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Variance—Board of zoning appeals denies variance request for wind turbines

Variance applicant argues board erred when determining variance eligibility

Citation: *Dan's Mountain Wind Force, LLC v. Allegany County Board of Zoning Appeals, 2018 WL 774760 (Md. Ct. Spec. App. 2018)*

Contributors

Corey E. Burnham-Howard

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MARYLAND (02/05/18)—This case addressed the issue of whether a board of zoning appeals properly applied the uniqueness test or the practical hardship test in determining an applicant's eligibility for a variance.

The Background/Facts: Dan's Mountain Wind Force, LLC ("Wind Force") sought to construct 17 wind turbines and an electrical substation on leased property on "Dan's Mountain" in Allegany County (the "County"). The County Code permitted wind turbines as a special exception in the zoning district in which the project was proposed. However, because the proposed sites of some of the turbines were within code-specified setback or separation distances, or both, Wind Force sought variances. Wind Force enlisted the support of the neighboring property owners, who joined Wind Force as co-applicants. In total, the County Board of Zoning Appeals (the "BZA") would have had to review and grant 26 separate variances "to get the wind turbine project in line with the existing zoning code."

Under Maryland law, a variance should be granted if: (1) "the property whereon structures are to be placed (or uses conducted) is—in and of itself—unique and unusual in a manner different from the nature of surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning provision to impact disproportionately upon that property;" and (2) practical difficulty or unnecessary hardship would result "from the disproportionate impact of the ordinance caused by the property's uniqueness."

Here, Wind Force maintained that there were many factors that limited the specific locations on which the turbines could be placed, including: topography; property boundaries; proximity of other dwellings; stream channels; wildlife habitats; wetlands; prior strip mining activity; communication beam paths passing over and through properties; and technical specifications of wind turbines. Wind Force contended that due to these various constraints, the wind turbines had to be placed in specific locations, necessitating variances from the County Code's minimum distance and setback requirements.

The BZA disagreed, and denied the variance requests. The BZA found that Wind Force had "failed to establish that the subject properties were sufficiently unique as to each other as to warrant a variance," and "failed to demonstrate that the multiple number of variances requested were in harmony with the spirit and intent of the zoning regulations."

Wind Force appealed (consolidating its appeals into a single petition for judicial review).

The circuit court affirmed, and Wind Force again appealed. On appeal, Wind Force argued that the BZA did not properly apply the uniqueness test or the practical hardship test when determining Wind Force's eligibility for a variance.

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

The Court of Special Appeals of Maryland agreed with Wind Force and held that the BZA did not properly apply the uniqueness test or the practical hardship test when determining Wind Force's eligibility for a variance.

In finding that the BZA used the "incorrect uniqueness analysis," the court noted that the BZA had "found that all of the co-applicant properties were similar to each other, and thus, not unique." The court stated that a proper uniqueness analysis "examines the unusual characteristics of a specific property in relation to the other properties in the area, and the nexus between those unusual characteristics and the application of the aspect of the zoning law from which relief is sought." The court emphasized that the purpose of the uniqueness test was to determine whether a "zoning law's effect on a property is particularized to that given property." Thus, the proper uniqueness analysis determines "whether the property is unique in the way that this particular aspect of the zoning code applies to it," said the court.

Here, the court found that the Board erred in its analysis because it: (1) failed to properly identify each applicant property's unusual characteristics, and then only compared co-applicant properties to each other and not surrounding properties; (2) failed to look at the nexus component and how the zoning law affected the subject property; and (3) addressed all of the co-applicant properties collectively, generalizing the properties in such a way as to negate the purpose of the uniqueness analysis.

In remanding the analysis back to the BZA, the court directed the proper analysis, saying that the BZA must "for each property, each factor, and each application": (1) first, determine "whether the unusual factors identified by the applicant are indeed, features of that particular property"; (2) then determine "whether those factors have a nexus with the aspect of the zoning law from which a variance is sought"; and (3) then "look at the ways in which those factors, together, affect the property, and whether that effect is unique as compared to similarly situated properties."

With regard to the "practical hardship" test of the variance analysis, the court found that the BZA had applied the wrong standard. The court explained that the second step of the variance test examines whether the "disproportionate effect of the ordinance, caused by the uniqueness of the property, creates practical difficulty for or unnecessary hardship on the owner of the property." The court further explained that there are two different standards that can be applied when determining hardship: (1) "a more lenient 'practical difficulty' test," which applies to area variances; or (2) "a more stringent 'unnecessary hardship' test,"

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which applies to use variances. The court found that the BZA had incorrectly applied the more stringent "unnecessary hardship" test. Since Wind Force was requesting area variances, the BZA should have reviewed the requests under the more lenient "practical difficulty" standard, said the court.

See also: *Cromwell v. Ward, 102 Md. App. 691, 651 A.2d 424 (1995).*

See also: *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County, 407 Md. 53, 962 A.2d 404 (2008).*

See also: *Montgomery County v. Rotwein, 169 Md. App. 716, 906 A.2d 959 (2006).*

Case Note:

In its decision, the appellate court found it "clear that Wind Force adduced evidence of several features of each of the co-applicant properties that suggest[ed] that the separation and setback requirements operate differently on each of those properties than they operated on other surrounding properties." The court, however, declined to rule on the merits, instead remanding the task for the BZA.

Preemption/Pipeline—Opponents say pipeline construction in residential districts in township violate township's zoning ordinance

Pipeline developer argues Pennsylvania's Public Utility Code preempts township's zoning ordinance

Citation: *Delaware Riverkeeper Network v. Sunoco Pipeline L.P., 2018 WL 943041 (Pa. Commw. Ct. 2018)*

PENNSYLVANIA (02/20/18)—This case addressed the issue of whether a municipal zoning ordinance that prohibited natural gas pipeline construction in residential districts was preempted by Pennsylvania's Public Utility Code.

The Background/Facts: In 2012, Sunoco Pipeline, L.P. ("Sunoco") announced its intent to develop an integrated pipeline system for

transporting petroleum products and natural gas liquids ("NGLs") such as propane, ethane, and butane from the Marcellus and Utica Shales in Pennsylvania, West Virginia, and Ohio to the Marcus Hook Industrial Complex ("MHIC") and points in between. Sunoco's goal for this project—known as the Mariner East Project—was "to move NGLs from the Marcellus and Utica Shales through and within the Commonwealth, and to provide take away capacity for the Marcellus and Utica Shale plays and the flexibility to reach various commercial markets, using pipeline and terminal infrastructure within the Commonwealth."

Sunoco's Mariner East Project had two phases. The first phase, referred to as Mariner East 1 ("ME1") was completed and utilized Sunoco's existing pipeline infrastructure, plus a 51-mile extension. It shipped 70,000 barrels per day of NGLs from the Marcellus Shale basin to the MHIC. After Marcellus and Utica Shale producers and shippers expressed a "need for additional capacity to transport more than the 70,000 barrels of NGLs per day being transported by ME1," Sunoco undertook to expand the Mariner East Project capacity and developed phase two of the Mariner East Project, known as Mariner East 2 ("ME2"). ME2 required construction of a new 351-mile pipeline, which would largely trace the ME1 pipeline route, and which would be, with a few exceptions, primarily below ground level.

For the Mariner East Project, Sunoco sought and obtained from the Pennsylvania Public Utility Commission ("PUC") the approval to provide intrastate service on the ME1 and ME2 pipelines. PUC confirmed that Sunoco was a public utility corporation subject to PUC regulation, and PUC recognized the service provided by the ME1 and ME2 pipelines as a "public utility service." Pursuant to PUC orders, Sunoco obtained Certificates of Public Convenience ("CPCs") that authorized Sunoco "as a public utility to transport, as a public utility service, petroleum and refined petroleum products both east to west and west to east in the following Pennsylvania counties through which the Mariner East Project [was] located: Allegheny, Westmoreland, Indiana, Cambria, Blair, Huntingdon, Juniata, Perry, Cumberland, York, Dauphin, Lebanon, Lancaster, Berks, Chester, and Delaware." Sunoco's CPCs applied to both ME1 service and to ME2 service, as the ME2 service was an authorized expansion of the same service.

In 2014, the West Goshen Township (the "Township") enacted a zoning ordinance (the "2014 Ordinance"), regulating the location and setbacks for gas and liquid pipeline facilities. Among other things, the 2014 Ordinance prohibited gas and liquid pipeline facilities in residential zoning districts, and allowed such facilities only in certain industrial zones by conditional use and subject to several enumerated standards.

In May 2017, the Delaware Riverkeeper Network, Maya van Rossum, the Delaware Riverkeeper, and residential landowners Thomas

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Casey and Eric Grote (collectively, the "Opponents") filed a complaint in trial court, which alleged that Sunoco's proposed ME2 pipeline, which was planned to run through the Township, including through residential zoning districts, violated the Township's 2014 Ordinance.

Sunoco responded, arguing that the PUC had exclusive jurisdiction over the regulation of public utilities and public utility service—such as Sunoco's ME2 pipeline, here, and that Pennsylvania's Public Utility Code preempted the Township's 2014 Ordinance.

Agreeing with Sunoco, the trial court held that the Township's power to regulate the location of the ME2 pipeline was preempted by the PUC's authority under the Public Utility Code.

The Opponents appealed. Among other things, the Opponents argued that there was no conflict between the Township's 2014 Ordinance and the Public Utility Code because the PUC did not have any regulations governing pipeline location.

DECISION: Judgment of Court of Common Pleas affirmed.

The Commonwealth Court of Pennsylvania held that the PUC's authority under the Public Utility Code preempted and precluded the Township's 2014 Ordinance from prohibiting the ME2 pipeline in the Township's residential districts.

In so holding, the court explained that there are "three generally recognized forms of preemption: (1) express or explicit preemption, where the statute includes a preemption clause, the language of which specifically bars local authorities from acting on a specific subject matter; (2) conflict preemption, where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute; and (3) field preemption, where analysis of the entire statute reveals the General Assembly's implicit intent to occupy the field completely and to permit no local enactments".

Here, the court found there was no express preemption provision in the Public Utility Code. However, upon "careful review" of the Public Utility Code, the court concluded that Pennsylvania's General Assembly "intended the PUC to occupy the field of public utility regulation, in the absence of an express grant of authority to the contrary." (See 66 Pa. C.S. §§ 309, 315, 331, 504, 505, 506, 701, 1501, 1504, 1505).

Despite concluding there was field preemption here, the court also went on to conclude that "conflict preemption also support[ed] the trial court's decision as to preemption [of the Township 2014 Ordinance] by the Public Utility Code." The court explained how conflict preemption may be applicable, including that "a local ordinance will be invalidated if it stands as an obstacle to the execution of the full purposes and objectives of a statutory enactment of the General Assembly."

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Here, the court found that the Township's 2014 Ordinance was such an obstacle to the execution of the full purpose of the Public Utility Code. The court explained that the policy purpose of state-wide regulation under the Public Utility Code was "to commit the regulation of public utility facilities to a state-wide commission, the PUC, because the rendition of efficient service to the public transcends the legitimate objectives of any one of the political subdivisions of the Commonwealth." In addition to the policy conflict of state-wide regulation versus local regulation of public utility services and facilities, the court noted that there was a "practical conflict" here as well: the 2014 Ordinance, prohibiting pipelines in residential zones, including the proposed ME2 pipeline, which paralleled and was mostly within the existing right of way of the ME1 pipeline, thus conflicted with full use of a pre-existing pipeline right of way.

In reaching its conclusion as to conflict preemption of the Township 2014 Ordinance, the court rejected the Opponents' argument that there was no conflict since the PUC did not have any regulations governing pipeline location. The court found it "irrelevant" that the PUC had no regulations covering pipeline siting. Rather, the court found that the PUC also exercised its authority in orders, such as those orders it had issued that governed the ME2 pipeline. Moreover, the court noted that the PUC regulates the intrastate shipment of natural gas and petroleum products through pipelines, though not the actual physical pipelines conveying those liquids. In regulating such pipeline transportation services, the court found that the PUC determined whether Sunoco's service and facilities were "unreasonable, unsafe, inadequate, insufficient, or unreasonably discriminatory, or otherwise in violation of the Public Utility Code. 66 Pa. C.S. §§ 701 (entitled 'Complaints'), 1505(a) (entitled 'Proper service and facilities established on complaint')."

See also: *Duquesne Light Co. v. Borough of Monroeville, 449 Pa. 573, 298 A.2d 252, 98 Pub. Util. Rep. 3d (PUR) 97 (1972).*

Case Note:

The Opponents had also alleged that the Township's duties to protect the public natural resources, as embodied under the Environmental Rights Amendment ("ERA") to the Pennsylvania Constitution, defeated preemption of the Township's 2014 Ordinance. The court rejected that argument, noting that it failed to address how the 2014 Ordinance impacted laws involving the regulation of public utilities or how the 2014 Ordinance furthered Township duties under the ERA or how the 2014 Ordinance related to conserving public natural resources, especially when the ME2 pipeline would be placed in or near the pre-existing ME1 pipeline right of way.

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Case Note:

The Opponents had further alleged that Sunoco's violation of the 2014 Ordinance was a violation of the Opponents' substantive due process rights because it rendered the zoning districts "irrational" and "unconstitutional." The court rejected this argument as "not viable" since the Opponents were not challenging a legislative enactment but rather Sunoco's decision not to comply with the 2014 Ordinance.

Standing—Homeowners' Associations challenge rezoning ordinance

City argues Associations lack standing to bring legal action because such action was not properly authorized under the Associations' corporate bylaws

Citation: *Willowmere Community Association, Inc. v. City of Charlotte, 809 S.E.2d 558 (N.C. 2018)*

NORTH CAROLINA (03/02/18)—This case addressed the issue of whether homeowners' associations had standing to bring an action challenging the rezoning of abutting properties. More specifically it addressed, as a matter of first impression (i.e., the first time North Carolina courts addressed the issue), whether homeowners' associations that failed to strictly comply with their corporate bylaws in deciding to initiate legal actions therefore lacked standing to bring the legal challenges.

The Background/Facts: Willowmere Community Association, Inc. ("Willowmere") and Nottingham Owners Association, Inc. ("Nottingham") (collectively, the "Associations") are non-profit corporations that represent homeowners in residential communities in the City of Charlotte (the "City"). In March 2014, the Associations instituted a legal action, challenging a City zoning ordinance that rezoned parcels of land to allow multifamily housing. The rezoned land abutted property owned by the Associations.

In response to the Associations' legal action, the City argued that the Associations lacked standing (i.e., the legal right to bring the action) because each association had failed to comply with various provisions in their corporate bylaws when their respective boards decided to initi-

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ate the litigation. The City pointed to evidence that neither Willowmere nor Nottingham explicitly authorized filing the legal action during a meeting with a quorum of directors present, either in person or by telephone.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the trial court granted summary judgment in favor of the City. The trial court agreed with the City that the Associations lacked standing because each had failed to comply with their corporate bylaws when bringing the lawsuit.

The Associations appealed, and the Court of Appeals affirmed.

The Associations again appealed.

DECISION: Judgment of Court of Appeals reversed, and matter remanded.

The Supreme Court of North Carolina held that the homeowners' Associations had standing to bring the legal action, which challenged a City ordinance that rezoned parcels abutting land owned by the Associations. As a matter of first impression (i.e., the first time addressing the legal issue), the court held that the Associations were not, in order to have standing, required to affirmatively plead, or prove, their compliance with their corporate bylaws and internal rules relating to their decision to initiate the action.

In so holding the court explained that the North Carolina Constitution confers standing on those who suffer an injury in their "lands, goods, person, or reputation." The court also explained that legal entities other than natural persons—such as associations—may also have standing if the association or one of its members suffers some immediate or threatened injury. Specifically, associations must meet certain elements to having standing: (1) "its members would otherwise have standing to sue in their own right"; (2) "the interests it seeks to protect are germane to the organization's purpose"; and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

Here, the court found that there was no dispute as to whether the Associations had met the elements of associational standing. Instead, the City had contended that by failing to follow their corporate bylaws, the Associations' boards of directors "had no authority to act on behalf of [the Associations] in filing and prosecuting this lawsuit."

The Supreme Court of North Carolina rejected the idea that a stranger to the Associations (i.e., here, the City) could assert that the Associations' failures to abide by their own bylaws necessitated dismissal of the Associations' legal complaint for lack of standing. Moreover, the court found no evidence that any member of either association opposed the association's prosecution of the lawsuit. Even if a

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member of one of the Associations disagreed with the decision to file suit, "the proper vehicle to challenge the association's failure to comply with its respective bylaws in making that decision [would be] a suit against the nonprofit corporation brought by the aggrieved member or members of the association or, in certain circumstances, a derivative action," said the court. Otherwise, held the court, there was no requirement to standing that the Associations affirmatively plead, or prove, their compliance with their corporate bylaws to bring the legal action.

Accordingly, the court concluded that "despite [the Associations'] failure to strictly comply with their respective bylaws and internal governance procedures in their decision to initiate this suit, they nonetheless "possess a 'sufficient stake in an otherwise justiciable controversy' to confer jurisdiction on the trial court to adjudicate this legal dispute."

See also: *Peninsula Property Owners Ass'n, Inc. v. Crescent Resources, LLC, 171 N.C. App. 89, 95-97, 614 S.E.2d 351 (2005).*

See also: *Lake Forest Master Community Ass'n, Inc. v. Orlando Lake Forest Joint Venture, 10 So. 3d 1187 (Fla. 5th DCA 2009) (concluding that a specific Florida statute requiring the approval of a majority of members of a homeowners' association entitled to vote before initiating any litigation involving amounts in controversy over $100,000 was for the protection of members and could not be asserted as an affirmative defense to suit by a non-member defendant), Orlando Lake Forest Joint Venture v. Lake Forest Master Community Ass'n, Inc., 23 So. 3d 1182 (Fla. 2009); Little Canada Charity Bingo Hall Ass'n v. Movers Warehouse, Inc., 498 N.W.2d 22, 24 (Minn. Ct. App. 1993) ("[A] third party has no power to challenge corporate action based on [a violation of the entity's bylaws].")*

Zoning News from Around the Nation

CALIFORNIA

State Senator Scott Wiener has introduced a bill—SB 827—which would "override city zoning restrictions to encourage housing development near transit hubs." Wiener and proponents of the bill maintain that it will "mitigate California's housing crisis and offset sprawl." Those opposed to the bill are concerned it will "relinquish local zoning authority to the state."

Source: *KQED*; www.kqed.org

HAWAII

The Hawaii County Council has failed to advance a bill that would have amended the zoning code to provide a 75-foot buffer zone between rooster farms and neighboring properties. Opponents of the bill reportedly argued that it would have infringed on rural lifestyles. Supporters of the bill were neighbors of large rooster farms who claimed their life and health were being impacted by the noise of the rooster farms.

Source: *US News*; *www.usnews.com*

OHIO

New Philadelphia is considering a proposed ordinance that would regulate wind turbines, including, among other things, by requiring a "one and half times the height setback" for wind turbines. The ordinance is reportedly aimed at protecting the public safety.

Source: *WKSU*; *http://wksu.org*

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Preemption/Marijuana—County ordinance bans the retail sale of marijuana

Marijuana retail license holder claims ordinance is preempted by state law legalizing and licensing marijuana sales

Citation: *Emerald Enterprises, LLC v. Clark County, 413 P.3d 92 (Wash. Ct. App. Div. 2 2018)*

Contributors

Corey E. Burnham-Howard

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WASHINGTON (03/13/18)—This case addressed the issue of whether a Washington municipality could lawfully ban the retail sale of marijuana, or whether such a ban was preempted by Washington law legalizing the sale of recreational marijuana and creating a regulatory state marijuana retail licensing system.

The Background/Facts: In November 2012, Washington voters approved an initiative legalizing recreational marijuana. In 2014, the state Legislature codified that initiative within Washington's Uniform Controlled Substances Act ("UCSA"). As amended, the UCSA "legalized the limited production, processing, and sale of recreational marijuana to persons twenty-one years and older." It also created a regulatory state licensing system through the Washington State Liquor and Cannabis Board (the "Board"). (See Former RCW 69.50.325-.369 (2014).) The Board then adopted rules governing marijuana sales and establishing the application requirements for marijuana retailer licenses. (See Former WAC 314-55-015 to - 050, -079, -081 (2014).)

In May 2014, Clark County (the "County") passed an ordinance (the "Ordinance"), which banned the retail sale of recreational marijuana within unincorporated Clark County.

Notwithstanding the Ordinance, Emerald Enterprises, LLC ("Emerald") applied to the Board for a retail license to sell marijuana in the unincorporated area of Clark County. The Board issued Emerald's license for retail sale of recreational marijuana. A year later, Emerald applied to the County for a building permit for "[g]eneral retail," and the County issued the building permit to Emerald. In December 2015, Emerald began selling marijuana in the County. When the County became aware of Emerald's activities, it ordered Emerald to cease all sales of marijuana and marijuana products as such activities were in violation of the Ordinance. The County also revoked Emerald's building permit.

Emerald appealed the County's enforcement actions to the County Hearing Examiner (the "Examiner"). The Examiner ruled in favor of the County, finding that Emerald sold marijuana in violation of the Ordinance, and had obtained its building permit based on misrepresentation.

Emerald appealed to the Superior Court, which affirmed the Examiner.

Emerald again appealed. On appeal, Emerald argued that the Ordinance violated article XI, Section 11 of the Washington Constitution because it "irreconcilably conflict[ed] with the UCSA." Article XI, section 11 provides: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." In addition, Emerald contended that the Ordinance was either expressly or impliedly preempted by the UCSA.

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DECISION: Judgment of Superior Court affirmed.

The Court of Appeals of Washington, Division 2, held that the County Ordinance was not preempted by the UCSA, and that the County retained its zoning authority to ban retail marijuana sales within unincorporated areas of Clark County.

In so holding, the court explained that, under article XI, section 11 of the Washington Constitution, counties could "make and enforce all regulations that do not conflict with state law." Thus, the court presumed that the County had the regulatory authority to enact the Ordinance, and that Ordinance was valid unless preempted. The court explained that the Ordinance would be preempted by the UCSA, and inconsistent with article XI, section 11, if the Ordinance either: "prohibit[ed] what the state law permit[ed]"; "thwart[ed] the legislative purpose of the statutory scheme"; or "exercise[d] power that the statutory scheme did not confer on local governments." The court found that the Ordinance did not conflict with the UCSA under any of those reasons.

The court found that the Ordinance did not prohibit what the UCSA permitted. The UCSA permitted the retail sale of marijuana, but did not grant retailers an affirmative right to sell marijuana, said the court. Moreover, the court found that nothing in the UCSA stated that a county could not prohibit retail recreational marijuana sales. The court further found that while the UCSA authorized the Board to designate the maximum number of retail marijuana sales licenses in each county, the UCSA did not set a minimum number. Moreover, the court noted that the Board's regulations explicitly provided that a marijuana retail license shall not be construed as "a license for, or an approval of, any violations . . . of zoning ordinances." (WAC 314-55-020(15).) In short, the court concluded that the UCSA did not create a right to engage in retail marijuana sales in the County (which was the activity prohibited by the Ordinance).

The Court also found that the Ordinance did not "thwart the legislative purpose" of the UCSA. The court found that the purpose of the UCSA was to "allow[ ] and regulate[ ] the sale of marijuana." Since there was no mandate under the UCSA to "maximize or encourage sales," the Ordinance's ban on marijuana sales did not frustrate such a mandate, concluded the court.

Moreover, the court found that subsequent amendments to the UCSA "strongly indicate[d] that the legislature intended to preserve the right of local governments to ban retail [marijuana] stores." Such amendments recognized that local jurisdictions might ban the retail sales of marijuana, and encouraged local governments to allow marijuana sales by providing a share of marijuana excise tax revenues to those local governments that allowed retail sales of marijuana. Thus the court found that, "[b]y expressly contemplating that local jurisdictions can 'prohibit

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the siting of any state licensed marijuana . . . retailer," the UCSA "acknowledge[d] that local governments retain zoning authority over retail locations."

In finding that, with the Ordinance, the County did not exercise unauthorized power, the court concluded that the UCSA did not specifically remove the County's exclusionary zoning authority. The court found that the regulatory powers the UCSA delegated to the Board did not include nor preclude local governments' zoning authority. Thus, the court concluded that "the Ordinance [did] not conflict with state marijuana laws by exercising authority delegated to the Board."

Finally, the court also concluded that the UCSA did not expressly or impliedly preempt the Ordinance. The court found that the only express preemption provided in the UCSA applied to criminal violations of the UCSA. Further, the court found that Emerald "fail[ed] to show that the UCSA impliedly strips the County of its ability to exercise police power through zoning regulation." Moreover, the court found that while the UCSA empowered the Board to "influence the location of marijuana retail outlets" through determining the maximum number of retail locations in a jurisdiction and having the "final say" in retail licensing, the UCSA did not give the Board authority to determine where a store could be located within a given jurisdiction. In sum, the court held that because state law did not explicitly or impliedly occupy the entire field of retail marijuana sales, the County retained its zoning authority.

See also: *Lawson v. City of Pasco, 168 Wash. 2d 675, 230 P.3d 1038 (2010) (finding a city ordinance was not preempted by Washington's Mobile Home Landlord Tenant Act).*

See also: *Weden v. San Juan County, 135 Wash. 2d 678, 958 P.2d 273 (1998) (finding a local ordinance prohibiting the operation of personal watercraft on all marine waters was not preempted by state vessel registration laws).*

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Nonconforming Use/Marijuana—City orders medical marijuana collective operation to cease as a use not permitted under city code

Collective argues its use is permitted as an allowed "medical office" under the code

Citation: *J. Arthur Properties, II, LLC v. City of San Jose, 230 Cal. Rptr. 3d 365 (Cal. App. 6th Dist. 2018)*

CALIFORNIA (03/19/18)—This case addressed the issue of whether a medical marijuana collective was a "medical office" as permitted in the relevant zoning district by the municipal zoning ordinance.

The Background/Facts: J. Arthur Properties, II, LLC owned property in a Commercial Office zoning district in the City of San Jose (the "City"). SV Care leased that property, and since 2010 operated a medical marijuana collective at the property. In 2010, the City's Municipal Code (the "Code") did not list medical marijuana collective or any other marijuana-specific uses in the table of permitted uses in the Commercial Office zone. "Medical offices," however, were on the list of permitted uses in the Commercial Office zone. Starting in 2014, "medical marijuana collective" was allowed as a restricted use in certain industrial zoning areas in the City, however, it still was not permitted in the Commercial Office zone.

In 2014, J. Arthur Properties, II, LLC, and SV Care (collectively, the "Plaintiffs") received from the City a compliance order stating that their medical marijuana collective was never allowed in the Commercial Office zone and was in violation of the Code. The Plaintiffs disputed the compliance order to a City hearing officer. They argued that their medical marijuana collective was a legal nonconforming use because it met the definition of "medical office," which was a permissible use when the collective opened.

The hearing officer upheld the compliance order.

The Plaintiffs then appealed to the City's Appeals Hearing Board, which also upheld the compliance order.

The Plaintiffs then petitioned the trial court. Again, they argued that the medical marijuana collective was a legal nonconforming use because it met the definition of a "medical office," which, under the Code, was permitted in the Commercial Office zone at the time the col-

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lective opened. They also argued that, in any case, the City should be estopped from enforcing the Code against them because the City had collected a marijuana business tax from the Plaintiffs.

The trial court denied the Plaintiffs' petition.

The Plaintiffs appealed.

DECISION: Judgment of Superior Court affirmed.

The Court of Appeal, Sixth District, California, upheld the City's compliance order against the Plaintiffs, concluding that the Plaintiffs' medical marijuana collective was not a "medical office" as permitted by the Code in the Commercial Office zone and was thus not a permitted use in the Commercial Zone. The court also concluded that the City was not estopped from enforcing the Code against the Plaintiffs.

In determining whether the medical marijuana collective qualified as a "medical office," as the Plaintiffs had argued, the court looked to the language of the City Code. The Code defined a medical office as "offices of doctors, dentists, chiropractors, physical therapists, acupuncturists, optometrists and other similar health related occupations, where patients visit on a daily basis." The Plaintiffs had argued that a medical marijuana collective was a "medical office" because it was a "health-related occupation," and because "medical marijuana collectives provide a medical and health-related service." The City, on the other hand, had argued that, unlike the specifically enumerated professions in the Code's definition of "medical office," a medical marijuana collective had neither physicians nor patients.

Acknowledging that the definition of "medical office" was "reasonably susceptible of both proffered interpretations," the court agreed with the City that a medical marijuana collective is not a "medical office" under the Municipal Code. The court found that a medical marijuana collective did not fall within any of the specifically listed occupations in the Code's definition of "medical office." The court also concluded that a medical marijuana collective was not a "similar health related occupation" to qualify as a "medical office" under the Code given that medical marijuana collectives do not have doctors or similar health care professionals on site treating patients as did all the examples of "medical offices" listed in the Code. Moreover, the court noted that none of the listed occupations in the Code's "medical office" definition provided a good or service that was illegal under federal law—as was medical marijuana collectives. (See 21 U.S.C.A. §§ 812(b)-(c), 841-844.) Further, noting its inclination to give deference to the City on its interpretation of its Code, the court found that the City "consistently interpreted the medical office category to exclude medical marijuana collectives." Thus, the court concluded that because the Plaintiffs' medical marijuana collective was not a permitted ("medical office") use when it opened, it could not be a legal nonconforming use now.

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Also addressing the Plaintiffs' equitable estoppel argument, the court explained that to trigger the doctrine of equitable estoppel, the Plaintiffs had to show: "(1) the City knew that medical marijuana collectives were an impermissible use; (2) the City intended, by delaying enforcement and collecting marijuana business taxes, to induce [the P]laintiffs into operating a medical marijuana collective (or acted in a manner entitling [the P]laintiffs to perceive such an intent); (3) [the P]laintiffs did not know that medical marijuana collectives were unauthorized; (4) [the P]laintiffs detrimentally relied on the City's conduct; and (5) the injustice that would result from a failure to estop the City [was] so great that it outweigh[ed] the effect the estoppel would have on public policy or the public interest."

Here, the court found that the Plaintiffs failed to make such a showing. First, the court concluded that the Plaintiffs' reliance on delayed enforcement and on payment of taxes was not reasonable. The court found that the Plaintiffs had been on notice from a City inspector since 2010 that their medical marijuana collective might not be a permissible land use. The fact that it took the City multiple years to enforce the law, did not estop the City from subsequently enforcing it, said the court. Moreover, the court concluded that in light of express disclaimers in the Municipal Code and on the medical marijuana business tax certificate, the Plaintiffs' reliance on paying required business taxes as authorization to operate a medical marijuana collective was "unreasonable as a matter of law." Finally, the court found that enforcement of the Code against the Plaintiffs—resulting in an inability to operate a medical marijuana collective at the property in the Commercial Office zone—would only result in "minimal" economic hardships of relocating the collective and reletting the property. Such "minimal hardship" was outweighed by the public policy interests of eliminating nonconforming uses and of maintaining City control over the location of medical marijuana collectives, and thus equitable estoppel was not warranted, concluded the court.

See also: *Feduniak v. California Coastal Com'n, 148 Cal. App. 4th 1346, 56 Cal. Rptr. 3d 591 (6th Dist. 2007).*

See also: *Schafer v. City of Los Angeles, 237 Cal. App. 4th 1250, 188 Cal. Rptr. 3d 655 (2d Dist. 2015).*

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Nonconforming Use—City claims addition of structures and expansion of homes within mobile home park amounts to an illegal expansion of a nonconforming use

Park owner argues nature and character of use have not changed and thus his vested right in the nonconforming use remains

Citation: *City of Des Moines v. Ogden, 2018 WL 1357471 (Iowa 2018)*

IOWA (03/16/18)—This case addressed the issue of whether intensification of a mobile home park use, through addition of structures or expansion of homes within the park, amounted to an illegal expansion of an authorized nonconforming use.

The Background/Facts: Mark Ogden owned property (the "Property") in Des Moines (the "City") on which he operated a mobile home park known as Oak Hill Mobile Home Park ("Oak Hill"). The history of the use of the Property was unclear, but from approximately 1941 to 1947, the Property was used as a tourist camp. Between 1947 and 1955, the Property became Oak Hill Mobile Home Park. In 1955, a prior owner of Oak Hill obtained from the City a certificate of occupancy that allowed for the operation of the mobile home park as a nonconforming use. From 1955 until 2014, the City took no zoning action against Oak Hill. However, in 2014, a City zoning administrator informed Ogden of "numerous violations of municipal zoning codes" on the Property. Among other things, the zoning administrator cited numerous setback violations, lot size violations, and failure to maintain an unobstructed driveway and a specific feet of clearance between trailers.

After receiving the enforcement notice, Ogden failed to respond to the City's directive that he bring the Property "into compliance or enter into a compliance plan." Thereafter, the City brought a legal action against Ogden. The City asked the court to order Ogden to cease use of the Property as a mobile home park.

Ultimately, the district court held that discontinuance of the mobile home park nonconforming use was "necessary for the safety of life or property" and that "the changes to the [P]roperty were unlawful expansions of the existing nonconforming use." In so holding, the court

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referred to a 1963 aerial photograph of Oak Hill, and noted it was now far more congested, with less open space, and filled with "the detritus of life." The court cited the 1955 occupancy permit, which stated that discontinuance of the permit was allowed "if the safety of life or property is threatened." And, the court noted that the "current use of the [P]roperty as a mobile home park 'has intensified beyond acceptable limitations' because the conditions 'pose a real threat in the event of an emergency.' " The district court issued an order enjoining the continued nonconforming use of the Property as a mobile home park.

Ogden appealed. The court of appeals affirmed the district court's order, and concluded that "the current status of the mobile home park exceeded the legal nonconforming use as it existed in 1955 and that it posed a threat to the safety of people or property at the mobile home park."

Ogden again appealed.

DECISION: Judgment of Court of Appeals vacated, reversed, and matter remanded.

Vacating and reversing the lower court holdings, the Supreme Court of Iowa held: (1) that the City had failed to show that the discontinuance of the nonconforming use under the 1955 certificate of occupancy was necessary for the safety of life or property; and (2) as a matter of first impression (i.e., the first time the court had addressed the specific issue), that intensification of a mobile home park use due to the addition of structures or the expansion of homes within the park did not amount to an illegal expansion of the authorized nonconforming use.

In so holding, the court first explained the law on nonconforming use. The court said that a nonconforming use is one "that lawfully existed prior to the time a zoning ordinance was enacted or changed, and continues after the enactment of the ordinance even though the use fails to comply with the restrictions of the ordinance." A lawfully existing prior use of the property creates a vested right in the continuation of the nonconforming use "unless the nonconforming use is legally abandoned, enlarged, or extended," explained the court. The court noted that the City's Municipal Code specifically provided for discontinuation of a nonconforming use if "necessary for the safety of life or property."

Here, the court could not conclude that the City had shown that the discontinuance of the nonconforming use under the 1955 certificate of occupancy was necessary for the safety of life or property. The court found no evidence in the record that demonstrated the existence of a significant safety issue. Oak Hill had not been cited for any fire safety code violations or for any zoning violations until the 2014 notice.

The court also found that the City had failed to meet its burden of proving that Ogden had so substantially changed the character and intensity of the mobile home park so as to have lost his vested right to

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the legal nonconforming use. The City had argued that Ogden had exceeded the established nonconforming use of the Property because the use of the mobile home park had intensified in terms of the numbers and location of structures attached to mobile homes. The court disagreed. The court explained that "intensification of a nonconforming use is permissible so long as the nature and character of the use is unchanged and substantially the same facilities are used." Here, the court found that the City failed to present evidence demonstrating that the zoning violations at Oak Hill had been "expanded to the point where the established nonconforming use is 'substantially or entirely different from the original use.' " The court observed that Oak Hill had not changed in size or in its form of use as a mobile home park. The court found that the number and location of the mobile homes was roughly the same in 2014, as it was in 1963 (which was the date of the first aerial photograph of the Property on record). Further, the court found that the additions to the structures of the mobile homes, as well as the "detritus of life" noted by the district court, had "not substantially changed the nature and character of Ogden's use of the [P]roperty as a mobile home park." Rather, the court found that "steady increase in the additions to the mobile home structures and other objects found on the [P]roperty represents a marginal change that falls within the degree of latitude that the law affords to property owners in their nonconforming use." "Ultimately," concluded the court, "Oak Hill [was] being used as a mobile home park in a manner that [was] not " 'substantially or entirely different' from its original use" as a mobile home park when the City issued the 1955 certificate of occupancy allowing for its nonconforming use. Accordingly, the court concluded that "the City did not prove that Ogden had lost the vested right he had in the operation of Oak Hill Mobile Home Park as a legal nonconforming use."

See also: *City of Central City v. Knowlton, 265 N.W.2d 749 (Iowa 1978).*

See also: *Worthington v. Everson, 10 Ohio App. 2d 125, 39 Ohio Op. 2d 234, 226 N.E.2d 570 (9th Dist. Medina County 1967).*

Case Note:

In his appeal, Ogden had also claimed that the actions of the City amounted to an unconstitutional regulatory taking. The Supreme Court of Iowa held that Ogden had waived his unconstitutional takings claim by failing to preserve it.

Case Note:

In its decision, the court cited case law from other jurisdictions that had held that replacing existing mobile homes with larger mobile homes results in an unlawful expansion of a nonconforming use. However, the court distinguished

this case from those cases, noting that, in those cases, the local zoning officers and regulations treated each mobile home within the mobile home park as a separate structure with separate compliance issues, while in this case the City had argued that Oak Hill in its entirety as a mobile home park had exceeded its nonconforming use and did not distinguish between the mobile home park in its entirety and each individual mobile home for enforcement purposes. (See e.g., Wiltzius v. Zoning Bd. of Appeals of Town of New Milford, 106 Conn. App. 1, 940 A.2d 892, 910 (2008); Kosciusko County Bd. of Zoning Appeals v. Smith, 724 N.E.2d 279, 281 (Ind. Ct. App. 2000).)

Zoning News from Around the Nation

MASSACHUSETTS

In early March, the Massachusetts Cannabis Control Commission finalized state regulations governing retail, recreational marijuana. Recreational marijuana stores will already be able to start applying for retail licenses starting April 1, and licensed venues will be able to open starting July 1.

Source: *MassLive.com; www.masslive.com*

In early March, the Northampton City Council gave final approval to zoning legislation related to retail marijuana. Among other things, the zoning ordinances: prohibit marijuana retailers from within 200 feet of a pre-existing public or private K-12 school; sanction outdoor cultivation of marijuana with site plan approval; provide distinctions in the city's code between medical and recreational marijuana and marijuana production; specifies limitations on where retail dispensaries can be located.

Source: *MassLive.com; www.masslive.com*

OHIO

Some residents of the City of Hillsboro are reportedly concerned about proposed zoning legislation, which would limit the number of pets per household. The proposed legislation would specifically limit each household to "no more than four dogs or four cats, or a combination of dogs and cats as not to total more than four . . . ." The zoning legislation would also limit households to "a maximum of four chicken hens or four rabbits, or a combination of both not total more than four" on each parcel of property.

Source: *The Highland County Press; http://highlandcountypress.com*

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Signs/Variances—City denies church's variance request for digital lettering on sign

Church argues variance is warranted due to "practical difficulties" of carrying out church use without digital sign lettering

Citation: *Antioch Community Church v. Board of Zoning Adjustment of City of Kansas City, 2018 WL 1599776 (Mo. 2018)*

Contributors

Corey E. Burnham-Howard

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MISSOURI (04/03/18)—This case addressed the issues of whether, with regard to a church's request for a nonuse zoning variance for a digital display on a monument sign in front of the church building: (a) the presence of digital lettering on the monument sign changed the sign type from monument to digital such that the city's board of zoning adjustment lacked authority under the zoning code to grant the church's request for a nonuse variance; and (b) the church showed "practical difficulties" in carrying out the church's use of the property without a nonuse variance for digital lettering on its sign.

The Background/Facts: Antioch Community Church (the "Church") was located in a residential zone in the City of Kansas City (the "City"). For more than 60 years, the Church had a "monument" type sign with a manual message display with individual removable hanging letters. In 2010, at a cost of $11,426, the Church upgraded its monument sign to include a digital display. The Church sought neither a permit nor a variance from the City prior to its 2010 installation of the digital lettering on its monument sign.

Approximately one year after the Church added the digital display to the monument sign, the City issued a citation to the Church. The City maintained that the Church's digital lettering was violating the City zoning code—specifically Section 88-445-06-A-4(a), which prohibited "any form of digital or electronic display" on monument signs in residential areas.

The Church appealed the citation to the City's Board of Zoning Adjustment ("BZA"). However, before the appeal could be heard, the Church filed an application with the BZA for a variance "to allow [a] digital display on [the] existing monument sign."

The BZA rejected the Church's request for a variance because it determined the addition of a digital display on the monument sign changed the "type" of sign from a monument sign to a digital sign. Section 88-445-12 of the City zoning code provided that the BZA could "grant variances to the requirements for signs, except as to type and number." The BZA further provided that even if the addition of the digital display did not change the sign "type," it denied the variance because the Church "failed to establish [the] undue hardship or practical difficulty" necessary for granting a variance.

Once the variance request was denied, the BZA ruled on the Church's appeal of its zoning violation citation, finding against the Church.

The Church then filed an action with the circuit court, challenging both the BZA's denial of the variance request and the BZA's decision on the appeal of the citation.

The circuit court ruled in the Church's favor. The court found: (1) that the addition of digital lettering was not a change in sign type and therefore the BZA did have the authority to grant the variance; and (2)

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the Church "adequately established the existence of 'practical difficulties' so the denial of the variance was not supported by competent and substantial evidence."

The City appealed.

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

The Supreme Court of Missouri, en banc, first agreed with the Church and the circuit court that the addition of digital lettering was not a change in sign type such that the BZA did have the authority to grant the variance. In so holding, the court looked at the City zoning code's definition of "monument sign." The code defined a "monument sign" as a "sign placed upon a base that rests upon the ground where the width of the base of the sign is a minimum of 75 percent of the width of the longest part of the sign." The court found that the "Church's sign fit within this definition of 'monument sign' both before and after the change in the lettering from manual to digital," since the definition did not include any language about what kind of lettering was required on a monument sign. Moreover, the court found that a different section of the City zoning code acknowledged the existence of "digital monument signs," permitting them in non-residential zoning districts. Since the sign "type" remained the same despite the change in lettering display, the court concluded that the BZA did have authority to grant the variance to the Church.

However, the court also concluded that the BZA properly denied the Church's requested variance because the Church failed to show "practical difficulties" in carrying out the C Church's use of the property as a church without the nonuse variance for the digital lettering.

Again, since the City zoning code (section 88-445-06-A-4(a)) prohibited "any form of digital or electronic display" on monument signs in residential areas, the Church needed a variance to maintain its sign. Missouri statutory law (RSMo § 89.090.1(3)), noted the court, provides that boards of adjustment can grant variances when: "there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance." Citing prior case law, the court noted that for "nonuse" variances, such as that sought by the Church here, the applicant must show that there are "practical difficulties" in carrying out the permitted use of the property because of conflicts with the zoning requirement, thus necessitating the nonuse variance. In other words, here, the Church had to show that it had "practical difficulties" in using its property as a church without a variance allowing it to have digital lettering on its monument sign.

The Church attempted to make such a showing. It argued that: (1) the lack of a digital sign impaired the Church's ability to "meaningfully convey its non-commercial religious message" because the Church's

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aging membership found it "extremely difficult" to go outside and manually change the lettering on the old non-digital sign; (2) the larger digital letters allowed the Church to more clearly convey its message and help it recruit new church members; and (3) it showed "economic hardship and 'unique factual circumstances' " in that the Church spent more than $11,000 on the digital display because it knew another church in a different city had no issues with such a display upgrade.

The court rejected all of the Church's arguments, finding they did not amount to "practical difficulties" in carrying out the church use. The court explained that there were "guidelines" to utilize in considering applications for nonuse variance, which boards of zoning adjustment should look to in determining whether practical difficulties have been shown:

> "(1) how substantial the variation is in relation to the requirement, . . . (3) whether a substantial change will be produced in the character of the neighborhood or a substantial detriment to adjoining properties created, (4) whether the difficulty can be obviated by some method, feasible for the applicant to pursue, other than a variance, and (5) whether in view of the manner in which the difficulty arose and considering all of the above factors the interests of justice will be served by allowing the variance."

Here, the court found that the Church's variance requested from the prohibition on digital sign displays in residential zoning districts would not meet the various criteria. The court found the Church's offered reasons for the variance explained the Church's "preference" for the digital sign, but not a "practical difficulty" in carrying out the Church's use of the property as a church. Rejecting the Church's arguments as to "practical difficulty," the court said that the Church: (1) could utilize a younger church member or hire someone to change the non-digital lettering on the sign; (2) had operated since 1853 without digital lettering; and (3) could not justify the variance because of the unfortunate waste of money caused by the Church's failure to make the expenditure without checking on zoning requirements.

See also: *Matthew v. Smith, 707 S.W.2d 411 (Mo. 1986).*

See also: *Slate v. Boone County Bd. of Adjustment, 810 S.W.2d 361 (Mo. Ct. App. W.D. 1991).*

Case Note:

On appeal, the Church alternatively had asked the court to hold that the portion of the City's zoning code prohibiting digital monument signs in residential zones violated the First Amendment by favoring commercial speech over non-commercial speech. The court found that the Church had failed to preserve that claim for appeal. In any case, the court viewed this argument of the Church's as being that: "the zoning code's prohibition against digital signs in residential areas has a disparate impact on churches because the zon-

ing code does not allow churches to obtain variances allowing them to have a digital display." The court noted that it had found the Church was not barred from obtaining a variance if it met the requirements for a variance. Rather, "[t]he Church simply failed to meet those requirements." Thus, the court concluded: "[t]he Church does not and cannot argue the ordinance was unconstitutional when the reason for denial of the variance was its own failure of proof."

Zoning Authority—County land use regulation prohibits fractional ownership of campgrounds

Campground owner contends regulation exceeds county's zoning authority

Citation: *Board of County Commissioners of Teton County v. Mackay Investments, LLC, 2018 WY 34, 413 P.3d 1120 (Wyo. 2018)*

WYOMING (03/28/18)—This case addressed the issue of whether a county zoning regulation prohibiting fractional ownership of campgrounds exceeded the county's zoning authority.

The Background/Facts: Mackay Investments, LLC ("Mackay") owned and operated two campgrounds in Teton County (the "County"). Pursuant to a settlement agreement between Mackay and the County, as well as a County Land Development Regulation aimed at promoting tourism, long-term camping was prohibited at both of Mackay's campgrounds.

In 2015, Mackay transferred undivided tenant in common fee ownership interests to 21 separate entities at each of its campgrounds. Mackay retained an undivided tenant in common fee ownership interest in each of the campgrounds. Thus, each of the campgrounds was then owned by 22 separate entities as undivided tenants in common or as tenants in common with an undivided interest in the whole.

In 2016, the County sent Mackay a Notice of Violation, asserting that tenant in common ownership of the campgrounds violated a section of the county Land Development Regulations that prohibited fractional ownership of campgrounds.

Mackay responded by filing a declaratory judgment action in the district court. Mackay asked the district court to find that the Land Development Regulation prohibiting fractional ownership of camp-

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grounds exceeded the County's regulatory zoning authority and was unenforceable. Mackay argued that the County only had authority to regulate use of land, and that the County had failed to show how regulation of the transfer of an ownership interest in the campgrounds affected use of land.

The County, on the other hand, asserted that its regulation prohibiting fractional ownership of campgrounds was "directly related to use . . . of the land encompassing the campgrounds."

Finding there were no issues of material fact in dispute, and deciding the matter on the law alone, the district court granted summary judgment in favor of Mackay. The court agreed with Mackay that the regulation prohibiting fractional ownership of campgrounds was unenforceable because it was beyond the County's zoning authority.

The County appealed.

DECISION: Judgment of district court affirmed.

Agreeing with Mackay and the district court, the Supreme Court of Wyoming held that the County Land Development Regulation prohibiting fractional ownership of campgrounds exceeded the County's zoning authority.

In so holding, the court explained that, pursuant to Wyoming statutory law (Wyo. Stat. Ann. § 18-5-201), the County's "general zoning authority" was: "to promote the public health, safety, morals and general welfare of the county" by regulating and restricting "the use, condition of use or occupancy of lands for residence, recreation, agriculture, industry, commerce, public use and other purposes in the unincorporated area of the county." Thus, determined the court, the County could regulate the "use" and "occupancy" of lands, but was not authorized to regulate the ownership of lands. Accordingly, said the court, a county's zoning authority does not include the right to regulate land ownership absent a showing that a change in ownership will result in a change in use.

The County had argued that the disputed regulation of campground fractional ownership was intended to ensure that camping spaces were available for visiting tourists and aimed for an "increased turnover of campsites," and was therefore a regulation on the use of campgrounds and a valid exercise of the its zoning authority.

Reviewing the plain language of the regulation prohibiting fractional ownership of campgrounds, the court disagreed. The court noted that the new tenant in common owners, under their transaction agreements with Mackay, were subject to exactly the same time limitations on camp site occupancy as Mackay was before the transactions. The court found nothing in the disputed regulation that altered the length of occupancy or affected the rate of turnover at the two campgrounds. The regulation

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prohibiting fractional ownership did not control the use of the campsites or have any impact on the use of the land. It controlled only the ownership of the land, not its use, found the court. Accordingly, the County regulation prohibiting fractional ownership of campgrounds was beyond the County's zoning authority and unenforceable, concluded the court.

Limitations Period/Time for Proceedings—County contends wireless communication provider's legal challenge to permit denial is outside of the Telecommunication Act's statute of limitations period, and therefore time barred

Parties dispute when "final action" occurs in zoning decisions, triggering Act's 30-day clock

Citation: *Athens Cellular, Inc. v. Oconee County, Georgia, 886 F.3d 1094 (11th Cir. 2018)*

The Eleventh Circuit has jurisdiction over Alabama, Florida, and Georgia.

ELEVENTH CIRCUIT (GEORGIA) (04/2/18)—This case addressed the issue of whether a telecommunications provider, which was denied a special use permit by a county board, met the 30-day statutory limitations period of the Telecommunications Act of 1996 (the "TCA") to timely appeal the county board's final action. The case addressed how to assess when the TCA's statute of limitations period begins to run.

The Background/Facts: In May 2014, Athens Cellular, Inc., doing business as Verizon Wireless, ("Verizon") submitted an application to the Planning Department of Oconee County (the "County") for a Special Use Permit (the "Permit") to construct a cellular communications tower that would "enhance its wireless service." Eventually, at its August 5, 2014 meeting, the County Board of Commissioners (the "Board") denied the Permit. That day, the Commissioners signed a document denying the Permit (the "Document"). On August 7, the Doc-

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ument was placed in the County's Ordinances and Resolutions books, according to "customary procedure." Then, on September 2, 2014, at the Board's next regular monthly meeting, the Board approved the minutes of the August 5 meeting at which it had voted on Verizon's application.

On September 5, 2014, Verizon sought a copy of the August 5 meeting minutes, which it found on the County website. The meeting minutes referred to the Document denying the Permit. Verizon had to submit an Open Records Request to obtain a copy of the Document, and received a copy of the Document on September 10.

On September 24, 2014, Verizon filed a legal action in court, challenging the denial of the Permit. Verizon argued that the Board's decision had the effect of prohibiting its provision of personal wireless services, in violation of § 332(c)(7)(B)(i)(II) of the Telecommunications Act of 1996 (the "TCA").

The TCA provides certain federal substantive and procedural limitations on the local permitting process for the construction of cellular communications towers "in order to facilitate broader extension of wireless services to the American people." Section 332(c)(7)(B)(i)(II) provides that a "local government . . . shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time . . . , taking into account the nature and scope of such request." (47 U.S.C.A. § 332(c)(7)(B)(ii).) It also requires that "[a]ny decision . . . to deny a request [for such authorization] shall be in writing and supported by substantial evidence." (47 U.S.C.A. § 332(c)(7)(B)(iii).)

Here, Verizon argued that the Board's decision to deny the Permit was "not supported by substantial evidence, as required by § 332(c)(7)(B)(iii)." Verizon asked the court to issue an injunction requiring the Board to issue the Permit.

The County responded to Verizon's action, arguing it was untimely and therefore time-barred under the TCA. Section 332(c)(7)(B)(v) of the TCA requires that "[a]ny person adversely affected by any final action by a State or local government . . . that is inconsistent with [§ 332(c)(7)(B)'s limitations] may, within 30 days after such action . . . , commence an action in any court of competent jurisdiction." (47 U.S.C.A. § 332(c)(7)(B)(v).) The County argued that Verizon failed to file the lawsuit within the TCA's 30-day limitations period. Verizon contended that the 30-day limitations period began to run on August 7, 2014, when the County Clerk (the "Clerk") entered the Document evidencing the Board's August 5 vote in the County's Ordinances and Resolutions books "pursuant to custom."

The District Court agreed with the County. It dismissed Verizon's action as time-barred.

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Verizon appealed. On appeal, Verizon contended that the TCA's statute of limitations began to run after September 2, 2014, when the Board formally approved the minutes of the August 5 meeting at which it had voted to deny the Permit.

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

Agreeing with Verizon, the United States Court of Appeals, Eleventh Circuit, held that the TCA's 30-day statute of limitations period for challenging the Board's denial of Verizon's Permit did not begin to run until the denial became a "final action"—which occurred on September 2, 2014, when the Board approved the minutes of the August 5 meeting at which the Permit was denied.

In so holding, the Eleventh Circuit looked to the TCA, Georgia law, and the County Code for their guidance on when a local permitting decision becomes a "final action"—thus starting the 30-day clock under the TCA. The court said that "[o]nly when an applicant receives sufficient notice does [a local board's] decision become 'final,' and only then can the thirty-day [TCA] clock begin to run." The court found that the TCA provided "no express answer" as to when an action is "final" and the 30-day clock begins. Still, the court determined that although Congress "did not explicitly instruct local governments to provide aggrieved parties with 'actual notice' of the issuance of their final permitting decisions and where the decision might be found, it could not have intended that aggrieved parties receive no notice at all, because that would effectively deprive the parties of their right to judicial review under [the TCA] 47 U.S.C.A. 332(c)(7)(B)(v)." Looking further, the Eleventh Circuit noted that the United States Supreme Court had defined "final action" under the TCA as "the issuance of the written notice of denial," thus signifying that the high Court understands the TCA to require "notice." Moreover, the Eleventh Circuit noted that the United States Supreme Court had further enumerated that for agency action to become final, two conditions must be met: "First, the action must mark the consummation of the agency's decision making process—it must not be of a merely tentative . . . nature[;] [a]nd second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow."

Next, consulting Georgia law and the County Code, the court concluded that Georgia's Open Meetings Act dictated the procedures for "final action" on zoning decisions—thus providing "constructive notice" to zoning applicants (such as Verizon, here) as to when an application denial would be "final." Georgia's Open Meeting Act required: a written summary of "subjects acted on" at meetings; minutes of the meeting to be prepared and "promptly recorded"; a vote on whether to approve those minutes at the board's "next regular meet-

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ing"; and such approved meeting minutes to be made "open to public inspection, but in no case later an immediately following [the board's] next regular meeting." (See O.C.G.A. §§ 50-14-1(e)(2)(A) and 50-14-1-(e)(2)(B).)

Applying Georgia's Open Meeting Act's procedural requirements to the case at hand, the Eleventh Circuit found that the Board had "plenary power over the August 5 minutes: it could approve the minutes, revise them, or postpone its approval decision until the next month's meeting in October." As it turned out, at its September 2, 2014 meeting, the Board approved the August 5 minutes in full. This, concluded the court, was when the Board's denial of the Verizon's Permit became a "final action," starting the TCA's 30-day statute of limitations period. In other words, it was at the September 2 meeting that the Board approved the August 5 meeting minutes and thus "the Board's 'decision-making process' was . . . consummated, and the relevant legal consequences under the TCA [flowed]." "Verizon's action, filed on September 24, was therefore timely," concluded the court. Accordingly, the District Court erred in dismissing Verizon's case.

See also: *T-Mobile South, LLC v. City of Roswell, Ga., 135 S. Ct. 808, 190 L. Ed. 2d 679 (2015).*

See also: *Bennett v. Spear, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281, 44 Env't. Rep. Cas. (BNA) 1161, 27 Envtl. L. Rep. 20824 (1997).*

Zoning News from Around the Nation

CALIFORNIA

In early April 2018, amendments were made to the housing transit bill—Senate Bill 827—which would allow for construction of taller residential buildings near public transportation stations. Among the amendments: the "maximum height of buildings that could be built under the bill has been reduced to five stories from eight"; and the effective date of the bill, should it become law, would be 2012 instead of 2019. The bill was expected to go before its first committee hearing on April 17.

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

PENNSYLVANIA

In early April, the Philadelphia City Council announced a "package of affordable housing bills," which includes new "inclusionary zoning

bonuses that would allow developers in many zoning districts to build denser and taller buildings if they provide affordable housing."

Source: *WhyY; http://planphilly.com*

LOUISIANA

State Senators have approved legislation—Senate Bill 462— which asserts "state authority over local zoning efforts to create affordable housing." Specifically, Senate Bill 462 "would forbid municipal and parish governments from requiring developers to set aside a certain number of low income units in order to receive building permits for apartment, condo, single family and other housing projects." Notably, the bill would reportedly "replace the term 'inclusionary zoning' with 'voluntary economic incentive policies,' which would circumvent the usual way local governments create more affordable housing . . . ."

Source: *The Advocate; www.theadvocate.com*

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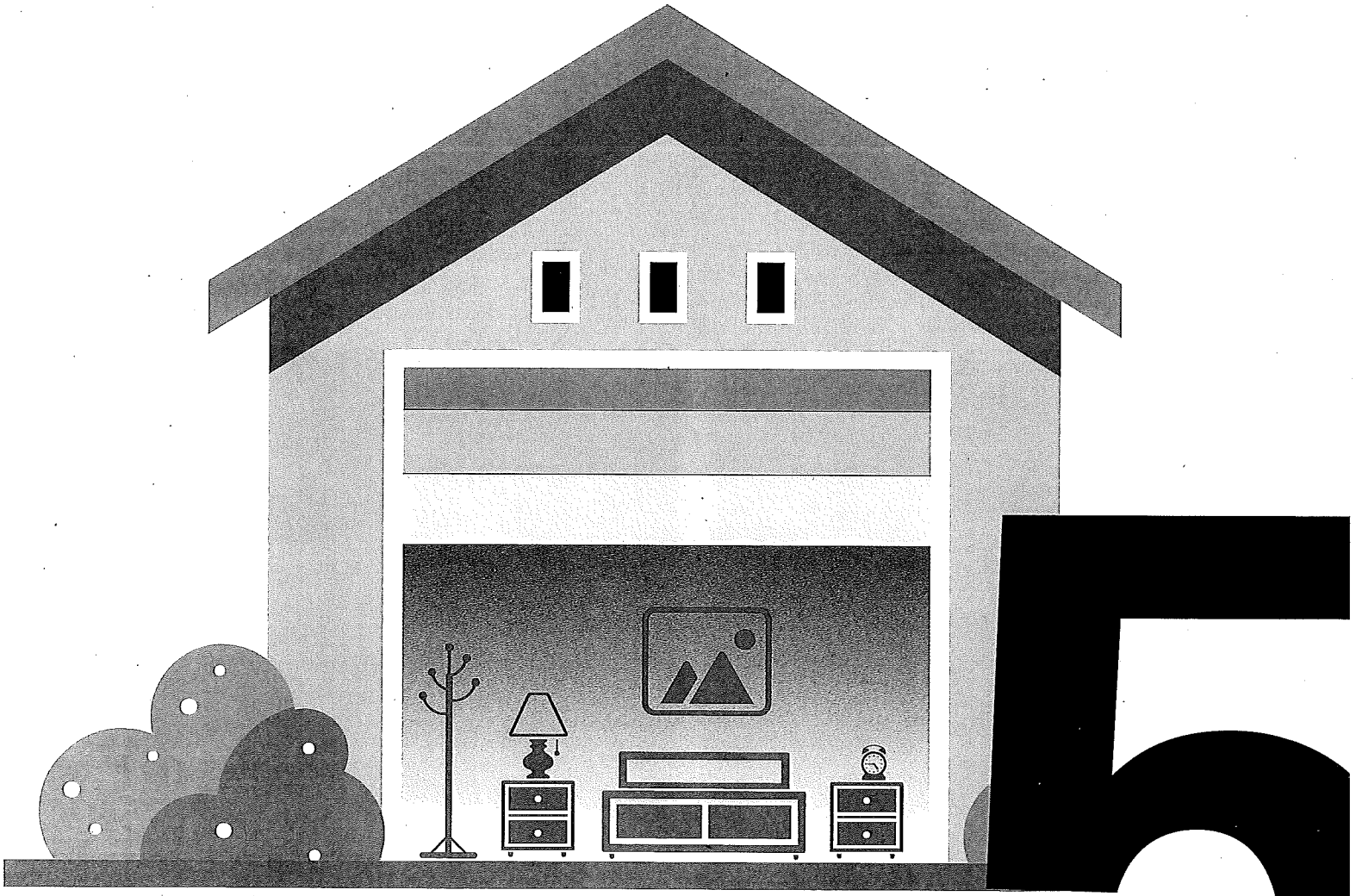
ZONING PRACTICE MAY 2018

AMERICAN PLANNING ASSOCIATION

ISSUE NUMBER 5

PRACTICE GARAGE APARTMENTS



5

Zoning to Promote Garage Apartments

By Anne Brown, Vinit Mukhija, and Donald Shoup, FAICP

American cities have a large supply of garages that could be converted into affordable apartments, but off-street parking requirements prevent converting most of these garages into housing for people.

Converted garages in single-family neighborhoods are variously called second units, accessory dwelling units, garage apartments, granny flats, and backyard cottages. To convert a garage into an apartment, off-street parking requirements typically force a home owner to replace the two garage parking spaces with two new off-street parking spaces, plus an additional off-street parking space for the new apartment. These parking requirements make it almost impossible—financially and physically—for most home owners to legally convert garages into housing.

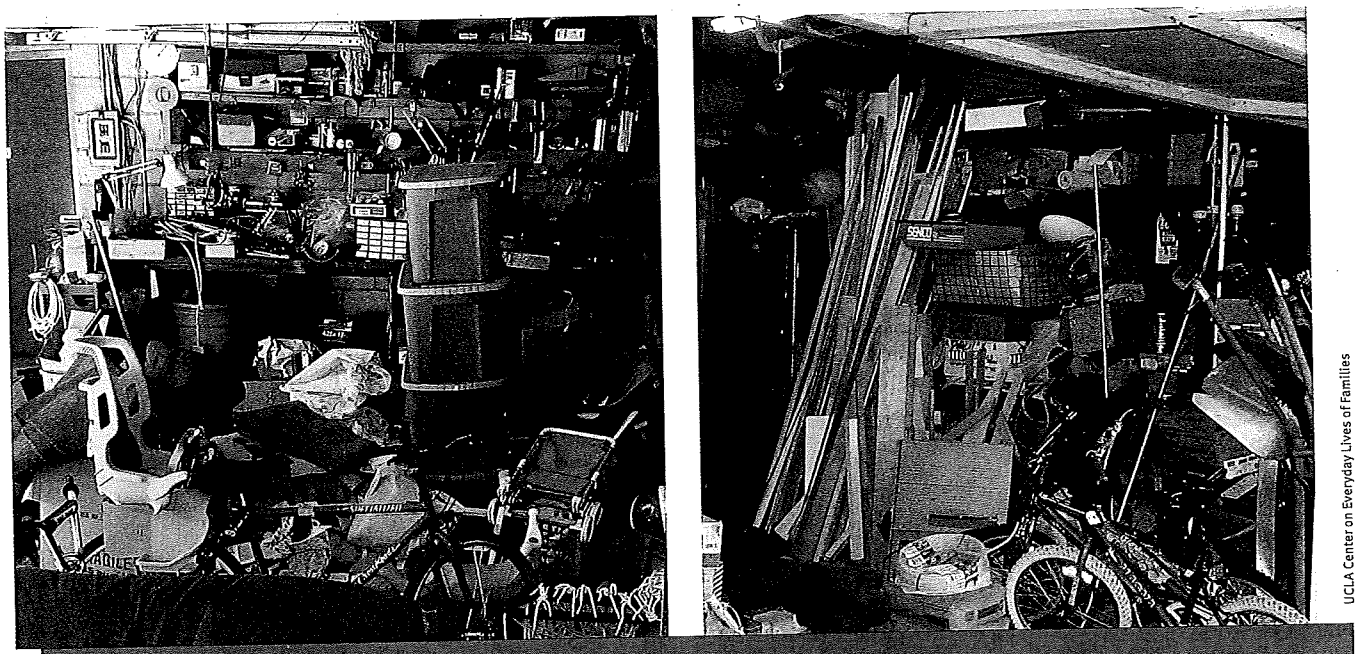
To make it easier to convert garages into housing, some cities have removed parking requirements for the second units. Although the residents of the garage apartments are less likely than others to own cars, many do own cars—some of which are parked on the street. Thus, converting a two-car garage into an apartment can add three cars parked on the street, and neighbors may fear that the conversions will congest on-street parking.

This dilemma can be resolved in neighborhoods with a residential parking permit district. We propose that cities remove the off-street parking requirements for single-family homes that have second units, and limit the number of on-street parking permits at that address to the number of cars that can park in front of the property. Managing on-street parking in this way can eliminate fears that converting garages into housing will flood the street with parked cars.

NOT IN MY NEIGHBOR'S BACKYARD

While reduced parking requirements for garage apartments can increase the supply of affordable housing, home owners often oppose garage conversions in their own neighborhood because of concerns about on-street parking. Explaining why she opposed garage apartments, one planning commissioner in a Southern California city said that she bought her house in a neighborhood "where I wouldn't have to worry if I was going to be able to park in front of my own house." Garage conversions can face severe political problems if local officials fear that the new residents will create parking problems.

This fear is exaggerated. A study of middle-income single-family home owners in the Los Angeles area found that 75 percent of garages were used to store old furniture or other household goods, not cars. Figure 1 shows two of these garages, where cars are out and just about everything else is in. In addition, many older garages are too small to accommodate larger modern vehicles such as pickup trucks or sports utility vehicles. Garage conversions are unlikely to displace many cars from garages because many cars are *already* in driveways or on the streets. Nevertheless, many residents fear garage conversions will lead to overcrowded on-street parking. How can cities remove off-street parking requirements for houses with garage apartments without crowding on-street parking and arousing political opposition?



UCLA Center on Everyday Lives of Families

Figure 1. A Look Inside Garages in Los Angeles. 2012. From *Life at Home in the 21st Century: 32 Families Open Their Doors.* Berkeley, California: University of California Press.

TABLE 1. SHARE OF UNPERMITTED SINGLE-FAMILY UNITS IN THE LARGEST METROPOLITAN STATISTICAL AREAS, 2000–2014

MSA	Increase in Number of Housing Units	Number of Building Permits	Number of New Units without Permits	Percentage of New Units without Permits	Wharton Regulatory Index
	(1)	(2)	(3) = (1) - (2)	(4) = (3)/(1)	(5)
Los Angeles	454,728	155,344	299,384	66%	0.51
New York	566,167	235,846	330,321	58%	0.63
Boston	205,337	86,102	119,235	58%	1.54
Philadelphia	317,891	153,821	164,070	52%	1.03
Chicago	514,888	292,800	222,088	43%	0.06
Miami	298,554	188,632	109,922	37%	NA
Washington, D.C.	398,169	279,401	118,768	30%	0.33
Dallas	608,604	459,609	148,995	24%	-0.35
Atlanta	582,114	471,479	110,635	19%	0.04
Houston	581,674	526,312	55,362	10%	-0.19
Total	**4,528,127**	**2,849,346**	**1,678,781**	**37%**	

Complete sources and methodology available in "Converting Garages into Housing," published in the *Journal of Planning Education and Research*.

Instead of requiring off-street parking to prevent crowded on-street spaces, cities can better manage the on-street parking. Parking is not the only reason why neighbors may object to garage conversions, but it is a major reason and a politically powerful one. If cities remove on-street parking problems as an objection to garage apartments, the other issues (such as concerns about noise or attracting lower-income residents to high-income neighborhoods) can be discussed more openly. Other zoning regulations for second units (location, size, safety, construction materials, and occupancy limits) can remain largely unchanged.

REFORMING OFF-STREET PARKING REQUIREMENTS

One way to manage on-street parking is to limit the number of cars permitted to park on the street. In residential permit parking (RPP) districts, the city can limit the number of on-street parking permits for cars registered at any address with a second unit. An RPP district is necessary but not sufficient to prevent garage conversions from crowding the curb. Although cities create permit districts only where parking is already scarce, they can be irresponsible about the number of permits issued.

For example, a political firestorm erupted in San Francisco when journalists discovered that romance novelist Danielle Steel had 26 residential parking permits for her mansion in Pacific Heights.

To solve the on-street parking problem, cities can impose an *if-then* condition for garage conversions: *If* an owner receives a permit to convert a garage into to housing, *then* the owner accepts a limit on the number of on-street parking permits at that address. This *if-then* condition can be included in the zoning for single-family neighborhoods with RPP districts.

There are good precedents for this if-then policy. In 2016, Washington, D.C., halved its off-street parking requirements for multifamily buildings near transit with the provision that the residents cannot receive residential parking permits (§702.1(c)). In 2017, California adopted legislation that prohibits local governments from requiring any off-street parking for some multifamily developments "when on-street parking permits are required but not offered to the occupants of the development" (Government Code §65913.4(d)(1)(C)). Limiting the number of on-street parking permits at every address with a converted garage can eliminate the parking-related concerns of neighbors and thus reduce the political opposition to garage conversions.

The option to convert a garage into housing in exchange for a limit on parking permits is far less restrictive than prohibiting garage conversions entirely. Furthermore, if a city limits the number of on-street parking permits only at addresses with second units, the neighbors without second units can continue receiving permits as usual. Because the if-then permit solution does what off-street parking requirements were intended to do—manage on-street parking congestion—cities can remove the off-street parking requirements altogether.

Some cities offer permits that allow residents to park on the street in front of their own driveway, effectively creating a reserved curb space in front of every house and substantially increasing the on-street parking supply. If residents convert their garages into housing, these block-your-own-driveway permits can give property owners a guaranteed on-street parking space for themselves, guests, home help, and service vehicles.

LEGALIZING UNPERMITTED GARAGE CONVERSIONS

After a city has created a clear path for legal garage conversions, it can begin targeted code enforcement for illegally converted garages following a grace period, during which home owners may comply with new regulations. While heavy-handed enforcement would previously have been "inhumane" due to the widespread displacement it would have caused, enforcement can now encourage

TABLE 2. COST AND REVENUE FOR CONVERTING A TWO-CAR GARAGE INTO A 400-SQUARE-FOOT APARTMENT

	Low	High
Construction Cost		
Architectural plans	$3,000	$5,000
Permit fees	$2,000	$3,000
Construction	$45,000	$60,000
Fixtures	$10,000	$12,000
Total	**$60,000**	**$80,000**
Monthly Cost		
Mortgage payment	$474	$633
Maintenance	$50	$67
Insurance	$73	$73
Total	**$597**	**$772**
Monthly Gross Revenue	**$1,440**	**$1,440**
Monthly Net Revenue	**$843**	**$668**

Complete sources and methodology available in "Converting Garages into Housing," published in the *Journal of Planning Education and Research.*

regularizing illegal conversions along with a limit to on-street parking. For example, Lawndale, California, requires an inspection and a report that "states whether the property is in compliance with the requirements for off-street parking" before any residential property is sold. A similar inspection-at-sale requirement in other cities would lead home owners to upgrade or remove conversions.

Garages converted without a legal permit are surprisingly widespread in the U.S. To estimate the increase in the number of unpermitted single-family housing units in the 10 largest Metropolitan Statistical Areas (MSAs), we compared the number of new single-family housing units reported in the U.S. Census with the number of single-family building permits reported by the U.S. Department of Housing and Urban Development. (Detached inhabited garages are counted as single-family housing units in both data sets.) Column 4 in Table 1 suggests that, between 2000 and 2014, 37 percent of new single-family units were unpermitted. In total, 1.7 million unpermitted housing units were added in the 10 largest MSAs.

Column 5 shows the Wharton Residential Land Use Regulatory Index, which measures the strictness of land-use regulation. MSAs with more regulation have higher values and those with less regulation have lower values. The MSAs with more regulatory barriers to new housing (Boston, Los Angeles, New York, and Philadelphia) have high shares of unpermitted units in their metropolitan areas, while the MSAs with fewer barriers (Atlanta, Dallas, and Houston) have low shares. Providing a pathway to legalization can greatly reduce the number of illegal garage conversions.

THE ECONOMICS OF GARAGE CONVERSIONS

Converting garages into housing can have far-reaching benefits for home owners, including an improved financial footing. According to Pearl Remodeling, a company that converts garages into livable space in Los Angeles, the cost of converting a two-car garage into a 400-square-foot apartment ranges from $60,000 to $80,000. If the home owner finances the conversion at five percent interest over a 15-year period, monthly loan payments would be between $474 and $633 per month. Using Craigslist, we surveyed rental listings of second units in Los Angeles County in May 2016 and estimated that the average rent for a 400- to 450-square-foot second unit in Los Angeles is $1,440, so the rent from a garage apartment can cover the mortgage payments and give the home owner between $602 and $793 a month in additional income. If the owner pays $60,000 for the conversion without borrowing, the rate of return on the investment is 25 percent per year and the payback period is 3.9 years; if the conversion cost is $80,000, the rate of return is 18 percent per year and the payback period is 5.4 years.

Some owners may not want to borrow money to convert a garage, or may have too little equity to do so. A policy that can help in this case is being tested in Portland, Oregon. The government offers to build a second unit on a single-family property if the home owner agrees to allow a homeless family to live in it rent-free for five years, after which the home owner has unrestricted use of the property. The sites considered for the second units are close to public transit, schools, grocery stores, and day care, and the formerly homeless families receive full support from social services.

The government's cost to build the second unit is around $75,000, about the same as the cost to convert a garage into a second unit—far less than the average $372,000 per unit it costs to build subsidized affordable housing in California.

If a city wants to provide housing for homeless families, subsidizing second units can be cheaper than subsidizing the rent for existing apartments.

Unlike rent subsidies, which increase the demand for affordable housing, subsidized second units increase the supply of affordable housing. After five years, home owners get the second units at no cost.

If an agency is committed to providing shelter for a specific group, subsidized second units can be a cost-neutral or even a less expensive alternative.

For example, because the U.S. Department of Veterans Affairs offers a wide array of programs to help homeless veterans, it can also offer to pay for converting garages into housing in exchange for letting veterans occupy the new housing rent-free for a specified period. This offer seems especially appropriate if the home owner appreciates a veteran's service to the country and if the neighbors approve of (or at least hesitate to publicly oppose) allowing a formerly homeless military veteran to live nearby.

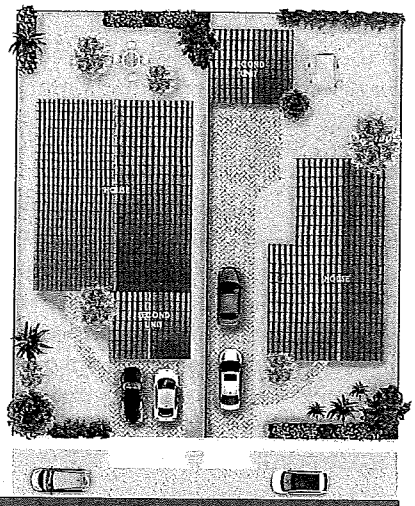


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Figure 2. Garages converted to second units at the front and back of houses.

GARAGE CONVERSIONS AND URBAN DESIGN

The large scale and bad design of some high-density infill projects often provoke opposition from home owners who want to preserve their neighborhood's physical character. In contrast, garage apartments do not overwhelm existing houses and may even go unnoticed by neighbors. Garage conversions merely swap people for cars or storage, leaving exteriors virtually unchanged. Critics cannot say that a converted garage will be out of scale in the neighborhood because the garage is already there. Garage apartments create horizontal, distributed, and almost invisible density instead of vertical, concentrated, and obtrusive density. Home owners may begin to consider their garages like unfinished attics or basements that can be converted into living space when the need arises. With a garage conversion, no one has to build more housing because it's already there. The problem is that the city requires it to be reserved for cars, not people.

Figure 2 shows single-family homes with converted garages in front of and behind the house. Both have enough parking to accommodate two, three, or more cars parked in the driveway or on the street in front of the house.

Because most garage conversions have been illegal, most of them have been in backyards where they are inconspicuous. Few home owners would be foolhardy enough to illegally convert a street-facing garage into housing because it would be obvious to everyone, including city inspectors. The investment would be risky because of the high chance of being cited for two violations: converting the garage to housing and not having the required off-street parking. Nevertheless, street-facing garages may be the most suitable for conversion to housing, for several reasons.

First, street-facing garages already comply with zoning-required setbacks and height limits. Second, converting a street-facing garage into an apartment will not reduce privacy in the home owner's or the neighbors' backyards. The garage apartment's resident will also have more privacy with a separate entrance to the street. Third, converting a street-facing garage that is part of the house into an apartment should be cheaper than converting a freestanding backyard garage. The apartment can connect with the electricity, central heating, air conditioning, and plumbing in the main house, and can have a door into the main house if the apartment is occupied by a family member or caregiver. Fourth, fire engines or ambulances can easily access a garage apartment in the front, removing an objection often raised against backyard cottages. Fifth, garage residents will provide more eyes on the street, and the home owners can feel safer while they are away if someone is living in the former garage. Sixth, converting a street-facing garage into an apartment can improve both the architecture of the house and the urban design of the street. Street-facing garages can be much more valuable for people than for cars.

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Figure 3. Design improvements from street-facing garage conversions, Los Angeles.

All this can be accomplished with little effect on parking or aesthetics. Cars can still park side-by-side in the driveway of a front-facing converted garage. If a garage abuts the sidewalk and has no driveway, the city can issue a block-your-own-driveway permit to provide a guaranteed on-street parking space along the curb cut in front of the house. Moreover, a city can require design review for any garage conversion to ensure that it is consistent with the design of both the house and the neighborhood.

The two renderings in Figure 3 illustrate the improvements possible when a residential facade replaces a garage door that formerly dominated the front of a house. (The entry door to the second unit can be in the side setback.)

AFFORDABLE HOUSING

Off-street parking requirements in single-family neighborhoods prevent on-street parking congestion mainly by preventing second units, and most garage conversions that do occur are confined to the unregulated housing market rather than the formal market. Some home owners ignore not just parking requirements but also important safety precautions when converting their garages without building permits. These unregulated garage units may then not adhere to building codes, thus exacerbating existing concerns over the safety of converted garages.

Urban economists have argued that high housing prices result not from a shortage of land, but from a zoning-induced shortage of building permits. Parking reforms that allow second units can provide a new supply of small, well-located, and high-quality dwellings within walking distance of stores and public transit. Allowing home owners to convert their garages into second units will allow the market to supply more housing with less parking and less traffic.

By creating new affordable housing, garage conversions can reduce the demand for existing affordable housing—which is in short supply—by increasing both the number of units and their geographical availability. If reformed parking requirements

allow it, garage apartments can create income-integrated communities not only in the sense of income diversity within a neighborhood but also of people with different incomes living on the same piece of property. The garage apartments will be what has been called naturally occurring affordable housing (NOAH): units that are affordable without being supported by public subsidies. Because the residents of the new garage apartments will not be competing for the existing supply of affordable housing, the benefits of the new NOAH units will trickle sideways and benefit everyone seeking affordable housing.

ALL PARKING IS POLITICAL

Diverse interests from across the political spectrum may support reducing the off-street parking requirements for second units if a city limits the number of on-street parking permits at any address with a second unit. Taken together, reforms for both on-street and off-street parking regulations are likely to appeal to important interest groups.

Housing advocates can see that allowing garage conversions will create affordable homes without requiring any subsidy. Property-rights advocates can see that it will increase owners' ability to manage their property. Environmentalists can see that it will reduce energy consumption, air pollution, and carbon emissions. Elected officials can see that it will encourage infill development and reduce traffic congestion without any new taxes. Contractors can see that it will increase investment in new housing. Urban designers can see that unobtrusive microapartments will enable people to live at higher density without being overwhelmed by cars. Libertarians can see greater opportunities for individual choice. Older people can see the potential to have on-site housing for caregivers or boomerang children. Opponents of illegal second units can see the potential for cities to legalize or remove these units.

Home owners can see the opportunities for guest quarters or rental income. Potential residents can see the prospect of affordable housing close to their workplace. Across the political spectrum, the left can see that garage conversions provide affordable, mixed-income housing in good neighborhoods, while the right can see they are 100 percent capitalist.

If many home owners convert their garages into apartments, cities can consider charging market prices for the on-street parking permits and spending the revenue to improve public services in the neighborhood. Everyone will have an incentive to economize on curb parking. Some residents who formerly parked their cars at the curb will park in the driveway, and others might sell an old car that isn't worth the price of an on-street parking permit. If more home owners convert their garages into apartments, rising permit prices will prevent a curb parking shortage, and will increase the revenue to pay for neighborhood public services.

CONCLUSION

One goal of city planning is to avoid conflicts before they happen, such as by regulating setbacks, fence heights, signs, and other features of real estate. Off-street parking requirements help to avoid conflicts about on-street parking, but they have serious unintended consequences, one of which is reducing the supply of housing. Garage conversions can increase the supply of housing but off-street parking requirements inhibit converting garages into housing.

SAMPLE LOCAL LEGISLATION

Off-street parking requirements shall be removed where the following conditions are met:

- The lot sits within a residential parking permit district; and
- On-street parking permits are limited.
- This condition shall remain in effect so long as the normally required number of off-street spaces are not provided on the lot.

SAMPLE STATE LEGISLATION

[A] local agency . . . shall not impose parking standards for an accessory dwelling unit in any of the following instances:

- The accessory dwelling unit is located within one-half mile of public transit.
- The accessory dwelling unit is located within an architecturally and historically significant historic district.
- The accessory dwelling unit is part of the proposed or existing primary residence or an accessory structure.
- When on-street parking permits are required but not offered to the occupant of the accessory dwelling unit.
- When there is a car-share vehicle located within one block of the accessory dwelling unit.

[Excerpted from California Government Code §65852.2(d)]

COMMENTARY

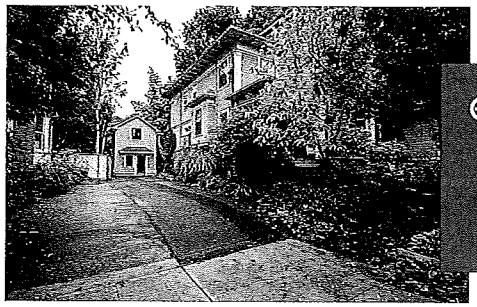
In California, all cities and counties must allow garage conversions and other second units through a ministerial review process (Government Code §65852.2).

Additionally, the California Vehicle Code authorizes block-your-own driveway permits (§22507.2):

> A local authority may, by ordinance, authorize the owner or lessee of property to park a vehicle in front of the owner's or lessee's private driveway when the vehicle displays a permit issued pursuant to the ordinance authorizing such parking. The local authority may charge a nonrefundable fee to defray the costs of issuing and administering the permits.

Cities can issue block-your-own-driveway permits in neighborhoods zoned for single-family residential use. Block-your-own driveway permits substantially increase the on-street parking supply and give property owners a guaranteed on-street parking space for themselves, guests, home help, and service vehicles.

This is not an unprecedented approach. Hermosa Beach, California, has authorized block-your-own driveway permits since 1989 (§10.32.080). Here is the city's permit application and the original ordinance: http://bit.ly/2uycyXT.



buildinganadu.com

Figure 4. An example of a two-story garage-to-ADU conversion in Portland, Oregon's historic Irvington neighborhood.

Off-street parking requirements put space for cars ahead of housing for people by making it difficult to convert garages into apartments. Instead, cities should remove off-street parking requirements for houses within RPP districts and limit the number of on-street parking permits at any address where a garage has been converted to housing. Limiting parking permits will prevent on-street parking congestion and help make garage conversions politically feasible. By increasing both home values and the supply of affordable housing, this parking reform can achieve individual and collective benefits of converting garages into housing without creating costs to neighboring home owners.

Parking reform for garage conversions can be offered first as a pilot program in one district. If the first district where garage conversions are allowed is successful, the policy can be offered in other parts of the city. Because they offer flexibility and may be adopted on a piecemeal basis, the parking reforms can allow residential districts to implement gradual change at the neighborhood level. The policy can also be expanded to allow other kinds of second units such as new detached structures, additions to the main house, or carve-outs in the main house, such as basement apartments. Parking reform can reduce the barriers to all forms of second units in both old and new housing while removing concerns about on-street parking congestion

Parking reforms offer a simple solution to encourage the addition of affordable housing while also providing home owners with improved choice and opportunities for mortgage financing and home equity loans. While parking regulations will change, other city regulations for second units, particularly building and safety codes, can remain the same. Existing garage conversions can be grandfathered if they are brought up to code, as is often done with other nonconforming land uses. New houses can also be built with second units or designed with garages and other spaces that are ready for conversion to second units.

The most appropriate method of managing on-street parking for houses with second units will depend on the nature of the neighborhood. In older neighborhoods with narrow lots, for example, only one on-street parking permit may be possible for a house with a second unit. In newer neighborhoods with wider lots, several parking permits for a house with a second unit may not crowd the street. Even in the densest neighborhoods, cities can allow second units such as basement flats if they manage the on-street parking properly. In this way, relatively minor parking reforms can allow home owners to create second units and adapt the urban landscape to a new future, one garage at a time.

Note: This article is condensed from "Converting Garages into Housing," in the *Journal of Planning Education and Research.*

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ABOUT THE AUTHORS

Anne Brown is a PhD candidate in the Department of Urban Planning at the University of California, Los Angeles and a graduate student researcher in UCLA's Lewis Center for Regional Policy Studies and the UCLA Institute of Transportation Studies. Her research examines the intersection of transportation equity, finance, and travel behavior. Brown's dissertation research investigates the equity implications of ride-hail services.

Vinit Mukhija is a professor and department chair of urban planning in the Luskin School of Public Affairs at UCLA. His research focuses on informal housing and slums in developing countries and "Third World-like" housing conditions (including *colonias*, unpermitted trailer parks, and illegal garage apartments) in the U.S. He is particularly interested in understanding the nature and necessity of informal housing, and strategies for upgrading and improving living conditions in unregulated housing. His work also examines how planners and urban designers in both developing and developed countries can learn from the everyday and informal city.

Donald Shoup, FAICP, is distinguished research professor in the Department of Urban Planning at UCLA. His research has focused on how parking policies affect cities, the economy, and the environment. Shoup is a Fellow of the American Institute of Certified Planners and an Honorary Professor at the Beijing Transportation Research Center. In 2015, he received APA's National Excellence Award for a Planning Pioneer.

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ARE YOUR PARKING STANDARDS BLOCKING GARAGE APARTMENT CONVERSIONS?

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