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Zoning Bulletin

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Validity of Zoning Regulation—City adopts ordinance granting limited immunity from prosecution as public nuisance to marijuana dispensaries

Marijuana dispensary owner argues new ordinance is an illegal ex post facto law, making previously legal activity, retroactively illegal

Contributors

Corey E. Burnham-Howard

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Citation: *City of Vallejo v. NCORP4, Inc., 15 Cal. App. 5th 1078, 223 Cal. Rptr. 3d 740 (1st Dist. 2017)*

CALIFORNIA (09/29/17)—This case addressed the issue of whether a city ordinance, which granted limited immunity from prosecution as public nuisances to marijuana dispensaries that consistently paid businesses taxes and met other requirements, improperly amended an earlier city ordinance, which placed a business license tax on marijuana businesses, by making activity that was legal at the time committed (or at least subject to very limited penalties) suddenly and retroactively illegal (or subject to greater and much different penalties).

The Background/Facts: California laws permit medicinal and recreational use of marijuana. While those laws permit the use of marijuana, they do not "mandate that local governments authorize, allow, or accommodate the existence of" marijuana dispensaries. Nor do they preempt "the authority of California cities and counties, under their traditional land use and police powers, to allow, restrict, limit, or entirely exclude facilities that distribute medical marijuana, and to enforce such policies by nuisance actions."

The City of Vallejo (the "City") has several ordinances affecting the operation of medical marijuana dispensaries. The City's zoning ordinance prohibits all uses not expressly permitted, and declares unpermitted uses to be "a public nuisance." The City's zoning ordinance does not recognize marijuana dispensaries as a permitted or designated land use, and, therefore, such a use is an unpermitted nuisance.

Despite the fact that marijuana dispensary uses were not permitted under the City's zoning ordinance, they nonetheless were "proliferating." Noting a lack of financial resources to enforce land use restrictions, the City attempted to take a first step of "taxing and regulating these businesses." In 2011, City voters approved "Measure C" which placed a business license tax on marijuana businesses. In 2015, the City adopted Ordinance No. 1715, which provides that medical marijuana dispensaries are a public nuisance but grants immunity from prosecution to those dispensaries that have consistently paid business taxes and meet other requirements.

NCORP4, Inc. ("NCORP4") was a nonprofit corporation operating a medical marijuana dispensary in the City. The City denied NCORP4's request for limited immunity under Ordinance No. 1715 because NCORP4 had not paid most of its marijuana business taxes due under Measure C. In its application for limited immunity, NCORP4 offered to pay delinquent taxes and penalties. The City denied NCORP4's application and then sought to enjoin NCORP4's operations.

In May 2016, the City sued to enjoin operation of NCORP4's medical marijuana dispensary. The trial court denied the City's requested injunction. The court found that Ordinance No. 1715 improperly amended Measure C by increasing the penalty for nonpayment of taxes. The court determined that Ordinance No. 1715 amounted to "in essence an ex post facto law, making activity that was legal at the time committed (or at least subject to very limited penalties) suddenly and retroactively illegal (or subject to greater and much different penalties.)"

The City appealed. The City contended that it could lawfully preclude

operation of a medical marijuana dispensary that had a history of unpaid taxes. The City argued that Ordinance No. 1715 did not, as the trial court had held, impermissibly amend Measure C's tax provisions to increase the penalty for nonpayment of taxes but simply "limit[ed] the many aspirants to sell medical marijuana in the city to a manageable number by preferring those who have demonstrated a willingness and ability to comply with local law by paying the Measure C tax when the [C]ity enforced it . . . and to continue paying taxes as a condition of immunized operation."

DECISION: Judgment of Superior Court reversed, and matter remanded with directions to issue the City's requested preliminary injunction.

The Court of Appeal, First District, Division 3, California, agreed with the City. The court said that "[l]ocal governments may rationally limit medical marijuana dispensaries to those already in operation and compliant with prior law as past compliance shows a willingness to follow the law, which suggests future lawful behavior." Thus, the court characterized Ordinance No. 1715 as "essentially a grandfather provision." The court determined that a marijuana dispensary's timely payment of business taxes provided the City "with a rational basis to conclude that the dispensary will continue to act in a law-abiding manner." Since NCORP4 did not pay its business taxes, the court concluded that the City reasonably denied NCORP4 immunity to continue operations.

Addressing the NCORP4's argument and the trial court's conclusion—that Ordinance No. 1715 impermissibly amended Measure C as an ex post facto law, the appellate court noted that the constitutional prohibition on ex post facto laws applied only to criminal statutes and was inapplicable to local ordinances regulating the operation of medical marijuana dispensaries. Moreover, the court concluded that Ordinance No. 1715 did not amend Measure C's tax provisions retrospectively, but rather was a separate ordinance that used past compliance with Measure C as one of several standards for granting dispensaries immunity from prosecution as a public nuisance.

See also: *420 Caregivers, LLC v. City of Los Angeles, 219 Cal. App. 4th 1316, 163 Cal. Rptr. 3d 17 (2d Dist. 2012).*

See also: *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc., 56 Cal. 4th 729, 156 Cal. Rptr. 3d 409, 300 P.3d 494, 28 A.D. Cas. (BNA) 144 (2013).*

Rezoning/Vested Rights—After corporation obtains conditional site plan approval to build self-storage facility within a block of a school, city changes zoning to prohibit such facilities within 250 feet of schools

Corporation contends it has a vested right to construct the self-storage facility, but city argues there was no vested right because corporation failed to comply with conditions in site plan approval or obtain building permit

Citation: *Siena Corporation v. Mayor and City Council of Rockville Maryland, 873 F.3d 456 (4th Cir. 2017)*

The Fourth Circuit has jurisdiction over Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

FOURTH CIRCUIT (MARYLAND) (10/13/17)—This case addressed the issue of whether a property owner had a vested right under the Due Process Clause of the United States Constitution in building a self-storage facility.

The Background/Facts: In 2013, Siena Corporation and Rockville North Land LLLP (collectively, "Siena") sought to build an "ezStorage" self-storage facility in the City of Rockville, Maryland (the "City"). The property on which construction of the self-storage facility was proposed was zoned "Light Industrial." At the time Siena purchased the property, that zoning designation allowed for its use as the site of a self-storage facility.

City residents opposed the proposed ezStorage facility, contending that it posed a safety threat to the students of the local elementary school, which was located down the block from Siena's property. Residents expressed fear that the ezStorage facility would increase traffic, and that the storage facility might be used to store "illegal or hazardous materials and therefore invite crime into the area." The Residents proposed that the City amend its zoning ordinance to prohibit self-storage facilities within 250 feet of school zones. Eventually, in February 2015, the City council adopted such a zoning ordinance amendment. In effect, the zoning ordinance amendment prohibited self-storage facilities like Siena's from being built within 250 feet of lots with public schools.

While the zoning text amendment was being considered, and before it was adopted, Siena obtained from the City's Planning Commission conditional site plan approval for its proposed ezStorage facility. Final approval of the site plan was "subject to full compliance with" 19 conditions listed in the conditional approval, including obtainment of various permits. Siena did not

satisfy all of the conditions on its site plan approval, and it didn't apply for a building permit.

After passage of the zoning amendment prohibiting self-storage facilities within 250 feet of schools, Siena was unable to build the ezStorage facility on its property. Siena sued the City. It alleged, among other things, that the zoning amendment violated the substantive due process guarantee of the Fourteenth Amendment of the United States Constitution. The Fourteenth Amendment provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." Siena maintained that it had a protected property interest in using its property to develop an ezStorage facility.

The district court dismissed Siena's due process claim. The court held that Siena lacked a protected property interest in the ezStorage facility construction because it had not applied for a building permit.

Siena appealed.

DECISION: Judgment of district court affirmed.

The United States Court of Appeals, Fourth Circuit, held that Siena did not have a vested right in building a self-storage facility that was protected by the Due Process Clause.

In so holding, the court explained that to succeed on its substantive due process claim, Siena had to establish: (1) that it possessed a "cognizable property interest, rooted in state law"; and (2) that the City Council in adopting the zoning amendment deprived it of this property interest in a manner "so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency." The court determined that Siena "ha[d] not cleared either hurdle."

To have a "cognizable property interest," requires a "legitimate claim of entitlement," said the court. Looking at Maryland law, the court found that:

> "in order to obtain a 'vested right' in the existing zoning use which will be constitutionally protected against a subsequent change in the zoning ordinance prohibiting or limiting that use, the owner must (1) obtain a permit or occupancy certificate where required by the applicable ordinance and (2) must proceed under that permit or certificate to exercise it on the land involved so that the neighborhood may be advised that the land is being devoted to that use."

Here, since Siena had failed to satisfy either of those requirements—in that it never applied for a building permit or satisfied the conditions of its site plan approval for its proposed self-storage facility, the court concluded that it did not have a vested right in the self-storage facility use.

Moreover, the court found that "[e]ven if Siena had a property interest here, the enactment of the zoning text amendment would still fall short of a substantive due process violation." The court said that state deprivation of a protected property interest violates substantive due process only if it is "so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies." In other words, the state action must be "conscience shocking, in a constitutional sense," lacking any "conceivable rational relationship to the exercise of the

state's traditional police power." Here, the court found that the zoning amendment to prohibit self-storage facilities within 250 feet of schools did not shock the conscience as it was an attempt to protect students from the hazards that the City Council believe to be associated with self-storage facilities: increased crime, traffic, and illicit drugs.

See also: *L.M. Everhart Const., Inc. v. Jefferson County Planning Com'n, 2 F.3d 48 (4th Cir. 1993).*

See also: *Sylvia Development Corp. v. Calvert County, Md., 48 F.3d 810 (4th Cir. 1995)).*

See also: *A Helping Hand, LLC v. Baltimore County, MD, 515 F.3d 356, 20 A.D. Cas. (BNA) 519 (4th Cir. 2008).*

Case Note:

Siena had also brought an equal protection claim under the Fourteenth Amendment. With regard to that claim, the Equal Protection Clause provides that no state shall deny to any person within its jurisdiction "the equal protection of the laws." Siena suggested that the zoning text amendment uniquely burdened its property in a discriminatory manner. The district court rejected that claim, concluding that the zoning text amendment "was rationally based, given the residents' concerns that self-storage facilities near school could attract crime and traffic that would endanger students." The Fourth Circuit agreed. It also noted that Siena could not show that Siena had been intentionally treated differently than others similarly situated since Siena failed to identify a similarly situated competitor. Moreover, said the court, even such a similarly situated competitor existed, "the zoning text amendment would apply to it in the exact same way it applie[d] to Siena."

Billboards/Eminent Domain—City denies company's billboard relocation request

Billboard company argues denial was "illegal" because denial amounted to eminent domain taking under state's Billboard Compensation Statute and city failed to comply with statutory eminent domain procedural requirements

Citation: *Outfront Media, LLC v. Salt Lake City Corporation, 2017 UT 74, 2017 WL 4783908 (Utah 2017)*

UTAH (10/23/17)—This case addressed the issue of whether, under Utah's Billboard Compensation Statute (Utah Code section 10-9a-513), the denial of a billboard relocation request by a municipality constitutes a physical taking of the billboard, which requires compliance with the eminent domain

procedures of Utah's Eminent Domain Statutes (Utah Code sections 78B-6-501 through 522).

The Background/Facts: CBS Outdoor, LLC ("CBS") owned a billboard in Salt Lake City (the "City"). Its billboard was located on land that CBS leased from Corner Property, L.C. ("Corner Property"). In the fall of 2014, CBS's lease from Corner Property was about to expire, so CBS sought to relocate its billboard. CBS submitted a billboard relocation request to the City. The City's mayor made the decision to deny CBS's request to relocate the billboard.

CBS appealed that denial. Among other things, CBS argued that the denial was "illegal" because, in denying CBS's billboard request, the City "invoked the power of eminent domain to effect a physical taking of CBS's billboard without complying with the procedural requirements that constrain the use of eminent domain." In particular, CBS asserted that under Utah's Billboard Compensation Statute (Utah Code section 10-9a-513), the denial of a billboard relocation request by a municipality constitutes a physical taking of the billboard, which requires compliance with the eminent domain procedures of Utah's Eminent Domain Statutes (Utah Code sections 78B-6-501 through 522). CBS contended that the City's denial of its billboard request illegally failed to comply with the eminent domain procedures of Utah's Eminent Domain Statutes, which provide that "[p]roperty may not be taken by a political subdivision of the state unless the governing body of the political subdivision approves the taking." Here, the "governing body" was the City Council, and the City Council did not participate in the decision to deny CBS's relocation request; the decision was made by the City's mayor alone.

The City maintained, however, that the Eminent Domain Statutes do not apply to billboard relocation denials. Pointing to the texts of the Billboard Relocation Statute and the Billboard Compensation Statute, the City noted that neither incorporated the Eminent Domain Statutes by explicit textual reference.

Utah's Billboard Relocation Statute provides, in relevant part, that a municipality may agree to relocation of a billboard. The Billboard Compensation Statute provides, in pertinent part that "[a] municipality is considered to have initiated the acquisition of a billboard structure by eminent domain if the municipality prevents a billboard owner from . . . relocating a billboard into any commercial, industrial, or manufacturing zone within the municipality's boundaries, if [certain spacing requirements are met]; and . . . the billboard owner has submitted a written request under Subsection 10-9a-511(3)(c); and . . . the municipality and billboard owner are unable to agree, within the time provided in Subsection 10-9a-511(3)(c), to a mutually acceptable location[.]" In other words, the Billboard Relocation Statute permits a municipality to agree to a billboard relocation request that would otherwise be prohibited by the city's zoning ordinance. However, if the city does not agree to a relocation request, and that request meets certain spacing requirements (which CBS' request here did), the city is "considered" under the Billboard Compensation Statute to have "initiated the acquisition of the billboard structure by eminent domain."

The district court agreed with the City's arguments, and upheld the City's denial of CBS's relocation request.

CBS appealed.

DECISION: Judgment of district court affirmed.

The Supreme Court of Utah also agreed with the City's arguments. The court held that the procedural requirements of eminent domain mandated by Utah's Eminent Domain Statutes (i.e., that property could not be taken by the City unless the City Council approved the taking) did not apply because, "under the Billboard Compensation Statute, relocation denials are merely 'considered' to be the acquisition of a billboard structure by eminent domain for compensation purposes, but th[ose] denials do not actually involve the formal exercise of the eminent domain power and the concomitant procedures the legislature has prescribed to restrain the exercise of that power." In other words, the court read the Billboard Compensation Statute to treat a denial under the Billboard Relocation Statute (such as the City's denial of CBS's billboard relocation request, here) as "an acquisition for compensation purposes only, even though the denial itself [was] not an acquisition."

In sum, the court concluded that Utah's Eminent Domain Statutes "do not apply to actions that may trigger the Billboard Compensation Statute." The court interpreted the Billboard Compensation Statute to mean that, by denying billboard relocation requests that meet the spacing requirements (as the City had done here with CBS), the City is "considered to have initiated the acquisition of a billboard structure by eminent domain, solely for purposes of just compensation as dictated in that section." Because "considered" in that context means "to look upon (as)," the court concluded that billboard relocation denials that meet the spacing requirements are "only to be looked upon as acquisitions by eminent domain, though in fact they are not."

Case Note:

CBS also challenged the denial of its relocation request as violating the City's Billboard Ordinance, and as being arbitrary and capricious. The appellate court rejected both of these arguments. The court found that the City's Billboard Ordinance did not forbid the City from denying a billboard relocation request that fit within the spacing requirements of the Billboard Compensation Statute (as with CBS' request here). And, the court found that the City mayor's decision to deny CBS' billboard relocation request was not arbitrary and capricious because it furthered the mayor's established goal of achieving a net reduction in the number of billboards in the area.

Variance/Conditions—Village grants restaurant owner's requested parking variance, with conditions dictating hours of operation and requiring valet parking

Restaurant seeks to annul conditions, arguing they are unreasonable

Citation: *Bonefish Grill, LLC v. Zoning Bd. of Appeals of Village of Rockville Centre, 153 A.D.3d 1394, 61 N.Y.S.3d 623 (2d Dep't 2017)*

NEW YORK (09/27/17)—This case addressed the issue of whether conditions imposed on a parking variance were reasonable.

The Background/Facts: Bonefish Grill, LLC ("Bonefish Grill") leased property (the "Property") in the Village of Rockville Centre (the "Village"). In 2013, Bonefish Grill sought to demolish the existing structure on the Property and to build a 5,400 square foot restaurant. Based on the square footage of the proposed structure, the Village's Zoning Code required Bonefish Grill to have 54 off-street parking spaces. The Property did not have any off-street parking spaces.

Bonefish Grill applied for a parking variance. The parking variance application relied on a license agreement, which Bonefish Grill had with the adjacent property, allowing Bonefish Grill access to that adjacent property's 40 exclusive parking spaces between 4:00 p.m. and 12:30 a.m. on Mondays through Fridays.

The Village's Zoning Board of Appeals (the "ZBA") granted the parking variance with specific conditions, including that the restaurant's operating hours be restricted to 4:00 p.m. and 12:30 a.m. on Mondays through Fridays, and that valet parking be mandatory. The ZBA also granted Bonefish Grill's application for a substantial occupancy permit, imposing the same conditions.

Bonefish Grill challenged the conditions imposed, asking the court to annul them. The court annulled the conditions that restricted the restaurant's operating house and required valet parking.

The ZBA appealed.

DECISION: Judgment of Supreme Court reversed in relevant part.

The Supreme Court, Appellate Division, Second Department, New York, held that the conditions imposed on Bonefish Grill's parking variance were reasonable.

The appellate court explained that a zoning board "may, where appropriate, impose reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property, and aimed at minimizing the adverse impact to an area that might result from the grant of a variance or

special permit." The court further explained that if the imposed conditions are "unreasonable or improper," they may be annulled although the variance is upheld.

Here, the appellate court concluded that the ZBA's conditions on Bonefish Grill's parking variance, requiring valet parking and limiting the hours of operation to coincide with the hours of access to the 40 off-street parking spaces granted in the license agreement, were "proper because the conditions related directly to the use of the land and were intended to protect the neighboring commercial properties from the potential adverse effects of [Bonefish Grill's] operation, such as the anticipated increase in traffic congestion and parking problems." The court found that the "ZBA's rationale was supported by empirical and testimonial evidence," including the testimony of local store owners and the ZBA members own personal knowledge of parking demands in the area of the Property.

See also: *St. Onge v. Donovan, 71 N.Y.2d 507, 527 N.Y.S.2d 721, 522 N.E.2d 1019 (1988).*

See also: *Martin v. Brookhaven Zoning Bd. of Appeals, 34 A.D.3d 811, 825 N.Y.S.2d 244 (2d Dep't 2006).*

Zoning News from Around the Nation

CALIFORNIA

The San Francisco Board of Supervisors in considering legislation "that would make it easier to establish specially protected cultural districts in the city." The bill's aim is to "help slow the tide of gentrification in traditional ethnic enclaves." The new bill defines a cultural district as a neighborhood that: "Embodies a unique cultural heritage because it contains a concentration of cultural and historic assets or culturally significant enterprise, arts, services, or businesses, or because a significant portion of its residents or people who spend time in the area or location are members of a specific cultural, community, or ethnic group."

Source: *Curbed San Francisco*; *https://sf.curbed.com*

MARYLAND

The Montgomery County Council passed legislation that restricts the placement of country inns in certain residential zones. While current zoning law designates "rural areas" as locations for country inns, the recently passed measure gives more specificity, allowing for a country inn to be located in certain residential zones "only on properties that border a more rural zone." An amendment to the bill creates an exemption to the location restrictions for country inns located in a building that the county has deemed historic.

Source: *Bethesda Magazine*; *www.bethesdamagazine.com*

OHIO

Cleveland's City Council recently voted to approve new zoning requirements that will reportedly "prevent the sale of medical marijuana in about 95 percent of the city." The legislation "limits the location of marijuana dispensaries, cultivation sites, production and refining facilities and research sites." More specifically, the new ordinance provides that medical marijuana operations:

- "cannot be opened within 500 feet of a property that is the site of a school, church, public library, public playground or public park;"
- "are allowed only on property zoned as a general retail district or one of three industrial property designations."

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

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Standing—Association of neighborhoods challenges county approval of planned use development

Developer argues that association lacks standing to bring such a judicial challenge

Citation: *Greater Towson Council of Community Associations v. DMS Development, LLC, 2017 WL 4990670 (Md. Ct. Spec. App. 2017)*

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Corey E. Burnham-Howard

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MARYLAND (11/01/17)—This case addressed the issue of whether a community-associations group had standing (i.e., the legal right to seek judicial review) to challenge a zoning board's decision to grant a developer a waiver of local "open space" requirements and to approve a planned unit development.

The Background/Facts: DMS Development, LLC ("DMS") proposed a planned unit development ("PUD") in Towson, an unincorporated community in Baltimore County (the "County"). DMS proposed that the PUD would contain a "mixed residential dormitory and commercial project."

Baltimore County Code ("BCC") required new developments to provide a certain amount of recreational "open space" depending on the number of residential units. The County granted to DMS a waiver of the local open space requirement, and the County set the fee to be paid in lieu of meeting the open space requirements at "zero" dollars. Ultimately, the County Council approved the PUD.

Thereafter, the Greater Towson Council of Community Associations ("GTC"), among others, challenged the PUD approval and the open space waiver. GTC was an "umbrella group" that represented more than 30 neighborhoods in Towson. Eventually, the County Board of Appeals (the "Board") affirmed the decision to approve the PUD. The Board also approved the open space waiver at the zero-dollar waiver fee.

GTC then filed two separate petitions for judicial review. One challenged the PUD approval and the other challenged the open space requirement waiver. Those cases were consolidated before the circuit court.

DMS asked the circuit court to dismiss the actions. DMS argued that GTC lacked standing (i.e., the right to assert the claims in the judicial forum). The circuit court denied DMS's motions to dismiss. The circuit court found that GTC had standing because GTC had participated as a party before the Board in both cases, and because one of GTC's member neighborhood association members owned a community park and garden near the PUD. With regard to the open space waiver case specifically, the circuit court found that GTC had a strong interest in DMS's payment of a higher waiver fee because of the benefits it could bring to GTC's member neighborhoods in the County.

The circuit court later affirmed both of the Board's decisions.

GTC appealed. DMS again argued that GTC lacked standing to maintain an appeal.

DECISION: Judgment of Circuit Court vacated and matter remanded with instructions to dismiss.

The Court of Special Appeals of Maryland held that GTC lacked standing to petition for judicial review both the Board's decision to grant DMS a waiver of the local open space requirements and to approve the PUD.

In so holding, the court explained that, under Maryland law, in order to have standing to petition for judicial review, a party must meet "two conditions precedent." First, the party "must have been a party to the proceeding before the Board." Second, the party must be "aggrieved" in that the party's "personal or property rights are adversely affected by the decision of the Board . . . in a way different from that suffered by the public generally." Here, the

appellate court found that "GTC did not put forth any evidence of its own property ownership, nor that it was specially aggrieved in some other way" different from the general public.

The court emphasized that while a party may have standing before the Board, it can lack standing to petition for judicial review in the circuit court (because there is a lower threshold for standing before a Board than a judiciary). The court also emphasized that "Maryland's policy relating to 'association standing' in land use actions" requires a neighborhood or community association itself to "be 'aggrieved' by the decision of the Board regardless of its members' property ownership." In other words, the court said that an association lacks standing to sue where it has no property interest of its own—separate and apart from that of its members.

Here, since GTC lacked any property ownership of its own, it was "required to overcome the difficult burden[of] alleging and proving how the Board's decision in the open space waiver case harmed GTC differently than others in the community," said the court. The court found there was "no evidence in the record . . . that GTC was 'specially aggrieved' by the decision to permit the zero dollar waiver fee any more than the general public—including all resident property owners in Baltimore County." The court also found that GTC was not an "aggrieved" party based on the property interests of any of the individual resident members of the neighborhoods, which were, in turn, members of GTC—since, to have standing, the association had to, itself, be "aggrieved" by the Board's decision and could not rely on its members' property ownership or interests.

Thus, finding that GTC lacked standing, the appellate court concluded that the circuit court erred in denying DMS' motions to dismiss GTC's petitions for judicial review in both cases.

See also: *Bryniarski v. Montgomery County Bd. of Appeals, 247 Md. 137, 230 A.2d 289 (1967).*

See also: *Ray v. Mayor and City Council of Baltimore, 430 Md. 74, 90, 59 A.3d 545 (2013).*

Rezoning/Eminent Domain/Due Process—City rejects landowner's request to rezone property

Landowner alleges that rezone denial constitutes unconstitutional taking of property

Citation: *Diversified Holdings, LLP v. City of Suwanee, 2017 WL 4985523 (Ga. 2017)*

GEORGIA (11/02/17)—This case addressed the issue of whether inverse condemnation was an available remedy on review of a particular zoning classification. It also addressed the issue of whether a city's refusal to rezone property violated a property owner's due process rights.

The Background/Facts: Diversified Holdings, LLP ("Diversified") owned 30 acres of undeveloped land (the "Property") in the City of Suwanee (the "City"). The Property was zoned for commercial use in accordance with the City's 2030 Comprehensive Plan. Claiming that it has been unable to sell the Property as zoned for more than two decades, Diversified applied to the City for rezoning of the Property to allow for multifamily use. The City denied Diversified's request to rezone.

Diversified then filed suit in superior court. Diversified alleged that the City's decision to deny Diversified's rezoning request constituted an unconstitutional taking of the Property.

The superior court concluded that the City's current zoning of the Property caused Diversified a "significant detriment." Evidence showed that the fair market value of the Property would increase "tremendously" if it were rezoned—from between $600,000 and $1.5 million to approximately $5.9 million. However, the superior court also concluded that the City's decision did not constitute an abuse of discretion and did not work an unconstitutional taking because the existing commercial zoning of Diversified's Property was "compatible with the surrounding commercial uses and [was] consistent with the City's comprehensive plan and economic development" and was therefore "substantially related to the public health, safety, morality, and welfare."

Diversified appealed. The City also cross-appealed the finding that Diversified showed a significant detriment.

DECISION: Judgment of Superior Court affirmed.

The Supreme Court of Georgia first held that inverse condemnation was not an available remedy for Diversified, here. The court explained that inverse condemnation claims draw their remedies from the eminent domain provisions in the Fifth Amendment of the United States Constitution (as well as Article 1, Section 3, Paragraph I of the Georgia Constitution), which protects against uncompensated "takings." The court explained that such takings are seen when the "government encroaches upon or occupies private land for its owner proposed use," or when a "regulation of property . . . violates constitutional due process guarantees." The court noted that, with regard to regulatory action, when a regulation results in a permanent physical infringement of property or deprives the property owner of "all economically beneficial uses," such action will be deemed a "per se taking" (i.e., on its face taking). With regard to cases that fall outside of those two categories, the court explained that courts look at certain factors to determine whether the regulation has "interfered with distinct investment-backed expectations." Those factors include: the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations"; and "the character of the government action" (i.e., physical invasion versus "public program adjusting the benefits and burdens of economic life to promote the common good"). In summary, said the court, a party challenging a government regulation as an uncompensated exercise of the government's eminent domain power must show that the regulation is "so onerous that its effect is tantamount to a direct appropriation or ouster."

The court further explained that zoning "does not ordinarily present the

kind of affirmative public use at the expense of the property owner that effects a taking." Zoning claims are typically "rooted in due process guarantees against arbitrary exertion of the police power rather than in the government's authority to take private property through eminent domain," said the court. "When the property owner's right to the unfettered use of his property confronts the police power under which zoning is effected, due process guarantees act as a check against the arbitrary and capricious use of that police power," said the court. Therefore, in order to strike a balance (between police power and property rights), "a zoning classification that substantially burdens a property owner may be justified if it bears a substantial relation to the public health, safety, morality, or general welfare," said the court. Lacking such a justification, the zoning may be set aside as "arbitrary or capricious," and cannot stand.

Here, Diversified had alleged both an inverse condemnation and a due process violation. The court concluded that because Diversified requested relief in the form of rezoning without seeking damages for a taking, their claim was properly understood as sounding in due process. Again, under the due process analysis, the court said that Diversified's challenge of the validity of the zoning "must show, by clear and convincing evidence, that the zoning at issue presents a significant detriment to the landowner and is insubstantially related to—in other words, does not 'substantially advance'—the public health, safety, morality, and welfare."

In looking at the validity of the City's decision to deny the rezoning request, the court explained that the following factors had to be considered:

> (1) existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restrictions; (3) the extent to which the destruction of property values of the plaintiffs promotes the health, safety, morals or general welfare of the public; (4) the relative gain to the public, as compared to the hardship imposed upon the individual property owner; (5) the suitability of the subject property for the zoned purposes; and (6) the length of time the property has been vacant as zoned considered in the context of land development in the area in the vicinity of the property.

Balancing those factors here, the court concluded that the City's denial of Diversified's petition to rezone the Property for multi-family housing should be affirmed. The court said this was because the zoning decision was not "arbitrary or capricious," but rather was "substantially related to the public's healthy, safety, morality, and welfare" as: the area around the Property was zoned for commercial use; the City's Comprehensive Plan provide for the Property's commercial zoning; such zoning was adopted after "extensive study and public debate"; the Property had no sidewalks and therefore was hazardous for pedestrians; and businesses abutted the Property.

See also: *Guhl v. Holcomb Bridge Road Corp., 238 Ga. 322, 232 S.E.2d 830 (1977).*

Case Note:

In its decision, the court emphasized that its decision clarified that the "substantially advances" standard that derives from constitutional due process guarantees "has no place in an eminent domain or inverse condemnation proceeding." "Consequently,

where a landowner claims harm from a particular zoning classification, inverse condemnation is not an available remedy unless the landowner can meet the separate and distinct requirements for such a claim."

Case Note:

The City had also cross-appealed the superior court's finding that Diversified showed a significant detriment. Because the appellate court affirmed the trial court's decision that the denial of Diversified's application was not arbitrary or capricious, the appellate court did not reach the City's contention on cross appeal.

Validity of Zoning Ordinance—City ordinance imposes overlay district that prohibits "mobile home parks or courts"

Property owner seeking to construct mobile homes argues that the term "mobile home parks or courts" was unconstitutionally vague

Citation: *Edwards v. City of Warner Robins, 2017 WL 4870994 (Ga. 2017)*

GEORGIA (10/30/17)—This case addressed the issue of whether the term "mobile home court or park" as used in a city's zoning ordinance was "unconstitutionally vague" as applied. The case also addressed whether a city's denial of a property owner's request to replace an existing mobile home or construct new mobile homes violated the property owner's vested rights.

The Background/Facts: Since 1973, Charles Edwards ("Edwards") and his wife, Carol Edwards, (collectively, the "Edwardses") had rented out a mobile home on each of three lots (the "1973 lots") that Edwards owned in the City of Warner Robins (the "City"). In June 1997, the Edwardses purchased properties (the "1997 lots") adjoining the three 1973 lots, with all lots then owned comprising seven acres with 36 lots. Each lot either had a mobile home on it or was being held out for use by a mobile home.

At the time of the Edwardses' 1997 lots purchase, however, mobile homes were prohibited on the 1973 lots and the 1997 lots under the City's 1994 Base Environs Overlay District ("BEOD") Ordinance. The BEOD was an overlay district that prohibited "manufactured housing" or "mobile homes" in the zoning district where the Edwardses' owned property. The BEOD Ordinance did provide exemptions for nonconforming uses. Thus, the Edwardses' original three mobile homes (on the 1973 lots) had been permitted since 1994 as nonconforming uses.

In 1997, the Edwardses requested, and the City granted, a rezoning of the

Edwardses' properties to an R-MH zoning designation, which allowed mobile home uses.

In 2008, the City amended the BEOD Ordinance by replacing a table, and in doing so, stated that "mobile home parks or courts" and "related structures" were prohibited in the BEOD Ordinance.

In February 2009, the City notified the Edwardses that even though the underlying R-MH zoning of their properties allowed mobile homes, the BEOD took precedence and did not allow them.

In August 2011, the Edwardses asked the City to allow them to: (1) upgrade a mobile home on one of the 1973 lots; and (2) to put additional mobile homes on the 1997 lots. The City denied those requests.

The Edwardses then appealed the City's denial of their requests. Among other things, the Edwardses argued that the City's denial of their requests were improper because the BEOD Ordinance was "unconstitutionally vague and overbroad" as applied to them. They also argued that the denial unconstitutionally violated their vested rights to use the properties for mobile homes.

Finding no material issues of fact in dispute, and deciding the matter based on the law alone, the superior court granted summary judgment on the Edwardses' claims in favor of the City.

The Edwardses appealed. On appeal, they again argued that the term "mobile home court or park" in the 2008 BEOD Ordinance amendment was "unconstitutionally vague" and that it was unclear if the BEOD Ordinance precluded them from placing additional mobile homes on their properties. In the alternative, they argued that even if it was clear that a large group of related mobile homes would qualify as a "mobile home park or court," the BEOD Ordinance was unconstitutionally vague because it was "not clear whether this language prohibits the placement of a single mobile home in the BEOD area." Further, the Edwardses argued that the BEOD Ordinance unconstitutionally hampered the use of their properties by violating their vested rights to use the properties for mobile homes.

DECISION: Judgment of district court superior court affirmed.

The Supreme Court of Georgia concluded that the BEOD Ordinance term "mobile home park or court" was not, as the Edwardses had argued, unconstitutionally vague as applied. The court explained that the BEOD Ordinance would be void if it was "so vague that persons of 'common intelligence must necessarily guess at its meaning and differ as to its application.' " Here, the court found that persons of common intelligence would understand that the term "mobile home park or court" encompassed the kind of aggregation of commonly owned mobile homes that the Edwardses had or had sought. Indeed, the court noted that the Edwardses had explained that they wanted to develop a "manufactured home park" or a "mobile home park" on their properties. Accordingly, the court concluded that the BEOD Ordinance was not vague as applied to Appellants' situation.

As to the Edwardses' argument that the BEOD Ordinance was vague as to the placement of a single mobile home in the BEOD area, the court would not address that issue since the Edwardses were "not in that situation" and thus lacked standing (i.e., the legal right) to raise that argument.

Finally, the court also held that the BEOD Ordinance did not, as the Edwardses had argued, violate the Edwardses' vested rights to use the properties for mobile homes. The court noted that since the City's zoning ordinance prohibited the expansion of nonconforming uses, the City's denial of the Edwardses' request to replace a mobile home on one of the 1973 lots was "not unconstitutional." As for the additional mobile homes that the Edwardses sought to place on the 1997 lots, the court concluded that the Edwardses had not acquired a vested right to put those mobile homes on those properties, as they did not own the property until after the BEOD Ordinance prohibition on mobile homes was adopted. The court explained that "vested rights to develop property in accordance with prior zoning are personal" and did not transfer to the Edwardses when they purchased the 1997 lots.

Further, the court concluded that the City's grant of the 1997 rezone of the properties to R-MH designation did "not change th[at] result." The court said that the Edwardses could not have reasonably relied on that rezoning to erect mobile homes on the properties because the rezoning changed only the underlying zoning classification, and it did not change the BEOD Ordinance, which had always prohibited mobile home parks.

See also: *Gouge v. City of Snellville, 249 Ga. 91, 287 S.E.2d 539 (1982).*

Conditional Use—City grants conditional use permit for professional office use in residential zoning district

Neighboring resident challenges the conditional use permit, arguing that accessible parking requirements were not met and use did not conform to character of the neighborhood as required

Citation: *Harrington v. City of Davis, 16 Cal. App. 5th 420, 224 Cal. Rptr. 3d 351 (3d Dist. 2017)*

CALIFORNIA (10/20/17)—This case addressed the issue of whether a city improperly issued a conditional use permit for a professional office space use that failed to provide accessible parking.

The Background/Facts: Catherine LeBlanc ("LeBlanc") and Christopher Sanborn ("Sanborn") owned real property (the "Property") in the City of Davis (the "City"). The Property was improved by a single family home, and was located in the City's "residential garden apartment" (R-3 or R-3-M) zoning district. In that zoning district, a variety of conditional uses could be permitted, including professional offices.

The previous owner of the Property had obtained a building permit and conditional use permit ("CUP") authorizing use of the Property for profes-

sional office space. However, that owner stopped using the Property for commercial purposes in 2011, and the original CUP had then expired.

In October 2013, LeBlanc applied to the City for a CUP authorizing use of the Property as a professional office space. The City's Planning Commission approved the CUP. Notably, in approving the CUP, the Planning Commission determined that, based on the square footage of the professional office space, a minimum of three parking spaces for the use were required. It was determined that those three spaces would be provided in a tandem configuration, with one parking space provided in a garage and two spaces in the driveway.

Michael Harrington ("Harrington") lived next door to the Property. Harrington appealed the City's grant of the CUP to LeBlanc. Harrington argued that the City erred in approving the CUP because the professional office use was "not of the same general character as the other conditional and general permitted uses within R-3-M." Harrington also argued that the parking plan for the Property and the professional office use did "not conform to law."

Ultimately, the City Council upheld the Planning Commission's approval of the CUP.

Several months later, upon LeBlanc's inquiry, the City notified LeBlanc that an accessible parking space was not required at the Property. Harrington again appealed, arguing that an accessible parking space was required. The City Council denied Harrington's appeal, concluding that an accessible parking space was not required on the Property.

Harrington then filed a legal action in court. The superior court denied Harrington's petition, and he again appealed.

On appeal, Harrington argued that the City erred in granting the CUP to LeBlanc because the CUP violated the City's Municipal Code. Harrington contended that: (1) the CUP required LeBlanc to provide accessible parking spaces; (2) the issuance of the CUP effectuated a change in occupancy that triggered the accessible parking requirements for new construction under the City's Building Code; (3) the CUP contemplated alterations to the Property that triggered the Building Code's accessible parking requirements; (4) the City Council failed to make sufficient findings to support the conclusion that compliance with accessible parking requirements would be technically infeasible; and (5) the CUP conflicted with the City's Municipal Code because the Municipal Code required protection of the "residential character" of an R-3 district.

DECISION: Judgment of superior court affirmed.

The Court of Appeal, Third District, California, rejected all of Harrington's claims. The court first concluded that, contrary to Harrington's claims, the CUP did not require LeBlanc to provide an accessible parking space since provision of an accessible parking space was not a condition of approval for the CUP.

Second, the court concluded that the expiration of the previous CUP on the Property changed the permitted use of the Property under the zoning code, but did not, as Harrington had argued, change the occupancy classification under the Building Code. Under the Building Code, there was no change in occupancy classification of a building unless the building official issued a certif-

icate of occupancy—which did not occur here when the previous CUP expired. Substantial evidence showed that, upon expiration of the previous CUP, the occupancy was not converted from B occupancy (commercial) back to R3 (residential); the occupancy was and remained "B."

Third, the court rejected Harrington's claims that the CUP contemplated alterations to the Property that triggered the Building Code's accessible parking requirements, finding that Harrington had waived that argument by failing to raise it at the administrative level and exhaust his administrative remedies.

Fourth, addressing Harrington's claims that the City Council failed to make sufficient findings to support the conclusion that compliance with accessible parking requirements would be technically infeasible, the court found that the City Council properly made no technical infeasibility findings with regard to parking at the Property because "there was no attempt to rely on the technical infeasibility exemption," in light of the determination that accessible parking was not required.

Finally, the court concluded that, contrary to Harrington's claims, the CUP did not conflict with the City Municipal Code's required protection of the "residential character" of an R-3 district because the City Council had found that LeBlanc's proposed professional office use was "of the same general character as the other conditional and general permitted uses within the [R-3-M zoning district]."

Zoning News from Around the Nation

MARYLAND

The Prince George's County Council has approved zoning to allow a marijuana dispensary to operate in the county, "permitting it to open 300 feet or farther from residential properties and at least 500 feet from schools, day care centers and parks."

Source: *The Washington Informer; http://washingtoninformer.com*

OHIO

The Cleveland Council recently adopted zoning legislation "that allows state-licensed medical marijuana cultivators, processors, retail dispensaries and testing laboratories to operate in certain zones in the city." Reportedly, the city legislation includes state restrictions such as limiting operations' proximities to within 500 feet of schools, parks, churches, and libraries.

Source: *News 5 Cleveland; www.news5cleveland.com*

WISCONSIN

State legislatures passed a property rights bill—the "Homeowners Bill of Rights"—which was headed to Governor Scott Walker's desk for signature. The bill reportedly is a response to the United States Supreme Court decision

in *Murr v. St. Croix County*. In that decision, two lots owned by the same family were deemed "substandard" after zoning regulations changed. The court had ruled that local regulators could effectively treat the two neighboring lots owned by the same family as if they were a single parcel of property. The Homeowners Bill of Rights would "let property owners build on and sell substandard lots if they were legal when they were created." It would also prohibit merging adjacent lots that share the same owner without the owner's permission. . . . Other parts of the bill would make it easier to get conditional-use permits and variances, maintain non-conforming structures, dredge private ponds, appeal assessments when a homeowner refuses to let the assessor inside the house, and hang the American flag when condominium or homeowner association rules might prohibit that.

Source: *Milwaukee Journal-Sentinel; www.jsonline.com*

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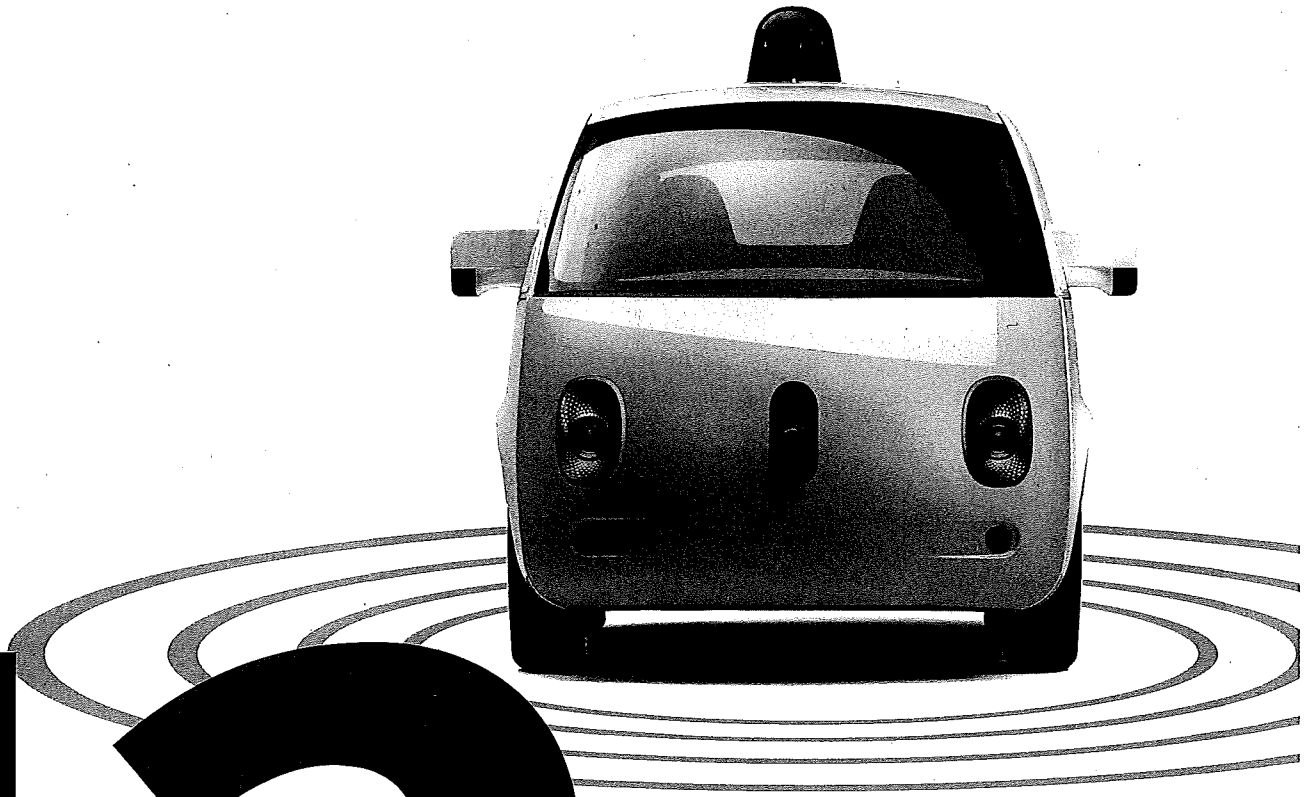

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Getting Ready for Driverless Cars

By Donald L. Elliott, FAICP

News about driverless cars is everywhere. It seems that everybody wants in on this "next best thing." Apple is playing. So is Google. So is Tesla. Even the U.S. military (though you won't be inside one of those unless you enlist).

Of course, not everyone is happy about this prospect. Some are fearful that the brains behind the vehicles might not be as smart as we hope; others swear they love driving too much to stop. But others yearn for the day they can drink coffee and read a novel while the car takes them where they want to go.

Unfortunately, much of the media coverage seems to focus on impressing us with this emerging technology, but provides little information about how the technology is likely to arrive and what changes we will see first. More specifically, the media blitz has left many planners wondering just what they should be doing to prepare for this brave new world. To help answer that question, let's focus on some basic facts about driverless cars, likely scenarios for their arrival, and what impacts planners are likely to see sooner rather than later.

One caveat at the start. This article assumes that driverless cars are coming whether we like them or not. While cities and counties will probably retain many powers to regulate their use—and will use those powers as their elected officials see fit—I assume that neither federal nor state nor local governments will significantly restrict their introduction into our vehicle fleet. This article is not about whether we should have driverless cars, but how to prepare for their arrival (To dig deeper, visit APA's resource for planners. Autonomous Vehicles: Planning for Impacts on Cities and Regions is at planning.org/research/av.)

THE BASICS

To begin with, we'll call them "autonomous vehicles," or "AVs," which seems to be the emerging preferred term. Three key facts about AVs need to be kept in mind as we think about how to plan for them.

Diablanco, Wikimedia (CC BY-SA 3.0)

An Uber self-driving car on a test drive in downtown San Francisco.

First, AVs Are Not One 'Thing'

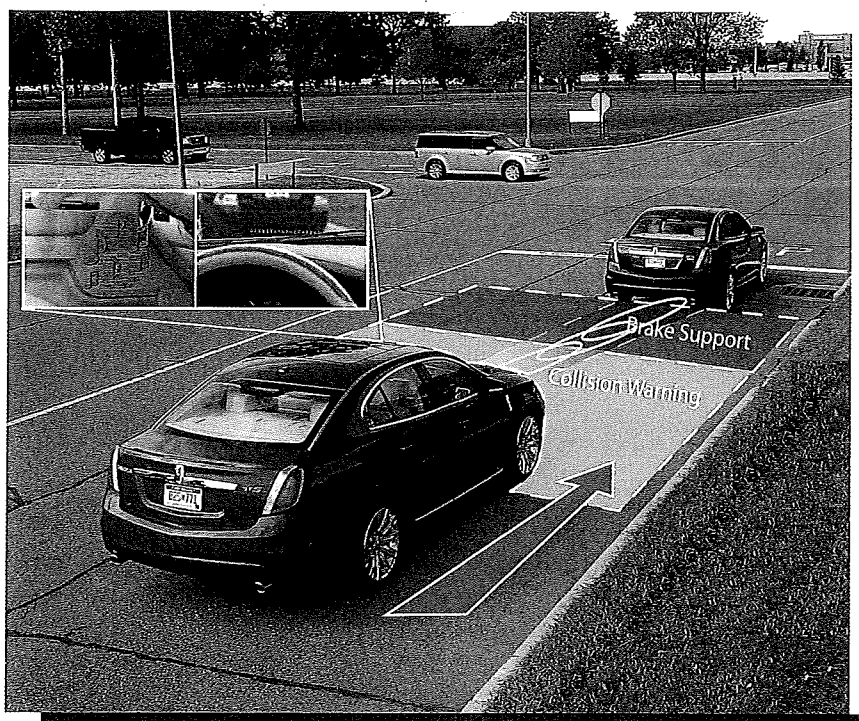
The Society of Automotive Engineers lists the following five categories of AVs (sae.org/autodrive):

1. Driver Assistance (like cruise control)
2. Partial Automation (like adaptive cruise control that brakes on its own)
3. Conditional Automation (system monitors the area and drives but may need help on demand)
4. High Automation (system monitors the area and drives in some conditions)
5. Full Automation (system can drive in all conditions without help)

At levels one and two, the driver is responsible for monitoring everything going on around the car (other cars, pedestrians, road conditions, weather)—so no reading a novel. At levels three and four, the car is monitoring what is going on nearby, and can drive part of the time, but may need help or need to have the human take over in some situations (like bad weather). So probably no reading a novel, because you don't know when the AV will ask for you to respond to a situation. We really haven't seen level five AVs yet (for example, many still have trouble in severe weather conditions). That means *The Jetsons* vision of a car that takes you where you want to go without any effort on your part is still a way off in the future. Most news coverage that "X will introduce a driverless car by 2020" doesn't clarify what level of AV will be introduced. Any changes in commuting patterns or choices of where to live will depend heavily on how much work the human still has to do (or be prepared to do).

Second, AVs Are Not Coming All at Once

Yes, AV technology has improved fast, and some automakers now say they will begin to introduce AVs by sometime between 2018 and 2021. By some estimates, AVs may capture 15 percent of the market by 2030, and maybe 50 percent of the market by 2040. That's pretty fast. While the projections do not say so, we'll assume that they are all level-five AVs—they can drive for you all the



Ford Motor Company, Flickr (CC BY-NC 2.0)

Partial automation features such as dynamic brake support and crash-imminent braking have been available in the U.S. for more than a decade, and major automakers have committed to installing automatic emergency braking systems in all new cars by 2022.

time. On the other hand, the U.S. currently has 264 million non-AV cars. So even if 50 percent are AVs by 2040, there will still be 132 million non-AV cars on the road. To make things more complicated, those cars will vary between AV levels one and four. They will have a range of capabilities.

For planners, this is a key fact. It means that for the foreseeable future we will be planning for cities, streets, and mobility for a mixed AV/non-AV system. (See "Here Come the Robot Cars," *Planning*, April 2017: planning.org/planning/2017/apr/robotcars.) For the rest of many of our professional careers, we will need to identify and respond to the different housing, working, and mobility needs of our citizens who use AVs while also responding to the needs of those who don't. Streets will be shared by cars with and without drivers (not to mention bikes and pedestrians); parking garages will probably not go the way of the dinosaur; and housing markets will continue to reflect the needs of those who want to live close to work and those who don't. This AV/non-AV mix will no doubt foster lots of innovative products and services, but it also carries the seeds of long-term conflicts that will need to be resolved. This key point may be the most important one for planners—but it is one that is rarely discussed in the news.

Third, a Lot Depends on Who Owns the AVs

There are two common visions about how AVs will operate. In the first vision, ride service firms will make fleets of AVs available to people needing mobility and will perfect and operate software that optimizes the efficiency of the fleet so that a subscriber's wait and trip will be as short as possible. This would be a super-efficient system that decreases the need for individual car ownership, shortens trip lengths (and greenhouse gases), reduces the need for parking spaces (because the cars are moving about most of the time), and reduces the "waste" of today's cars sitting still while we work or shop or play.

The second vision is one of private individual ownership; a vision where I will trade in my non-AV car for an AV that will provide individual services to me. It will be just like my current car except I don't need to drive it, and it knows when it could take my significant other somewhere and get back before I need it again—potentially allowing me to own fewer vehicles. In this vision, I still commute to work, so my AV occupies street space (just like my non-AV used to do). When there are no other family members to serve, it also sits still somewhere (just like my non-AV used to do). When the AV is not shared with a big group of people that need it in different places and times, the opportunities for a more efficient transportation system are reduced. It's sort of like today's world; I just don't have to drive.

Since we live in the U.S.—a country that prides itself on allowing individual freedom—it is very unlikely that any level of government will prohibit private ownership of AVs for individual use. In fact, in September 2017 the U.S. government relayed the Trump administration's goal to take a hands-off approach to regulation of AVs with the release of *Automated Driving Systems 2.0: A Vision for Safety*. So not only will we have a mix of AV and non-AV cars on the road, we will have a mix of system-operated AVs operating on software designed to maximize their efficiency (or profitability) and individually owned AVs carrying out the unpredictable mix of commuting, shopping, errands, and pleasure trips that they do today.

While the first vision is more efficient, both raise concerns for planners. First, both visions could be tempting alternatives to public transit. Those who ride the bus for non-sustainability reasons (they don't like to drive, they can't drive, or they like to work while they commute) may decide that AVs offer them the same choices plus privacy. Lower public transit ridership creates financial pressures on transit systems and could mean that more transit riders are those with no other mobility options. Second, both visions may tend to feed sprawl. If I can work while I commute in a private vehicle, maybe I don't hate commuting as much as I thought, so maybe I want to move further from my job. It wouldn't take a big shift toward longer commutes to undo years of slow progress in trying to reduce vehicle miles travelled.

The point is that—despite the media hype—planners who make and implement

plans will be working in a very fluid environment in which a variety of AV and non-AV vehicles, operated both individually and by coordinated systems with different mobility patterns, are being introduced over a long period of time. And all this will be occurring while distributors, wholesalers, and retailers introduce AV over-the-road trucks, AV delivery trucks, and drone deliveries. The good news is that most of these changes will happen over the 20- to 30-year planning horizons of most comprehensive plans. All of the potential impacts of AVs will not show up at once, which allows us to focus on those impacts that are likely to occur sooner rather than later.

TYPE OF VEHICLE IN OPERATION	POTENTIAL REDUCTION IN PARKING DEMAND
A. AV owned and operated by a mobility sharing system like Uber or Lyft	Significant, because operation of the vehicles is optimized to keep them moving most of the time
B. AV owned individually but operated by a mobility sharing system when the individual's household does not need it (think timeshare or AirBnb for cars)	Less than type A, since efficiency will be reduced by the need of the vehicle to get to where the household needs it when they need it
C. AV owned and operated individually for household use	Less than type B, because the AV is parked whenever the household does not need it
D. Level 1–4 AVs that require driver involvement	Same as today

HOW WILL ZONING NEED TO ADAPT TO AVS?

Most land-use control systems are organized to address each of the following major topics, although the order and the priority they give to those topics varies a lot:

1. Parking and Access
2. Streetscape and the Public Realm
3. Permitted Building Forms and Dimensions
4. Permitted Land Uses

The potential impacts of AVs on each of these zoning topics is discussed below, with particular emphasis on which impacts are likely to appear in the short run. Let's start with parking, since much of what follows relates back to that topic.

Parking and Access

One estimate is that the U.S. currently has two billion parking spaces. That's almost six spaces for every man, woman, and child in the country. Or almost 10 spaces for every licensed driver. Think about that the next time you cannot find a parking space; there are 10 of them out there just waiting for you. Up to 75 or 80 percent of suburban commercial property area is sometimes-occupied parking. In urban areas, parking can occupy between 20 and 30 percent of building envelopes. If those numbers seem high, consider that that the average size of a parking space (200 square feet, not counting driving aisles and access to the space) is two-thirds the size of some micro-unit dwellings (300 square feet, not counting hallways and lobbies and access to the unit). If AVs do result in decreased demand for on-site parking, that could require major changes in zoning requirements for parking.

Whether AVs result in reduced demands for parking turns on the fleet ownership mix and the long time frame over which they will be introduced (see the table above).

The fleet mix will probably move from type D to C, and perhaps from types C to B and B to A over time as AV mobility systems improve, but for a long period, reductions in parking demand will occur gradually because of the mix of vehicles in use. If you work in a community that has no minimum parking requirements, rest easy, because there is every reason to believe the market will adjust the supply of parking as demand for parking changes. But most medium and large cities and counties still have minimum parking requirements (and are hesitant to repeal them altogether), so what does this mean for planners in those communities? It means that cities and counties should

- continue to monitor parking usage to see how fast this transition is occurring, and reduce any minimum parking requirements to reflect those trends;
- think about potential reuse of surface parking areas (e.g., for vertical development, stormwater infiltration areas, or additional open or recreational space) as demand for those spaces falls; and
- consider whether reductions in parking demand should result in increased lot coverage ratios.

In addition, planners should be thinking about the need for "staging areas" for AVs—particularly those operated by shared mobility systems—when those vehicles are not in use. No matter how efficient the system, the supply and demand for AVs will not always align. Despite our amazing abilities to work from home, telecommute, and work over the internet, most large communities still experience rush hours when commuters want to get to and from work. It is unlikely that AVs will change that. Yes, some of those AVs will be used for nonwork trips between rush hours, but there are not as many of those trips to be made (otherwise we would not have rush hours since all the nonworkers would be making non-rush-hour trips and traffic volumes would not vary through the day). Yes, mobility systems will try to influence travel behavior by discounting rates at low demand times and raising them at other times, but I predict that we will still have variations in traffic levels throughout the day.

So where will the AVs hang out while waiting for their next optimized ride? In the short run, it is likely that they will use current parking lots as staging areas. And as parking demands fall, it will be rational for parking lot and garage operators to make space available to shared mobility systems and have parts of their lots or garages available for AV staging (for a price). When that does not happen, the AV system operators may need to construct lots or garages in optimized locations. But since it is hard to optimize locations when ride demand can come from anywhere (think of demands for Lyft and Uber today), it is more likely that the demand will be met by leasing or buying parts of current parking facilities in dispersed locations.

This means that reduced demand for parking space to park cars will be partially

offset in the short run by demands to use (or construct) them as staging areas. Planners should also think about their design standards for parking lots and garages, because when those facilities are used as staging areas, there may be a lot more in-and-out activity than in today's parking garages (where in-and-out activity tends to mirror peak traffic periods). That may mean more entrances and exits that disperse entry and exits onto more or different streets.

While there has been some media coverage of staging areas (mostly talking about how many more AVs can occupy spaces because they could be smaller vehicles that park within inches of each other and never make a mistake), there has been little coverage about how the need for staging areas will act as a partial brake on reduced demand for parking lots and garages. Planners who have not thought about demand for staging areas should think about the alternative. If AVs do not wait somewhere still during nondemand periods, they will need to move around, which will compound traffic congestion needlessly (cars moving around for no purpose) and degrade air quality (at least until the AVs are all electric and our national electric system doesn't burn fossil fuels). Surely that is a worse outcome than allowing staging areas.

Site Design

In addition to gradual changes in demand for parking, the introduction of a mixed fleet of AVs may have a fairly significant impact on site design. Just as Uber and Lyft can pick up and drop off customers exactly where they want, AVs operated by mobility systems will do the same—or they will try to. One of the earliest impacts of AVs may be increased demand for on-site drop-off and pick-up areas. Today, most zoning codes only require drop-off/pick-up areas for specific uses. At the top of that list are hotels, because the level of drop-off/pick-up activity is high. Somewhere near the top of the list are child care facilities, because we think young children probably should not be dropped off on the street if that can be avoided. Sometimes they are required for nursing care or elderly care facilities, on the assumption that our elderly also should be treated a little better than dropping them off on the street. Sometimes large facilities like hospitals, auditoriums, and educational facilities are included.

However, few zoning ordinances require drop-off/pick-up locations for office buildings, street-oriented retail, restaurants, multifamily residences, mixed use buildings, and the vast majority of other land uses. Today, most of that activity takes place on the street. The dramatic increase in drop-off/pick-up activity by systems like Lyft and Uber is already noticeable, and when we use those services we sometimes think "Hmm, where can I stand where the car can both see me and pull over to pick me up?"

It is unlikely that the dramatic increase in drop-off/pick-up activity that will accompany both system-owned and individually owned AVs can be accommodated within the street right-of-way (more about that later) without potentially significant impacts on traffic congestion and pedestrian safety. So planners should think about what types of additional facilities (or maybe just large ones) will be needed for drop-off/pick-up areas in the future. While they're at it, planners should think about how those areas can be designed to minimize conflicts with bicycle and pedestrian traffic.

Another Believer, Wikimedia (CC BY-SA 3.0)

A curbside drop-off/pick-up zone for on-demand ride services.

The Edge of the Street

While the introduction of AVs may have significant impacts on street design, most zoning ordinances do not deal directly with design of through-traffic lanes (or they share that turf with engineering manuals approved by the public works department). But zoning ordinances do frequently regulate streetscapes and the "public realm" between building frontages and the through traffic lanes (i.e., the edge of the street, where the demands of urban design meet the demands of traffic management). In addition to requiring additional *on-site* pick-up/drop-off areas, the introduction of AVs will increase demands for *on-street* drop-off/pick-up areas. In fact, the on-street impacts may be felt earlier, since drop-offs at existing buildings that do not have an on-site area will have to occur in the street. That may result in pressure to convert some of our current on-street parking spaces to drop-off/pick-up areas so that the AVs do not block traffic while on-boarding or off-loading humans.

In a perfect world, the demand for on-street parking spaces would fall exactly as much as the demand for on-street drop-off/pick-up areas rises, so the problem would solve itself. The city would just have to monitor the changing use and mark spaces or take out parking meters to reflect that changing demand. However, in the real world those miracle alignments of competing demands happen rarely, so planners should be thinking about how to accommodate increased on-street drop-offs and pickups.

All of this assumes that the issue arises on streets that currently provide on-street parking. If they occur on streets without on-street parking, then there may be pressure to create drop-off/pick-up areas out of areas currently occupied by trees, lawns, street furniture, patios, or other types of pedestrian-friendly urban amenities that many planners have been trying to promote. That may lead to prohibitions on AV drop-offs and pickups along some street segments.

In addition, planners should note the potential tension between the need for more on-street drop-offs and pickups and the goals of many complete streets programs. At the same time, we are trying to reinvent streets to allow more room for bicycles, pedestrians, and sometimes buffers between different modes of travel, so there

Dllu, Wikimedia (CC BY-SA 4.0)

A small fleet of Volvo 780 semis converted into self-driving trucks by Uber subsidiary Otto, parked at the company's headquarters in San Francisco.

will be increased demand for edge-of-the-street drop-off and pick-up areas. That may require rethinking of some complete street designs or not allowing AV drop-offs or pick-ups on some street frontages.

Permitted Building Forms and Dimensions

In contrast to the potentially significant impacts on parking, staging, and street edges discussed above, the introduction of AVs may not have equally significant impacts on building forms and dimensions. The potential impacts include

- less building square footage devoted to in- or under-building parking garages;
- more ground floor building area devoted to drop-off/pick-up areas; and
- in those communities that regulate density by floor-area ratio (FAR), more available FAR being used for business as opposed to parking uses, which could mean higher occupancy of the building, more commuting to and from the building, and a need to rethink what levels of FAR can be supported by the streets and public transit system.

In short, the introduction of AVs is unlikely to require significant redesign of the types of buildings demanded by the private sector in the short run. The changing demands for building form and design are more likely to be driven by macroeconomic trends, such as declining demand for brick-and-mortar retail, significant unmet demands for affordable housing, declining space devoted to each office or back-office worker, rising demands for services for our aging population, and declining industrial employment throughout the U.S. While basic building forms may not change, however, there will be impacts on needed uses of buildings and land.

Permitted Land Uses

Since the U.S. building stock changes slowly over time—almost all the buildings that will exist 10 years from now are already here—many changes in land-use demand need to be accommodated within our existing land

and building stock. We have already seen significant conversions of aging office, industrial, and institutional buildings into housing and redevelopment of functionally or market-obsolete commercial strip centers into a variety of other uses. So the major impact of introducing AVs may be in pressure to repurpose existing auto-oriented buildings and land uses.

For example, there is already pressure to convert parking garages (or parts of parking garages) to housing or commercial/institutional uses, and there are many examples of successful conversions. Many cities have already required that ground-floor frontages (or entire street frontages) be designed for future conversion to non-parking uses.

In the future, this may expand from frontages to requirements that entire floors or structures be designed for conversion to other uses if anticipated declines in parking demand occur. And the private sector may do this on its own (without regulation) when it concludes that local off-street parking demands overstate future needs for that parking.

Additionally, if a significant portion of the AV fleet is operated by shared mobility systems with cars continually circulating for optimum efficiency, the operator will presumably have those vehicles recharge (or fill up) at facilities where land and operating costs are low, which could lead to declining demand for recharging/fueling stations in high-value locations.

As the AV fleet increases and (we are told) they have fewer accidents because they are more than humanly aware of where the other vehicles are, demand for auto body and repair shops could fall. If increased use of AV mobility systems leads to lower per-capita car ownership, we may see declining demand for land to accommodate auto dealerships. In fact, however, the declining demand for this use is already well under way due to online car shopping, storefront showrooms (rather than car lots), and multistory car dealership facilities (to lower land costs). This trend is likely to continue and may only be marginally impacted by the introduction of AVs.

A FEW DISTURBING THOUGHTS

AVs are coming, and the previous discussion should give planners plenty to think about in preparing for their arrival. But there will probably be some not-so-attractive side effects as AVs are introduced. As we plan for AVs, planners should probably think about mitigating the following unintended side effects:

- Potential loss of jobs. While the AV industry will no doubt create many new jobs, there are four million professional drivers in the U.S. today, and not all of them will keep their jobs.
- Potential health impacts. The only meaningful exercise some Americans get is walking to and from their job to where their car is parked. Front-door drop-offs and pickups will change that.
- Potential marginalization of low-income neighborhoods. Individually owned AVs are more affordable to people with more money, and AV mobility systems are also designed to make money. Without intervention to ensure that mobility systems serve low-income areas, they may choose not to.
- Potential mobile AV-billboard "spam." What if every system-owned AV has advertising on it, and the software balances driving efficiency with advertising exposure? Not a pretty picture.
- Potential decreases in public transit ridership as some riders opt for an individual (rather than shared) vehicle driven by someone other than themselves.
- Potential pressure for low-density sprawl development at the edges of our cities, if a substantial number of citizens decide that they don't care how long they spend in the car as long as they're not driving (which may not be as large a number as some fear).

CONCLUSION

The introduction of AVs will have significant impacts on our built environment, streetscapes, and mobility systems, and we really don't know the exact order in which those impacts will be felt or their intensity when they arrive. The good news is that, despite the tone of some media coverage, AVs will be introduced over time. For the foreseeable future, we will be living in and regulating cities and counties to accommodate a mixed fleet of AV and non-AV vehicles, which will allow planners time to do what they do best—measure what is changing and design locally appropriate responses to those changes.

ABOUT THE AUTHOR

Donald L. Elliott, FAICP, is a director in the Denver office of Clarion Associates, a former chapter president of APA Colorado, and a former chair of the APA Planning and Law Division. As a planner and lawyer, he has assisted more than 40 North American cities and counties reform and update their zoning, subdivision, housing, and land-use regulations. He has also consulted in Canada, Russia, India, Lebanon, Mongolia, and Indonesia, and served as USAID Democracy and Governance Advisor in Uganda for two years. Elliott is the author of *a Better Way to Zone* and is a member of the Denver Planning Board.

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