

# Zoning Bulletin

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## Rezoning—City amends zoning ordinance to allow for previously prohibited uses in zoning district

Residents allege zoning amendment constitutes illegal rezoning and impermissible spot-zoning

Citation: *Gerald Emmett Beard v. City of Ridgeland*, 2018 WL 1869589 (Miss. 2018)

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MISSISSIPPI (04/19/18)—This case addressed the issue of whether a city’s amendment of a zoning ordinance to allow for certain previously prohibited uses constituted an illegal zoning and/or impermissible “spot zoning.”

**The Background/Facts:** In February 2014, the City of Ridgeland (the “City”) adopted a comprehensive Zoning Ordinance and Map. Soon thereafter, the City’s Director of Community Development pursued the siting of a Costco in the City, offering to Costco six potential sites to consider. Ultimately, Costco chose its preferred site (the “Site”). Under the 2014 Zoning Ordinance, the Site was zoned C-2. C-2 districts did not permit—as permitted or conditional uses—gas stations, fast-food drive-through restaurants, drive-through pharmacies, banks, drive-through automatic teller machines (“ATMs”), food-product carry-out or delivery stores, or laundry and dry-cleaning pickup stations. After working closely with Costco representatives on the language, the City drafted and then adopted, in June 2015, a zoning amendment that created as a permitted use in C-2 districts a “Large Master Planned Commercial Development” (“LMPCD”). The zoning amendment allowed uses previously prohibited in C-2 districts, including service stations, banks, drive-through ATMs, food product and carry-out and delivery stores, laundry and dry-cleaning pickup, fast-food drive-through restaurants, and drive-through pharmacies.

Area residents (the “Residents”) challenged the June 2015 zoning ordinance amendment as invalid for, among other things, failure by the City to provide proper notice before its adoption. The City then repealed the zoning amendments, noticed a public hearing, and in April 2016, adopted a new amended zoning ordinance (of substantially similar language to the June 2015 amendment).

The Residents challenged the adoption of the April 2016 amended zoning ordinance. They argued that the amendment constituted illegal rezoning or spot-zoning.

The City argued that the zoning change was “a mere textual amendment.”

The circuit court affirmed the City’s April 2016 zoning amendment

The Residents appealed, arguing again that the April 2016 zoning amendment constituted illegal rezoning and/or impermissible spot-zoning.

**DECISION: Judgment of Circuit Court reversed, and matter remanded.**

The Supreme Court of Mississippi agreed with the Residents, concluding that the April 2016 zoning amendment constituted both illegal rezoning and impermissible spot-zoning.

In arguing that the zoning amendment was illegal rezoning, the Residents had pointed to a City zoning ordinance, which provided criteria for rezoning. That ordinance allowed re-zoning only if: (1) there was a mistake in the original zoning; or (2) “the character of the neighborhood has changed to such an extent as to justify reclassification, and that there is a public need for re-zoning.” No mistake had been claimed, and the Residents contended that in the short time between the 2014 adoption of the Zoning Ordinance and Map and the 2016 zoning amendment, there had been no substantial change in the neighborhood character. The appellate court agreed. It held that “the City il-

legally rezoned” the Site “[b]ecause, almost immediately after adopting a new comprehensive zoning ordinance and map in 2014, the City sought to change the zoning of the proposed Costco site to allow numerous prohibited uses, and . . . those additional uses effectively transformed the [Site] from a C-2 district to a C-3 district . . .”

The Residents had also argued that the 2016 zoning amendment was primarily for the private interest of Costco so that it could build on the Site, and therefore constituted impermissible spot-zoning. Looking at the City Zoning Ordinance’s guidelines for amendments to zoning ordinance text, the court found that under those guidelines, a rezoning would be considered illegal spot-zoning “if the proposed amendment is for a small parcel of land singled out for special and privileged treatment.” Here, the court found that the 2016 zoning amendment was “created and . . . focused solely on Costco and its activities.” Because the City “engaged in illegal spot-zoning by singling out a parcel of land for special and privileged treatment,” the court found that the April 2016 zoning amendment was “arbitrary, capricious, and unsupported by substantial evidence.”

See also: *Modak-Truran v. Johnson*, 18 So. 3d 206 (Miss. 2009).

## **Variance—Board of Zoning Adjustment grants variance for church addition based on “exceptional condition” in that building structure contributed to local historic district**

Neighbors argue contributing nature of structure is not sufficient to constitute “exceptional condition” warranting a variance

Citation: *Dupont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment*, 2018 WL 1748313 (D.C. 2018)

DISTRICT OF COLUMBIA (04/12/18)—This case addressed the issue of whether the presence on property of a structure that contributes to a historic district constitutes an “exceptional condition” justifying a zoning variance.

**The Background/Facts:** St. Thomas’ Episcopal Parish (the “Parish”) has occupied its current site in the District of Columbia (“D.C.”) for 120 years. In 1970, the main church was destroyed by fire. Since that time, the church has operated out of the only remaining structure on the property—the Parish Hall.

In September 2015, the Parish proposed to build an addition to the Parish Hall. Although one building would remain, its western side would include a four-story church element, and its eastern side would include a multifamily

residential building with approximately 56 units in seven stories. Because the zoning district in which the Parish was located limited buildings to no more than 80% of the lot, and the proposed project would occupy 86.7% of the lot, the Parish sought an area variance from D.C.'s Board of Zoning Adjustment (the "BZA").

The BZA granted the Parish's requested variance. In doing so, the BZA found that the fact that the Parish Hall was a contributing building to the local historic district amounted to an "exceptional condition that would create a practical difficulty in complying with the existing lot occupancy regulations." The BZA concluded that such practical difficulty warranted variance relief.

Two neighborhood associations (the "Neighbors") challenged the BZA's order granting the area variance to the Parish. The Neighbors argued that the Parish had failed to meet the requirements for an area variance. The Neighbors disagreed that the fact that the Parish Hall contributed to the local historic district amounted to an "exceptional condition," warranting an area variance.

**DECISION: Judgment of Board of Zoning Adjustment vacated, and matter remanded.**

The District of Columbia Court of Appeals agreed with the Neighbors. It held that the presence of a contributing structure to a historic district is "not sufficient to constitute an exceptional condition" warranting a variance.

The court explained that a board of zoning adjustment may grant an area variance if it finds: "(1) there is an extraordinary or exceptional condition affecting the property; (2) practical difficulties will occur if the zoning regulations are strictly enforced; and (3) the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan." The court further explained that "the extraordinary or exceptional conditions affecting a property can arise from a confluence of factors; however, the critical requirement is that the extraordinary or exceptional condition must affect a single property." That requirement may be satisfied by, among other things, "features of the lot such as irregular shape or narrow width, a characteristic of the land, [a] condition inherent in the structures built upon the land, or prior zoning actions regarding the property.' "

Here, the court recognized that the presence of a historic landmark building which restricted development opportunities would amount to an "exceptional condition." However, in comparison, the court disagreed with the BZA that the presence of a contributing structure to a historic district—such as the Parish Hall here—was sufficient to constitute an exceptional condition. The court said that "[t]he presence of a contributing structure is thus less akin to the presence of a landmark building than to the property's inclusion in a historic district, which does not qualify as an exceptional circumstance."

Defending the BZA's finding of exceptional condition on another ground, the Parish argued that as a "public service organization" a more flexible standard should be applied to it with regard to finding exceptional conditions. This "public service doctrine," established by case law, provides that: "[w]here a public service organization applies for an area variance . . . it must show (1) that the specific design it wants to build constitutes an institutional necessity,

not merely the most desired of various options, and (2) precisely how the needed design features require the specific variance sought.”

The Neighbors argued that the Parish’s argument was moot because the Parish did not qualify as a public service organization but was “merely a private organization dedicated to particular religious beliefs and practices.”

Here, the court held that a church could be a public service organization entitled to additional flexibility in a board’s variance analysis. However, here, the BZA had not explicitly found that the Parish itself was a public service organization. Thus, concluding that the Parish could “not demonstrate an exceptional condition affecting its property through the mere presence of a structure that contributes to a historic district,” the court vacated the BZA’s decision and remanded for consideration of whether the Parish was entitled to additional flexibility as a public service organization and whether the requested variance could be justified under the public service doctrine.

See also: *Monaco v. District of Columbia Bd. of Zoning Adjustment*, 407 A.2d 1091 (D.C. 1979).

See also: *Draude v. District of Columbia Bd. of Zoning Adjustment*, 527 A.2d 1242, 40 Ed. Law Rep. 808 (D.C. 1987).

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*Case Note:*

*In remanding the matter, the court said that the BZA should consider that the variance was requested because of the Parish’s desire to erect both a church and a residential building on the lot, which formerly was occupied only by the church.*

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## **Fees—Property owners bring class action against county, seeking to recover development impact fees**

Parties dispute whether impact fees are subject to the rational nexus/rough proportionality test for a government taking

Citation: *Dabbs v. Anne Arundel County*, 2018 WL 1724642 (Md. 2018)

MARYLAND (04/10/18)—This case addressed the issue of whether area-wide impact fees are subject to the rational nexus/rough proportionality test for a government taking.

**The Background/Facts:** Beginning in 1987, Anne Arundel County (the “County”) imposed road and school impact fees on land developers and builders. Under the County’s Impact Fee Ordinance, those who paid impact fees might become eligible for refunds of those fees under certain circumstances such as the County’s failure to utilize or encumber within a specified period of time the collected fees for present or future eligible capital improve-

ments—like the “expansion of the capacity of public schools, roads, and public safety facilities.”

Eventually, property owners in the county brought a class action lawsuit against the County, seeking to recover development impact fees. The “Dabbs” Class demanded refunds for an unspecified amount of impact fees collected by the County between fiscal years (“FY”) 1997-2003. The Dabbs Class sought that refund on the ground that the impact fees were not expended or encumbered in a timely manner as required under the County’s Impact Fee Ordinance.

The circuit court found that the County had applied the Impact Fee Ordinance as required, and concluded that there were no impact fees available for refund.

The Dabbs Class appealed. On appeal, the Dabbs Class argued that the County’s Impact Fee Ordinance was subject to the “rational nexus/rough proportionality test” for a government taking. In two different cases (*Nollan* and *Dolan*), the United States Supreme Court had held that “a unit of government may not condition the approval of a land-use permit on the owner’s relinquishment of a portion of his property unless there is a ‘nexus’ and ‘rough proportionality’ between the government’s demand and the effects of the proposed land use.” Here, the Dabbs Class argued that with regard to impact fees, the County had to “demonstrate that its expenditure of impact fees was attributable reasonably to new development and each such expenditure reasonably benefitted ‘new development’ and/or individual ‘against whom the fee was charged.’” The Dabbs Class argued that the County could not meet that test, and that therefore the impact fees should be refunded.

The Court of Special Appeals rejected the Dabbs Class’ argument. The court held that the rough proportionality/rough nexus test had no application here.

The Dabbs Class then petitioned for certiorari, which was granted by the Court of Appeals of Maryland.

**DECISION: Judgment of Court of Special Appeals affirmed.**

The Court of Appeals of Maryland held that area-wide impact fees, such as those imposed under the County’s Impact Fee Ordinance, were not subject to the rational nexus/rough proportionality test for a government taking.

In so holding, the court explained that the rational nexus/rough proportionality test for a government taking had been expanded recently by the United States Supreme Court (in *Koontz*) to “apply to a narrow set of monetary exactions, i.e., a condition of the payment of money for favorable governmental action on a required permit application for a specific parcel of land.” The United States Supreme Court had held that “a monetary exaction for mitigation as a condition for issuing a land-use permit to enable development of an individual property must meet the nexus and rough proportionality requirements [test].” In other words, the Supreme Court held that “challenges to governmental demands for money (except application fees) in connection with the permit review process for a specific property are subject to nexus and rough proportionality analysis.”

Analyzing the Supreme Court cases, the Court of Appeals of Maryland emphasized that the nexus and rough proportionality analysis applied very

narrowly: “when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property . . . .” Here, the Court of Appeals of Maryland found that the County’s Development Impact Fee Ordinance did not fit that narrow window for application of the nexus and rough proportionality analysis. The court found that the Ordinance here did not direct a property owner to make a conditional monetary payment to obtain approval of an application for a permit of any particular kind, nor did it impose the condition on a particularized or discretionary basis. Rather, the court found that the Ordinance was “imposed broadly on all properties, within defined geographical districts, that may be proposed for development,” leaving “no discretion in the imposition or the calculation of the fee.” In other words, the Ordinance here imposed an impact fee on a generalized district-wide basis, making no determination as to whether an actual permit would issue to a payor individual with a property interest. And, the County impact fee was “predetermined” based on a specific monetary schedule and applied to all persons wishing to develop property in the district.

The Court of Appeals of Maryland said the law recognized that cases such as that here where impact fees are imposed on a generally applicable basis are not subject to a rough proportionality or nexus analysis.

See also: *Waters Landing Ltd. Partnership v. Montgomery County*, 337 Md. 15, 650 A.2d 712 (1994).

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

See also: *Nollan v. California Coastal Com’n*, 483 U.S. 825, 837, 107 S. Ct. 3141, 97 L. Ed. 2d 677, 26 Env’t. Rep. Cas. (BNA) 1073, 17 Env’t. L. Rep. 20918 (1987).

See also: *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 599, 133 S. Ct. 2586, 2591, 186 L. Ed. 2d 697, 76 Env’t. Rep. Cas. (BNA) 1649 (2013).

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*Case Note:*

*The Dabbs Class had also argued that amendments to the County’s Impact Fee Ordinance unconstitutionally interfered with their vested rights in refunds. The circuit court rejected those claims. The Court of Special Appeals affirmed. The Court of Appeals of Maryland also affirmed, finding the amendments to the County Impact Fee Ordinance, which codified the County’s pre-existing administrative procedures for counting impact fee encumbrances, did “not work substantive change in policy” interfering with the vested rights of the Dabbs Class. Moreover, the Court of Appeals found that the Dabbs Class’ alleged right to refund of the development impact fee did not vest, and thus, the county had the right to repeal the refund provision of the ordinance.*

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## Standing—Landowners challenge constitutionality and construction of statutes governing rezoning of another's property

City argues that landowners lack standing to bring such challenges

Citation: *Byron v. Synco Properties, Inc.*, 2018 WL 1385339 (N.C. Ct. App. 2018)

NORTH CAROLINA (03/20/18)—This case addressed the issue of whether landowners, in seeking to invalidate city approval of another property owner's rezoning application, had standing to challenge the constitutionality and construction of the statutes governing the rezoning.

**The Background/Facts:** In late 2014, SYNCO Properties, Inc. ("SYNCO") filed an application with the City of Charlotte (the "City") to rezone a tract of land it owned in the city. Pursuant to North Carolina statute (N.C. Gen. Stat. § 160A-385 (2013))—the "Protest Petition Statute"—several local property owners (the "Petitioners") filed a protest petition (the "Protest Petition") with the City opposing the proposed rezoning. Then, in July 2015, the North Carolina General Assembly, via Session Law 2015-160, replaced the protest procedure in the Protest Petition Statute with a "Citizen Comment" procedure, effective August 1, 2015. Thereafter, in September 2015, SYNCO withdrew its rezoning application, but then filed a new rezoning application the following day. In January 2016, the City Council approved SYNCO's second rezoning application.

William M. Byron and Dana T. Byron (the "Byrons") filed a declaratory judgment action seeking to invalidate the City Council's approval of SYNCO's rezoning application. The Byrons were landowners in the city, but they had not been among the Petitioners who had filed a Protest Petition opposing SYNCO's first rezoning application.

In their declaratory judgment action, the Byrons brought several claims, including allegations that: (1) the City and SYNCO misinterpreted the Protest Petition Statute and its applicability (and thus violated the Protest Petition Statute); (2) the City's actions violated the Byrons' due process rights; and (3) replacement of the protest petition procedures with citizen comment procedures deprived the Byrons of their constitutional right to petition the government for redress. Generally, with regard to those claims, the Byrons argued that because SYNCO filed its first rezoning application prior to the effective date of the Session Law 2015-160 (which replaced the protest petition procedure with the "Citizen Comment" procedure), the rezoning under its second rezoning application was a "zoning ordinance change[ ] initiated" prior to the session law's effective date. The Byrons argued that the City was thus required to have followed the Protest Petition Statute in the consideration of SYNCO's

rezoning application. The Byrons further argued that since the City failed to do so, as a result, the City's rezoning decision in favor of SYNCO was invalid.

The City and SYNCO argued that the Byrons lacked standing to bring their claims (i.e., the legal right to bring their action in court).

The trial court found that the Byrons had standing, but nonetheless dismissed all the claims against the City and SYNCO.

The Byrons appealed. The Byrons argued on appeal only that the trial court: (1) incorrectly concluded that the City was not required to apply the Protest Petition Statute to the rezoning due to its misinterpretation of the effective date of Session Law 2015-160; (2) wrongfully concluded their challenges to certain zoning statutes and session laws were moot; and (3) impermissibly dismissed their constitutional challenges to those zoning statutes and session laws. The Byrons did not appeal their claimed inherent invalidity of the rezoning decision itself.

Again, the City and SYNCO argued that the Byrons lacked standing to bring those claims.

**DECISION: Judgment of superior court affirmed.**

The Court of Appeals of North Carolina agreed with the City and SYNCO and held that the Byrons lacked standing to bring their appealed claims.

In so holding, the court distinguished the different standing doctrines applicable to: (1) zoning ordinance challenges; (2) statutory construction and validity claims; and (3) constitutional challenges to zoning ordinances. The court said "[a] rezoning ordinance may be challenged in a declaratory judgment action 'only . . . by a person who has a specific personal and legal interest in the subject matter affected by the zoning ordinance and who is directly and adversely affected thereby.'" Comparatively, "[s]tanding to challenge a statute requires that the statute directly and adversely affect the plaintiff." And, "standing to challenge the constitutionality of a zoning ordinance or statute requires that the plaintiff demonstrate injury or immediate danger of injury to a constitutionally protected interest in the property subject to that ordinance or statute."

Here, in applying the standing doctrines, the court emphasized that the Byrons sought to "revive their declaratory judgment action only as to their challenges of the interpretation and constitutionality of the statutes and session laws governing the City's rezoning decision, rather than the inherent validity of the rezoning decision itself." Thus, the court did not look to whether the Byrons had standing to challenge the rezoning decision (as they had sought to do in the claims not at issue on appeal), "but whether they had standing to seek a declaratory judgment determining the construction and constitutionality of the session laws and statutes governing that rezoning."

The court concluded that the Byrons lacked standing to challenge the City's interpretation of Session Law 2015-160 and the applicability of the Protest Petition Statute. Looking at the standing doctrines, the court said that the Byrons could only seek a declaratory judgment proclaiming their preferred interpretation of the statute if they were "directly and adversely affected" by its enactment and replacement of the protest petition procedures with citizen comments. However, the court noted that the Byrons were never entitled to

access the remedies of Protest Petition Statute (as the statute allowed the remedy only by property owners within a certain proximity to the proposed rezoning). Thus, the court concluded that they Byrons, as parties not subject to or able to avail themselves of the Protest Petition Statute, were not “directly and adversely affected” by the unavailability of a statutory procedure they were never entitled to enjoy in the first instance—and therefore did not have standing to bring their claim interpreting the language “initiated on” in Session Law 2015-160.

The court further held that the Byrons did not have standing to bring their constitutional claims. The court found that the Byrons claims were solely as persons with a “general interest as . . . citizen[s] in good government in accordance with the provisions of the Constitution[,]” rather than as those “who [are] in immediate danger of sustaining a direct injury.”

See also: *Wake Cares, Inc. v. Wake County Bd. of Educ.*, 190 N.C. App. 1, 660 S.E.2d 217, 231 Ed. Law Rep. 951 (2008), decision aff'd, 363 N.C. 165, 675 S.E.2d 345 (2009).

See also: *Charles Stores Co. v. Tucker*, 263 N.C. 710, 140 S.E.2d 370 (1965).

## Zoning News from Around the Nation

### CONNECTICUT

The state’s General Assembly recently passed House Bill 5515, “which would empower local zoning commissions throughout the state to regulate the brightness and illumination of advertising signs and billboards.” The bill exempts from such regulations signs that do not have the technological capability to have brightness adjusted. The bill next goes to the state Senate for consideration.

Source: *New Haven Independent*; [www.newhavenindependent.org](http://www.newhavenindependent.org)

### LOUISIANA

The Louisiana House Municipal Affairs Committee recently voted to “approve a ban that would forbid local governments from requiring developers to include affordable housing in new developments.” Municipalities could still provide incentives to developers to encourage the building of affordable housing. Opponents of the bill included City of New Orleans officials, while proponents of the bill included the Home Builders Association of Greater New Orleans.

Source: *The Times-Picayune*; [www.nola.com](http://www.nola.com)

### PENNSYLVANIA

In late April, the Philadelphia Planning Commission put a 45-day hold on City Council legislation “intended to overhaul community notification requirements about zoning changes.” The proposed regulation would, among other

things, “require developers to send up to two rounds of certified mail to neighbors in a 250-foot radius of a property seeking a zoning change.” Opponents claim such requirements are onerous and unnecessary. The bill is reportedly being changed to revise the “certified mail” requirement to a “certificate of mailing” requirement.

Source: *WHYY*; <https://whyy.org>

# ZONING PRACTICE

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## PRACTICE COASTAL ADAPTATION



# Zoning for Coastal Flood Resilience

By Joseph DeAngelis

Flooding poses a considerable threat to the well-being of coastal cities and towns. Most coastal communities are well acquainted with the flood risks from the array of potential tropical disturbances, less impactful but more frequent coastal storm events, and increasingly common nuisance flooding due to rainstorms and high and king tides. Impacts associated with sea-level rise have ceased to be a prospect and are now becoming a reality for municipalities on the coast.

While the integration of hazards and climate resilience into comprehensive planning efforts has been a welcome development in recent years, local implementation processes are where coastal adaptation measures must take root. Where a hazard mitigation and emergency management plan may have sufficed in the past, the integration of coastal flood adaptation into the standard repertoire of local implementation techniques is vital to long term resilience. Zoning and land-use regulations are well suited to address long-term flood resilience by directing both the general form and location of coastal development.

This edition of *Zoning Practice* will summarize the spectrum of risk coastal flooding poses to cities, discuss zoning and land-use approaches that can help communities to adapt, and highlight relevant zoning reform efforts in Mandeville, Louisiana; Norfolk, Virginia; and New York City.

## HIGH AND DRY ON THE WATERFRONT— FIVE YEARS LATER

2017 was a landmark year for coastal storms. Three of the five costliest hurricanes in U.S. history all came in the space of a single, mercilessly active hurricane season. September 2017 alone was rated as the most powerful month for Atlantic coastal storms on record. Hurricanes Irma, Maria, and Harvey covered the spread of major hurricane impacts. Hurricane Irma's winds topped out at 185 mph, making it the most powerful Atlantic storm on record. Hurricane Maria brought devastating wind, rain, and coastal flooding to Puerto Rico, where the death toll likely lingers in the range of 500 to 1,000 people, far in excess of the official toll of 64. Hurricane Harvey

brought biblical rainfall to the sprawling Houston metropolitan area. In Nederland, Texas, Harvey dumped 60.58 inches of rain, the largest volume of rainfall attributable to a single storm in the lower 48.

These storms, together with Hurricanes Katrina and Sandy, signal that the billion-dollar future isn't just more likely, but imminent. Taken with rising sea levels due to climate change, the risks to coastal cities and towns are clear: Flooding is likely to increase in regularity and worsen in intensity in the near and medium-term future. While the role of the federal government is considerable, particularly in the context of the National Flood Insurance Program (NFIP), the Federal Emergency Management Agency's (FEMA) ubiquitous Flood Insurance Rate Maps, and the Natural Hazard Mitigation Grant Program, state and local governments must ensure that they are doing all they can to mitigate coastal flooding. Zoning is one of the major tools at the disposal of municipalities that are looking to reduce the exposure and vulnerability of its citizens and structures to coastal flooding. From lot-level design requirements and standards to overlay districts, rezonings, and map amendments, the zoning code and map are powerful ways of addressing flood resilience at a variety of scales.

The November 2013 issue of *Zoning Practice*, "High and Dry on the Waterfront" by Jim Schwab, FAICP, looked at the impact of FEMA's new Advisory Base Flood Elevation Maps for the City of New York, and the city's initial steps in addressing coastal flood adaptation through the zoning code. This issue also came on the one-year anniversary of Hurricane Sandy, an event that put New York City's vulnerability to extreme coastal flooding in stark relief. In this context, the city grappled with how the zoning code and the city's built environment actively conflicted with the basics of coastal flood adaptation. How do height limits in lower density parts of the city interfere with elevation requirements in the wake of new FEMA flood maps? What about residential buildings with accessory basement residences? How do you even begin to discuss the

elevation of attached and multifamily buildings? What happens to a commercial district when two dozen buildings with ground-floor retail uses require dry or wet floodproofing?

As Schwab acknowledges in the article, while New York City is often considered an outlier around issues such as zoning codes and the built environment, the challenges outlined above are not exclusive to New York. Given the direct flood impacts of Hurricanes Maria and Harvey on major metropolitan areas with diverse building stocks and wide ranges of density, the lessons learned in New York City post-Sandy have a surprisingly wide applicability. Later in this article I will dig deeper into the evolution of New York City's zoning and land-use strategy for coastal flood adaptation since "High and Dry on the Waterfront" and look at how the city's unique focus on both lot-scale interventions and zoning map changes may be a model for other cities.

## COASTAL FLOOD RISK AND ZONING CONSIDERATIONS

According to FEMA, 39 percent of the U.S. population lives in counties that are adjacent to open ocean, major estuaries, or one of the Great Lakes. A much smaller percentage live within FEMA's one percent annual chance (or 100-year) floodplain. (A one percent annual chance (or 100-year) flood means that there is an equal chance annually of major flooding, not that major flooding is only allowed to occur once every 100 years within a specific geographically defined area.) FEMA's flood insurance rate maps follow historical precedent, and future flood events tend not to consider the lines drawn on regulatory maps. That maps follow the historic paths of floods and not vice-versa is a surprisingly common realization for both the public and practitioners, and one I encountered often as a community planner for the East Shore of Staten Island after Hurricane Sandy.

Of course, coastal inundation flooding is not solely the domain of tropical disturbances. Nor'easters and similar offshore events can also cause storm surge and inundation of populated coastal areas. High tide and "king tide" (the annual highest tide

event) flooding is increasingly common due to both sea-level rise and recent coastal development.

There is no specific point in time that sea-level rise will suddenly take effect and permanently inundate a community. Rather, in the near to medium term, a gradual rise in sea levels will have cumulative impacts in the form of more regular nuisance flooding and more extreme coastal flood events. According to the National Oceanic and Atmospheric Administration's (NOAA) 2017 publication *Global and Regional Sea Level Rise Scenarios for the United States*, the intermediate-high scenario of 14 inches of local sea-level rise by 2030 (which NOAA considers increasingly likely) will increase instances of damaging or disruptive flooding 25-fold over the present baseline. This means that regular inundation during high tides, more extreme inundation during king tides, and inundation further inland during and after tropical disturbances are the likeliest impacts that communities will need to plan for. The good news is coastal communities may already be experienced in planning for coastal flooding. The bad news is that future flooding is likely to be of the more regular, and more extreme, variety.

Zoning is a convenient and effective means of addressing coastal flood adaptation. At the building or lot scale, the zoning code can ensure that new and existing buildings are permitted to adapt to FEMA floodplain regulations. The zoning code can also build in additional requirements for buildings both in and outside of the floodplain to encourage additional adaptation to potential future sea-level rise or more extreme flood scenarios. The zoning code can also serve to enhance the local pedestrian experience in the case of building elevations or dry floodproofing through design standards and incentives built into the zoning code.

To this end, Mandeville, Louisiana, has developed a series of design standards for the elevation of buildings in historic districts intended to mitigate against the visual and practical impacts of elevation, and ensure that the character of the community and the experience of the citizen are preserved. At the district scale, zoning can play a considerable role in directing and incentivizing development away from high flood-hazard areas and toward parts of the jurisdiction

capable of supporting growth. Whether through existing zoning districts, new flood-specific overlays, or some combination of the two, map and code changes can effectively mitigate against the impact of flooding upon the community. Norfolk, Virginia, is deeply engaged in the use of zoning to direct development away from its highest hazard areas, particularly in light of local sea-level rise impacts. In many cases, some combination of the two above strategies may be necessary. Over the last five years, New York City has taken a comprehensive look at how local zoning regulations can best permit attractive, contextual, and resilient as-of-right development, while developing ways to accommodate coastal retreat and dedensification in the highest risk areas.

#### MANDEVILLE, LOUISIANA

Mandeville, Louisiana, is a city of about 12,000 people located north of New Orleans directly across Lake Pontchartrain. Though initially settled in the mid-19th century, the city experienced explosive growth toward the end of the 20th century with the completion of the Lake Pontchartrain Causeway, a pair of 24-mile-long bridges connecting Mandeville with the outskirts of New Orleans. With growth came considerable challenges, particularly around flood hazards. Much of the recent development was typical of mid-century slab-on-grade development popular elsewhere in the U.S., and few were elevated to accommodate floodwaters. Likewise, many new residents were unfamiliar with flood hazards associated with Lake Pontchartrain. Much of Mandeville is



Louissette Scott, Mandeville, Louisiana



Retaining the historic character even after home elevation was a driving force behind Mandeville's design regulations and guidelines.

located within a FEMA Special Flood Hazard Area, meaning both the enforcement of NFIP regulations and purchase of flood insurance for mortgage holders is required. Hurricane Katrina significantly impacted Mandeville, with 9.5 feet of storm surge off Lake Pontchartrain resulting in 423 NFIP claims and local damage costs of nearly \$24 million.

The historic context of Mandeville poses particular challenges for flood hazard mitigation. However, existing precedent for elevated pre-causeway historic homes did point a way forward. The problem to solve is essentially twofold: How does the local zoning code interfere with elevation, and what design standards are necessary to mitigate the visual impact of elevation? These questions have wide applicability beyond historic districts. Height requirements in residential districts would likely preclude elevation in

many cases, or severely restrict the building envelope in others. Further, questions of setback, siting, the location of parking, ingress and egress, and direct access to the structure all must be considered if homes are to be raised or built to their FEMA-required elevations (or higher). The mitigation of these changes likewise may mean specific design interventions to maintain either historic context or neighborhood character.

The *Old Mandeville Business District Area Plan*, developed in the wake of Hurricane Katrina, spells out a series of design regulations and guidelines for homes and businesses within the district. The goals of the plan are straightforward: Enable historic Mandeville to retain its historic context while allowing for structural elevation that will mitigate flood impacts and ensure compliance with FEMA regulations.

Following adoption, the city incorporated the plan's design regulations and guidelines into its zoning code by reference (§7.5.10.5.1). Design regulations in the plan are heavily focused on screening, regulating the use of space below elevated buildings, and mitigating perceptions of height. They also tend to be sensitive to the particulars of individual sites. The following constitutes a brief summary of both site and building design regulations:

- *Site design requirements:* Ensuring proper use of the public frontage including the provision of pedestrian and on-street parking space where rights of way exist; landscaping with shrubs, trees, and greenery; the use of hedges and fencing to separate private and public realms; and screening on-site parking located beneath the structure with foundation plantings and vegetative screens. Requirements also include the screening of piers and columns that have been used to raise structures with paneling and plantings of at least half the height of the piers. Finally, building entries must face the street on which the building fronts, and walkways should provide direct access from the sidewalk to the front door.
- *Building design requirements:* Uses below the building Base Flood Elevation are restricted to access, parking, and storage. Given the increased height of buildings due to elevation, specific elements such as turrets, towers, and cupolas cannot exceed 50 feet in height. Front

entry porches must use materials, colors, and proportions appropriate for the local architectural context. Large and multi-family buildings must use treatments similar to single-family housing to ensure local architectural consistency.

Design guidelines included in the plan function as recommended practices that go beyond code requirements. These include guidelines for specific design elements such as canopies, galleries, and locally significant materials and colors, and design strategies for mitigating height and size perception.

The impacts of Hurricane Isaac on Mandeville in 2012 are notable for entirely different reasons than Katrina in 2005. While Mandeville experienced a similar storm-surge event during Isaac, NFIP claims were reduced by half and financial losses by 71 percent. While much of this is likely attributable to post-Katrina flood mitigations (home elevation, community preparedness, etc.), having a zoning code and design guidelines that consider NFIP elevation requirements in addition to neighborhood context no doubt played a role.

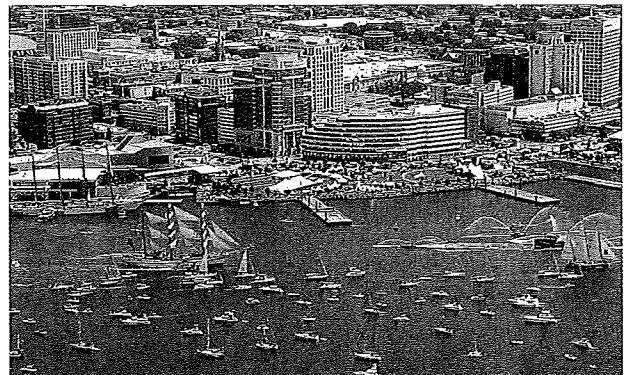
#### NORFOLK, VIRGINIA

Norfolk, Virginia, is at the leading edge of incorporating sea-level rise information into its local planning processes. Notably, the integration of coastal flood resilience has gone beyond the inclusion of flood-hazard and sea-level rise data in various plans and documents, but has also focused on how flood-hazard and sea-level rise information can inform implementation processes such as the capital improvements program or the zoning code.

Located in the Chesapeake Bay, and home to both the world's largest naval base and the second largest port network on the East Coast, Norfolk has a long and enduring relationship with water. Yet this reliance on the water has obvious drawbacks, particularly in an age of sea-level rise. Norfolk's awareness of its own exposure and vulnerability is the driving force behind its considerable adaptation

efforts, which have recently included a 2013 comprehensive plan update, investment in local flood-resilient infrastructure, and participation in both the Dutch Dialogues and Rockefeller's 100 Resilient Cities initiative. An enduring theme of the 2013 comprehensive plan update revolved around ensuring that flood resilience can be operationalized within the city's array of implementation processes. To that end, the plan update called for a revised zoning ordinance that considered the risks of sea-level rise on the built environment. The code revision, titled *Zone Norfolk* and adopted unanimously by Norfolk's city council in January 2018, seeks to tackle the problem with a strategy that fuses site-specific requirements with a districtwide overlay approach.

At the site scale, Norfolk built its most recent revisions atop earlier elevation requirements adopted in 2013. These rules require an additional three feet of freeboard above the base flood elevation for buildings within the Special Flood Hazard Area, and 18 inches of freeboard in the "shaded X" area, which includes buildings between the 100-year (or one percent annual chance) floodplain and the 500-year (or point-two percent annual chance) floodplain (§3.9.7). As a part of the most recent code revision, the city now requires builders to elevate all new single-family detached dwellings outside of defined flood hazard areas between 16 and 24 inches (§5.9.3.D). This approach is notable as it considers the likelihood of more extreme flooding inside of and more extensive flooding outside of the FEMA-defined flood hazard area, which is generally based on historic flooding and doesn't consider sea-level rise.



Pixabay <https://bit.ly/21YcQ00>



As a coastal city, Norfolk has long relied on water as the lifeblood of its economy. The prospect of sea-level rise complicates that relationship.

## NORFOLK'S RESILIENT POINT SYSTEM FOR RESIDENTIAL DEVELOPMENT

Resilient Development Activity for Risk Reduction	Points Earned
Construct building to meet 110-mile wind-load design requirements of the Virginia Uniform Statewide Building Code	2.00
Elevate the ground-story finished floor and all significant electrical and mechanical equipment no less than three feet above highest adjacent grade	1.00 plus 0.50 per ft. above 3 ft.
Construct an impact-resistant (hail, tree damage) roof	0.50
Install impact- (hurricane or wind) resistant windows	0.50
Install operable storm shutters	0.50
Establish operating procedures for how the project will handle loss of off-site or grid power, transition to a backup source of power, and transition back to normal operation	0.50

A hallmark of the recent code revision is the "Resilience Quotient" concept, a point-based system that requires risk mitigation, sustainable energy, and stormwater management measures for all new development (§5.12). Each new proposed development may elect to undergo evaluation for inclusion of these considerations during the site plan review process or to forego that portion of the review process and select from a menu of specific interventions. Each proposed development is required to have a certain number of points, ranging from four points for one- to five-unit developments, to 10 points for large multifamily development. With regard to flood risk mitigation, the menu options include elevating mechanical systems, on-site stormwater retention, and the installation of permeable surfaces.

Norfolk has also developed a series of zoning map overlays that serve to classify local flood risk citywide and prescribe specific interventions for each overlay.

- Coastal Resilience Overlays are applied to areas with the highest flood risk (§3.9.18). These areas require higher elevations of the first floor, limit parking and hard pavement, and require additional landscaping and open space.
- Upland Resilience Overlays are applied to lower-risk areas that are more capable of accommodating growth (§3.9.19). New construction within an Upland Resilience Overlay is also permitted to reduce its own resilience requirements in exchange for placing conservation easements on higher-risk properties.
- Neighborhood Resilience Overlays are also lower-risk areas, and are intended

for more typical cases. They allow for customized design standards that are appropriate to the local context (§3.9.16).

Norfolk's multifaceted approach of utilizing the zoning code to not only encourage but require flood-resilient development is likely a harbinger of things to come for coastal municipalities. Norfolk's model proves a way forward for medium-sized coastal cities looking to turn coastal adaptation and resilience goals identified in a climate adaptation or comprehensive plan into zoning reality.

## NEW YORK CITY

New York City—fresh off a multiyear post-Hurricane Sandy planning effort—has taken an approach similar to Norfolk, though on a decidedly larger scale. Given the diverse local building stock and its unique vulnerability to catastrophic coastal flooding and sea-level rise, the city's efforts are wide ranging and comprehensive from a zoning and land-use perspective.

In "High and Dry on the Waterfront," Schwab described New York's initial post-Sandy flood zoning measures to ease the structural flood mitigations and ensure that these mitigations weren't disruptive to the existing urban fabric. These measures largely mirrored Mandeville's approach; that is, explicit zoning relief to permit elevation (or dry floodproofing) and design guidelines to screen and integrate newly elevated properties into the streetscape.

Soon after the publication of that article, the city engaged in a community-based, five-borough planning effort led by the Department of City Planning (DCP) to take these initial measures several steps further. The Resilient Neighborhoods Initiative, as it later came to be known, identified communities in all five boroughs that had been hit particularly hard by Hurricane Sandy. They would be subject to FEMA's new Advisory



Joseph DeAngelis



Attached buildings in coastal neighborhoods pose a series of retrofitting challenges, particularly in the context of mandatory flood insurance and revised flood insurance rate maps.



➤ Zoning relief enabled the elevation of the historic building stock in coastal New York City neighborhoods after Hurricane Sandy. Code amendments currently under review seek to mitigate the downsides of elevation.

Base Flood Elevation maps, and would also be required to purchase flood insurance (at rising actuarial rates) for these new elevations. Local DCP planning staff then engaged in wide-ranging assessments and public engagement processes in these communities to develop specific, actionable amendments to the city's zoning code and map. Additional local recommendations would also be fed into a large Citywide Flood Resilient Text Amendment, which would apply to flood-prone neighborhoods throughout the city.

The effort is notable in that many of the coastal communities impacted by Sandy bear a more than passing resemblance to other coastal communities throughout the nation. The East Shore of Staten Island, Gerritsen Beach, Howard Beach, Sheepshead Bay, and the Rockaways all feature smaller-scale single- and two-family residences (including a large proportion of historic beach bungalows), and neighborhood retail, much of it based on late-19th and early-20th century settlement and development patterns. These communities, much like other coastal communities nationwide, have significant historic connections with the water, particularly around tourism, recreation, and shipping. Consequently, this means exposure to coastal inundation and sea-level rise with limited adaptive capacity.

The East Shore of Staten Island, where I worked as a community planner as part of the Resilient Neighborhoods Initiative,

is a convenient case study for wider zoning and land-use applicability. My former planning director would often remark that Staten Island is more like the rest of the country than the rest of New York City, a sentiment that rings particularly true on the topic of coastal flood adaptation. The East Shore was hit particularly hard by Sandy, with coastal inundation up to a mile inland, and thousands of significantly damaged or destroyed homes and businesses. These impacts transformed the community into something of a hub of federal, state, and local government activity, with federally sponsored seawall construction, state-sponsored property buyouts, and city reconstruction and elevation efforts all under way concurrently. In this environment, DCP sought to develop a series of locally calibrated zoning recommendations tailored to this post-Sandy environment.

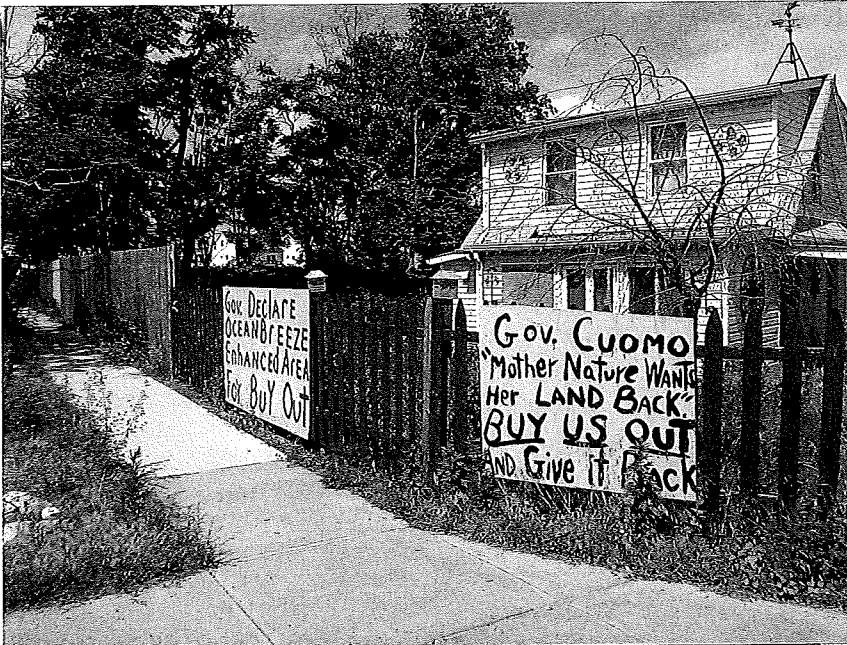
Zoning for long-term retreat formed the core of these recommendations. Several neighborhoods along the East Shore that suffered near-total housing losses due to their proximity to the water and extremely low elevation had elected to participate in a large-scale federally funded (and state-administered) voluntary property buyout program following the storm. Although the program was notable for its high participation rate, it also led to some significant issues. Any property purchased by the state would need to remain as open space in perpetuity, but what would happen to those home

owners who elected not to participate? What about vacant land in these buyout areas with development potential? What would the zoning permit property owners to build in an area that both the state and federal government consider too high risk for long-term development? How would the city supply services to a dwindling population? What would this patchwork of open space, new development, and property holdouts look like?

To begin answering these questions, DCP created the East Shore Special Coastal Risk District, a map and code revision specifically tailored to the boundaries of the local property buyout areas and with the intent of only permitting contextual development and incentivizing long term coastal retreat (§137). Generally, the overlay applies more intense planning commission scrutiny to any future development, reduces permitted development from two-family and attached structures to only single-family detached, modifies existing bulk regulations to increase wetland buffers, and eases regulatory burdens on home elevation and rebuilding for those few home owners who choose to stay.

Lessons learned on Staten Island's East Shore fed directly into New York's work on their Citywide Flood Resilient Text Amendment, a measure meant to allow for and mitigate the impacts of flood-resilient construction. While the text amendment is not yet final, proposed changes are undergoing vetting through a comprehensive citywide public engagement process. Proposed changes from DCP include:

- Allowing property owners to reallocate lost floor area from the ground floor and sub-grade spaces elsewhere in the structure
- Reducing required side or rear yards relative to overall height to allow squatter and more proportional residential buildings
- Enacting new height limits where possible that are based on the new local Design Flood Elevation (one to two feet over the Base Flood Elevation) where side- and rear-yard relief is possible
- Permit relief from height limits, where possible, for developers and property owners who wish to go above the Design Flood Elevation
- Require design interventions to screen and mitigate elevation impacts on the local streetscape



Widespread damage and some areas with near total housing losses led many residents on the East Shore to lobby for property buyouts. Three neighborhoods, including the one pictured here, eventually participated in a federally funded program that purchased homes in predetermined areas at prestorm value.

- Make permanent, with modifications, the standards of temporary 2013 Flood Resilience Text Amendment

## CONCLUSION

There are a few key takeaways from the three case studies here that may be helpful for other coastal municipalities:

Your zoning code can be used to enable local elevation and mitigate its impacts through design standards and

bulk regulations. Design standards can help to encourage a continuity of local character and give developers and home owners a menu of potential options that can mitigate increased height, exposed piers and piles, and open spaces beneath the structure.

The zoning and building code can be used to add additional freeboard above the FEMA Base Flood Elevation to account for sea-level rise.

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Scoring systems built into the site plan review process add predictability for developers and home owners.

Zoning overlays, like those used in Norfolk and New York City, can be complicated, but they are also versatile tools to designate and apply regulations to areas of special concern (high risk, long-term retreat, capable of accommodating future density, etc.).

Coastal municipalities are starting to take significant steps toward aligning their coastal flood adaptation goals with local implementation processes, and zoning remains one of the most powerful tools at their disposal in guiding the overall form of and general direction of development. The three cities included here demonstrate that even at a wide range of scales, zoning can greatly aid the goals of long-term flood resilience.

## ABOUT THE AUTHOR

Joseph DeAngelis is a planner, researcher, and coeditor of *Zoning Practice* with the American Planning Association in Chicago. Previously, he was a resiliency planner for the New York City Department of City Planning, where he worked on long-term planning and zoning solutions for communities impacted by Hurricane Sandy.

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