

# Zoning Bulletin

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## Uses/Oil and Gas Development—Natural gas company seeks approval of gas wells as conditional use in zoning district

Company argues gas wells use can be permitted under zoning ordinance that permits uses “similar”

Contributors

Corey E. Burnham-Howard

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## to others allowed in zoning district, suggesting gas wells are like a “public service facility”

Citation: *Gorsline v. Board of Supervisors of Fairfield Township*, 2018 WL 2448803 (Pa. 2018)

PENNSYLVANIA (06/01/18)—This case addressed the issue of whether a natural gas company satisfied the local zoning ordinance’s requirement that, to be permitted as a conditional use, its proposed gas wells be “similar to” other uses allowed in the relevant zoning district.

**The Background/Facts:** Inflection Energy, LLC (“Inflection”) sought to construct and operate multiple gas wells on a nearly 60-acre parcel of land in Fairfield Township (the “Township”). The parcel of land was located in a Residential-Agricultural (“R-A”) zoning district. Inflection submitted to the Township’s Board of Supervisors (the “Board”) a “Zoning and Development Permit Application” for its proposed gas wells use.

Because gas wells were not identified under the Township’s zoning ordinance as a permitted or conditional use in the R-A district, the Board looked to section 12.18 of the Township zoning ordinance. Section 12.18 was known as the “savings clause.” It provided that when a use was neither specifically permitted nor denied, the Board would review the request as a conditional use. Section 12.18 specified that the Board had the authority to permit or deny the use in accordance with conditional use applications but only if the use: “is similar to and compatible with other uses permitted in the zoning district”; “is not permitted in any other zone”; and is not “in conflict with the general purposes of [the Township] zoning ordinance.”

The Board granted Inflection a conditional use permit for its proposed gas wells use. In doing so, the Board found that: the use was not allowed in any of the Township’s three zoning districts and thus was governed by the savings clause in section 12.18. The Board also found “that the criteria for review set forth in section 12.18” had been “sufficiently satisfied.”

Town residents (the “Objectors”) appealed the Board’s decision to grant Inflection the conditional use permit. The Objectors asserted that the Board had made no findings of fact with respect to the requirements of section 12.18 “and instead reached the bald conclusion that Inflection somehow satisfied its burden of proof without identifying any similar permitted use the in the R-A district.”

Inflection argued that its gas wells use was “similar” to other uses permitted in the R-A district because it constituted a “public service facility” since it furnished gas to the public. The Township’s zoning ordinance allowed for “public service facility” uses (as conditional uses) in all three of the Township’s zoning districts.

Agreeing with the Objectors, the trial court rejected Inflection's argument, finding "the Board had offered no explanation regarding the manner in which Inflection's proposed fracking use was 'similar to' a 'public service facility.'" The court noted that Inflection "would not be providing any public service, as it '[was] not constructing [those] wells to furnish natural gas to the residents of the [area], or even [the] Township.'"

Inflection appealed.

Reversing the trial court, the Commonwealth Court determined that Inflection's proposed natural gas compressor station use was "similar to and compatible with a 'public service facility' use and/or an 'essential service' use" and was thus appropriately permitted by the Board.

The Objectors again appealed.

**DECISION: Judgment of Commonwealth Court reversed.**

The Supreme Court of Pennsylvania held that Inflection's proposed gas wells use was not "in any material respect, of the same general character as, or similar to" a "public service facility" use or "essential services" use allowed in the Township's R-A district. In so holding, the court looked at the Township's zoning ordinance definitions of "public service facility" and "essential services." The Township's zoning ordinance defined "public service facility" as involving "public service structures by a utility . . . or by a municipality or other governmental agency." "Essential services" were defined as the facilities and related equipment of a "public utility." The court found that those uses were permitted in the R-A district "to promote residential and agricultural development in that part of the [T]ownship." The public nature of "public service facility" and "essential services" uses was inherently "local in nature"—namely, to provide services for the benefit of Township residents, found the court.

Seen in that light, the court concluded that Inflection's proposed gas well use was "plainly not of the 'same general character as,' or 'similar to,' 'public service facility' or 'essential services' uses." The court noted that Inflection was not a "public utility," and was "clearly not a municipality or a government agency, but rather [was] a private, for-profit commercial business." Moreover, the court found that Inflection had offered no evidence, and the Board had made no findings, that Inflection's extraction of natural gas "is in any respect for the benefits of the residents of the R-A district, [the] Township, or even [the] County." Rather, the court found that Inflection's proposed use provided "no public or essential services to the residents of the R-A district, and provide[d] no infrastructure that supports and promotes residential and agricultural development in Fairfield Township." Conversely, the court determined that "Inflection's proposed use was intended solely for Inflection's own commercial benefit, and not in any respect for the ben-

efit of furthering the expressed goals of [the] Township’s R-A district.” In fact, the proposed use was “a purely industrial use of the type the [Township’s Zoning] Ordinance expressly discourages in the R-A district,” said the court.

For those reasons, the court concluded that there was insufficient evidence to support the Board’s conclusion that Inflection satisfied its burden of proving that its proposed use was similar to a permitted use in an R-A district, and thus insufficient evidence to support the Board’s decision to grant Inflection the conditional use permit for its proposed gas wells use.

See also: *MarkWest Liberty Midstream & Resources, LLC v. Cecil Tp. Zoning Hearing Bd.*, 102 A.3d 549, 184 O.G.R. 118 (Pa. Commw. Ct. 2014).

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**Case Note:**

*In its decision, the Supreme Court of Pennsylvania emphasized that its decision “should not be misconstrued as an indication that oil and gas development is never permitted in residential/agricultural districts, or that it is fundamentally incompatible with residential or agricultural uses.” The court noted that “the protection of environmental values” is a “quintessential local issue that must be tailored to local conditions,” and that to that end, municipal zoning ordinances could be amended to permit oil and gas development in any or all of its zoning districts, in designated areas, “setting forth whatever limitations and conditions it decides are appropriate for the protection of its citizenry.” However, the court warned, municipalities may not “permit oil and gas development in residential/agricultural districts without first enacting the necessary amendments . . . .”*

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## **Proceedings—Residents file petition for writ of certiorari, seeking review of city’s zoning board of adjustment decision**

City says petition was untimely, and parties dispute when the statutory time period for filing the petition began to run

Citation: *Burroughs v. City of Davenport Zoning Board of Adjustment*, 2018 WL 2372570 (Iowa 2018)

IOWA (05/25/18)—This case addressed the issue of the interpretation of Iowa Code section 414.15, which requires a petition for writ of certiorari seeking review of a decision of a city zoning board of adjustment to be filed in district court “within thirty days after the filing of the decision in the office of the board.” Specifically, the case addressed “when is a decision ‘filed in the office of the board’ ” under Iowa Code section 414.15—thus triggering the 30 day time period.

**The Background/Facts:** In March 2014, the Zoning Board of Adjustment (“ZBA”) of the City of Davenport (the “City”) issued a special use permit to Tiny Tots Learning Center (“Tiny Tots”) to operate a daycare facility at leased premises. Within a year, Tiny Tots closed its doors. The property then stood vacant until July 2016 when Mz. Annie-Ru Daycare Center (“Annie-Ru”), a new lessee of the premises, opened a daycare at the same location. Although Annie-Ru supervised more children and was open for longer hours than Tiny Tots, the City’s Zoning Administrator determined that the special use permit issued to Tiny Tots “[ran] with the land.” Therefore, Annie-Ru was allowed to operate without having to apply for and obtain a new special use permit.

Nearby residents (the “Residents”) challenged Annie-Ru’s right to operate. They appealed the Zoning Administrator’s decision to the ZBA. They argued that Tiny Tots’ special use permit was not transferrable to Annie-Ru.

City staff disagreed with the Residents’ argument, and determined that Annie-Ru was “entitled to operate under the provision of the Special Use Permit issued to Tiny Tots.” At an October 13, 2016, meeting, the ZBA upheld the City staff’s recommendation. Minutes from that meeting were posted on the City’s website and then approved on October 27.

The Residents then filed a petition to revoke Annie-Ru’s special use permit. At its December 8 meeting, the ZBA unanimously voted against revoking the special use permit. Those meeting minutes were posted on December 19 and approved at a December 22 meeting, the minutes of which were not posted on the City’s website until January 6, 2017.

On January 25, the Residents filed a petition for writ of certiorari in district court, challenging the ZBA’s October 13, 2016 and December 8, 2016 decisions.

The City asked the court to dismiss the Residents’ petition for certiorari as untimely because the petition was “not filed within thirty days” of the challenged decisions. The City pointed to Iowa Code section 414.15, which requires a petition for writ of certiorari seeking review of a decision of a city zoning board of adjustment to be filed in district court “within thirty days after the filing of the decision in the office of the board.”

The Residents argued that the petition for certiorari was timely because “a signed written decision with factual findings was necessary

to trigger the thirty-day deadline for seeking certiorari review,” and that such a written, fact-finding decision had not been made. Alternatively, they argued that even if the minutes of the Board’s meetings could be sufficient to trigger the 30 day period, the December 8 minutes were not properly filed until officially approved and the approval vote posted on January 6, 2017. Thus, they claimed that their January 25 petition was timely.

The district court granted the City’s motion to dismiss the Residents’ petition for certiorari. The court concluded that the “thirty-day time period begins to run from the time the appealing party has either actual knowledge or is chargeable with knowledge of the decision to be appealed.” Because it was “undisputed” that Residents attended both the October 13 and the December 8 meetings, the court found that they had actual knowledge of the Board’s decisions as of those dates, and that their January 25 petition was filed more than thirty days after that knowledge.

The Residents appealed, arguing that their petition for certiorari was timely.

**DECISION: Judgment of district court affirmed in part, reversed in part, and remanded.**

The Supreme Court of Iowa first held that, contrary to the Residents’ argument, the time for appeal from a zoning decision “runs from the date of the decision, regardless of the alleged adequacy of any findings of fact.” Significantly, the court pointed to its certiorari rule requiring the petition to be filed “within 30 days from the time the tribunal, board or officer exceeded its jurisdiction or otherwise acted illegally.” (Iowa R. Civ. P. 1.1402(3).) The court found that the Residents’ interpretation of “decision” as including only those decisions supported by sufficient findings of fact would “create a stark conflict between Iowa Code section 414.15 and Iowa Rule of Civil Procedure 1.1402(3), a circumstance [the court] normally [tries] to avoid.” Moreover, the court found it was sound policy to ensure the deadline to petition for a writ of certiorari be “as clear as possible” and not subject to “the unpredictable outcome of a debate over the sufficiency of factual findings.”

Next, the court held that a zoning decision is “filed in the office of the board”—thus triggering the 30 day deadline to file a petition for writ of certiorari under Iowa Code section 414.15—when: (1) it is in “some documentary form” such as official meeting minutes; (2) is filed either in electronic or paper form; (3) and has been posted on the board’s publicly available website that the board uses as a repository for official documents. Importantly, (with support from out-of-state appellate courts addressing the same statutory terms) the court also held that proposed meeting minutes do not constitute a zoning “decision,” but that only approved and posted meeting minutes constitute a zoning “decision”—the

filing of which in the “office of the board” (i.e., on the publicly available website) triggers the 30 day deadline.

Applying that holding to the facts of the case, the court concluded that the Residents’ challenge to the ZBA’s refusal to revoke the permit was timely “because the unapproved minutes of the December 8, 2016 meeting posted to the Board’s website on December 19 [did] not amount to ‘the filing of the decision’ ”—triggering the 30 day period. Rather, that “filing of the decision” occurred on January 6, 2017—the date of the public website posting of the December 22 meeting minutes, which reflected the approval of the December 8 meeting minutes—at which the ZBA voted to refuse to revoke the permit. On the other hand, the court also concluded that the Residents’ challenge to the ZBA’s October 13 decision was untimely as the minutes of the October 13 meeting had been posted and approved more than thirty days before the Residents went to court.

See also: *Aucoin v. City of Mandeville*, 552 So. 2d 714 (La. Ct. App. 1st Cir. 1989).

See also: *Sanchez v. Board of Adjustment for City of San Antonio*, 387 S.W.3d 745 (Tex. App. El Paso 2012).

See also: *Holding v. Franklin County Zoning Bd. of Adjustment*, 565 N.W.2d 318 (Iowa 1997).

## **Vested or property rights—City suspends commercial tenant’s building permit, citing material misrepresentations in the permit application**

Commercial tenant then sues the City, alleging the suspension of its permit violated its procedural due process rights under the Fourteenth Amendment

Citation: *Rockville Cars, LLC v. City of Rockville, Maryland*, 891 F.3d 141 (4th Cir. 2018)

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

FOURTH CIRCUIT (MARYLAND) (05/24/18)—This case ad-

addressed the issue of whether a commercial tenant had a property interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution in building permits issued by the city.

**The Background/Facts:** Rockville Cars, LLC and Priority 1 Automotive Group, Inc. (collectively, “Rockville Cars”) sold new and used cars. In pursuit of that business, Rockville Cars leased a parcel of land owned by Robin Tang (“Tang”) in the City of Rockville (the “City”). On that parcel of land was a building that had previously housed a restaurant and small furniture store. Rockville Cars sought to convert that building into an automobile showroom.

Before starting work on the building conversion, Rockville Cars submitted two documents to the City. First, Rockville Cars submitted a Minor Site Plan Application (the “Plan Application”), in which it listed Tang as the owner of the property, and maintained that it planned to “repurpose” the building into a show room. Second, months later, Rockville Cars submitted, to a separate division of the City’s Planning Department, a Commercial Building Permit Application (the “Permit Application”), in which it listed Priority One Automotive Group, Inc. as the property owner and stated an intent to “demolish and renovate” the building.

After receiving the Permit Application, in March 2013, the City issued a building permit in Tang’s name. Rockville Cars then razed the leased building, leaving only the foundational slab. However, in July 2013, the City issued a Stop Work Order. That order explained that Tang had claimed Rockville Cars lacked authority to submit a building permit application. The order also stated that the scope of the project “did not comport with the Minor Site Plan Amendment,” which the City had previously approved.

Later, the City further explained to Rockville Cars that its demolition of the building resulted in a violation of the City’s zoning ordinances. A “build-to” provision of the zoning ordinance, applicable to the commercial strip upon which Tang’s property was located, mandated that construction of new buildings be within a certain distance from the road. Since the original building had predated the build-to provision, it was exempt from compliance. That exemption would have continued if Rockville Cars had merely renovated the interior of the original building. However, because Rockville Cars demolished the building, Rockville Cars was required to build any new structure in accordance with the build-to provision.

Some time subsequently, Rockville Cars submitted a new application to the City, and the City approved that application. However, since Rockville Cars had “conceded to numerous demands at a considerable expense,” it brought a legal action against the City, which alleged that suspension of its March 2013 building permit violated its procedural

due process rights under the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment provides that no State shall deprive any person of life, liberty, or property, without due process of law. Rockville Cars claimed that it received a property interest in the March 2013 building permit because the City's zoning ordinances limited the City's power to suspend or revoke permits for cause, thus creating entitlement.

The City asked the district court to dismiss Rockville Cars' complaint. The City argued that no property interest vested in a building permit granted on the basis of material misrepresentations within an application. The City argued that no property interest vested in the permit granted to Rockville Cars because Rockville Cars' application contained material misrepresentations—as to the owner of the property and intended scope of the work—and the demolition of the building resulted in a violation of the City's zoning ordinances.

The district court granted the City's Motion to Dismiss. The court agreed that no property interest vested in a building permit granted on the basis of material misrepresentation within an application.

Rockville Cars appealed.

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

Agreeing with the City and the district court, the United States Court of Appeals, Fourth Circuit, held that the City did not violate Rockville Cars' due process rights because no property interest vested in a building permit granted on the basis of material misrepresentation within an application.

The Fourth Circuit explained that in order to establish a due process claim (and survive the City's Motion to Dismiss), Rockville Cars had to show: (1) that it had a protected property interest; (2) of which the City deprived it; and (3) without due process of law. Here, the court concluded that Rockville Cars failed to show the first element: no property interest vested in Rockville Car's building permit since the permit was granted on the basis of material misrepresentations.

The court explained that “[t]he vested rights doctrine allows property owners to ‘obtain a vested right in an existing zoning use that will be protected against a subsequent change in a zoning ordinance prohibiting that use.’ ” But, to prove a vested right, a property owner must: (1) obtain a lawful building permit; (2) commence building in good faith; and (3) complete a substantial portion of construction. The fact that the first element of the vested rights doctrine requires obtaining a lawful building permit illustrates a core principle, said the court: “[Maryland] law does not entitle permit holders to a property right when permits are obtained on the basis of mistake or in violation of the law.” Such events render any permit void *ab initio* (i.e., from the beginning).

The Fourth Circuit held that, here, Rockville Cars' procedural due

process claim failed because no property right vested in the building permit given that its applications contained three material misrepresentations: (1) the two documents it submitted to the City differed in describing the scope of the renovation project; (2) Rockville Cars misrepresented the owner of the property within its Permit Application; (3) Rockville Cars certified in the Permit Application that the proposed construction “shall conform to the regulations in the Rockville City Code, and all other codes and regulations . . . .” but in demolishing the building violated the City’s build-to ordinance, which required construction of new buildings within a certain distance from the center of the street.

Given those material misrepresentations, the Fourth Circuit concluded that Rockville Cars had no “legitimate claim of entitlement” to a permit it never lawfully obtained and therefore had no procedural due process rights violated when the permit was suspended.

See also: *Marzullo v. Kahl*, 366 Md. 158, 783 A.2d 169 (2001).

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**Case Note:**

*In their decisions, the district court and the Fourth Circuit also noted that even if a property right vested in Rockville Cars’ building permit, and even if the City deprived Rockville Cars of that interest, no procedural due process violation existed here because Rockville Cars failed to exhaust both administrative and state court remedies that the government afforded.*

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## Zoning News from Around the Nation

### LOUISIANA

In late May, Governor John Bel Edwards vetoed a bill that would have blocked the institution of inclusionary zoning policies in the state of Louisiana. Reportedly, Edwards’ veto “comes with the condition that parishes in Louisiana must enact inclusionary zoning policies by 2019” or else face a new bill blocking inclusionary zoning policies.

Source: *The New Orleans Advocate*; [www.theadvocate.com](http://www.theadvocate.com)

### MASSACHUSETTS

Governor Charlie Baker is touting his proposed housing production bill in hopes that it will pass in the state legislature before the July 31 end of formal sessions. The bill would “allow zoning changes to be made with majority, rather than super-majority approval at the local

level.” Proponents of the bill say this would “remove a major obstacle to housing development in cities and towns that are each governed by their own zoning rules.” In May, the Committee on Housing endorsed a redrafted version (H 4290) of Baker’s bill. In early June, that bill was being considered by the House Ways and Means Committee.

Source: *The Lowell Sun*; [www.lowellsun.com](http://www.lowellsun.com)

The Conservation Law Foundation (“CLF”) is reportedly asking the state’s environmental secretary, Matt Beaton, to “reconsider new zoning he recently approved for Boston’s downtown waterfront.” The zoning plan covers approximately 42 acres of land and was negotiated over several years. CLF claims that Beaton’s decision to allow a 600-foot-tall tower on the site of the Boston Harbor Garage and a 305-foot-high tower on the site of Hook Lobster violates state law because the approvals do not mandate enough open space and allow too much height so close to the water, while requiring insufficient community benefits.

Source: *Boston Globe*; [www.bostonglobe.com](http://www.bostonglobe.com)

## MICHIGAN

The City of Detroit is considering a draft ordinance that would provide zoning restrictions on medical marijuana facilities, including capping the number of dispensaries city-wide at 75 and requiring dispensaries to be located at least 1,000 feet from schools, churches, liquor stores, and from each other. The ordinance would further set up “new rules and local permitting requirements for four new types of marijuana operations allowed under state rules: growing, testing, transporting, and processing operations.”

Source: *Michigan Radio*; <http://michiganradio.org>

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## Notice/Authority—When neighbor does not receive notice of landowner's Act 250 application, district commission issues second notice

Applicant contends district commission lacks authority to issue second notice after permit is final

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Citation: *In re Mathez Act 250 LU Permit, 2018 VT 55, 2018 WL 2382006 (Vt. 2018)*

VERMONT (05/25/18)—This case addressed the issue of whether a district commission had the authority to issue a second notice for a final Act 250 permit when a neighbor did not receive notice of the permit before it became final, and the neighbor failed to timely appeal.

**The Background/Facts:** Act 250 is Vermont’s land use and development law under which statutes dictate procedures related to permit applications. (See, e.g. 10 V.S.A. § 6084). Nine district commissions review Act 250 applications and issue decisions and land use permits. Under Act 250’s statutory application process, applicants are required to list on their application, adjoining landowners and those with a “significant interest in the affected property” so that those with an interest have notice of the permit application and can request a hearing on the permit if desired.

On May 9, 2016, Lori and Richard Mathez (the “Applicants”) applied for an Act 250 permit to build a steel building for commercial vehicle repair and body shop. Applicants listed their neighbor, Wyle Solomon, but not his spouse, Sung-Hee Chung (“Neighbor”). Neighbor therefore did not receive an Act 250 notice of Applicants’ permit application, and thus did not request a hearing before the permit issued, without a hearing, on June 15, 2016.

On July 21, 2016, Neighbor learned about the permit, yet she did not seek to challenge or appeal the permit. Still, having been advised that Neighbor had not received notice about the permit, the District Commission, on August 25, 2016, sent out a second Act 250 notice for the permit. That second notice stated that the District Commission was “again reviewing [Applicants’] application under Act 250 Rule 51” and would decide “the status of [the] permit . . . as a component of its current application review.”

The Applicants appealed the second notice to the Superior Court, Environmental Division. The court held that in issuing a second notice, the District Commission “attempted to void or revoke” the permit, which was analogous to a collateral attack on a final decision, and the Commission lacked the authority to do so. Having determined that the second notice was therefore beyond the Commission’s authority, the court granted summary judgment in favor of the Applicants, and ordered the District Commission to vacate its decision to issue a second notice of the permit.

Neighbor appealed. Neighbor argued that the District Commission had authority to issue the second notice of the permit because “the District Commission was correcting an error, not adjudicating the final permit a second time, and the Commission has express, inherent, and implied authority to correct errors.”

**DECISION: Judgment of Superior Court, Environmental Division, affirmed.**

The Supreme Court of Vermont concluded that Neighbor’s arguments “miss[ed] the mark,” and held that, “[w]ithout deciding whether a District Commission ever at any time has authority to issue a second notice of a permit . . . the Commission did not have that authority here.”

In so holding, the court acknowledged that “Act 250 and its rules authorize

the District Commission to grant or deny permits and to correct application errors in certain circumstances.” (See 10 V.S.A. § 6025(b)(3) (authorizing Natural Resources Board to create procedures for District Commission to approve Act 250 permits); Act 250 Rules, Rule 30 (directing District Commission to approve, approve with conditions, or deny permit applications); Act 250 Rules, Rule 31 (allowing District Commission to alter Act 250 permits in certain circumstances); Act 250 Rules, Rule 34 (authorizing District Commission to amend permit in certain circumstances).) The court also acknowledged that aggrieved parties could challenge an issued permit. (See 10 V.S.A. § 8504(a) (authorizing appeal of District Commission decision to Environmental Division).) However, the court emphasized that such “opportunities are circumscribed; they do not give the Commission open-ended authority to change a permit or an aggrieved party unlimited opportunity to appeal.”

Here, the court found, in light of the lack of required notice, Neighbor had the legal option of requesting that the court extend or reopen the time to appeal. (V.R.A.P. 4.) The court further found that Neighbor did not do so. “Having failed to appeal through an authorized procedure,” Neighbor could not then appeal Applicants’ permit “through this alternative second-notice process,” determined the court. The District Commission, said the court, “is limited by the applicable statutes and rules and cannot create an alternative mechanism for review.” In so concluding, the court recognized “the tension between fairness and the finality of judgments that exists in all types of cases,” but found that “to protect and balance these competing interests,” “existing procedural rules already set the balance between finality and fairness” through avenues which Neighbor here did not take advantage.

See also: *In re Mahar Conditional Use Permit*, 2018 VT 20, 183 A.3d 1136 (Vt. 2018).

See also: *In re Treetop Development Co. Act 250 Development*, 201 Vt. 532, 2016 VT 20, 143 A.3d 1086 (2016).

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*Case Note:*

*In its decision, the court also addressed the procedural issue of whether the issuance of the second permit notice was properly before the Supreme Court for interlocutory review. The court concluded that interlocutory review was appropriate because the matter challenged was whether the District Commission “clearly exceeded its jurisdiction,” and “delaying review until the final decision would harm the parties.”*

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## Hearings and meetings in general— Planning Commission holds hearing on permit, but Board of Commissioners fails to provide for notice for hearing before approving same permit

Neighbors contend board's failure to notice hearing violated Georgia's Zoning Procedures Law, but board says law only requires one noticed hearing per permit

Citation: *Hochstetter v. Pickens County*, 2018 WL 2465513 (Ga. 2018)

GEORGIA (06/04/18)—This case addressed the issue of whether a hearing before a county planning commission afforded interested citizens a meaningful opportunity to be heard by the county board of commissioners on an application for a conditional use permit, and thus satisfied the notice-and-hearing requirements of the Zoning Procedures Law.

**The Background/Facts:** In August 2015, Doug and Lynda Tatum (the "Tatums") applied for a conditional use permit for a 75-acre parcel in Pickens County (the "County"). Following publication of notice, in October 2015, the County Planning Commission held a hearing on the permit application. Several neighbors appeared at the hearing and objected to the application. Nevertheless, the Planning Commission approved the permit application. At its January 2016 meeting, the County Board of Commissioners (the "Board") also approved the permit.

Some of the neighbors (the "Neighbors") then filed a petition for judicial review. The Neighbors argued that they were denied a meaningful opportunity to be heard on the application. In particular, the Neighbors asserted that the Board failed to give notice as required by Georgia's Zoning Procedures Law ("ZPL") of the January 2016 Board meeting at which the Board approved the Tatums' permit.

Pursuant to the ZPL, before a county or municipality makes a "zoning decision," it must afford affected landowners and other interested citizens an opportunity to be heard. To that end, it must "provide for a hearing" on the proposed zoning decision and publish notice of that hearing. (See OCGA § 36-66-4 (a).)

The Board maintained that the hearing for which notice was required under the ZPL was not its January 2016 meeting, but rather, the October 2015 hearing before the Planning Commission—for which proper notice had been given.

The superior court agreed with the Board, holding that the notice of the October 2015 hearing was enough to satisfy the ZPL.

The neighbors appealed, and the Court of Appeals affirmed.

The Supreme Court of Georgia then issued a writ of certiorari to review the decision of the Court of Appeals.

**DECISION: Judgment of Court of Appeals reversed.**

Agreeing with the Neighbors, the Supreme Court of Georgia held that because the January Board meeting was “too attenuated in time or circumstances” from the Planning Commission’s October decision, it did not afford interested citizens a meaningful opportunity to be heard by the Board on the permit application, and therefore another hearing was required for the Board’s January 2016 meeting in order to satisfy the notice-and-hearing requirements of the ZPL.

In so holding, the court agreed with the Board that “a hearing is not required at every stage of the process that leads up to a zoning decision,” and “what the statute requires is one hearing during the continuous course of a zoning matter fore the local government.” Nevertheless, the court found that only one hearing in this case was insufficient to afford the Neighbors a meaningful opportunity to be heard on the permit application. The court said this was because: the Planning Commission had no authority to make a final zoning decision; and although the Planning Commission could make recommendations to the Board, here there was not an adequate record of the hearing before the Planning Commission made and transmitted to the Board—such that the final zoning decision of the Board could be said to have been meaningfully informed by what happened at the Planning Commission’s hearing. Rather, the Board received only a one-page memorandum about the Planning Commission’s October hearing, which noted “considerable objections from the surrounding neighbors in attendance,” but “fail[ed] to disclose even the general nature of those ‘considerable objections.’” The court could not find how the memorandum informed the Board in a “meaningful way” of what happened at the hearing. Accordingly, the court concluded that it could not find that the hearing before the Planning Commission afforded interested citizens a meaningful opportunity to be heard by the Board on the Tatums’ permit application. Thus, the court concluded that the October 2015 hearing did not satisfy the notice-and-hearing requirements of the ZPL.

See also: *City of Roswell v. Outdoor Systems, Inc.*, 274 Ga. 130, 549 S.E.2d 90 (2001).

## Structures and Scale—Zoning board finds by-law limiting scale of new construction does not apply to an applicant's proposed new construction

Abutting landowners challenge that determination and urge a different interpretation of the by-law and its applicability

Citation: *Sinaiko v. Zoning Board of Appeals of Provincetown*, 93 Mass. App. Ct. 274 (May 25, 2018)

MASSACHUSETTS (05/25/18)—This case addressed the issue of the application of a municipal zoning by-law to a proposed new construction. The case involved the interpretation and application of the by-law.

**The Background/Facts:** Stanley Sikorski (“Sikorski”) apparently agreed to purchase a vacant lot (the “Lot”) in the Town of Provincetown (the “Town”). The purchase was contingent on Sikorski obtaining a building permit. Sikorski proposed to build a two-and-a-half story single-family home, totaling 33,810 cubic feet in volume.

Section 2640 of the Town’s zoning by-law was “applicable to all new buildings and all additions in all zoning districts in [the Town].” Section 2640 regulated the scale of new construction and additions. Its purpose was to preserve the Town’s existing character of “buildings that have relatively consistent and harmonious scale within neighborhoods,” and to prevent the construction of “[n]ewer buildings, where the appropriate scale has not been maintained, [that] have disrupted the character of the neighborhoods.” To serve that purpose, the by-law limited the size of new buildings and building additions that could be constructed. More specifically, new buildings were allowed, as of right, in a scale up to 25% larger than the average size of existing buildings in the area (the “neighborhood average”). The by-law dictated that, with regard to new construction, the neighborhood average was to be calculated based on existing structures that lie within 250 feet of the center of the parcel—with “the largest and smallest structures’ within that radius . . . to be excluded.” Landowners seeking to construct a larger building than could be built as of right could apply for a special permit from the Town’s Zoning Board of Appeals (the “Board”).

When Sikorski applied for a building permit for his proposed home, the building commissioner determined that by-law § 2640—and its scale limitations—was not applicable. The building commissioner so determined because in calculating the “neighborhood average” structure scale, only two nearby structures lay within 250 feet of the center of Sikorski’s Lot (with the mean volume of those structures being 6,380 cubic feet). The building commis-

sioner determined that since § 2640 dictated that the “largest and smallest structures” within 250 feet be excluded from the scale calculation for proposed new construction, then § 2640 placed “no constraints on the size of building that Sikorski could build as of right.”

Jonathan Sinaiko and Camille Cabrey (the “Abutters”) appealed the building commissioner’s decision. They argued that the plain language of § 2640 required its application to all new construction—including that proposed by Sikorski, and that, as applied, the by-law required Sikorski to seek a special permit for his proposed building since its 33,810 cubic feet in volume was over five times as large as the 6,380 cubic foot mean volume of the two structures within 250 feet of the center of Sikorski’s Lot.

The Board affirmed the building commissioner’s decision. The Board agreed with the building commissioner’s interpretation of the application of § 2640, and found that, in this case, “there [was] no scale calculation procedure to follow.”

The Abutters appealed. Finding there was not material issue of fact in dispute, and deciding the matter based on the law alone, the superior court affirmed the Board’s decision. The court reasoned that § 2640 was “ambiguous because it did not address how the neighborhood average was to be calculated in the circumstances of this case” (i.e., where there are only two structures within the 250-foot radius of the center of the parcel). The court found it reasonable for the Board to conclude that “where no qualifying structures exist in the 250[-]foot radius, there is no existing scale which must be protected.”

The Abutters again appealed.

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

The Appeals Court of Massachusetts agreed with the Abutters’ arguments. It held that by its plain language, § 2640 was “applicable to all new buildings,” and the Board was therefore “not free to determine that the by-law simply [was] inapplicable.”

Having determined that § 2640 applied to Sikorski’s proposed structure, the court next looked at how the neighborhood scale average was to be calculated in the circumstances presented. The court concluded that there was an interpretation of the by-law that would “accord both its language and its express purpose.” The court found that “[n]othing in the language of § 2640 compelled the building commissioner to exclude existing structures when doing so would leave him without a basis upon which to set a neighborhood average.” In fact, the court found that “the specific language of the by-law cuts in the other direction.” Finding that the terms “largest” and “smallest” that appear in the by-law properly are used only in relation to three or more items, the court concluded that “a grammatically correct reading of the by-law’s plain language, the directive that the building commissioner exclude the ‘largest’ and ‘smallest’ structures in calculating a neighborhood average would apply only where there are three or more structures within 250 feet of the applicable measuring point.” Applying such an interpretation here, the court found that the two structures within 250 feet of the applicable measuring point would not be excluded in calculating the neighborhood average.

With Sikorski’s proposed structure having a volume five times greater than

the mean volume of the two structures within the 250-foot radius, the court agreed with the Abutters that the proposed building was “too large to be approved . . . without a special permit.”

See also: *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 255 N.E.2d 347, 1 Env't. Rep. Cas. (BNA) 1122 (1970).

## Vested Rights—After applicant files building permit for farm structures, town zones land as non-agricultural

Applicant contends Wisconsin's Building Permit Rule applies to land and not just structures, thus vesting its right to agricultural use

Citation: *Golden Sands Dairy LLC v. Town of Saratoga*, 2018 WI 61, 2018 WL 2710392 (Wis. 2018)

WISCONSIN (06/05/18)—This case addressed the issue of whether the Building Permit Rule—which vests the right to use property consistent with current zoning at the time a building permit application that strictly conforms to all applicable zoning regulations is filed—applies to all land specifically identified in the building permit application, or whether it applies merely to structures.

**The Background/Facts:** In June 2012, Golden Sands Dairy, LLC (“Golden Sands”) filed a building permit application with the Town of Saratoga (the “Town”). Golden Sands sought to operate a farm on 6,388 acres in and around the Town. In furtherance of that use, Golden Sands’ building permit application sought to build seven farm structures on 92 acres of the 6,388 acres. Attached to Golden Sands’ building permit application was a map of the property. The map highlighted the agricultural land in blue and the land on which the building structures would be constructed in yellow. The map was based on a U.S. Geological Survey topographical map that contained details such as county borders, roads, and latitude and longitude.

At the time Golden Sands filed its building permit application, the Town did not have any zoning ordinances, and the county zoning ordinance zoned the land as “unrestricted,” meaning it could be used for any lawful purpose. In October 2012, the Town passed a permanent zoning ordinance, which was ratified by the county in November 2012. Under the Town’s new zoning ordinance, only 2% of the town—and none of Golden Sands’ land—was zoned for agricultural use. Accordingly, Golden Sands’ planned dairy farming operation did not conform to the zoning ordinance.

Ultimately, in light of its new zoning ordinance, the Town refused to issue the building permit to Golden Sands. Golden Sands then filed a mandamus action to compel the Town to issue the building permit. Golden Sands argued that the Building Permit Rule extended to all land specifically identified in a

building permit application—and as such, Golden Sands thus had a vested right to use all of the property for agricultural purposes. Under Wisconsin law, the Building Permit Rule vests the right to use property consistent with current zoning at the time a building permit application that strictly conforms to all applicable zoning regulations is filed.

The circuit court concluded that Golden Sands' building permit application was complete and complied with all zoning regulations at the time it was filed. The circuit court also agreed with Golden Sands and concluded that the Building Permit Rule extends to all land identified in the building permit application. Finding there was no material issues of fact in dispute, and deciding the matter on the law alone, the court issued summary judgment in favor of Golden Sands.

The Town appealed. On appeal, the Town argued that Golden Sands' building permit was limited to vesting its right to build the seven structures identified in the building permit but did not also grant Golden Sands the right to use for agricultural purposes the farmland specifically identified in the building permit application.

The court of appeals agreed with the Town. The court of appeals distinguished between the right to build a structure and the right to use land. It determined that “the right to build a structure vests with the filing of a building permit application that strictly conforms to all applicable zoning regulations, but the right to use land vests with open and obvious use under the nonconforming use doctrine.” Based on that distinction, the court of appeals concluded that Golden Sands' building permit vested its right to build the structures, but not to use the other land identified in the building permit application for agricultural purposes—since Golden Sands was not yet using the land for agricultural purposes. The court of appeals concluded that because Golden Sands had not established a nonconforming use before the Town's zoning ordinance took effect, it could not use any of its land for agricultural purposes.

Golden Sands appealed.

**DECISION: Judgment of court of appeals reversed.**

Agreeing with Golden Sands, the Supreme Court of Wisconsin held that “the Building Permit Rule extends to all land specifically identified in a building permit application.” The court concluded that, consequently, Golden Sands had a vested right to use all of the property for agricultural purposes.

In so holding, the court found that the “primary policy underlining the bright-line Building Permit Rule” was “predictability.” The court concluded that predictability was “best advanced by applying the [Building Permit Rule] to all land specifically identified in the building permit application.” Otherwise, noted the court, “piecemealing,” as advanced by the Town and the court of appeals, “would require extensive litigation over how much land specifically identified in the building permit application [was] necessary . . . .” Moreover, said the court, “for any business that requires land in addition to structures for its operations, a building permit is nearly worthless if the rights vested by virtue of obtaining a conforming building permit do not extend to the land necessary to put the structures to their proper use.” Further, the court said that “[t]o separate structures from their associated land would be to allow zoning

authorities to circumvent the Building Permit Rule by enacting restrictive zoning regulations on land that is necessary to give the buildings value.” (The court found support for its conclusion under the principles advanced in other jurisdictions—namely those that “emphasize that the rights vested by a building permit application are to develop land, not merely build structures.”)

Applying its holding to the facts here, the court held that because Golden Sands’ building permit application included a map that provided “an objective means to determine the contours of the [p]roperty,” Golden Sands possessed a vested right to use the property for agricultural purposes.

See also: *McKee Family I, LLC v. City of Fitchburg*, 2017 WI 34, 374 Wis. 2d 487, 893 N.W.2d 12 (2017).

See also: *Manna Funding, LLC v. Kittitas County*, 173 Wash. App. 879, 295 P.3d 1197 (Div. 3 2013), as amended on denial of reconsideration, (Apr. 9, 2013).

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*Case Note:*

*Wisconsin is in the minority of United States jurisdictions that adheres to the Building Permit Rule. The majority of other jurisdictions require both a building permit and “substantial construction and/or substantial expenditures before rights vest.” The court explained that under the majority rule, a landowner’s building permit can be revoked if the property is rezoned (even if construction has already begun).*

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## Zoning News from Around the Nation

### HAWAII

The Puna County Council Planning Committee has reportedly postponed action until mid-July on vacation rental legislation while the County recovers from its ongoing lava flow emergency. The proposed legislation would prohibit un-hosted short-term rentals in residential and agricultural zones, while allowing them in hotel and resort zones as well as commercial districts. Existing rentals in disallowed areas would be able to be grandfathered in by applying for a nonconforming use certificate that must be renewed annually at a cost of \$500. One council woman has reportedly proposed adding language to the bill that would allow the County planning director to accept applications for new short-term vacation rentals to replace those lost during an emergency. However, opponents of that proposed amendment argue it is contrary to the original intent of the bill.

Source: *West Hawaii Today*; [www.westhawaii.com](http://www.westhawaii.com)

### OHIO

Governor John Kasich recently signed legislation, which, among other things, contained an amendment that would accelerate an expected referen-

dum on the proposed rezoning of approximately 290 acres in the Village of Lordstown, Trumbull County—on which the TJX Companies has proposed to build a HomeGoods distribution center. “The legislation allows the Trumbull County Board of Elections to schedule a special election for the referendum 60 days after a council vote accepting the rezoning.” Without the legislation, a referendum would not have taken place until the general election in November.

Source: *The Business Journal*; <https://businessjournaldaily.com>

## TENNESSEE

Effective May 23, 2018, a new state law (House Bill 1020)—The Short-Term Rental Unit Act—allows “cities to regulate short-term rental units if they choose, but will protect those hosts who already have been renting their properties through online platforms such as Airbnb.” Under the new law, “short-term rentals” are defined as “a residential dwelling that is rented wholly or partially for a fee for a period of less than 30 continuous days” and does not include a hotel or bed and breakfast. The new law allows municipalities to pass local legislation that bans or limits short-term rentals. However, the state law grandfathers short-term rental hosts that can prove they were offering short-term rentals for at least six months of the 12-month period before the effective date of any new municipal law regulating such use.

Source: *The Daily Times*; [www.thedailytimes.com](http://www.thedailytimes.com)

# Zoning Bulletin

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## Vested rights—After developer submits incomplete zoning application, township adopts ordinance prohibiting developer's proposed use

Developer says its still entitled to develop pursuant to New Jersey's Time of Application Rule, but township says Rule only applies to "complete" applications

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### Contributors

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Citation: *Dunbar Homes, Inc. v. Zoning Board of Adjustment of Township of Franklin*, 2018 WL 3041000 (N.J. 2018)

NEW JERSEY (06/20/18)—This case addressed the issue of whether an incomplete zoning application triggers New Jersey’s Time of Application Rule (the “TOA Rule”) (N.J.S.A. 40:55D-10.5)—which provides that “development regulations which are in effect on the date of the submission of an application for development shall govern the review of that application for development.” More specifically, the case addressed the issue of “whether an application for development that does not include all required materials should be considered an ‘application for development’ for purposes of the TOA Rule.”

**The Background/Facts:** Dunbar Homes, Inc. (“Dunbar”) was a land developer and residential builder. Dunbar owned a 276-unit garden apartment complex in a General Business Zone (“GB-Zone”) in Franklin Township (the “Township”). Dunbar also owned 6.9 acres adjacent to its apartment complex. Dunbar sought to develop on those 6.9 acres an additional 55 garden apartments.

At the time Dunbar was considering the proposed development, under the Township’s zoning ordinance, garden apartments were a permitted conditional use in the GB-Zone. As such, Dunbar was required to obtain a (d)(3) variance and site plan approval. However, in May 2013, the Township introduced a proposed ordinance that eliminated garden apartments as a permitted conditional use in the GB-Zone. One day before the public hearing on that proposed ordinance, Dunbar submitted an application to the Township’s Planning Board for site plan approval and a (d)(3) variance to build those additional 55 garden apartments. The next day, July 16, 2013, the Town adopted the new ordinance eliminating garden apartments as a permitted conditional use in the GB-Zone. The new ordinance became effective on August 5, 2013. On August 7, 2013, a Township zoning officer notified Dunbar that its application was incomplete. As such, and given the effectiveness of the new ordinance, Dunbar was instructed that it would now need to apply for a (d)(1) variance (with stricter standards) instead of a (d)(3) variance.

Dunbar appealed the zoning officer’s determination to the Township’s Zoning Board of Adjustment (the “Board”). Dunbar argued that its application was “complete” upon submission and therefore was protected by New Jersey’s Time of Application (“TOA”) Rule. The TOA rule provides:

“Notwithstanding any provision of law to the contrary, those development regulations which are in effect on the date of submission of an application for development shall govern the review of that application for development and any decision made with regard to that application for development. Any provisions of an ordinance, except those relating to health and public safety, that are adopted subsequent to the date of submission of an application for development, shall not be applicable to that application for development.” (N.J.S.A. 40:55D-10.5)

Dunbar argued that, therefore, for the purpose of its application, the TOA Rule preserved the zoning ordinance in place at the time Dunbar submitted its application (allowing garden apartments as permitted conditional uses, and requiring a less stringent (d)(3) variance). Dunbar contended that despite some admitted deficiencies in its application, its application was “sufficient.” It also argued that requiring its application be “complete” for the TOA Rule to be effective would “frustrate the purpose” of New Jersey’s Municipal Land Use Law (“MLUL”) (which includes the TOA Rule), which only required an “application for development” rather than a “complete application for development” to trigger the protections of the TOA Rule.

The Township argued that the zoning ordinance required an application for development to be “complete” for the TOA Rule to apply.

Agreeing with the Township’s view, the Board denied Dunbar’s appeal. The Board determined that Dunbar’s application was not an “application for development” as defined by the ordinance because it did not include materials required by the ordinance. Thus, the Board concluded that because Dunbar’s application was not deemed “complete” before the effective date of the ordinance prohibiting garden apartments in the GB-Zone, the TOA Rule did not shield Dunbar from the Township’s new zoning ordinance, and Dunbar was required to obtain a (d)(1) variance for its proposed development.

Dunbar appealed to the superior court. The superior court determined that the TOA Rule should apply “if the applicant provide[s] enough information . . . so that a meaningful review of the application can commence.” And, here, the court found that Dunbar’s submission met that standard. The court thus concluded that Dunbar’s application was protected by the TOA Rule.

The Township appealed. The Appellate Division reversed the trial court. In doing so, the Appellate Division rejected the trial court’s “enough information for meaningful review” standard. The Appellate Division instead held that an application must meet the definition of “application for development” under the MLUL. Under the MLUL (N.J.S.A. 40:55D-3), “application for development” is defined as “the application form and all accompanying documents required by ordinance for approval of a subdivision plat, site plan, planned development, cluster development, conditional use, zoning variance or direction of the issuance of a permit.” Thus, the Appellate Division concluded that “[t]he benchmark for determining whether documents required for the submission to constitute an application for development . . . is whether they are specifically required by the ordinance.” Applying that standard to Dunbar’s application, the Appellate Division concluded that Dunbar’s submission did not constitute an “application for development” within the meaning of the MLUL because it did not include all items required by the ordinance. Accordingly, the Appellate Division determined that therefore the Board’s decision not to extend the protection of the TOA Rule to Dunbar’s submission was not arbitrary or capricious or unreasonable.

Dunbar petitioned for certification, and the Supreme Court of New Jersey granted the petition.

**DECISION: Judgment of Appellate Division affirmed.**

Agreeing with the Appellate Division and looking at the plain language of the MLUL, the Supreme Court of New Jersey held that for protections of the TOA Rule to apply, an “application for development” must include the information and all accompanying documents required by the relevant municipal ordinance. In its holding, the court rejected Dunbar’s argument that the TOA Rule did not require a “complete” application. The court found that although the TOA Rule did not use the word “complete,” it explicitly cross-referenced the local ordinance provisions of the MLUL, which list application requirements. (See N.J.S.A. 40:55D-3, defining “application for development.”)

The court found support for its position in noting that such a “clear, easily, applied, and objective standard advances the MLUL’s goal of statewide consistency and uniformity in land use decisions.” The court explained that such a standard “requires that the zoning officer compare the contents of a submission to the requirements of the municipal ordinance; it does not require review of each submission to determine whether a ‘meaningful review’ can be undertaken.”

Having determined that, to be protected by the TOA Rule, applicants must submit precisely what the MLUL (N.J.S.A. 40:55D-3) requires—"the application form and all accompanying documents required by ordinance for approval of a . . . site plan, . . . conditional use, zoning variance or direction of the issuance of a permit"—the court concluded that the Board's determination that Dunbar's application was not entitled to the protection of the TOA Rule and that Dunbar would have to complete a more stringent (d)(1) variance application was not "arbitrary and capricious or unreasonable." The court found it undisputed that Dunbar's submission lacked items mandated by the ordinance. Because Dunbar's application was incomplete and Dunbar had not sought a waiver, the court concluded that Dunbar's application could not benefit from the TOA Rule.

See also: *Grabowsky v. Township of Montclair*, 221 N.J. 536, 115 A.3d 815 (2015).

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*Case Note:*

*In this case, the Supreme Court of New Jersey granted the following motions for leave to appear as amicus curiae: a joint motion by the New Jersey Builders Association, NAIOP New Jersey Chapter, Inc., and the International Council of Shopping Centers; a joint motion by the New Jersey State League of Municipalities and the New Jersey Institute of Local Government Attorneys; and an individual motion by the New Jersey State Bar Association.*

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*Case Note:*

*In its decision, the Supreme Court of New Jersey also noted "some important practical limits to Board determinations based on an application's failure to include all required materials." The court said that an application is not rendered "incomplete" simply because a municipality requires "correction of any information found to be in error and submission of additional information not specified in the ordinance or any revisions in the accompanying documents." (See N.J.S.A. 40:55D-10.3). Further, the court said that "in the event information required by local ordinance is not pertinent, the applicant may request a waiver as to that information or those documents it finds extraneous." (See N.J.S.A. 40:55D-10.3). In such a case, the court explained, if a waiver request for one or more items accompanies all other required materials, the applicant's submission will provisionally trigger the TOA Rule. Then, if the Board grants the waiver, the application will be deemed complete. If the Board denies the waiver, its decision will be subject to review under the customary "arbitrary and capricious or unreasonable" standard.*

## Civil Rights/Procedures—Property owner appeals issuance of zoning permits to neighbor, and later brings a civil rights claim against borough

Property owner's civil rights claim contends borough violated her substantive right to be heard in her appeal

Citation: *Harz v. Borough of Spring Lake*, 2018 WL 3117016 (N.J. 2018)

NEW JERSEY (06/26/18)—This case addressed the issue of whether a homeowner, who challenges the issuance of a zoning permit allowing construction on neighboring property, has a statutory right to be heard before the municipal planning board, and if so, whether the violation of that right gives rise to an action under the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2.

**The Background/Facts:** In December 2009, the Borough of Spring Lake (the "Borough") issued a zoning permit (the "First Permit") to Thomas Carter ("Carter"). The permit was for construction of a two-and-a-half story residence and a detached garage. Mary Harz ("Harz") owned the property adjacent to Carter's. She was unaware of the issuance of the permit until late spring 2010 when construction began on Carter's residence. Concerned about what she was observing of the construction, Harz reviewed Carter's development plans on file at the Borough's Zoning Office and determined that they allowed for several violations of the Borough's land-use ordinance. Harz brought her concerns to the Borough's zoning officer. Unsatisfied with the zoning officer's response, Harz hired an attorney.

In June 2010, Harz's attorney appealed the issuance of Carter's zoning permit. Despite Harz's request to do so, the zoning officer failed to transmit the appeal to the Borough's Planning Board. The zoning officer did request revised construction plans from Carter, and although no stop work order issued, construction on the project effectively ceased.

In August 2010, the zoning officer approved a new set of revised plans and issued an amended zoning permit to Carter (the "Second Permit"). Harz appealed the Second Permit, alleging that the revised plans still violated the Borough's height regulations. The Planning Board set a hearing for the appeal, but later cancelled it, and instead the zoning officer issued a stop work order on the determination that Carter's construction plans were not in conformance with the Borough's land-use ordinance.

After Carter again submitted revised construction plans, another permit (the "Third Permit") issued. Harz again believed the revised plans still violated the Borough's land-use ordinance. She sought and obtained from the superior court a temporary restraining order to stop construction, and then she appealed the issuance of the Third Permit to the Planning Board.

After a hearing, the Planning Board agreed with some of Harz's objections, finding Carter's construction plans violated some of the Borough's land-use ordinance. The Planning board rescinded the Third Permit, and then, once Carter met specified conditions, issued a final permit to Carter.

Harz did not appeal that final permit. However, in August 2011, Harz filed a federal and state civil rights action against the Borough and the initial zoning officer (hereinafter, collectively the "Borough"). Among other things, Harz brought a claim under the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2, alleging that the Borough violated her substantive rights under the New Jersey Constitution and New Jersey's Municipal Land Use Law (the "MLUL"). Essentially, Harz complained that she had a right to a hearing on her appeal, and that right was violated, causing her to expend substantial funds to retain an attorney and other licensed professionals in battling the improperly issued zoning permits.

Finding no material issues of fact in dispute, and deciding the matter on the law alone, the trial court issued summary judgment in favor of the Borough and dismissed Harz's complaint. With regard to Harz's civil rights claim, the trial court concluded that the MLUL only established a "right to be heard," and not a "right to a hearing." The court found that Harz was "heard" by filing her appeals, and therefore concluded that her rights were not violated.

Harz appealed. Disagreeing with the trial court, the Appellate Division found that, under the MLUL—N.J.S.A. 40:55D-72—Harz had a substantive right to appeal the issuance of the permits, which the Borough violated when the zoning officer failed to transmit her initial appeal to the Planning Board and when the Borough cancelled the hearing on the appeal of the Second Permit. The Appellate Division essentially concluded that Harz's action in getting a temporary restraining order on construction from the trial court "was the means by which Harz vindicated her substantive right to secure the [Planning B]oard's review of an alleged zoning violation.'"

The Borough petitioned for certification, challenging the reinstatement of Harz's state civil rights claim. The Borough argued that N.J.S.A. 40:55D-72 does not confer on an "interested party," such as Harz, the "right to a board hearing" on an appeal challenging the issuance of a zoning permit and therefore the Appellate Division erred in finding the violation of a cognizable substantive right under the Civil Rights Act. Alternatively, the Borough argued that, even assuming that the statute conferred a right to appeal to a Board, Harz "received relief under the statute because the appealed zoning permits issued to her neighbors were either withdrawn (after Harz's first Notice of Appeal) or rescinded (after Harz's second Notice of Appeal)"—thus rendering moot Harz's appeals to the Board.

The Supreme Court of New Jersey granted the Borough's petition.

**DECISION: Judgment of Appellate Division reversed.**

The Supreme Court of New Jersey held that Harz did have a substantive right to be heard pursuant to the MLUL. However, the court concluded that "the Borough did not violate a substantive right as envisaged under [New Jersey's] Civil Rights Act."

The court explained that New Jersey's Civil Rights Act—subsection (c) of N.J.S.A. 10:6-2—provides in part: "Any person who has been deprived of . . . any substantive rights, privileges or immunities secured by the Constitution or laws of this State, . . . by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief." (N.J.S.A. 10:6-2(c).) The court noted that the prevailing party in a private cause of action under the Civil Rights Act may also receive "reasonable attorney's fees and costs." (N.J.S.A. 10:6-2(f).)

The court further explained that identifying whether a claimed right is a “substantive right” protected under the state’s Civil Rights Act involves a multi-step test under which the court must determine: “(1) whether, by enacting the statute, the Legislature intended to confer a right on an individual” . . . ; (2) whether the right “is not so ‘vague and amorphous’ that its enforcement would strain judicial competence,” . . . ; and (3) whether the statute “unambiguously impose[s] a binding obligation on the [governmental entity]” ; and (4) whether the “right is substantive, not procedural.” With regard to differentiating “substantive” from “procedural” rights, the court noted that “a substantive right is ‘[a] right that can be protected or enforced by law; a right of substance rather than form.’”

Here, the court found that the nature of the substantive right at issue—a property right—was “clearly identifiable,” and that Harz had a right to have her property concerns “heard in some form.” Looking at the MLUL, the court found that it “clearly” conferred on Harz a right to be heard before the Planning Board. Finding “an interested party’s right to be heard is inextricably tied to a party’s property rights,” the court found that the MLUL right to be heard was “substantive, not procedural.”

Although the court found that Harz had a substantive right to be heard by the Board, the court also found that the zoning officer’s failure to transmit Harz’s initial appeal to the Planning Board and the Borough’s cancellation of the hearing on the appeal of the Second Permit “did not deprive Harz of a substantive right because she suffered no adverseness.” The court cited the effective ceasing of construction on Carter’s property after Harz’s initial appeal as reason that Harz “suffered no adverseness to any property right she possessed.” Moreover, the court found that nothing in the record suggested that if Harz had not filed her action with the trial court for the temporary restraining order, the Planning Board would have denied her a hearing. Thus, the court concluded that, for the purposes of the state Civil Rights Act, Harz did not exhaust the statutory process for securing her right to be heard under the MLUL. Having found that Harz failed to prove that the Borough deprived her of the right to be heard, the court concluded that Harz’s civil rights claim must be dismissed.

See also: *Tumpson v. Farina*, 218 N.J. 450, 95 A.3d 210 (2014).

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*Case Note:*

*In its decision, the court acknowledged that if the zoning officer had permitted construction to proceed on Carter’s property and blocked Harz’s ability to appeal and be heard by the Board, that scenario may have been a violation of Harz’s substantive property right and a Civil Rights Act violation.*

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## Telecommunications Act—After zoning board denies variance for telecommunications tower, variance applicant alleges board violated the federal Telecommunications Act

Applicant contends board's decision failed to provide substantial evidence related to express consideration of the Act's requirements

Citation: *American Towers LLC v. Town of Shrewsbury*, 2018 WL 3104105 (D. Mass. 2018)

MASSACHUSETTS (06/22/18)—This case addressed the issue of whether a zoning board's decision in denying a variance for a telecommunications tower was supported by "substantial evidence," as required by the federal Telecommunications Act. It also addressed the issue of whether the federal Telecommunications Act requires municipal zoning boards, when denying a particular application, to expressly consider the requirements of the Telecommunications Act—including coverage gap or whether a denial is an effective prohibition of wireless services.

**The Background/Facts:** American Towers LLC and T-Mobile Northeast LLC (collectively, "American Towers") entered into a lease agreement to lease a certain part of a property in the Town of Shrewsbury (the "Town"). American Towers planned to construct a wireless communications facility on the property, including a 149-foot multicarrier monopole-style tower. The property was located in a Rural A Zoning district which did not allow wireless communication towers or structures taller than 35 feet. Accordingly, American Towers applied to the Town's Zoning Board of Appeals ("ZBA") for a use variance and a dimensional variance.

Eventually, the ZBA voted to deny the variances. The ZBA issued a three-page decision denying the application. The decision explained that the Board found that the proposed tower "would create a nuisance by virtue of noise, odor, smoke, vibration, traffic generated, unsightliness and other conditions detrimental to the public good." The ZBA also found "no unique conditions of the lot's size, topography, orientation, and shape, where strict compliance with the requirements of the Zoning Bylaw would be an undue hardship upon [American Towers]."

American Towers later brought a lawsuit against the Town and the ZBA. American Towers contended that the ZBA's denial of the variances violated the federal Telecommunications Act of 1996 ("TCA").

Among other things, the TCA provides that the state and local regulation of "the placement, construction, and modification of personal wireless service facilities" shall not "unreasonably discriminate among providers of functionally equivalent services" or "prohibit or have the effect of prohibiting the provision

of personal wireless services.” (47 U.S.C.A. § 332(c)(7)(B)(i) and (iii).) Also, when a local zoning authority denies an application to construct a wireless facility, the TCA requires the local authority’s decision be (1) “in writing” and (2) “supported by substantial evidence contained in a written record.” (47 U.S.C.A. § 332(c)(7)(B)(iii).)

Here, under Count 1 of its complaint, American Towers alleged that the Town had effectively prohibited cell-phone service in violation of the TCA. Under Count 2, American Towers alleged that the ZBA’s opinion was not based on substantial evidence contained in a written record, in violation of the TCA.

American Towers asked the court to find there were no material issues of fact and to issue summary judgment in their favor on Count 2. American Towers sought this summary judgment on the theory that if the ZBA’s denial of the variances was found not to be supported by substantial evidence—in violation of the TCA—American Towers would be entitled to an injunction requiring the Town to approve the variances (and Count 1 would then be moot). American Towers argued that the ZBA did not comply with the TCA’s requirement that its decision be “supported by substantial evidence contained in a written record.” Specifically, American Towers contended that the “hardship” warranting their requested variance was a significant gap in wireless service coverage. They further contended that the TCA required local zoning boards to treat such a gap in coverage as an additional category of hardship under the Massachusetts variance standard. (Under the Massachusetts Zoning Act, zoning variances are permitted for hardships related to soil conditions, shape, or topography of the land. (Mass. Gen. Laws Ch. 40A, § 10.)) Thus, they contended that the ZBA had a duty to consider, under the TCA’s substantial-evidence requirement, whether a variance denial effectively prohibited wireless service. They argued that: “(1) they demonstrated, without contradiction, a significant gap in coverage—indeed, the Board so found; (2) the Board’s refusal to permit the closing of such a gap constitutes an ‘effective prohibition of wireless service’ within the meaning of the TCA; and (3) the Board did not give any reason as to why its refusal to permit the variance did not constitute ‘effective prohibition’; [and] therefore (4) the Board’s decision [was] not supported by substantial evidence contained in a written record.”

In a cross-motion, the Town asked the court to issue summary judgment on Count 2 in its favor.

**DECISION: American Tower’s motion for partial summary judgment on Count 2 and the affirmative defenses granted in part as to liability for Count 2, and denied in part without prejudice as to the affirmative defenses and the remedy for Count 2. Town’s cross-motion for partial summary judgment on Count 2 denied.**

The United States District Court, D. Massachusetts, held that the ZBA’s decision did violate the substantial-evidence standard of the TCA.

In so holding, the court rejected American Tower’s argument that a zoning board must expressly consider the requirements of the TCA—including coverage gap or whether a denial is an effective prohibition of wireless services. The court found the TCA did require a variance if a town’s denial would be an effective prohibition of wireless services. And, the court found that the TCA requires zoning decisions be supported by substantial evidence. However, in reviewing the statutory language, First Circuit (Court of Appeals) guidance, and explicit holdings in other circuits, the court found those two requirements were separate.

For example, explained the court, “[t]o demonstrate an effective-prohibition claim based on the denial of a particular proposal, the proponent of the tower has the burden to show ‘that further reasonable efforts are so likely to be fruitless that it is a waste of time to even try.’” Moreover, “[w]hile an individual denial by a zoning board might amount to an effective prohibition, the information necessary to make that determination is broader than the particular site for which approval is sought— . . . presumably includ[ing] information about the town’s regulatory scheme, the feasibility of other possible locations, and so on.” In comparison, to demonstrate a “substantial evidence” claim, “a plaintiff need only establish that the particular decision by the zoning board in a given case was not in writing or not supported by substantial evidence.” Those different standards of review, said the court, “appear to reflect a judgment that deference is due to the zoning board’s specific decision about the appropriateness of a particular project, whereas the question of whether wireless service has been effectively prohibited is a question on which a lay zoning board has no particular expertise.” Thus, the court concluded that a zoning board “need not expressly consider the requirements of the TCA.” Rather, “[t]he relevant standard the [b]oard must use to determine a variance is that set forth by state and local law.” Accordingly, the court concluded that its substantial-evidence review here was limited to the ZBA’s decision under the Massachusetts Zoning Act’s standards for obtaining a zoning variance.

Under that review, the court concluded that the ZBA failed to support its zoning variance denials with substantial evidence, as required by the TCA. The court noted that “it is not sufficient under the TCA for a board to simply recite the applicable legal standard.” Here, the court found that was all that the ZBA had done in issuing its decision denying American Tower’s variances. The ZBA, found the court, failed to address Massachusetts Zoning Act variance standards—such as the hardship of land topography (which might require a tall tower). In fact, the court found that the ZBA failed to address any claimed hardship at all. The court concluded that the ZBA’s “bare-bones decision” was not “sufficient explanation of the reasons for the denial ‘to allow a reviewing court to evaluate the evidence supporting those reasons.’” In short, the court concluded that the reasons given by the ZBA for variance denials were “plainly inadequate.”

Having concluded that the ZBA violated the TCA’s substantial-evidence requirement, the court next addressed the remedy due American Towers. American Towers had argued that the ZBA’s violation of the TCA’s substantial-evidence requirement warranted an injunction, ordering the Town to issue the variances. While the court acknowledged that an injunction might be warranted for such a violation under “some circumstances”—such as when a “board is hostile to an applicant and using an . . . unsupported decision as cover for unreasonably obstructing a proposal”—here, the court concluded that it was not yet prepared to address a remedy for the substantial-evidence violation. The court said it would not address a remedy until American Tower’s effective-prohibition claim under Count 1 of the complaint was resolved (which could be dispositive).

See also: *Nextel Communications of Mid-Atlantic, Inc. v. Town of Wayland Mass.*, 231 F. Supp. 2d 396 (D. Mass. 2002).

See also: *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620 (1st Cir. 2002).

See also: *T-Mobile Central, LLC v. Unified Government of Wyandotte County, Kansas City, Kan.*, 546 F.3d 1299 (10th Cir. 2008).

See also: *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715 (9th Cir. 2005).

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*Case Note:*

*In its decision, the Court further noted that “although it is by no means required to do so, a local zoning board is not prohibited from considering whether its decision in a particular case would amount to an effective prohibition on the provision of wireless services.” The court said that in choosing to address the effective-prohibition issue, a zoning board thereby “retain[s] substantial control over where and how cell towers are built within its borders.” Still, if the zoning board chooses not to address that issue—as it may, the court advised that “it runs the risk that an individual decision might be held to be an effective prohibition, and it may be forced to issue a variance without further discussion of alternatives.”*

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## Zoning News from Around the Nation

### MAINE

The state House and Senate have passed a “sweeping medical marijuana reform bill.” The bill was headed to Governor LePage. Among other things, the bill would let medical marijuana caregivers “open retail stores, letting them become mini dispensaries that can serve as many card-carrying patients as they can from 30 flowering marijuana plants, but only in towns that have authorized medical marijuana storefronts.” A municipal opt-in amendment that was adopted with the bill “essentially allows a town to shut out caregiver retail stores by doing nothing,” and also allows towns “to shut down existing stores that have popped up without municipal authorization.”

Source: *The Times Record*; [www.timesrecord.com](http://www.timesrecord.com)

### NEW YORK

The state Senate recently quashed a bill—Senate Bill S6760—which would have eliminated the cap on the residential floor area ratio. If the bill had passed, it would have allowed for taller and denser residential building.

Source: *Brownstoner*; [www.brownstoner.com](http://www.brownstoner.com)

### OHIO

The state Senate Energy and Natural Resources Committee is considering a bill—House Bill 114—that would reportedly “relax the state’s strict wind turbine setbacks rules but again weaken renewable and energy efficiency standards.” Under the bill property line setbacks for commercial wind turbines would be “at least 1,225 feet to the nearest habitable structure on a property.”

Source: *Energy News Network*; <https://energynews.us>

# Zoning Bulletin

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## Inverse Condemnation—City encourages and invites public to use privately-owned beach parcel

Parcel owner sues city, alleging a taking of property without just compensation

Citation: *Chmielewski v. City of St. Pete Beach*, 890 F.3d 942 (11th Cir. 2018)

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### Contributors

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

ELEVENTH CIRCUIT (FLORIDA) (05/16/18)—This case addressed the issue of whether a city's encouragement and invitation to the general public to access private beachfront property amounted to an illegal seizure in violation of the property owner's Fourth Amendment rights, and a taking without just compensation in violation of the Florida Constitution.

**The Background/Facts:** The estate of Chester Chmielewski (the "Chmielewskis") owned beachfront property in the Don CeSar Place Subdivision in the City of St. Pete Beach (the "City"). Specifically, the Chmielewskis' home sat adjacent to one of the two blocks of the subdivision—Block M, and the Chmielewskis had title to the beachfront portion of Block M contiguous to their residence and extending across Block M to the mean high water line ("MHWL") of the Gulf of Mexico. The Chmielewskis' fee simple ownership was subject only to: (1) a 1925 plat restriction that allowed Don CeSar Subdivision owners the right to use Block M, including the Chmielewskis' beach parcel, for "beach and bathing purposes"; and (2) Florida law making available for public use the beach area between the water and the MHWL.

In 1975, the City acquired the original Don CeSar subdivision developer's residence, known as the Don Vista property. The Don Vista property adjoined Block M, just north of the Chmielewskis' property. From 2003 to 2005, the City renovated the Don Vista property, turning it in to a community center. As part of the renovations, the City cleared a direct public access path from a mini-park across from Block M to the Gulf of Mexico, and posted large signs with the City's emblem stating "Beach Access." The City also provided public parking to facilitate beach access, and published a map showing public access to the Block M beach at the Don Vista Center. While the City was renovating the Don Vista Center, it also zoned and mapped Block M, including the Chmielewskis' beach parcel, as "recreation open space/public park." That zoning designated the property as a public beach for public use (inconsistent with the Chmielewskis' private ownership rights).

The Chmielewskis later claimed that following these City renovations and actions, large numbers of public beachgoers flocked onto the Chmielewskis' private beach parcel. The Chmielewskis also claimed that the City declined to enforce its trespassing laws against those members of the public trespassing on the Chmielewskis' property. Moreover, the Chmielewskis pointed to the fact that the City actually facilitated public use of the Chmielewskis' beach parcel by, among other things: allowing Block M to be used for weddings, including nuptials on the Chmielewskis' beach parcel; and organizing a large wiffle ball tournament that occurred on Block M, including the Chmielewskis' beach parcel.

In 2009, the Chmielewskis sued the City. They alleged the City committed an unreasonable seizure of the property in violation of the Chmielewskis' Fourth Amendment rights and an unlawful taking of their property without full compensation in violation of the Florida Constitution.

Ultimately, a jury returned a verdict for the Chmielewskis on both the federal and state claims. The jury awarded the Chmielewskis \$1,489,700—which was the exact amount that the Chmielewskis' appraiser testified represented “just compensation” for the value of the entire beach parcel plus the severance damages to the Chmielewskis' residential property.

After trial, the City moved for judgment as a matter of law (i.e., arguing that the evidence was insufficient to support the jury's verdict), asking the court to issue judgment in the City's favor. The district court refused. The court held that the evidence was sufficient to support the jury's finding that “the City had meaningfully interfered with the Chmielewskis' use and enjoyment of their property, in violation of the Fourth Amendment, and that the Chmielewskis had presented substantial evidence from which a reasonable jury could find that the City's statements and actions had demonstrated ‘more than a passive attitude’ about the public's use of the Chmielewski property.” On the takings claim, the district court also held that the evidence supported a finding that the City: “created a right of public access across Block M behind the Don Vista Center, so that a fair-minded person could conclude that the City's actions gave members of the public a permanent and continuous right to pass to and fro on Block M, so that the Chmielewski Block M beach parcel may be continuously traversed.”

The City had also contended that if the judgment was to be enforced, then the City should receive title to the Chmielewskis' beach parcel. The district court denied this request.

The City appealed. On appeal, the City argued that the inverse condemnation award must be reversed because there was no evidence of a taking under Florida law. Alternatively, the City again contended that if the judgment was to be enforced, it should receive title to the beach parcel.

**DECISION: Judgment of United States District Court for the Middle District of Florida affirmed.**

The United States Court of Appeals, Eleventh Circuit, was “unpersuaded by the City's arguments.” The court first held that the evidence at trial supported the jury's finding that a physical taking occurred through the continuous occupation of the Chmielewskis' property by members of the general public, and that, through its actions, the City encouraged public occupation.

The court noted that Article X, § 6(a) of the Florida Constitution

provides: “No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner . . . .” The court explained that this clause prohibits the government from taking private property for a public use without paying for it. Moreover, the court explained that a plaintiff (such as the Chmielewskis here) “need not demonstrate direct government appropriation of private property to prove a taking.” Notably, citing United States Supreme Court precedent, the court said that “[a] taking also occurs when the government gives third parties ‘a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed.’” “[E]ven a temporary or intermittent invasion of private property can trigger physical takings liability,” said the court.

Here, the court found that the City encouraged public use of the beach parcel by placing beach access signs, clearing vegetation, creating nearby parking spaces, hosting events at the property, and refusing to remove trespassers. The court found that those City actions “resulted in frequent public use of the beach parcel.”

The City had argued that a taking could not be found here because the City had “never asserted ownership or exclusive control over [the Chmielewskis’ beach parcel].” But the court asserted that “ownership and exclusive control are not necessary elements for a takings claim.” Rather, noted the court, a physical taking can occur “when government ‘deliberately brings it about that . . . the public at large regularly use or permanently occupy space or a thing which theretofore was understood to be under private ownership.’”

Here, the court found that there was sufficient evidence to establish that the continuous public trespassing and occupation of the Chmielewskis’ property was “the natural and intended effect of the City’s actions.” In other words, the court found that the City’s actions imposed a de facto public access easement on the Chmielewskis’ property.

Addressing the City’s alternative request for fee simple ownership of the beach parcel upon payment of the judgment, the court held such relief was not warranted under Florida law and that the district court did not abuse its discretion in denying the City’s request to transfer title. The court explained that, under Florida law, “the taking of an easement may, in some cases, amount to the taking of the full value of the fee with resultant severance damages, but ‘naked fee title’ still remains in the property owner.” Moreover, the court noted that Florida law restricts the City from acquiring a greater interest in condemned property than necessary to serve the public purpose for which it is acquired. Because existing plat restrictions prevented the land in question from being developed, the court found that the City needed nothing more than a public easement across the land to accomplish its goal

of beach access (i.e., it didn't need to own the fee simple). Furthermore, the court noted that the jury's award of inverse condemnation damages was based on an appraisal by the Chmielewskis' expert who used a "before and after" approach to determine the loss of value to the Chmielewskis' property as a result of the easement-type taking, which thus did not reflect a market valuation of the fee simple estate. Accordingly, the court affirmed the district court's ruling denying the City's request to transfer title of the beach parcel. However, the Eleventh Circuit also made clear in its holding that the City had "paid for, and is entitled to, a permanent easement across the Chmielewskis' beach property for the benefit of the public."

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

See also: *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868, 8 Media L. Rep. (BNA) 1849 (1982).

See also: *Smith v. City of Tallahassee*, 191 So. 2d 446 (Fla. 1st DCA 1966).

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**Case Note:**

*The City had also sought a new trial on both counts. The appellate court concluded that there was no basis to grant a new trial.*

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## **Vested Rights/Preemption—Under county zoning ordinance, licensed medical cannabis dispensary is denied a building permit**

Dispensary sues claiming entitlement to the permit and arguing state cannabis regulations preempt the county ordinance

Citation: *Hippocratic Growth, LLC v. Board of County Commissioners of Queen Anne's County*, 2018 WL 3343588 (Md. Ct. Spec. App. 2018)

MARYLAND (07/09/18)—This case addressed the issue of whether a medical cannabis dispensary possessed a protected property inter-

est—either a vested right in the zoning use or a legitimate claim of entitlement to a permit or approval—in a medical cannabis dispensary interest. The case also addressed the issue of whether a county ordinance requiring conditional use approval and establishing set-back requirements for cannabis growing operations was preempted by state legislation—specifically the regulatory framework established by the Maryland Medical Cannabis program.

**The Background/Facts:** In anticipation of receiving a license to dispense medical cannabis, Hippocratic Growth, LLC (“HG”) entered into agreements with 101 Drummer Drive, LLC (“Drummer”) and 111 Scherr Lane, LLC to open a dispensary at an address (the “Property”) in Queen Anne’s County (the “County”). In December 2016, HG was awarded preliminary licensing approval. In February 2017, Drummer submitted a building permit application for the Property.

Meanwhile, in January 2017, the County Commissioners enacted Resolution 17-06, which put a temporary moratorium on the approval of medical cannabis zoning applications. In March 2017, Resolution 17-06 was rescinded. In April 2017, Ordinance 17-06 was adopted. Among other things, Ordinance 17-06 created regulations that required conditional use approval and established set-back requirements for cannabis growing operations.

In May 2017, the County Planning Department notified Drummer that its building permit had been denied pursuant to Ordinance 17-06.

HG and Drummer (collectively, the “Applicants”) brought a legal action for: (1) mandamus; (2) declaratory judgment; (3) preliminary injunctive relief; (4) permanent injunctive relief; and (5) violations of the Maryland Constitution and Maryland Declaration of Rights. More specifically, the Applicants argued that they had a protected constitutional interest in completing “Stage 2” of Maryland’s Cannabis Commission’s licensing approval process. According to the Applicants, upon the Commission’s announcement of HG’s preliminary approval in December, 2016, the Applicants “possessed a vested property interest in a medical cannabis dispensary license that is cognizable under Article 24 of the Maryland Declaration of Rights.” They maintained that right was violated when the County Commissioners passed Resolution 17-06, which had the effect of prohibiting them from completing Stage 2 of the licensing process, and Ordinance 17-06, which imposed zoning regulations “so restrictive that identifying a qualifying property in the unincorporated portion of Queen Anne’s County became virtually impossible.” The Applicants further argued that Ordinance 17-06 was preempted by the Maryland Medical Cannabis Program’s regulatory framework.

The County, on the other hand, maintained that the Applicants did not have a vested property interest because they did not obtain a build-

ing permit, and did not make a substantial beginning to reconstruct the building at the Property. The County also argued that the state Legislature did not intend to preempt local municipalities from exerting zoning control over the medical cannabis industry.

The circuit court found that the Applicants “failed to meet the requirements under Maryland law to assert a claim that they acquired a property interest to develop [the Property] and, as a result, [could] not meet the burden required to prove either a substantive due process or procedural due process claim.” The circuit court also concluded that the Ordinance was not preempted “by any other legislation.”

The Applicants appealed.

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

The Court of Special Appeals of Maryland first held that the Applicants did not acquire a vested property interest or “have a legitimate claim of entitlement to any other cognizable constitutional interest.”

In so holding, the court explained that there were “two avenues” by which the Applicants could acquire a constitutionally protected property interest: (1) by obtaining a “vested right” in the existing zoning use; or (2) by possessing a “legitimate claim of entitlement” to a permit or approval. The court addressed each of those avenues.

The court explained that, under Maryland law, in order to obtain a vested right in the existing zoning use that will be constitutionally protected against a later change in the zoning ordinance prohibiting or limiting that use, the owner must: “(1) obtain a permit or occupancy certificate where required by the applicable ordinance and (2) must proceed under that permit or certificate to exercise it on the land involved so that the neighborhood may be advised that the land is being devoted to that use.” Here, the court found that the Applicants “never acquired a vested property interest” since they did not obtain a permit at the Property, and did not make a substantial beginning to reconstruct the building at the property such that “the neighborhood [was] advised that the land [was] being devoted to that use.”

In finding that the Applicants also did not have a legitimate claim of interest to a permit or approval, the court explained that whether the property interest at issue here was a permit license or a medical cannabis dispensary license, the test would be the same: “a constitutionally cognizable interest requires a ‘legitimate claim of entitlement’ and turns on whether the ‘local agency lacks all discretion to deny issuance of the permit or to withhold its approval.’” Here, the court found that the County did not lack discretion to deny the permit or withhold its approval. In fact, the court found that “the [Cannabis] Commission’s regulations indicate that local zoning authorities wield independent authority in the licensing process.” Specifically, Commission regulations authorize the Commission to issue a dispensary license on a de-

termination that the proposed premises “comply with all zoning and planning requirements” (COMAR 10.62.25.07(B)(3)(b)), and require “[t]he premises and operation of a licensee shall conform to all local zoning and planning requirements” (COMAR 10.62.27.02(D)). Furthermore, the court noted that Maryland courts had “made clear that the issuance of a building permit is not a ministerial act unless applications ‘fully comply with applicable ordinances and regulations[.]’ ” Moreover, the court found that a lack of certainty as to the County’s medical cannabis zoning requirements was “evidence that the zoning regulations [were] discretionary, not objective in nature.”

Addressing the Applicants preemption argument, the Court of Special Appeals of Maryland also held that the Maryland Medical Cannabis Program’s regulatory framework did not preempt “the entire field of zoning law.” And, the court held that Ordinance 17-06 did not prohibit an activity that was intended to be permitted by state law “where the plain language of the regulations requires dispensaries, growers, and processors to ‘conform to all local zoning and planning requirements.’ ” As such, the court held that there was no preemption of Ordinance 17-06, and therefore it applied to the Property.

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

## **Vested Rights/Mootness—After Village denies special-use permit for strip club, state adopts ordinance essentially foreclosing any locations for strip clubs in village**

District court concludes applicant’s appeal for injunctive relief is thus moot, but applicant claims a vested right to regulations at the time of the permit application

Citation: *Chicago Joe’s Tea Room, LLC v. Village of Broadview*, 894 F.3d 807 (7th Cir. 2018)

*The Seventh Circuit has jurisdiction over Illinois, Indiana, and Wisconsin.*

SEVENTH CIRCUIT (ILLINOIS) (06/29/18)—This case addressed the issue of whether an applicant for a special-use permit had a vested right to use the property for operation of a strip club. The case also addressed the issue of whether the applicant's claim seeking injunctive relief was mooted by Illinois' adult entertainment facility statute.

**The Background/Facts:** Chicago Joes' Tea Room, LLC was formed to operate a strip club. In 2006, Pervis Conway ("Conway") contracted to sell land (the "Property") in the Village of Broadview (the "Village") to David Donahue ("Donahue"). Donahue assigned the land contract to Chicago Joe's Tea Room, LLC. The manager of Chicago Joe's Tea Room, LLC then applied to the Village for a special-use permit needed to operate a strip club on the Property. The Village denied the application.

Subsequently, Chicago Joe's Tea Room, LLC and Conway (hereinafter, collectively, "Chicago Joe's") sued the Village. They alleged that the Village violated Chicago Joe's First Amendment rights. Among other things, Chicago Joe's asked the district court to declare that certain Village zoning ordinances were unconstitutional, in violation of the First Amendment. Chicago Joe's also asked the court to issue an injunction blocking the Village from enforcing its zoning ordinance.

The Village's zoning ordinance required a special-use permit for "adult businesses," which included strip clubs. The Village's zoning ordinance also used a separate adult-use zoning ordinance to regulate the placement of strip clubs.

Finding there were no material issues of fact in dispute, and deciding the matter based on the law alone, the district court judge granted summary judgment in favor of the Village on Chicago Joe's declaratory judgment and injunction claims. With regard to the injunction claim, the district court concluded that those claims were moot in light of an Illinois statute prohibiting the location of "adult entertainment facilities" within one mile of certain other uses.

Chicago Joe's appealed that order, limiting its arguments on appeal to the denials of injunctive relief.

**DECISION: Judgment of United States District Court for the Northern District of Illinois affirmed.**

The United States Court of Appeals, Seventh Circuit, agreed with the district court that Chicago Joe's injunction claims were moot.

The court explained that, a few months after the Village had denied Chicago Joe's permit application, the Illinois legislature had amended its "adult entertainment facility" statute to prohibit "locat[ing], construct[ing], or operat[ing] a new adult entertainment facility within one mile of the property boundaries of any school, day care center, cemetery, public park, forest preserve, public housing, or place of

religious worship located in that area of Cook County outside of the City of Chicago.” (See 65 Ill. Comp. Stat. Ann. 5/11-5-1.5.) The court noted that Illinois statutes preempt conflicting ordinances by non-home-rule municipalities—such as the Village here. The Property at issue here—on which Chicago Joe’s sought a special-use permit to operate a strip club—was within one mile of a cemetery, two schools, three parks, and a church. Thus, by its terms, the state statute foreclosed Chicago Joe’s attempt to operate a strip club at the Property, or, in fact to operate a strip club anywhere in the Village. Accordingly, the Seventh Circuit concluded that Chicago Joe’s claims for injunctive relief were moot.

Chicago Joe’s argued that it had a vested right to use the Property in accordance with the law that existed at the time that it submitted the special-use permit application (i.e., when the prior version of the state statute, which was less restrictive, required only a 1,000-foot setback). The Seventh Circuit disagreed. The court explained that Illinois courts have “made clear that a property owner who claims a vested right must proceed according to the law as it existed at an earlier time, by ‘attempting to comply with an ordinance as written.’ ” Here, the court concluded that Chicago Joe’s did not have a vested right because its proposal to use the property would have violated at least one Village ordinance. The court found that Chicago Joe’s application proposed a use with sales of alcoholic beverages, which would have violated a Village ordinance that expressly forbade adult businesses to “sell, distribute, or permit beer or alcoholic beverages on the premises.”

In summary, the Seventh Circuit agreed with the district court that Chicago Joe’s claims for injunctive relief were moot because Illinois’ “adult entertainment facility” statute now prohibited Chicago Joe’s from opening anywhere in the Village. The court concluded that the current state statute would effectively prohibit a court from granting effective relief to Chicago Joe’s even if Chicago Joe’s prevailed on its federal constitutional challenges to the Village ordinances.

## Zoning News from Around the Nation

### ILLINOIS

The DeWitt County Zoning Board of Appeals is reportedly looking to amend its wind farm ordinance governing such facilities. Among the changes being considered are the following: adding a requirement that wind farms have aircraft detection lighting systems; lowering the acceptable noise level limit from a turbine from 50 dBA to 37 dBA; set-

ting a standard for shadow flicker caused when rotating blades cast moving shadows on the ground; mandating an analysis verifying turbines will not interfere with public communication; and establishing setbacks from property lines instead of from existing homes for turbine locations.

Source: *Herald & Review*; <https://herald-review.com>

## MASSACHUSETTS

State Attorney General Maura Healey is allowing municipalities to extend temporary bans on recreational marijuana for another year—through June 2019 “without having to ask their residents about the decision.” This extension is reportedly intended to “give communities more time to create [related] zoning rules.”

Source: *WBUR*; [www.wbur.org](http://www.wbur.org)

## TEXAS

A Travis County Judge has ruled that the Austin City Council must put a petition ordinance related to CodeNEXT, the city’s rewrite of the land development code, on the November ballot. If the ordinance were to pass, it would require voter approval to implement CodeNEXT—if CodeNEXT is ultimately approved by the city council. The City of Austin reportedly has acknowledged the court’s order, but questions “whether zoning is an appropriate subject for election.”

Source: *KVUE*; [www.kvue.com](http://www.kvue.com)