercial speech but not noncommercial speech. The court found "no constitutional infirmity in [Article 6's] failure to regulate every sign that it might have reached." The court concluded that the distinctions drawn in Article 6 between commercial and noncommercial speech directly advanced San Francisco's substantial interests of safety and aesthetics.

See also: *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341, 6 Media L. Rep. (BNA) 1497, 34 Pub. Util. Rep. 4th (PUR) 178 (1980).*

Use—Property owner builds and maintains race cars as a hobby at residential property

Town says such use does not constitute a permitted "accessory use" to residence

Citation: *DiMattia v. Zoning Hearing Board of East Whiteland Township, 2017 WL 3399931 (Pa. Commw. Ct. 2017)*

PENNSYLVANIA (08/09/17)—This case addressed the issue of whether a property owners' daily use of the property to build and maintain race cars, as a hobby activity, qualified as a permitted accessory use in a residential district.

The Background/Facts: Alexander DiMattia and Nancy E. DiMattia (the "DiMattias") owned property (the "Property") in an R-1 Low Density Residential Zoning District ("R-1 District") in East Whiteland Township (the "Township"). On the Property was a single-family detached residence, two carriage houses, and a pole barn garage. The DiMattias rented the residence to tenants, but did not rent out the carriage houses or pole barn. The DiMattias used the pole barn for race car building and repair, which was a hobby of Tony DiMattia. Tony DiMattia worked on the race cars on the Property nearly every day, sometimes for "as much as 12 hours per day and often into the night."

In November 2014, following complaints from neighbors, the Township's Code Enforcement Officer ("CEO") issued to the DiMattias a Notice of Violation. Among other things, the Notice of Violation asserted that the DiMattias use of the Property for "working on race cars" was a violation of the provisions of the Township's Zoning Ordinance, as it was not a permitted use in the R-1 District. The Zoning Ordinance limited the permitted uses in an R-1 District to single-family detached

residential dwellings, uses accessory to such dwellings, and passive recreation.

The DiMattias appealed the Notice of Violation to the Township's Zoning Hearing Board ("ZHB"). The DiMattias argued that their race car activities were a permitted accessory use.

After hearings on the matter, the ZHB concluded that the DiMattias' use of the Property for "the preparation of race cars for races and the rebuilding, repair, maintenance and transport of race cars were not subordinate to or customary or incidental to the residential use of the Property and [therefore] were not permitted as an accessory use in an R-1 District."

The DiMattias appealed to court. On appeal, the DiMattias argued that their race car activities were "automatically a lawful accessory use" because, under the Zoning Ordinance, "private garages" were listed as an accessory use for residential properties. They also argued that their race car activities constituted a permitted accessory use because the activities were a "hobby, rather than a commercial use of the Property."

DECISION: Judgment of Court of Common Pleas affirmed.

The Commonwealth Court of Pennsylvania held that because the DiMattias' race car work was a regular, daily activity "more analogous to a vehicle repair shop in its intensity than to a homeowner working on his own vehicle in his garage or the mere storage of vehicles," the race car activities did not meet the requirements of the Zoning Ordinance that an accessory use be "clearly incidental to and customarily found in connection with" the primary residential use of the Property.

In so holding, the court looked to the Zoning Ordinance's definition of "accessory use," which included "a structure or use" that is: "clearly incidental to and customarily found in connection with a principal building or use;" "subordinate to and serves a principal building or a principal use;" and "[c]ontributes to the comfort, convenience, or necessity of occupants . . . in the principal building or principal use served."

The court concluded that the DiMattias' race car activities did not satisfy those requirements for an accessory use. The court noted that because the DiMattias did not reside on the Property, the DiMattias' building and maintenance of race cars could not satisfy the accessory use requirements that the use: "be subordinate to or serve the principal use (as a residence);" or "[c]ontributes to the comfort, convenience, or necessity of occupants" of the residence. In any case, the court said that even if the DiMattias resided on the Property, their race car activities "would not constitute a lawful accessory use under the Zoning Ordinance" because they were not "clearly incidental to or customarily found in connection with" residential properties, since the activities were "extensive and pervasive," with daily work for hours at a time.

Addressing the DiMattias' arguments directly, the court rejected

them. The court said that the race car activities were not, as the DiMattias had argued, "automatically a lawful accessory use" simply because "private garages" were listed as an accessory use for residential properties. While a private garage for "storage" was a permitted accessory use under the Zoning Ordinance, use of the garage for building, repairing, and transporting race cars was not an explicit permitted use, noted the court. Moreover, private garages were not permitted regardless of their relationship to the residential use of the property; they were only permitted *if* accessory to the dwelling. Further, the fact that the race car activities were a hobby, as emphasized by the DiMattias, and were not commercial, was not determinative as to whether they qualified as an accessory use, said the court. Even if the use was a hobby or recreational activity, as claimed by the DiMattias here, it would not be a permitted accessory use if the type and intensity of the activity was not subordinate and incidental to and customarily associated with the primary permitted use of the property (i.e., here as a residence), said the court.

See also: *Rudolph v. Zoning Hearing Bd. of Cambria Tp., 839 A.2d 475 (Pa. Commw. Ct. 2003).*

See also: *Sky's the Limit, Inc. v. Zoning Hearing Bd. of Smithfield Tp., 18 A.3d 409 (Pa. Commw. Ct. 2011).*

Use—County zoning administrator issues permit for hog confinement unit

Neighbors seek court order compelling revocation of permit, arguing it is not a permitted use under the county zoning ordinance

Citation: *Hoffman v. Van Wyk, 2017 SD 48, 900 N.W.2d 596 (S.D. 2017)*

SOUTH DAKOTA (08/09/17)—This case addressed the issue of whether a proposed hog containment facility, which was located in an agricultural district, was a permitted use, without the need for a variance or conditional use permit, under county zoning.

The Background/Facts: Douglas Luebke ("Luebke") owned 160 acres of land in an agricultural district in Douglas County (the "County"). In 2015, Luebke applied for and received from the County's Planning and Zoning Administrator (the "PZA") a building permit for a hog confinement unit on the land.

Nicholas and Donnelle Hoffman (the "Hoffmans") owned a residence less than a half mile from Luebke's proposed hog facility. They challenged the grant of the permit to Luebke. They argued that, among other things, the use was an "animal feeding operation" that required a variance or a conditional use permit, with specific setbacks from other uses. They asked the PZA to revoke the building permit.

The PZA refused to revoke the permit. The PZA maintained that the proposed hog facility was to house fewer than 1,000 "animal units" and therefore did not constitute an "animal feeding operation" necessitating a variance or conditional use permit with specific setbacks. She explained that the proposed hog confinement facility was a permitted use as a "farm" or "ranch" in the agricultural district under the County zoning ordinance because Luebke grew farm products on an area of greater than 25 acres.

The zoning ordinance permitted a "farm" or "ranch" defined as "[a]n area of twenty[-]five (25) acres or more which is used for growing usual farm products . . . and for the raising thereon of the usual . . . farm animals such as . . . hogs, and including the necessary accessory uses for raising, treating, and storing products raised on the premises."

The Hoffmans applied for a writ of mandamus from the circuit court (i.e., an order from a court to an inferior government official ordering the government official to properly fulfill their official duties or correct an abuse of discretion). The Hoffmans asked the court to compel the PZA to revoke the building permit.

After a trial, the circuit court held that Luebke's hog facility was not a "farm" or a "ranch" and that it therefore did not fall under any of the permitted uses of land for which a building permit could be granted. The court pointed to an absence of evidence that Luebke used the land to grow grain or farm products in addition to the proposed use of feeding hogs. Nevertheless, the circuit court concluded that a writ of mandamus "could not be used to undo an already completed act"—since by that time the hog facility construction was complete.

The Hoffmans appealed. The PZA also appealed, arguing that the court had erred in determining that the hog containment facility was not a permitted use under the ordinance.

DECISION: Judgment of Circuit Court affirmed reversed in part, and affirmed in part.

The Supreme Court of North Dakota held that Luebke's hog containment facility was a permitted use as a "farm" or "ranch" under the ordinance. The court found that evidence, including Luebke's testimony and aerial photographs, did support a finding that Luebke grew farm products on the land. The court found that while the 10 acres used for the hog barn may not have involved cultivation, the hog barn was "nonetheless a component of '[a]n area of twenty five . . . acres or more' that

involved growing farm products," and thus met the ordinance's definition of a permitted "farm" or "ranch" use.

Furthermore, the court affirmed that a writ of mandamus to revoke the permit now (even if the application for the building permit did not conform to ordinance's requirements for a site plan, as the Hoffmans argued) would be "ineffective" since the construction of the facility was already complete.

Zoning News from Around the Nation

GEORGIA

Reportedly, Atlanta's City Council is considering two ordinances that would "bring inclusionary zoning both to the neighborhoods near Mercedes-Benz Stadium and around the Atlanta BeltLine." Under inclusionary zoning, "developers would be required to include affordable housing when they build apartments" consisting of more than 10 units. Specifically, under the proposed legislation, developers would have to either: "make 15 percent of units affordable to people with 80 percent of area median income, or build 10 percent of units so they're affordable to 60 percent of the area median income."

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

MARYLAND

In early September, the Harford County Council introduced Bill 17-015—"Adoption of Zoning Maps," which recommends zoning changes for more than 100 properties. It is expected that the council will vote on the bill in November. If the legislation is adopted, the public then has 60 days after adoption to seek a referendum on the bill before it takes effect. The county executive can also veto the legislation.

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

MICHIGAN

Recently, the Hillsdale City Council voted unanimously to opt out of the five new medical marijuana businesses stemming from 2016 legislation to better regulate and monitor the medical marijuana industry.

Source: *The Daily Telegram; www.lenconnect.com*

QUINLAN™ November 10, 2017 | Volume 11 | Issue 21

Zoning Bulletin

in this issue:

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Mat #41945626

Immunity from Regulation—State university seeks to construct on-site road that will intersect local road

University maintains it is immune from local regulation, but county and city say such immunity does not apply when there are roadway safety concerns

Citation: *Montclair State University v. County of Passaic, 2017 WL*

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Zoning Bulletin is published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. For subscription information: call (800) 229-2084, or write to West, Credit Order Processing, 620 Opperman Drive, PO Box 64833, St. Paul, MN 55164-9753.

POSTMASTER: Send address changes to Zoning Bulletin, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

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P.O. Box 64526
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ISSN 0514-7905

3611681 (N.J. Super. Ct. App. Div. 2017)

NEW JERSEY (08/23/17)—This case addressed the issue of whether limits of a local government's authority to regulate development of a state university's property (see *Rutgers, State University v. Piluso, 60 N.J. 142, 286 A.2d 697 (1972)*) apply to a state university's construction of a roadway that intersects a county road.

The Background/Facts: Montclair State University ("MSU") sought to develop a roadway from its campus to Valley Road in the City of Clifton (the "City") in the County of Passaic (the "County"). MSU spent approximately six years consulting with the County and the City with regard to various objections and concerns about the project. Finally, in 2014, MSU applied to the County for a permit to install traffic controls at the intersection of the campus roadway and Valley Road. In seeking that permit, MSU stated that it was exempt, under New Jersey case law, from seeking any approvals from the City's land use boards. In arguing such exemption, MSU referenced the case of *Rutgers, State University v. Piluso, 60 N.J. 142, 286 A.2d 697 (1972)* ("*Rutgers*"). In *Rutgers*, among other things, the Supreme Court of New Jersey held that state universities are permitted to exercise certain "governmentally autonomous powers." The court in *Rutgers* held that the development of state university property is excluded from local regulation.

The County refused to issue the permit sought by MSU because it believed that MSU's roadway design failed to meet certain American Association of State Highway Transportation and New Jersey Department of Transportation standards and because it believed that the City's approval was required for a proposed traffic signal as it would impact municipal roadways. Here, the County and the City argued that the case at hand was "distinguishable" from *Rutgers*. They argued that the limits of a local government's authority to regulate development of a state university's property did not apply where there were "legitimate safety concern[s]," such as here with regard to MSU's roadway design.

MSU filed a legal action in court. It asked the court to declare that the County's refusal to issue the permit was contrary to law, and it asked the court to order the County to issue the permit to MSU so that MSU could construct the roadway.

The trial judge dismissed MSU's complaint, citing an "insufficient record to rely upon because MSU had not appeared before the [County] or [City] planning boards."

MSU appealed. On appeal, it argued that the trial judge abused his discretion by dismissing MSU's complaint. MSU contended that, under *Rutgers*, its only obligation was "to act reasonably and consult with the city and county." MSU contended that it had met that obligation, and, as such, it was error for the trial judge to dismiss its complaint.

On appeal, the County and the City reiterated their argument that the state university development immunity from local regulation found under *Rutgers* did not apply where, as here, there was "legitimate safety concern[s]."

DECISION: Judgment of Superior Court, Law Division, reversed, and matter remanded.

The Superior Court of New Jersey, Appellate Division, held that the state university development immunity from local regulation found under *Rutgers* also applied here—to a state university's construction of an on-site road that will intersect a local or county road. However, the court emphasized that such "immunity [from regulation] is not completely unbridled." The court explained that state universities have "an 'implied duty' to consider local interests that obviously include legitimate 'safety concerns.' " To satisfy such an obligation, said the court, "a state university 'ought to consult with local authorities and sympathetically listen and give every consideration to local objections, problems and suggestions in order to minimize conflict as much as possible.' " Addressing the City and County's argument directly, the court said that in order for a state university to satisfy its obligation to reasonably consider "local safety concerns," the state university is "not obligated to appear before local land use boards," but must listen to and consider local objections.

Whether a state university has complied with its obligation to consult and consider local concerns is a "judicial function not conditioned upon consideration by a local zoning board," said the court. Here, the court remanded the matter to the trial judge for reinstatement of MSU's complaint, and for the judge to determine whether MSU satisfied those obligations under *Rutgers*.

See also: *Rutgers, State University v. Piluso, 60 N.J. 142, 286 A.2d 697 (1972).*

See also: *Township of Fairfield v. State, Dept. of Transp., 440 N.J. Super. 310, 113 A.3d 267 (App. Div. 2015), certification denied, 222 N.J. 310, 118 A.3d 350 (2015)* (quoting *Garden State Farms, Inc. v. Bay, 77 N.J. 439, 390 A.2d 1177 (1978)*).

RLUIPA—City denies height variance for personal chapel

Variance applicant claims denial substantially burdens his exercise of religion in violation of RLUIPA

Citation: *Milosavlejevic v. City of Brier, 2017 WL 3917015 (W.D. Wash. 2017)*

WASHINGTON (09/07/17)—This case addressed the issue of whether a city's denial of a zoning variance for the construction of a personal chapel violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA") (42 U.S.C.A. § 2000ee).

The Background/Facts: Vladan Milosavlejevic ("Milosavlejevic") sought to build a personal Serbian Orthodox chapel on property owned by his company in a single-family residential zone in the City of Brier (the "City"). Milosavlejevic sought to build a chapel with two domes, each nearly 40.5 feet high. He claimed that the height of the domes was necessary to comply with religious standards, including a "Serbian Orthodox belief that 40 is a holy number." Because the City Municipal Code (the "Code") limited buildings in

a single-family residential zone to 30 feet in height, Milosavlejevic applied to the City for a height variance to construct his chapel.

The City denied Milosavlejevic's variance request on the basis that Milosavlejevic met only two of eight mandatory criteria for granting variances.

Milosavlejevic then filed a legal action against the City. Among other things, Milosavlejevic claimed that the City's denial of his requested height variance violated the substantial burden provision and the equal terms provision of RLUIPA. (See 42 U.S.C.A. § 2000cc.)

Under RLUIPA's substantial burden provision, a "government land-use regulation 'that imposes a substantial burden on the religious exercise of a [person, including a] religious assembly or institution' is unlawful 'unless the government demonstrates that imposition of the burden . . . is in furtherance of a compelling government interest; and is the least restrictive means of furthering that compelling governmental interest.' " (See 42 U.S.C.A. § 2000cc(a)(1).) Under RLUIPA's equal terms provision, governments are prohibited from imposing land-use "restriction[s] on a religious assembly 'on less than equal terms' with a nonreligious assembly." (See 42 U.S.C.A. § 2000cc(b).)

The City argued that Milosavlejevic's RLUIPA claims failed because: (1) Milosavlejevic failed to demonstrate that his exercise of religion was substantially burdened by the City's denial of his variance request because alternative locations exited in which Milosavlejevic could practice his religion; and (2) Milosavlejevic was not a "religious assembly," and even if he was, the City did not treat him on "less than equal terms to comparable nonreligious or secular assemblies or institutions."

The City asked the court to find there were no material issues of fact in dispute, and to issue summary judgment in its favor on the law alone.

DECISION: City's motion for summary judgment granted, and Milosavlejevic's claims dismissed.

The United States District Court, W.D. Washington, held that Milosavlejevic's RLUIPA claims failed.

In so holding, the court agreed with the City's arguments. The court found that Milosavlejevic failed to demonstrate that his free exercise of religion was "substantially burdened" by the city's failure to grant his requested height variance. The court found that Milosavlejevic had "ready alternative places of worship at his disposal," including at home or other faith centers. The court noted that Milosavlejevic's own witness, an Orthodox priest, had stated that Milosavlejevic's prayer could take place anywhere, including within other churches and homes. The court also found that the City had not precluded Milosavlejevic from practicing his faith at home or other faith centers. Further, the court stated that "the City's zoning procedures do not impose a substantial burden simply because they prevent a religious institution or person from constructing an ideal place of worship." While worshipping within a home or church in the local county was "unsatisfactory" to Milosavlejevic, that "inconvenience [did] not rise to the level of a substantial burden," said the court. Additionally, the court noted that Milosavlejevic had the option of submitting a building permit application for land located within a different

zone, which could be "inconvenient," but was "not substantially burdensome," particularly given that Milosavlejevic had experience in the construction business and owned additional properties.

With regard to Milosavlejevic's claim under the equal terms provision of RLUIPA, the court agreed with the City that, even if Milosavlejevic qualified as a "religious assembly or institution," he failed to demonstrate that he was treated less than equal to similarly situated applicants. The court found that Milosavlejevic failed to "offer a suitable comparator." He had compared his proposed chapel to utility towers that had been approved at a height greater than 30 feet, but the court found that "[u]tility towers are not suitable comparators to chapels" as they "serve completely different purposes" and are "located within different City zones with different zoning criteria."

See also: *International Church of Foursquare Gospel v. City of San Leandro, 673 F.3d 1059 (9th Cir. 2011).*

Case Note:

Milosavlejevic had also brought a Section 1983 claim, alleging that the City's variance denial violated his right to free exercise of religion and equal protection. The court rejected those claims also, finding that: the Section 1983 claims relied on the same, inadequate facts and evidence as Milosavlejevic's RLUIPA claims; and that Milosavlejevic "fail[ed] to demonstrate either unequal treatment or any racial animus" by the City in the denial of the variance. Moreover, the court emphasized that Milosavlejevic's discrimination claims were "undermined by the fact that his variance application met only two of eight mandatory criteria for granting variances."

Rezoning/Discrimination—Village's rezoning of parcel is challenged as violating federal Fair Housing Act

Opponents say an alternative zoning designation would have had allowed for multi-family housing and thus had a less discriminatory effect on minorities

Citation: *MHANY Management, Inc. v. County of Nassau, 2017 WL 4174787 (E.D. N.Y. 2017)*

NEW YORK (09/19/17)—This case addressed the issue of whether a village, in rezoning a parcel of land, was liable under the federal Fair Housing Act based on disparate impact and disparate treatment. More specifically, it addressed whether the "substantial, legitimate, nondiscriminatory interests" proffered by the village in support of its zoning change "could be served by another practice that has a less discriminatory effect."

The Background/Facts: The Village of Garden City (the "Village")

rezoned a parcel of land from a Public Use ("P") designation to a Residential-Townhouse ("R-T") zoning designation. The parcel had previously been occupied by numerous government offices. Following that rezoning, MHANY Management, Inc. ("MHANY") challenged the rezoning. MHANY argued that because an R-T zoning designation did not allow any "affordable multifamily housing," the rezoning of the parcel had a disparate impact on minorities and disparate treatment of minorities—namely African Americans and Hispanics. MHANY maintained that an alternative zoning designation would have had allowed for multi-family housing and thus had a less discriminatory effect on minorities. Specifically, MHANY had maintained that a CO-5(b) zone with multi-family residential group restrictions ("R-M" zoning controls), which would have allowed for the construction of multifamily housing such as apartment buildings, would have had a less discriminatory effect than the R-T zoning controls that were adopted by the Village. MHANY, which was later joined by intervenor New York Communities for Change, (hereinafter, collectively, "MHANY") brought a housing discrimination action against the Village.

After trial, agreeing with MHANY, the United States District Court, E.D. New York found that based on the Village's rezoning of the parcel from a P to R-T zoning designation, the Village was liable under various federal laws, including the Fair Housing Act (the "FHA"), 42 U.S.C.A. §§ 3601 to 3618, based on disparate impact and disparate treatment.

MHANY and the Village cross-appealed. The United States Court of Appeals for the Second Circuit affirmed the majority of the Court's conclusions, but remanded the case on two points, one of which was addressed is addressed here. The Second Circuit held that the district court had applied an incorrect standard in addressing MHANY's FHA disparate impact claims. The Second Circuit explained that the district court should have analyzed the disparate impact claims under the standard announced by the Secretary of Housing and Urban Development ("HUD") in 2013. (See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500).) The Second Circuit found that the FHA was "ambiguous on the relative burdens of the parties, and therefore HUD's interpretation was entitled to deference."

Under HUD's standard, in order to succeed on a FHA disparate impact claim, a plaintiff—such as MHANY, here—must present a prima facie (i.e., on its face) case of disparate impact. The burden then shifts to the defendant (here, the Village) to demonstrate that the "challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant." (24 C.F.R. § 100.500(c)(1)-(2).) As a third step, the burden shifts back to the plaintiff to prove that the defendant's "substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." (24 C.F.R. § 100.500(c)(3).)

Here, the Second Circuit held that the first two steps were met: "MHANY more than established a prima facie case[,] . . . [and] [the Village] identified legitimate, bona fide governmental interests, such as increased traffic and strain on public schools." However, the Court remanded the case back to the

district court with instructions that the district court determine whether MHANY proved at trial that the "substantial, legitimate, nondiscriminatory interests" proffered by the Village in support of its zoning shift "could be served by another practice that has a less discriminatory effect." (See 24 C.F.R. § 100.500(c)(3).)

DECISION: Judgment for MHANY.

The United States District Court, E.D. New York, found that MHANY met its burden at trial in demonstrating, by a preponderance of the evidence, that the Village's proffered reasons for its chosen zoning change (P to R-T) could have been met by another practice that had a less discriminatory effect.

As an initial point, re-addressing the first step in the HUD standard analysis of this disparate impact claim, the court reiterated its previous holding that R-M zoning would have provided for a "significantly larger percentage of minority household than the pool of potential renters in the R-T zoning." In other words, MHANY had established that the adoption of an R-T zoning instead of an R-M zoning "affected minority residents to a greater degree." In support of this finding, the court pointed to evidence that the R-T zoning would not have allowed for "any measurable number of affordable housing units," while the R-M zoning would have allowed for 45 to 78 affordable housing units. The court further noted that 88% of those on the Section 8 rental housing list in the county were African American and Hispanic households, even though those households comprised only 14.8% of all households in the county. Thus, the court had found that R-M zoning would create more affordable housing units available to minorities than the R-T zoning. Accordingly, the court reiterated its previous holding (made prior to the appeal and remand) that "R-M zoning controls would have a less discriminatory effect than R-T zoning controls."

Re-addressing the second step in the analysis, the court noted that the Village had identified its "legitimate, bona fide governmental interests" in the zoning change as including: "controlling traffic; minimizing school overcrowding; developing townhouses; maintaining the character of the area; and creating a transition zone." On appeal, the Second Circuit had concluded that the only "legitimate interests" of those claimed by the Village were the interests of "minimizing traffic and school overcrowding."

Finally, the court addressed the issue that was remanded to it from the Second Circuit: whether MHANY had met its burden at the third step of HUD's disparate impact burden shifting analysis. (See 24 C.F.R. § 100.500(c)(3).) For guidance, the court looked to the language of the statute and HUD's interpretation.

The statute provides:

> "If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section [(i.e., the first and second steps of the analysis)], the charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."

(24 C.F.R. § 100.500(c)(3).) And, the court found that "HUD's interpretation could not be clearer that a plaintiff's burden under 24 C.F.R. § 100.500(c)(3) is not to show that the less discriminatory practice would be

equally effective, but merely that it must serve a defendant's legitimate interests."

Looking at the evidence presented in the case, the district court found that MHANY provided at trial that: R-M zoning would not have overburdened or strained public schools; and the Village's interest in reducing traffic from the levels that existed under the P zone, could have been served by R-M zoning. The court found that evidence showed that the Village's school could have accommodated as many as 565 additional students, and that the R-M zoning would have, at most, added 156 additional students. The court also found that elimination of government office buildings (as found previously in the P zone) and replacement with residential buildings "would have reduced traffic, whether the residences were single or multi family," and any decrease in traffic between R-M and R-T zoning was de minimis as eliminating multi-family housing only reduced peak traffic by 3%.

Thus, in conclusion, the district court determined that MHANY met its burden at trial in establishing that the Village's "legitimate, substantial, nondiscriminatory interests" in not overburdening public schools and in reducing traffic could have been served by R-M zoning. The Court confirmed its finding that the adoption of R-T zoning instead of R-M zoning had a disparate impact on minorities in the Village.

See also: *Mhany Management, Inc. v. County of Nassau, 819 F.3d 581 (2d Cir. 2016).*

Case Note:

The Second Circuit had also vacated the district court's grant of summary judgment to the County of Nassau on MHANY's "steering" claims under Section 804(a) of the FHA and Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000d ("Title VII"), and remanded for reconsideration of those claims. Those claims were not addressed in the court opinion summarized here.

Preemption—City regulates registration and use of drones

Drone owner contends city regulations are preempted by Federal Aviation Administration regulations

Citation: *Singer v. City of Newton, 2017 WL 4176477 (D. Mass. 2017)*

MASSACHUSETTS (09/21/17)—This case addressed the issue of whether a city ordinance, requiring the registration of drones and prohibiting operation of drones out of the operator's line of sight or in certain areas without permit or express permission, was preempted by Federal Aviation Administration regulations.

The Background/Facts: Michael Singer ("Singer") was a resident of the

City of Newton (the "City"). Singer was a Federal Aviation Administration ("FAA")-certified small unmanned aircraft ("drone") pilot and owned and operated multiple drones in the City. In December 2016, "[i]n order to prevent nuisances and other disturbances of the enjoyment of both public and private space," the City adopted an ordinance (the "Ordinance") regulating drone use in the City. Among other things, the Ordinance imposed registration requirements on drone owners. It also banned the use of drones: below an altitude of 400 feet over private property without the express permission of the owner of the private property; over public property without prior permission from the City; and "beyond the visual line of sight of the Operator."

Singer sued the City, challenging those requirements of the Ordinance. He argued that those provisions of the Ordinance were preempted by federal law—namely FAA regulations, which extensively control much of the field of aviation.

Newton defended the Ordinance, contending that it was not preempted by federal law because it fell "within an area of law that the FAA expressly carved out for local governments to regulate." Newton pointed to FAA regulations that provide that "[c]ertain legal aspects concerning small UAS [i.e., unmanned aircraft systems such as drones] use may be best addressed at the State or local level," including those related to "land use, zoning, privacy, trespass, and law enforcement operations." (See 81 Fed. Reg. 42063 § (III)(K)(6).)

DECISION: Judgment for Singer.

The United States District Court, D. Massachusetts, held that those sections of the City's Ordinance that were challenged by Singer conflicted with federal regulation of drones and therefore were preempted by FAA regulations.

In so holding, the court explained that the Supremacy Clause of the United States Constitution provides that "federal laws are supreme." (U.S. Const. art. VI, cl. 2.) Thus, said the court, federal laws preempt any conflicting state or local regulations. Where Congress has not expressly preempted an area of law, federal law will preempt state or local law where field or conflict preemption is evident. Field preemption, explained the court, "occurs where federal regulation is so pervasive and dominant that one can infer Congressional intent to occupy the field." Conflict preemption "arises when compliance with both state and federal regulations is impossible or if state law obstructs the objectives of the federal regulation."

Here, the court determined that since the FAA explicitly contemplated state or local regulation of pilotless aircraft such as drones, the City's Ordinance was not preempted under the principles of field preemption. However, the court found that the sections of the City Ordinance that were challenged by Singer did conflict with FAA regulations and were therefore preempted under the principles of conflict preemption.

Specifically, the court found that the FAA had explicitly indicated "its intent to be the exclusive regulatory authority for registration of pilotless aircraft." (See State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet) ("FAA UAS Fact Sheet"). Accordingly, the court concluded that the City's drone registration requirements were preempted.

The court also found that the FAA regulations preempted the Ordinance's ban on drone use below an altitude of 400 feet and over private property without the express permission of the owner of the private property and over public property without prior permission from the City. The court found that those provisions of the Ordinance worked in tandem to "create an essential ban on drone use within the limits of the [City]," since the FAA mandated that drone operators keep drones below an altitude of 400 feet from the ground or a structure (see 14 C.F.R. § 107.51). In other words, given the FAA mandate, the City's ban on drone use below an altitude of 400 feet essentially eliminated any drone use in the confines of the City, absent prior permission.

Finally, the court found that the FAA regulations preempted the Ordinance's ban on drone use "at a distance beyond the visual line of sight of the Operator." The court pointed to FAA rules regarding aircraft safety and the visual line of sight for pilotless aircraft operation (see 14 C.F.R. §§ 107.31 and 107.205), and determined that the Ordinance "limit[ed] the methods of piloting a drone beyond that which the FAA has already designated, while also reaching into navigable space."

Case Note:

In its decision, the court noted that the remaining, unchallenged portions of the Ordinance "stand."

Zoning News from Around the Nation

CALIFORNIA

In late September, Governor Jerry Brown signed into law 15 bills aimed at addressing the "affordable housing crises." Among those new laws are: Senate Bill 35, which requires cities approve "projects that comply with existing zoning if not enough housing has been built to keep pace with their state home-building targets"; Assembly Bill 73, which provides that a "city receives money when it designates a particular community for more housing and then additional dollars once it starts issuing permits for new homes" provided at least 20% of the housing is reserved for low- or middle-income residents, "and projects will have to be granted permits without delay if they meet zoning standards"; Senate Bill 540, which "authorizes a state grant or loan for a local government to do planning and environmental reviews to cover a particular neighborhood," provided the developers in the designated community reserve a certain percentage of homes for low- and middle-income residents "and the city's approvals there would be approved without delay"; Assembly Bill 1505, which allows cities to "once again implement low-income requirements," forcing developers to set aside a percentage of their projects for low-income residents; Assembly Bill 1397, which "forces local governments to zone land for [buildable] housing"; Senate Bill 166, which requires cities to

"add additional sites to their housing plans if they approve projects at densities lower than what local elected officials had anticipated in their proposals"; Assembly Bill 879, which instructs cities to take steps to shorten the time developers take to build projects once approved; and Senate Bill 167, Assembly Bill 678 and Assembly Bill 1515, which make "it easier for developers to prove a city acted in bad faith when denying a project," and increase a city's penalty to "$10,000 per unit they rejected."

Source: *Los Angeles Times*; www.latimes.com

MASSACHUSETTS

State Legislators are considering a bill that would "require that developments defined as 'substance use and alcohol addiction centers and clinics' go through local zoning regulations and approvals." The bill is entitled "An Act to Prevent Over Saturation of Clinical or Educational Programs in Low Income Neighborhoods Under the Dover Amendment without Local Approval." Currently, under an existing state law known as the "Dover Amendment," "sober houses and other addiction centers are exempt from zoning requirements if they can show they offer some educational function." Under the bill, "addiction centers would not be exempt from zoning regulations 'without first obtaining the approval of the legislative body of such city or tow' in cases where it is a low[-]income city or town . . . ."

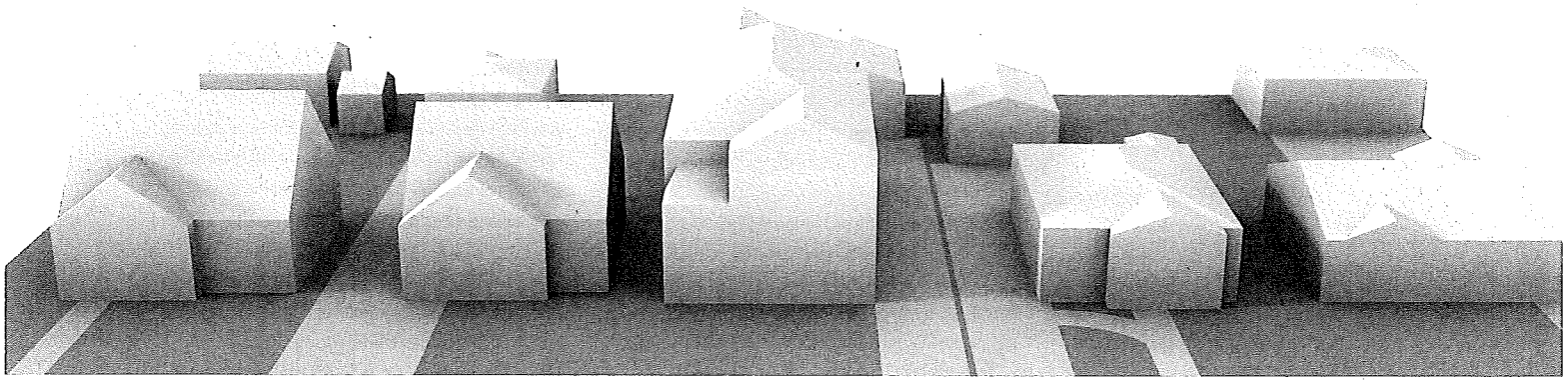
Source: *MassLive*; www.masslive.com

ZONING PRACTICE NOVEMBER 2017

AMERICAN PLANNING ASSOCIATION

ISSUE NUMBER 11

PRACTICE ORDINANCE TESTING



11

Testing the Zoning Ordinance

By Christopher Jennette, AICP

Many communities around the country are working with aged, outdated, and cumbersome zoning ordinances. These ordinances neither fit the existing development of their communities nor facilitate the achievement of a consensus vision for the future.

This mismatch happens for a variety of reasons, not the least of which is that older ordinances often contain complex sets of rigid regulations that lump specific uses into a pyramidal structure that actively works against achieving a mix of uses and dimensional standards narrowly designed to achieve a particular—often suburban—development form that may not reflect the existing on-the-ground conditions. Further, many communities have heavily adapted and amended their zoning ordinances over time, adding layers of additional requirements, techniques, and processes that together result in a web of regulations that may unintentionally discourage just the type of development they desire.

Some of these problems appear to be generational in nature: What was once deemed desirable has fallen out of favor for numerous reasons and must be updated. Other issues, however, are simply more functional in nature. What if, as we were drafting regulations to address a resident's unsightly addition, we looked more carefully ahead, anticipating and testing their impacts, to assure that we were not creating unintended consequences for homes across town or home owners who may want to invest in a tasteful addition 10 years from now? What if we tested that new regulation to ensure that we knew the full extent of how it would impact the homes in our community, so that we could aid in an informed decision-making process about how to move forward?

Updating a zoning ordinance is not a simple process. It involves reconciling adopted policy with existing development patterns, future development goals, and the often competing interests of landowners, residents, the business community, and elected officials, among others. With so many interested parties at the table, and so much at stake for the community and its residents, new regulations must be vetted through a thoughtful process that is seated in reliable data, modern techniques, and a whole lot of research. As communities work to update their zoning ordinances, a proactive approach to testing regulations can ensure that new standards do not create a ripple of unintended consequences, but rather match the character of existing development and result in new development that is in line with adopted plans, policies, and community desires. Finally, if you are a fan of creative problem solving, testing can also be (gasp!) fun.

WHAT IS TESTING?

Here, "testing" refers to putting regulations through their paces, ensuring that we fully understand the consequences and impacts of what we're proposing, drafting, discussing, and ultimately adopting. Though it is often heavily driven by data, testing itself is not purely a technical exercise. Rather, it can take a variety of forms, from presenting "proof of concept" draft districts that allow us to gauge the level of support for general approaches, to completing complex geographic information systems (GIS) analyses to ensure that we're not increasing nonconformities through new dimensional regulations. Some typical forms of testing:

- Testing new approaches to gauge community support, such as implementing a modern planned unit development process or collapsing overlay districts into base districts
- Testing new or revised district dimensional standards (lot sizes, setbacks, etc.) to ensure that existing development patterns are acknowledged in the zoning ordinance, and that the built character and future desires of the community are accurately reflected in the range of districts provided
- Testing design standards to ensure that they are both specific enough to create high-quality development and flexible enough to accommodate architectural diversity and creativity
- Testing specific regulations, such as maximum heights, design standards, or unique provisions, such as sliding-scale setbacks, to ensure they work both within the particular contexts that are driving their creation as well as throughout the community overall
- Testing new or revised processes to ensure they will work relative to the comfort and capacity of staff and elected officials, and that they represent an improvement over previous processes.

Zoning does not exist in a vacuum. Assessing the impacts of regulations before they are enacted is invaluable in ensuring that an updated or revised ordinance will suit the community it is designed to serve. The overarching benefit that testing can provide is the opportunity to evaluate any proposed regulations or approaches in action before they are formally adopted and enacted as part of a new zoning ordinance. The testing process allows a variety of stakeholders—staff, elected officials, the development community, and the public at large—to get a much clearer understanding of the techniques being employed and the anticipated results of the technical zoning language that is being proposed.

Testing, therefore, plays a critical role in ensuring that an updated zoning ordinance or regulation has been properly vetted through a process that aids truly informed decision making.

This article will cover when, what, and how to test zoning ordinances and regulations, and it will provide examples of how testing has been used to produce zoning ordinances that are more predictable and more closely customized to the needs and desires of their communities.

WHEN TO TEST

Broadly, the question of when to test your zoning ordinance can be answered, "now." It can be beneficial whether you are working with a 30-year-old ordinance and thinking about updates, or are currently in the process of updating your ordinance, or if you adopted a new ordinance yesterday. Proactively assessing your community's primary tool for controlling development is a good habit to get into no matter what your community's current situation may be.

When You're Updating

The simplest and perhaps most effective time to test zoning regulations is while they're in the process of being updated. The update process provides the far-reaching latitude to evaluate all aspects of the zoning ordinance and how they may currently be working (or not working) together to achieve the community's development goals.

The update process allows for the testing of existing regulations (such as district dimensional standards, maximum heights, parking ratios, landscape requirements, etc.) to ensure that they continue to work within the developed context of a community, and that they continue to work toward achieving the community's vision for the future.

The update process also allows new regulations and approaches to be tested before they become the rules for development in a community. Are we proposing smaller minimum lot sizes? Let's test to ensure that they're going to work to accommodate existing homes and facilitate growth where we desire, but that we're not unintentionally allowing existing lots to subdivide and create new density where it may not make sense. Are we proposing moving from regulating side yards as a minimum number to a percentage of lot width? Let's make sure that the percentage is tailored to sensibly accommodate both the small lots to which it would apply, as well as the larger ones. Are we writing a new regulation to limit the height of second-story additions in residential neighborhoods because someone built a terrible one? Let's make sure that we're not unintentionally prohibiting second-story additions in entire neighborhoods where they may be totally appropriate, and pushing home owners into an unnecessary variance process.

When You're Not

When you aren't updating, it's still important to be putting your ordinance through its paces. Proactively testing allows for an ongoing assessment of the limitations and effectiveness of your ordinance to meet the demands of future development pressure, and to act as a barrier to less desirable forms of development. The first and most obvious place to look for things to test is the pattern of variance requests that you're seeing. If home owners are repeatedly asking for relief related to fences in their side yards, this may indicate a regulation that needs adjustment. Similarly, if a good number of businesses in your general commercial district are asking for relief from ground-floor transparency requirements, you may want to test the requirements to ensure they are reasonably achievable and appropriate.

Keeping an eye on development trends and patterns in nearby communities, as well as emerging or nascent regulatory approaches, can also illuminate some areas that would benefit from testing. For instance, is the community next door seeing a number of tear-down redevelopment projects, or new homes on double lots in existing small-lot residential neighborhoods? Now might be a good time to see how your ordinance would handle new residential development of larger homes on larger lots, and if your controls allow for desirable forms of development that also protect current home owners and the fabric of the neighborhood. The brewpub you went to after work the other night—the one in the industrial area next to the glassblowing studio and the gym—could something like that happen in your community? Now might be a good time to look at older industrial areas in your community and see what may be standing in the way of their reuse or revitalization.

As new trends, technologies, and techniques emerge, how nimble is your community at recognizing and adapting to the demand for change? Proactively evaluating how your ordinance may (or may not) handle something like a roof-mounted wind turbine, a chicken coop, or a tiny house can prepare you for when the first permit application arrives at your desk. Knowing where the flexibilities and limitations lie can provide a great basis for working within an existing ordinance, or making the move to update when the tipping point is reached.

WHO DOES THE TESTING?

During an ordinance update, testing responsibilities may fall to different parties. If a consultant is the primary drafter, the consultant should also be the primary party responsible for testing any proposed regulations. Close coordination with staff is important to ensure that any data being used is the most up to date and accurate, to assist in the selection and prioritization of specific issues to test, and to identify any particularly critical areas within the community to test. In the case of process testing, following any initial "shadowing" or process engagement with the consultant, the staff should be the primary party responsible for testing and evaluating any proposed process changes.

WHAT AND HOW TO TEST

See the list of "forms of testing" above with some examples of ways in which testing may be used when a community is revising or updating its zoning ordinance. The sections below present more detail.

Approach Testing

Approach testing is a key step at the outset of any zoning update process, particularly for communities with an older ordinance. Changes in the form of new approaches or techniques, such as the implementation of a generic use approach, or a new manner of handling nonconformities, can often be a larger mental hurdle than changes to specific provisions, such as modified building height or setback requirements. Testing such new techniques can help to ensure that they will work for your community, and that they are supportable by staff, elected officials, and the public. Approach testing is often useful when transitioning from one technique to another, or when attempting to implement a new technique or practice within a community.

Testing a new approach requires that all stakeholders understand and support the proposed change of course. For example, many older zoning ordinances subject all nonconformities to the same standards. Meanwhile, contemporary zoning ordinances often define and regulate different types of nonconformities, such as "nonconforming lots," "nonconforming uses," "nonconforming structures," "nonconforming signs," and "nonconforming site elements" (e.g., landscaping, lighting, and parking). The benefit of this approach is that, rather than rendering a structure nonconforming because of a landscape issue, it establishes a separate set of regulations that govern the maintenance and improvement of only the nonconforming element. (However, it is important to note that the enabling legislation in some states does not allow for "nonconforming site element" provisions.)

Testing such an approach, depending upon the state in which it is proposed, may first involve getting a legal OK to proceed, then discussing with staff and stakeholders the details of how this approach is different and what exactly it would mean within

their community. In this case, testing may involve finding a number of examples of situations where structures are conforming, but landscaping, parking, or lighting would be nonconforming, and explaining the differences between how the two approaches would handle such a situation. There may be a good deal of support, or there may be some reluctance depending on the details. In either case, testing the approach using real-world examples allows for a much clearer understanding and an informed decision-making process.

Dimensional Testing

Dimensional testing is an important practical step to ensure that any new regulations adequately address the existing development pattern on the ground. Many zoning ordinances contain residential district dimensional standards that create a great deal of nonconformity, making life difficult for home owners who simply want to maintain or improve their property. Lot area, lot width, and setback dimensions required by residential districts within older zoning ordinances often do not correspond to the pattern of development that has occurred. They frequently require a much greater lot area and larger setbacks than the predominant development pattern.

A key step in updating these dimensional standards is to evaluate the relationship between what is required and what is actually built in the community. GIS analysis can be quite helpful in testing this relationship and exploring patterns of development that have occurred over time, both relative to and independent of zoning district requirements. Mapping individual residential zoning districts and aggregating data on the typical lot sizes, widths, and setbacks within those districts allows us to visualize and assess levels of nonconformity across a community's residential districts and to see patterns as they emerge.

Frequently, modern ordinance updates require the adjustment of dimensional regulations within residential districts, including the creation of small-lot residential districts to accommodate older neighborhoods and denser development patterns that were previously not acknowledged through the zoning ordinance.

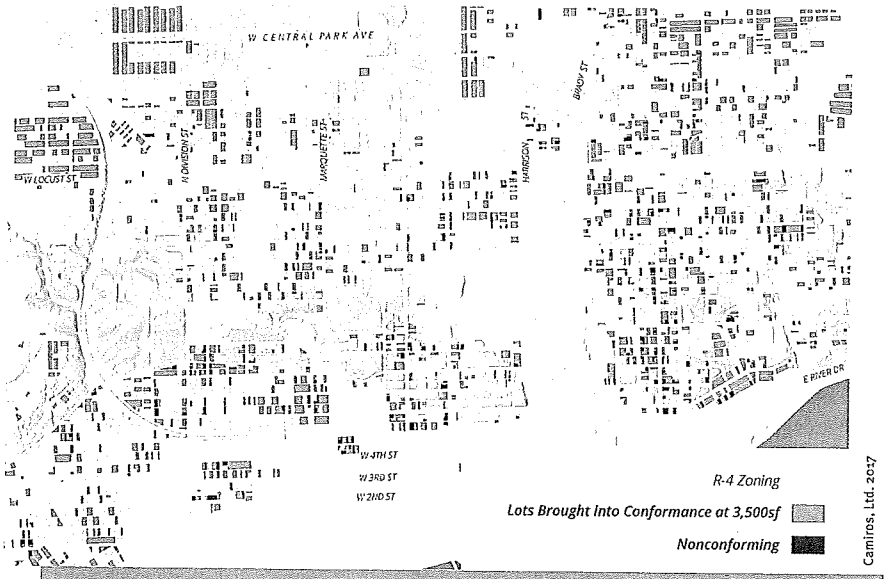
Further, when a community creates new residential districts or proposes adjusted dimensional regulations, testing those regulations through GIS analysis of existing development patterns allows it to quickly gauge how many properties would be brought into conformance with zoning, versus how many properties would remain or be made nonconforming under the new regulations. In this way, dimensional testing can provide a road map for what must be changed through the zoning update process.

Design Testing

Many modern ordinances incorporate some level of design standards to ensure that new development achieves a high level of quality and a consistency with the existing character of the community. It is helpful to test them to make sure that they are stringent enough to ensure high-quality development and flexible enough not be prescriptive. A good set of design standards should regulate the essential elements of building form, setting reasonable standards that address elements such as fenestration, facade articulation, roofline form, and entry location.

To test design standards, select a number of buildings currently within the community, and use the proposed regulations to evaluate their design. Could the buildings be built again if the new standards were adopted? This can be an illuminating exercise; specific provisions within the design standards often emerge for discussion based upon their application to existing buildings, and the community's regard for those buildings. For example, comparing the proposed standards to an existing structure, and measuring conformance to provisions such as minimum percentage of transparency or required roofline articulation, can trigger some good discussion. The results of testing may surprise stakeholders by revealing that the design standards would indeed accommodate a specific building. In others, stakeholders may learn that the proposed standards would actually prohibit a beloved landmark or symbol of the community.

Frequently there is concern that standards must be flexible enough to not stifle architectural diversity and creativity within the community. A good set of design standards should accommodate a variety of architectural styles and unique building designs. Testing examples of contemporary, modern, and traditional structures, and showing that they would conform, can alleviate such concerns.



Dimensional testing can reveal development patterns that are not accommodated through existing zoning district standards, and can provide guidance as to how standards should be adjusted.

Issue Testing

It is given that there will be unique, complex, or particularly sensitive issues that arise when a zoning ordinance is updated.

Fenestration Design Standards | *Graphic Comparison*

- *Proposed transparency requirements for the ground floor (50%) and upper stories (25%) are illustrated on the first and second stories.*
- *A reduced requirement of 15% is shown on the third story of the building below, for comparative purposes.*

Design testing may also include specific provisions, such as different levels of required window transparency.

Hot-button issues can demand innovative or unique approaches to regulation. Such issues often revolve around a particular development project or trend. Whether you're working as a private consultant or a public-sector planner, having the ability to accurately test the impacts of regulations designed to address these issues—and to communicate the results of testing to enable informed discussion and decision making—is an invaluable skill.

Take, for instance, my recent experience with a hospital and its adjacent neighborhood. Neighbors had become concerned that the height limitations placed on the hospital property by the current ordinance were too permissive, and that if redevelopment were to occur to the maximum permitted height, they would find their homes in shadow throughout the day. Working with local planners, and with input from representatives of the neighborhood and the hospital, we were able to test the impacts of a variety of potential permitted heights and required mitigation strategies, such as increased required setbacks from residentially zoned property, and upper-story step-backs. Shadow studies tested the impact of potential adjustments, and the results showed that a tailored combination of increased setbacks, step-backs, and a reasonable maximum building height would minimize any potential impacts on the adjacent neighborhood, while maintaining the ability for the hospital to reasonably expand in the future.

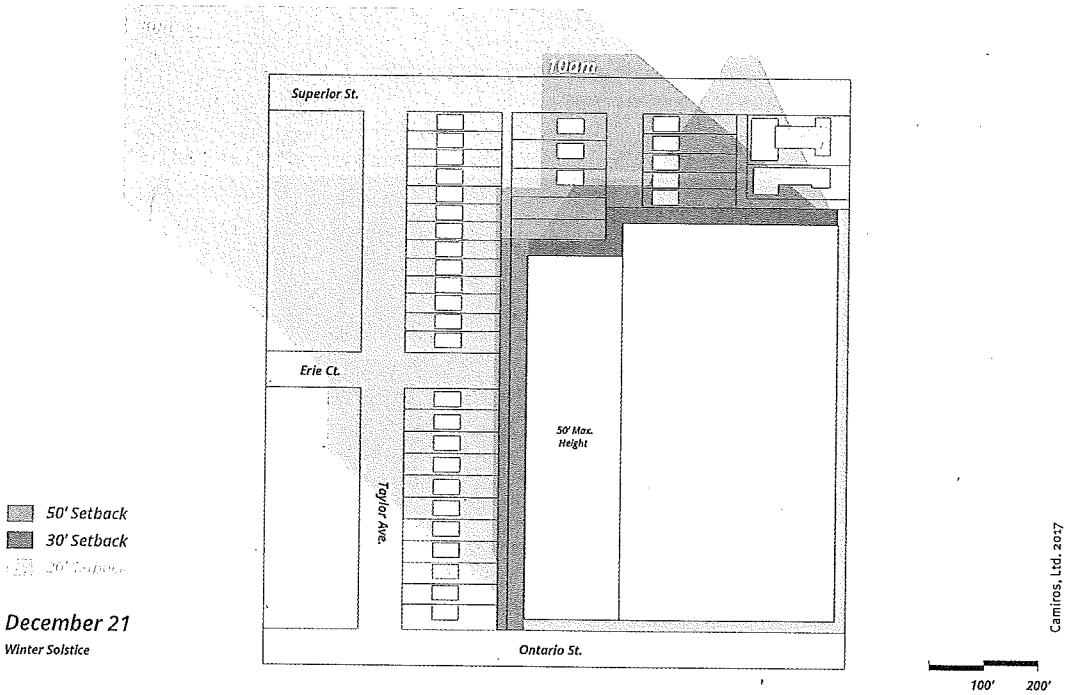
Finally, there can often be a chorus of voices that arises to address particularly sensitive development trends, such as an influx of new residential construction that is out of scale and threatening to undermine the character of an established neighborhood. Creating controls to address these types of development trends demands sensitive testing to ensure that they will indeed prevent the negative impacts of such development—but that they still provide the flexibility for people to improve their homes, or for redevelopment to occur in a manner that can meet market demands. Testing can help to make sure that you're addressing the issue at hand, and not creating a separate issue through the adoption of a new regulation.

Issue testing can be some of the most important work in updating a zoning ordinance. Specific regulations that address unique conditions must be adequately tested to ensure that they are not creating unintended consequences or contributing to regulatory tangles that will need to be resolved later on. This type of testing, as it deals with unique issues and solutions, is also some of the more fun and engaging work in an update process.

Process Testing

As part of an overall ordinance update, staff should consider putting new processes through their paces before they are adopted and enacted. In most communities, an ordinance update does not involve major changes to the way that applications are handled and processed, but even minor changes can have a big impact on workflow. It is important to have a grasp of staff capacity to implement new procedures, or to simply practice the new procedures before they are in place.

This type of testing generally involves taking applications received—either during the update process or beforehand—and running them through a parallel internal (nonbinding) process, evaluating them against new standards and ensuring that procedures and time frames established through the new zoning regulations work for staff and



Shadow studies test the impacts of allowed maximum heights, as well as the effectiveness of mitigation strategies such as increased setbacks from adjacent residential property and required upper-story step-backs.

that no toes are stepped on or barriers created to an efficient workflow. Comparing proposed processes to existing ones can lead quickly to intuitive assessments of any new regulations. The inclusion of something like a completeness review process, for instance, can come as a relief to staff who may often find themselves in the position of attempting to assemble the missing pieces needed to process an application.

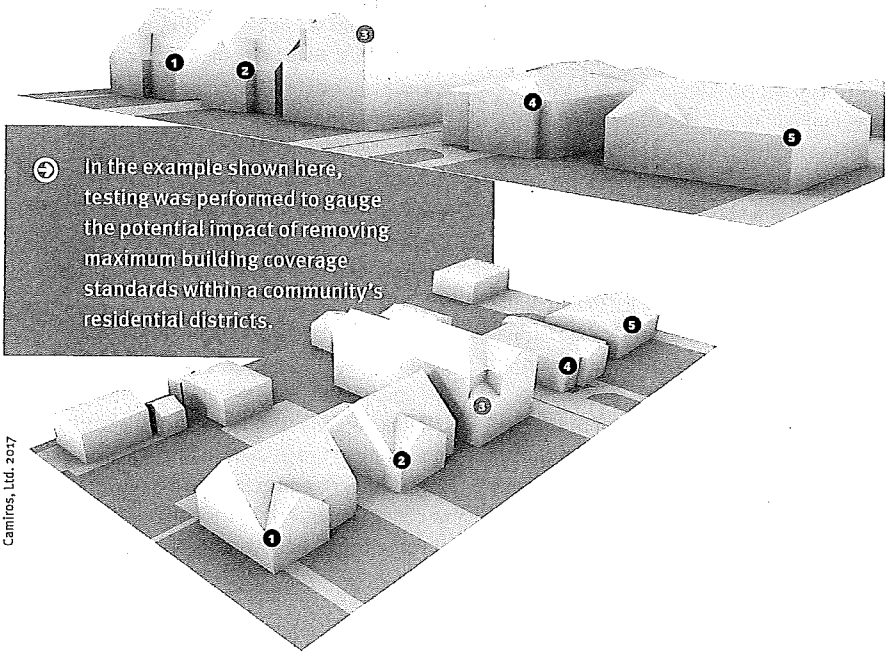
Project Testing

Project testing is where it all comes together. Whereas the previous types of testing primarily involve specific tuning of regulations to ensure they each achieve their specific intent, project testing can help to ensure that they work together to create the type of new development that a community is looking for. As such, it is a valuable tool for communicating the impact of such regulations to a variety of stakeholders, the public, and elected officials. This type of testing can be very involved (essentially executing hypothetical projects under the proposed regulations, from design through application and approval) or relatively simple, depending upon the desires of the community and the time and capacity available within a project scope.

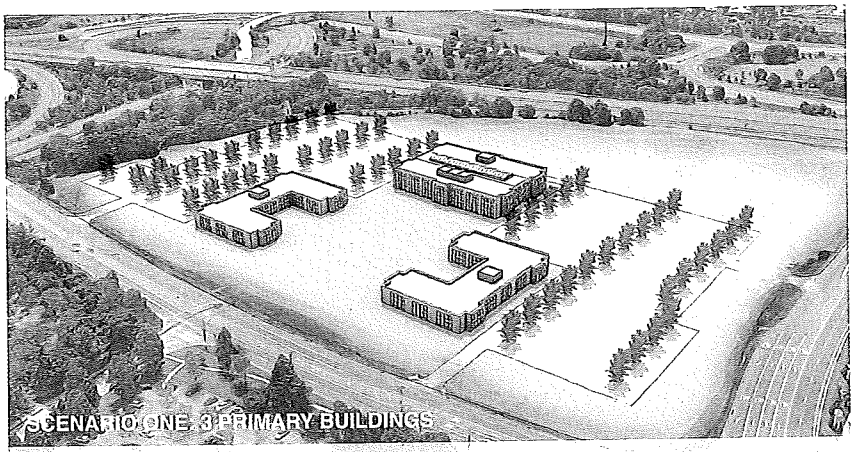
The most common, easily executed, and helpful type of project testing, however, is a before-and-after comparison of a development or development type—what could occur under the existing regulations versus what could occur under new regulations.

Testing could be based on real or hypothetical development: Do we want to evaluate a real project against new regulations to see how it may be different, or do we want to create a hypothetical project and show the impact of existing regulations versus new regulations? Both avenues can be helpful in communicating key changes between an old ordinance and a new one, and the answer to the real versus hypothetical question may be different from community to community based upon the desire or hesitancy to second-guess or reevaluate existing development. In cases where existing or "real-world" sites are used to conduct testing, we must be sensitive to the implicit difficulty in labeling existing developments as either "good" or "bad," and be sure to choose sites based on quantitative characteristics or similarities to other undeveloped locations, rather than a qualitative judgment of a development as something deserving of a "redo."

Project testing can be most helpful to illustrate new regulations as they relate

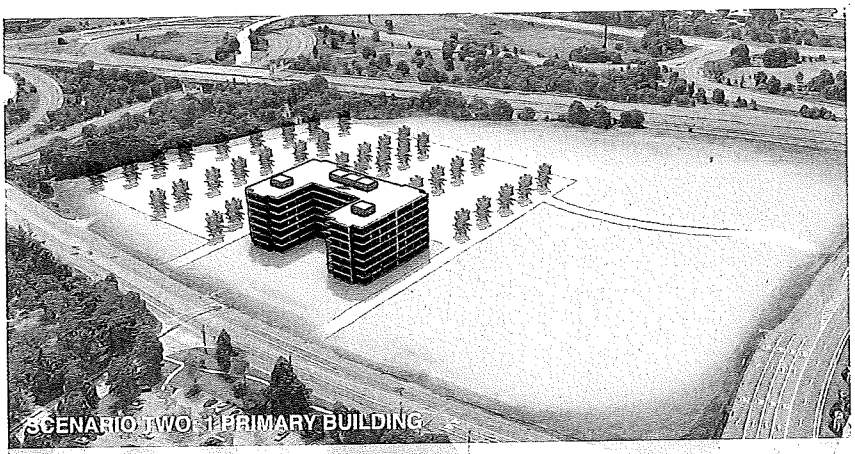


In the example shown here, testing was performed to gauge the potential impact of removing maximum building coverage standards within a community's residential districts.



Height: Approx. 24' and 36'
Square Footage: Approx. 174,000sf GFA
Parking: 600 spaces
Does not meet current ordinance parking requirement for office use.
Building Coverage: 8.5%
Impervious Coverage: 40%

Camiros, Ltd. 2017



Height: Approx. 84'
Square Footage: Approx. 175,000sf GFA
Parking: 600 spaces
Meets proposed ordinance parking requirement for office use.
Building Coverage: 3%
Impervious Coverage: 33%

Camiros, Ltd. 2017

Comparing existing regulations to new ones, such as through project testing, can help to illustrate how proposed regulations may be reflected in on-the-ground development.

to a variety of physical and dimensional characteristics of development. A buildout analysis, for instance, examining the most intense development that could occur on the same site under two different sets of regulations, is often helpful in drawing distinctions between new and old. Similarly, a comparison of projects with the same square footage and development program can effectively illustrate the impact of new regulations as they relate to permitted building siting, coverage, parking ratios, landscaping requirements, heights, and design character.

COMMUNICATING RESULTS

Though most of what has been covered here has dealt with techniques for testing zoning regulations, communicating the results of that testing is perhaps the most critical piece of the puzzle. When sharing the results of testing, we must ensure that diagrams, models, spreadsheets, or any other forms of communication are clear and effective, and that we are explicit about what exactly was tested and how we are interpreting the results.

The key value of testing regulations is that it provides the ability to clearly communicate the results of proposals to stakeholders, the public, and elected officials. This enhances their ability to make informed decisions about the future of the community through a new zoning ordinance or regulation. That value is easily diminished if the results of that analysis are not clearly communicated in a readily digestible form. All drawings should be clearly labeled, and synopses in plain English should be included to aid the understanding of audiences who are familiar with zoning and those who may not be.

ABOUT THE AUTHOR

Christopher Jennette, AICP, is an urban designer and planner with Camiros in Chicago. His experience includes a broad range of disciplines, from zoning to urban design and landscape design at a variety of scales. He is committed to working closely with communities in developing thoughtful, responsive planning and design solutions that positively impact people's daily lives.

VOL. 34, NO. 11

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. Joseph DeAngelis and David Morley, AICP, Editors; Julie Von Bergen, Senior Editor.

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