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Zoning Bulletin

in this issue:

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Exhaustion of Administrative Remedies/Fees—Three years after paying county permit fees, petitioners challenge the fees as excessive

County argues this is a challenge to a "land use decision" exclusively reviewable subject to state's Land Use Petition Act, whose time limitations for such a

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claim had long ago passed

Citation: *Community Treasures v. San Juan County, 427 P.3d 647 (Wash. 2018)*

WASHINGTON (11/11/18)—This case addressed the issue of whether Washington's Land Use Petition Act ("LUPA") (RCW chapter 36.70C) applies when parties are challenging, as excessive, permit application fees assessed when a building or a land use permit application is submitted for processing.

The Background/Facts: In 2012 and 2013, Community Treasures d/b/a Consignment Treasures, and John Evans and Bonita Blaisdell (collectively, the "Petitioners") submitted permit applications to the San Juan County Department of Community Development. Among other items required, the County Code required permit applicants pay "[t]he applicable fee." Petitioners paid the applicable fees, and the permits were issued. Nearly three years later, Petitioners sued the County, seeking a partial refund of their paid fees. Petitioners contended that the fees they had paid were "illegally excessive" in violation of Washington statutory law (see RCW 82.02.020). They also sought certification as a class action lawsuit for everyone who paid the County fees for land use and building permits, modifications, or renewals during the preceding three years. Petitioners asked the court to order any fee overcharges be paid back to the class.

The County argued that the Petitioners' lawsuit must fail. They pointed to Washington's Land Use Petition Act ("LUPA") (RCW chapter 36.70C) and maintained that LUPA was the "exclusive means of judicial review for the fees paid because each fee was inextricably tied to and paid as a condition of approval of a land use decision." The County argued that the Petitioners complaint should thus be dismissed because the Petitioners failed to exhaust the administrative remedies required under LUPA and/or timely bring their complaint within LUPA's 21-day (from issuance of the permits) limitations period.

In Washington, LUPA is "the exclusive means for obtaining judicial review of a county's land use decisions," including building permits. (RCW 36.70C.030(1).) Under LUPA, a petition for review of land use decision must be filed within 21 days of the issuance of the decision. (RCW 36.70C.040(3).) In order to bring a land use petition, a party must have exhausted administrative remedies "to the extent required by law," with statutory exceptions. (RCW 36.70C.060(2)(d).)

The trial court agreed with the County.

The Petitioners appealed, and the Court of Appeals affirmed the dismissal of the Petitioners' action.

The Petitioners again appealed. The Petitioners argued on appeal that the lower courts had erred in determining that LUPA applied to their claim for partial reimbursement of alleged overcharges for permit application processing fees. Alternatively, they argued that even if their challenges to the permit application fee were subject to LUPA, the statutory exemption for "[c]laims provided by any law for monetary damages or compensation" applied. (See RCW 36.70C.030(1)(c).)

DECISION: Judgment of Court of Common of Appeals affirmed.

The Supreme Court of Washington agreed with the County and lower courts and rejected the Petitioners' arguments. The court held that the Petitioners' complaint was properly dismissed because the challenged assessment of permit fees constituted "land use decisions" under LUPA, and the Petitioners failed to challenge those permit fees as specified under LUPA—by contesting the fee amounts at the time of payment or pursue administrative remedies, or by filing land use petitions within 21 days of the assessment of the fees in question.

The Petitioners had argued that the assessment of permit fees here did not constitute a "land use decision"—and thus was not under the exclusive jurisdiction of LUPA. Rather, Petitioners argued that the fees here were "a prerequisite" to a land use decision. In other words, they had argued that the "decision to impose that fee [was] not, itself, a 'land use decision' [because] nothing about the fee and the process for determining it affect[ed] the use of land."

The County, on the other hand, pointed out that "[t]he land use decision 'on an application' includes a constellation of smaller decisions that precedes approval or disapproval of the land use request," and that "[t]hese decisions are part-and-parcel of the permit decision and inextricably linked to the permit itself."

The Supreme Court of Washington agreed with the County. In doing so, the court first looked to the definition of "land use decision," finding it included a "final determination" on an "application for a project permit . . . ." The court also found that, under the County Code, project permit applications "must" include the applicable permit fees. The court found that because the fee was a "mandatory requirement" for a completed project permit, it was "inextricably tied to the permitting process," and thus part of the land use decision itself, challengeable only under LUPA.

The court also addressed the Petitioners' alternative argument that even if LUPA governed, their claims fit under the "monetary damages or compensation" exception under LUPA because the assessed fees exceeded municipal expenses related to processing the permits and inspecting and reviewing plans, in violation of RCW 82.02.020 as an unauthorized tax. Under that LUPA exception, "[c]laims provided by any law for monetary damages or compensation" that are "set forth in the same complaint with a land use petition" under LUPA are "not subject to the procedures and standards, including deadlines, provided [in LUPA] for review of the petition."

The court disagreed with this argument, noting that it had, in a prior case, already rejected the applicability of RCW 82.02.020 to the "monetary damages" exception in LUPA in the wake of its enactment.

See also: *James v. County of Kitsap, 154 Wash. 2d 574, 115 P.3d 286 (2005).*

See also: *Home Builders Ass'n of Kitsap County v. City of Bainbridge Island, 137 Wash. App. 338, 153 P.3d 231 (Div. 2 2007).*

Case Note:

In rejecting Petitioners' argument that permit fees were a "prerequisite" to a land use decision and not a "land use decision" subject to LUPA, the court noted that there were "many other prerequisites that must be met before the final decision is issued, but those activities or conditions are all tied to the decision process nonetheless, occurring within the processing of the application." Accepting and adopting the Petitioners' argument would, said the court, "divide a land use decision into component pieces, each of which would arguably support a claim for monetary damages arising out of the decision process." The court noted that in prior cases it had rejected such an argument.

Case Note:

In its decision, the court noted that permit applicants are not without legal recourse to challenge permit application fees as "unreasonable." The court noted that LUPA allows for review procedures "to establish the basis to seek review and bring a challenge, provided the time limits are met" (which Petitioners failed to meet here).

Referendum Petition—Petitioners fail to provide ordinance title and date on zoning referendum petition

County auditor rejects petition for those failings, but petitioners argue petition should not be rejected on "mere technicalities"

Citation: *Thompson v. Lynde, 2018 SD 69, 2018 WL 4623400 (S.D. 2018)*

SOUTH DAKOTA (09/26/18)—This case addressed the issue of whether a petitioner's failure to substantially comply with the express conditions of the state statute governing the description of the matter to be covered by a referendum petition required rejection of the referendum petition.

The Background/Facts: In May 2017, the County Commissioners of Deuel County (the "County") passed an ordinance (the "Ordinance") that amended Wind Energy System ("WES") zoning requirements. Subsequently, Doyle Thompson, Debra Huber, Allen Skatvold, and Dennis D. Evenson (the "Petitioners") circulated petitions to obtain the necessary signatures to refer the Ordinance for a special election referendum. Of those three petitions, the County Auditor rejected two for failure to comply with the state statute governing referendum petition requirements—SDCL 7-18A-17. That statute requires a referendum petition to include the title and date of passage of an ordinance. Specifically, it provides that "the petition shall contain the

title of such ordinance . . . and the date of its passage . . . ." The Auditor noted that Petition 2 was missing the title of the Ordinance, and Petition 3 was missing the words "Wind Energy Systems (WES) Requirements" from the title of the Ordinance as well as the date the Ordinance was passed. After rejecting Petition 2 and 3, the Auditor determined that the Petitioners had collected on Petition 1 only 19 of the 145 signatures needed for a referendum on the Ordinance.

The Petitioners then sought a writ of mandamus to compel the Auditor to accept the rejected petitions and schedule a special election on the Ordinance.

The circuit court denied the Petitioners application for a writ of mandamus. The circuit court concluded that Petitions 2 and 3 were properly rejected by the Auditor because they "did not substantially comply with the statutory requirements of SDCL 7-18A-17."

The Petitioners appealed. On appeal, they argued that Petition 3 (which contained 252 signatures) substantially complied with the statutory requirements. More specifically, they argued that the defects in Petition 3 were "mere technicalities presenting no reasonable risk of confusion, fraud, or corruption," and thus Petition 3 was improperly rejected.

DECISION: Judgment of circuit court affirmed.

Rejecting the Petitioners' argument, the Supreme Court of South Dakota concluded that because Petition 3 failed to substantially comply with the requirements of SDCL 7-18A-17, Petition 3 was properly rejected.

In so concluding, the court acknowledged that SDCL 2-1-11 provides that petitions for referendum "shall be liberally construed, so that the real intention of the petitioners may not be defeated by a mere technicality." For that reason, the court said that there is a presumption that referendum petitions are valid. However, the court also emphasized that statutory requirements "governing a referendum petition are substantial in character and not merely requirements of form." Thus, explained the court, statutory requirements for such petitions must be "substantially complied with in order to render the petition valid." The court further explained that "[s]ubstantial compliance" means that the statutory requirements must be "followed sufficiently so as to carry out the intent for which it was adopted." In other words, substantial compliance is achieved if the purpose of the statute is served, said the court.

Looking to the facts of this case, the court found that the express conditions of SDCL 7-18A-17 were intended to "ensure that the face of the referendum petition readily informs a prospective signatory of the nature of the challenged ordinance, the date of its passage, and that the voter's signature corresponds to the actual ordinance being challenged." The court determined that to excuse compliance with those requirements would "frustrate the statute's purposes." Because Petition 3 failed to substantially comply with the requirements of SDCL 7-18A-17, the court concluded that Petitioners' petition for writ of mandamus, challenging the rejection of Petition 3 was proper.

See also: *Baker v. Atkinson, 2001 SD 49, 625 N.W.2d 265 (S.D. 2001).*

Use/Substantive Due Process/ Equal Rights—After developers' development plan application is denied they sue claiming violations of their constitutional rights

Developers argue that because they met all guidelines of the zoning ordinance, the city had no discretion to deny their application, and thus violated their substantive due process rights with the denial

Citation: *Da Vinci Investment, Limited Partnership v. City of Arlington, Texas, 2018 WL 4090599 (5th Cir. 2018)*

The Fifth Circuit has jurisdiction over Louisiana, Mississippi, and Texas.

FIFTH CIRCUIT (TEXAS) (08/27/18)—This case addressed the issue of whether a city's denial of a development plan application violated the developers' substantive due process and equal protection rights.

The Background/Facts: In 1991, Da Vinci Investment, Limited Partnership ("Da Vinci") purchased approximately 12 acres of undeveloped land in the City of Arlington (the "City"). After that purchase, Da Vinci obtained a zoning change on the land to "planned development" ("PD"). PD zoning allowed for the property to be developed in accordance with an approved development plan.

Over several years, Da Vinci sold portions of the land. In 2012, Da Vinci contracted with Daniel Griffith ("Griffith") to purchase the sole remaining tract of land (the "Lot"). That purchase was conditioned upon approval by the City of a development plan to build a car wash. Under the PD zoning, a car wash was a permitted use on the Lot. In furtherance of the proposed car wash and Lot sale, Da Vinci and Griffith submitted a development plan application to the City.

The City Council ultimately voted to deny the development plan application. The City council gave three reasons for the denial: "(1) the plan failed to mitigate compatibility issues; (2) the plan failed to enhance the neighborhood; and (3) the plan failed to mitigate the concerns of a majority of the neighbors."

In an effort to challenge the development plan application denial, Da Vinci sued the City. Griffith also sued the City. The two cases were consolidated. In their cases, Da Vinci and Griffith (hereinafter, collectively, the "Developers") argued that in denying their development plan application, the City violated their constitutional substantive due process and equal

protection rights under the Fourteenth Amendment to the United States Constitution. Among other things, the Fourteenth Amendment provides that government shall not "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Here, specifically, the Developers argued that the City Council had "no discretion to deny [the] development plan because [the Developers] had met all guidelines set forth in the ordinances," thus denying their property interest in violation of their substantive due process rights under the Fourteenth Amendment. They also argued that their equal protection rights were violated because the City treated their development plan application differently from others similarly situated without any rational basis for the different treatment. The Developers pointed to another car wash use—Cooper Carwash, which had been approved by the City.

The City filed a motion for summary judgment with the district court, asking the court to find there were no material issues of fact and to decide the matter in the City's favor on the law alone.

The district court granted the City's motion.

The Developers appealed.

DECISION: Judgment of district court affirmed.

The United States Court of Appeals, Fifth Circuit, first held that the Developers lacked a constitutionally protected property interest and therefore there was no substantive due process violation by the City.

In so holding, the court explained that to prevail on a substantive due process claim, a plaintiff (such as the Developers here) had to establish that it held a constitutionally protected property right to which the Fourteenth Amendment's due process protection applies. Further, explained the court, "[t]o have a property interest in a benefit" (as claimed here), a plaintiff must "have a legitimate claim of entitlement to it." Importantly, noted the court, "[i]f the benefit may be granted or denied at the discretion of government officials, it is not an entitlement." Thus, if city council members could "grant or deny [a development plan application] in their discretion," there would be no entitlement to the benefit and, therefore, no protected property right.

Here, Da Vinci had argued that the City Council members had no discretion to deny the development plan application because it had met all the guidelines set forth in the ordinance. The court, however, found no explicit language in the ordinances requiring, for example, the City Council to grant a development plan when all guidelines are met. The court determined that even when all guidelines are met, without "explicitly mandatory language" requiring approval when all required guidelines are met, the City Council had discretion to grant or deny the benefit. Accordingly, the court concluded that given that discretion, the Developers did not have a protected property right in the approval of the development plan, and, without a protected property interest, there could be no substantive due process violation.

The court also held that the Developers' Equal Protection claim failed. The court explained that in order to prevail on the claim, the Developers had

to allege that they had been "intentionally treated differently from others similarly situated and that there was no rational basis for the differential treatment." Although the Developers had claimed that their development plan application was treated differently from the application of Cooper Carwash, the court found that: (1) Cooper Carwash was not similarly situated given different lot sizes, different surrounding areas, different total uses, and different opposition; and (2) even if it was similarly situated, the City had a rational basis for the differential treatment—namely to "provide development which enhances neighborhood areas" (one of the purposes of the City ordinances).

See also: *Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005).*

See also: *Village of Willowbrook v. Olech, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060, 30 Envtl. L. Rep. 20360 (2000).*

Case Note:

Da Vinci had also brought a takings claim against the City. On appeal, the Fifth Circuit rejected that claim. The court held that although the value of Da Vinci's property was "undoubtedly reduced by the denial of its development plan application, the zoning and allowable uses of the property never changed." The property could still be developed for commercial use—and thus, any reasonably held investment-backed expectations were not affected by the City enforcing restrictions in place when such investments were made, said the court.

Use/Short-term Rentals—Neighbors argue landowner's short-term rental of cabin is an unpermitted zoning use

Landowner points to fact that ordinance does not prohibit short-term rentals, and claims his use constitutes a permitted "single[-]family detached dwelling" use

Citation: *Leinberger v. Stellar as Trustee of Deborah E. Stellar Revocable Trust, 2018 WL 4924786 (Pa. Commw. Ct. 2018)*

PENNSYLVANIA (10/11/18)—This case addressed the issue of whether a landowner's short-term rental of his cabin was an unpermitted zoning use in violation of the township's zoning ordinance.

The Background/Facts: Anthony G. Stellar, Trustee of the Deborah E.

Stellar Revocable Trust ("Landowner") owned a 48.1-acre property (the "Property") in Lynn Township (the "Township"). The Landowner's Property had a cabin, which was used by the Landowner's family for 70% of the year, and which was rented to members of the public 30% of the year. The Property was located partially within the Township's Blue Mountain Preservation ("BMP") zoning district and partially within the Township's Agriculture Preservation ("AP") zoning district. Both of those districts permitted only a limited number of uses, including "single[-]family detached dwellings."

In December 2015, Cheri Ann Leinberger, Matthew S. Leinberger, Daniel P. Seneca, Kathleen A. Seneca, and William J. Necker (the "Neighbors") brought a legal action against the Landowner. The Neighbors sought to enjoin the Landowner from using his property for short-term rentals. They argued that short-term rental was not a permitted use in the zoning districts in which the Property was located.

Ultimately, the trial court concluded that the Landowner's Property met the definition of "single[-]family detached dwelling," a permitted use in the relevant zoning districts. Finding that the Township's zoning ordinance contained no prohibition on short-term rentals, the court concluded that the use of the Property for short-term rentals was consistent with the zoning ordinance.

The Neighbors appealed. On appeal, they again argued that "Landowner's use of his rural, single-family residentially-zoned property, as a for-profit business venture involving short-term transient rentals, violated the zoning ordinance." They pointed to the fact that the relevant zoning districts allowed only a limited number of uses, "none of which include[d] operation of a short-term rental business." Moreover, they contended that leasing the Property to "unrelated strangers" under "several-day long booking agreements" did not qualify as a zoning ordinance-permitted single-family residential use either.

DECISION: Judgment of trial court affirmed.

The Commonwealth Court of Pennsylvania first held that the Property met the Township's definition for "single[-]family detached dwelling," a use that was permitted in the relevant zoning districts. In so holding, the court rejected the Neighbors' contention that the dwelling was not occupied as a residence for "one family" because of the transient, for-profit nature of the short-term rentals. Rather, looking at the language of the zoning ordinance, and broadly interpreting it, the court found that the ordinance defined "family" as "one or more individuals living independently as a single housekeeping unit and using cooking facilities and certain rooms in common." Here, the court found that the Property was used as a single-family dwelling because, even when it was rented 30% of the year, the entire dwelling was rented out and was rented to a maximum of eight occupants.

The court also held that because the zoning ordinance did not expressly prohibit the Landowner from using his dwelling on the Property for short-term rentals, that short-term rental use was not prohibited.

Thus, finding that there were no short-term rental prohibitions in the

Township's zoning ordinance and that the Property met the definition of "single[-]family detached dwelling" under the ordinance, the court concluded that the use of the Property for short-term rentals was consistent with the zoning ordinance.

See also: *Shvekh v. Zoning Hearing Board of Stroud Township, 154 A.3d 408 (Pa. Commw. Ct. 2017).*

See also: *Slice of Life, LLC v. Hamilton Township Zoning Hearing Board, 180 A.3d 367 (Pa. 2018).*

See also: *Marchenko v. Zoning Hearing Board of Pocono Township, 147 A.3d 947 (Pa. Commw. Ct. 2016).*

See also: *Reihner v. City of Scranton Zoning Hearing Board, 176 A.3d 396 (Pa. Commw. Ct. 2017).*

See also: *Albert v. Zoning Hearing Bd. of North Abington Tp., 578 Pa. 439, 854 A.2d 401 (2004).*

Case Note:

The Commonwealth Court's decision here is an "unreported panel decision," which is "not binding precedent."

Zoning News from Around the Nation

MAINE

Augusta City Councilors recently voted to extend moratoriums that temporarily ban all retail stores selling either recreational marijuana to adults or medical marijuana to card-carrying patients. The City Council also voted to add a new moratorium that temporarily bans medical marijuana caregivers from selling to patients in all residential zoning districts in Augusta. Reportedly, given these moratoriums, "the only marijuana sales that could take place in the city legally under state law would be by caregivers to patients in the city's nonresidential zones." City officials reportedly claim the moratoriums are in place to give them more time to establish related regulations.

Source: *Press Herald; www.pressherald.com*

MARYLAND

The Montgomery County Council recently passed a zoning text amendment aimed at "increasing the amount of affordable housing in the county in exchange for providing developers with extra density for multifamily housing projects." Specifically, under the text amendment, "developers will be rewarded for building housing projects with 15 percent or more of housing units designated as moderately priced," and, in exchange, the developers

will be "entitled to more than 22 percent bonus density for their projects, based on a formula . . . ."

Source: *Bethesda Magazine; https://bethesdamagazine.com*

NEW YORK

The New York City Council is considering a proposed bill that would establish a task force to review any properties that have the potential to cast shadows across city parks. Under the bill, the taskforce would "study the effect of shadows cast on parks under the jurisdiction of the [Department of Buildings] by new or proposed building construction," and "issue recommendations to the mayor (which could include proposed changes to developments)."

Source: *Curbed NY; https://ny.curbed.com*

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Variance—Billboard company purchases land on which billboards are banned, and then seeks a use variance to construct billboard

After zoning board approves variance, city appeals arguing both that zoning board lacked authority to grant the variance and that the variance should have been denied because any hardship was self-created

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Citation: *City of Detroit v. City of Detroit Board of Zoning Appeals, 2018 WL 5276473 (Mich. Ct. App. 2018)*

MICHIGAN (10/23/18)—This case addressed the issue of whether a board of zoning appeals had the authority to grant a use variance in an overlay zone. It also addressed the issue of whether a landowner that had purchased property on which a use was banned could prove hardship meriting a use variance for the banned use.

The Background/Facts: In 1999, the City of Detroit (the "City") amended its zoning ordinance to ban off-site advertising signs in a portion of the City referred to as the Grand Boulevard overlay zone (the "Overlay Zone"). In 2011, International Outdoor Inc. ("IO") purchased a small parcel of vacant property in Detroit that was located within the Overlay Zone. The property measured 30 feet wide and 184 feet long with an area of 5,520 square feet. In 2015, IO submitted an application for a permit to erect a billboard on the property. The City's planning department denied the application, referencing the Overlay Zone ban on off-site advertising signs. IO then appealed to the City's Board of Zoning Appeals ("BZA"), seeking a hardship variance.

In seeking the hardship variance, IO claimed that the City's "ordinance scheme rendered the property unfit for any reasonable or economically feasible use due to its size and shape." IO argued that one of the only possible uses for the property would be for a billboard. The BZA agreed that this hardship warranted a use variance, and thus granted the IO its requested variance.

The City appealed the BZA's decision to circuit court. The City argued first that the BZA did not have the authority to grant the variance in an overlay zone. The City further argued that, even if the BZA had such authority, IO's act of purchasing the property with knowledge of the ban on off-site advertising, self-created the hardship at issue, thus barring the variance request.

DECISION: Judgment of Circuit Court affirmed.

The Court of Appeals of Michigan first held that the BZA had the authority to grant a variance in an overlay zone. Looking at Michigan statutory law defining a board's authority to grant a use variance (see MCL 125.3604) and prior case law, the court noted that a board of zoning appeals "has the authority to vary or modify *any* zoning ordinance to prevent unnecessary hardship if the spirit of the ordinance is observed, the public safety is secured, and substantial justice is done." The court also noted that under the City's ordinances, the BZA here had "broad power" to provide relief for any landowner who proves economic hardship. Further, the court found nothing in the the City's ordinances prohibited the BZA from granting a use variance in the Overlay Zone. Moreover, the court found that to bar the BZA from granting any variance in the Overlay Zone "may interfere with the purpose and intent" of the City's zoning code, which was to "guide and regulate the appropriate use or development of all land . . . ." Thus, the court concluded that the BZA had the authority to grant a variance to IO for the erection of a billboard, "so long as IO could prove an unnecessary hardship."

The court next concluded that IO could prove that unnecessary hardship. The court explained that to prove hardship, IO had to show substantial evidence of the following: "(1) the property [could] not reasonably be used in a

manner consistent with existing zoning, (2) [IO's] plight [was] due to unique circumstances and not to general conditions in the neighborhood that may reflect the unreasonableness of the zoning, (3) [the billboard use] authorized by the variance [would] not alter the essential character of a locality, and (4) the hardship [was] not the result of [IO's] own actions." The parties did not dispute the first three elements of this hardship test, but did dispute the fourth. Specifically, the City argued that IO created the hardship it now complained of by purchasing property with the knowledge that billboards were prohibited on the property. IO and the BZA argued that IO did not physically alter the property so as to create the hardship at issue, and that IO could thus seek any variance the law permitted and should not be limited just because it purchased the property with knowledge of the banned use.

The court acknowledged that on the basis of the "self-created hardship rule," a zoning board must deny a variance "when a landowner or predecessor in title partitions, subdivides, or somehow physically alters the land after the enactment of the applicable zoning ordinance, so as to render it unfit for the uses for which it was zone." In other words, the court said that a landowner "is not entitled to a hardship variance if the parcel has a reasonable use under the zoning ordinance and the landowner's subsequent act of splitting the property renders the property unfit for the uses for which it was zoned." But the court found such circumstances were not present here, and so the rule requiring a variance denial did not apply. The court specifically "decline[d] to extend the self-created hardship rule to all instances where a landowner simply purchases the property with knowledge of an ordinance's applicable restriction." In other words, the court concluded that IO's purchase of the property with knowledge of the ordinance banning billboards did not preclude the BZA from granting the use variance. The court further concluded that the variance was properly granted because "IO proved an unnecessary economic hardship meriting relief under MCL 125.3604(7)."

See also: *Johnson v. Robinson Tp., 420 Mich. 115, 359 N.W.2d 526 (1984).*

See also: *Bierman v. Taymouth Tp., 147 Mich. App. 499, 383 N.W.2d 235 (1985).*

See also: *Cryderman v. City of Birmingham, 171 Mich. App. 15, 429 N.W.2d 625 (1988).*

Due Process—City issues ordinance violation to property owner six months after violation is recorded

Property owner argues this delay in issuing citation violated her due process rights

Citation: *Tucker v. City of Chicago, 2018 WL 5095151 (7th Cir. 2018)*

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

SEVENTH CIRCUIT (ILLINOIS) (10/19/18)—This case addressed the issue of whether a municipality violated a property owner's due process rights as a result of a delay in issuing a citation for a municipal ordinance violation.

The Background/Facts: In 2015, Nanette Tucker ("Tucker") purchased from the City of Chicago (the "City") a vacant lot on her neighborhood block. Tucker intended to convert the lot into a community garden. In June 2015, a City inspector determined that Tucker's property was in violation of the City's yard weed ordinance, which required all weeds not exceed an average height of 10 inches. The inspector took two photographs of Tucker's lot from the street to document the vegetation.

Six months later, in December 2015, Tucker received notification of the alleged June yard weed ordinance violation. Subsequently, Tucker appeared at a hearing before an administrative law judge to contest the alleged violation. Tucker argued that the the City failed to present evidence of the "average height" of the weeds in order to prove violation of the City ordinance. Tucker testified that her practice was to have the property "cut and cleaned" every other week. She presented no other evidence to the administrative law judge.

The judge ultimately ruled in favor of the City and imposed a $640 fine against Tucker.

Tucker paid the fine under protest. She then filed a putative class action against the City. In that action, she alleged that the City's six-month delay in notifying her of the yard weed citation unconstitutionally denied her due process.

The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." (U.S. Const. amend. XIV, § 1.)

The district court dismissed Tucker's claim. The court found that Tucker had failed to state a plausible claim that the City denied her of due process.

Tucker appealed.

DECISION: Judgment of district court affirmed.

The United States Court of Appeals, Seventh Circuit, held that the six-month delay between the City property inspection and the City's notice to Tucker of the municipal ordinance violation did not violate Tucker's due process rights.

In so holding, the court explained that to succeed on her procedural due process claim, Tucker would have to show: (1) deprivation of a protected interest; and (2) insufficient procedural protections surrounding that deprivation.

While Tucker acknowledged that she received a hearing on the alleged municipal ordinance violation, she argued that here there was a "prehearing denial of due process." Tucker asserted that the City's delay in issuing her notice of the alleged violation caused her "prejudice in that she was unable 'to make any measurements of the average height of the vegetation on her lot at or near the time of inspection' or to use 'photographs taken contemporaneously with the date of the alleged violation.' " In other words, she argued that the delay in

notifying her of the alleged violation prevented her from compiling contemporaneous evidence that may have countered the violation allegation.

The court rejected Tucker's arguments. The court determined that accepting Tucker's prejudice argument "would place a near instantaneous notice mandate on the [C]ity." And the court noted that even if it were "helpful" if alleged violators were provided notice more quickly, whether there was a due process violation was dependent on whether "the existing procedures 'present an unreasonable risk of an erroneous deprivation' of due process." Acknowledging that Tucker "may have been able to mount a better defense had she known immediately of the June [ ] citation," the court found that the hearing she did receive six months later "did not present an unreasonable risk of an erroneous deprivation." In conclusion, finding Tucker failed to point to any authority requiring immediate prosecution of a municipal ordinance violation (such as a statute of limitations in the City's weed ordinance) and failed to demonstrate actual and substantial prejudice caused by the delayed prosecution, the court determined that Tucker "failed to plausibly allege a due process claim based on the six months between the inspection of her property and the issuance of the citation." In sum, the court held that "[a]lthough a six[-]month delay between inspection and citation may not be a model of administrative efficiency, the delay in this case did not violate the Constitution."

See also: *Cochran v. Illinois State Toll Highway Authority, 828 F.3d 597 (7th Cir. 2016).*

Case Note:

Tucker had also argued that the City "mis[-]enforced" the City's weed ordinance because it only required inspectors to determine whether some weeds exceeded 10 inches, while the plain text of the ordinance required an "average height" of the offending weeds exceed 10 inches. The court refused to address that issue, noting that federal due process protection "is not a guarantee that state governments will apply their own laws accurately." The court suggested that if Tucker believed the administrative law judge's interpretation of the ordinance was legally incorrect, she could have appealed her fine to Illinois' state courts.

Substantive Due Process/Spot Zoning/Oil and Gas Well Use—Township's zoning ordinance allows oil and gas well operations by right in all zoning districts

Landowners contend ordinance amounts to illegal spot zoning and violates the Pennsylvania Municipalities Planning Code by allowing incompatible uses in the same zoning districts

Citation: *Frederick v. Allegheny Township Zoning Hearing Board, 2018 WL 5303462 (Pa. Commw. Ct. 2018)*

PENNSYLVANIA (10/26/18)—This case addressed the issue of whether a township's zoning ordinance allowing oil and gas well operations in all zoning districts violated substantive due process by instituting illegal spot zoning. It also addressed whether such an ordinance violates the Pennsylvania Municipalities Planning Code by placing public health and safety at risk and by allowing incompatible uses to take place in zoning districts.

The Background/Facts: In December 2010, Allegheny Township (the "Township") enacted Zoning Ordinance 01-2010 (the "Ordinance"). The Ordinance made oil and gas development "a permitted use by right in all Zoning Districts" in the Township. That use by right was subject to numerous standards or conditions related to road safety, land clearing, security measures, emergency planning, and noise and light controls. The Ordinance also required gas well operators comply with all federal and state permitting requirements, including permits from the Pennsylvania Department of Environmental Protection ("DEP").

In October 2014, the Township issued a "zoning compliance permit" to CNX Gas Company ("CNX") to develop an unconventional gas well on property located in the Township's R-2 Zoning District. The R-2 Zoning District was an agricultural-residential use district. The property (the "Property") on which CNX planned to develop the unconventional well was owned by a family-owned farm, Northmoreland Farms, LP.

Dolores Frederick, Patricia Hagaman, and Beverly Taylor (collectively, the "Objectors") all lived near the Property. The Objectors filed with the Township's Zoning Hearing Board (the "Board") a challenge to the Ordinance. The Objectors argued that the Ordinance violated substantive due process and the Pennsylvania's Municipalities Planning Code ("MPC") by placing public health and safety at risk and by allowing incompatible uses to take place in zoning districts. They also argued that the Ordinance "improperly instituted illegal spot zoning in violation of substantive due process" by failing to designate uses within the same district that were compatible. They maintained that

an unconventional gas well use was not a use compatible with agricultural-residential use. They expressed concerns that the gas well would impact water wells and the local water supply, would present noise and light pollution nuisances, would result in traffic inconveniences, and would decrease their property values.

Ultimately, the Board rejected Objectors' challenges to the substantive validity of the Ordinance. The Board concluded that the Ordinance comported with the MPC and promoted the public healthy, safety, and welfare of the Township "by permitting [Township citizens] to benefit economically from oil and gas resources and royalties, in order to help their livelihood and way of life" (such as by allowing farmers to benefit financially through oil and gas well leases, which in turn allowed them to keep their land in farming). The Board also rejected Objectors' claim that the Ordinance instituted a scheme of impermissible "spot zoning," noting that the Ordinance allowed oil and gas development by right in all districts and not in one "spot" singled out for special treatment.

Objectors appealed. The trial court affirmed the Board's decision.

Objectors again appealed.

DECISION: Judgment of trial court affirmed.

The Commonwealth Court of Pennsylvania first held that the Ordinance did not violate substantive due process.

In so holding, the court explained that the Ordinance would be found to be a valid exercise of the police power of zoning if it promoted "public health, safety or welfare," and its regulations were "substantially related to the purpose the ordinance purports to serve . . . ." The court explained that when performing a substantive due process analysis, as it was tasked to do here, it must "balance the public interest served by the zoning ordinance against the confiscatory or exclusionary impact of regulation on individual rights . . . ." The court further explained that the party challenging the constitutionality of certain zoning provisions (i.e., here, the Objectors) must establish that the zoning provisions are "arbitrary, unreasonable and unrelated to the public health, safety, moral and general welfare." Where the validity of zoning provisions are debatable, the zoning board's judgment "must control," said the court.

Here, the court determined that the Objectors failed to prove that the Ordinance violated substantive due process. The court found that the Objectors lacked evidence with probative value. The court found that the Objectors had merely speculated on possible harm. The Objectors also had argued that a gas well was "incompatible with and must be segregated from the other uses in the R-2 Zoning District," but the court disagreed. In fact, to the contrary, the court concluded that the Ordinance "preserve[d] the protected 'rights of property owners' to realize the value of their mineral deposits but without causing cognizable injury to their neighbors." Accordingly, the court concluded that the Ordinance did not violate substantive due process.

The court also held that the Ordinance did not, as the Objectors had argued, violate the MPC by placing health, safety, and general welfare at risk. The MPC requires zoning ordinances promote, protect and facilitate the public

health, safety, morals, and the general welfare. (See MPC Section 604). The court noted that the Board had found that natural gas development was a compatible use in the R-2 District, and the court found that Objectors had "presented only conclusory arguments without reference to enumerated uses allowed in the R-2 District and how oil and gas drilling [was] incompatible with those uses." Accordingly, the court concluded that the Objectors' MPC violation claim also failed.

See also: *Gorsline v. Board of Sup'rs of Fairfield Tp., 123 A.3d 1142 (Pa. Commw. Ct. 2015), appeal granted, 635 Pa. 591, 139 A.3d 178 (2016).*

See also: *Robinson Tp., Washington County v. Com., 623 Pa. 564, 83 A.3d 901, 181 O.G.R. 102 (2013).*

Case Note:

The Objectors had also challenged the Ordinance as not comporting with the Environmental Rights Amendment, in Article I, Section 27 of the Pennsylvania Constitution. The Board rejected that challenge. The Commonwealth Court of Pennsylvania also rejected that claim. The court found that the Objectors failed to prove the Ordinance was a law that "unreasonably" impairs their rights under the Environmental Rights Amendment. In reaching that conclusion, the court stated that Objectors' complaints about the "purported harm to the environment" from the operation of the gas well were better addressed to the DEP than the Board. The court noted that "a municipality may use its zoning power only to regulate where mineral extraction takes place" and "not . . . how the gas drilling will be done."

Case Note:

In its decision, the court expressed being "confound[ed]" by "Objectors' objectives in this litigation." The court noted that were Objectors to succeed in invalidating the Ordinance, oil and gas operators would be released from conditions related to noise, lighting, hours, security, and dust. Without the Ordinance, CNX would no longer need a permit to operate the gas well, said the court. "Objectors' proper recourse is to elect a different board of supervisors to achieve their objective of keeping oil and gas drilling out of the R-2 District," suggested the court.

Due Process/Vagueness—Property contends city approval of access road on public right-of-way outside of his business violates his substantive and procedural due process rights

Property owner argues that access road will lead to congestion and traffic, destroying his business and posing a public safety hazard

Citation: *Wayne Watson Enterprises, LLC v. City of Cambridge, 2018 WL 5099629 (6th Cir. 2018)*

The Sixth Circuit has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee.

SIXTH CIRCUIT (OHIO) (10/19/18)—This case addressed the issue of whether a business/property owner's procedural and due process rights were violated when a city authorized an access road on the public right-of-way, which would potentially increase traffic in front of the property owner's business. More specifically, the case addressed whether the business/property owner had a "property interest" that was deprived by the approval of the access road.

The Background/Facts: Wayne Watson was the owner and sole member of Wayne Watson Enterprises, LLC (collectively, "Watson"). Watson owned two parcels of land along Route 209 in the City of Cambridge (the "City"). On his land, Watson operated a car wash business. Next to Watson's business was a Wendy's Restaurant. Relevant here, prior to the fall of 2014, at the head of Watson's parcel, situated nearest to the Wendy's Restaurant was a traffic light, which permitted Watson's customers to make a protected left turn onto Route 209.

In the fall of 2014, Wendy's operators submitted to the City a site plan for a proposed demolition and reconstruction of the restaurant. The plan included a proposed connection of the right-of-way, which would allow Wendy's customers to make the protected left turn onto Route 209. This proposed construction was referred to as the "access road." This proposed access road was to be located entirely in the public way, in the vicinity of the Wendy's Restaurant.

In October 2014, the City approved an ordinance (the "Ordinance") which authorized construction of Wendy's proposed access road. Watson received no individual notice of the meeting at which the Ordinance was approved. Later, Watson brought a legal action challenging the constitutionality of the approval of the access road. Specifically, Watson argued that his constitutionally protected procedural and due process rights were violated. The Fourteenth

Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." (U.S. Const. amend. XIV, § 1.) Here, Watson argued that his procedural due process rights were violated because he didn't receive advanced individual notice of the meeting at which the City approved the access road. As to substance, he argued that the Ordinance (as well as another later-adopted ordinance that authorized "the establishment of access roads in the City") was unconstitutionally vague. He also maintained that the access road would destroy his business and pose a public safety hazard because it would lead to congestion and traffic.

Finding there were no material issues of fact in dispute, and deciding the matter based on the law alone, the district court issued summary judgment in favor of the City.

Watson appealed.

DECISION: Judgment of district court affirmed.

The United States Court of Appeals, Sixth Circuit, held that Watson's procedural and due process claims failed because Watson had no property interest that was being deprived. The court explained that both procedural and substantive due process claims required Watson to show that he had a property interest that was being deprived. Specifically, explained the court, to establish a procedural due process violation under 42 U.S.C.A. § 1983, Watson had to show: (1) that he had life, liberty, or property interest protected by the Due Process Clause of the Fourteenth Amendment; (2) that he was deprived of this protected interest within the meaning of the Due Process Clause; and (3) that the City did not afford Watson adequate procedural rights prior to depriving him of his protected interest. In other words, the court said that to succeed on his substantive due process claim, Watson must show that an "arbitrary and capricious government action deprive[d] [him] of a constitutionally protected property interest."

Watson had claimed he had property interests in the use and enjoyment of his property, the safe operation of his business, and in safe access to and from the car wash. The court acknowledged that those claimed property rights were, generally, recognized by courts, including: the right to acquire, use and dispose of property; the right to do business; and a private right of access, for the purpose of ingress and egress, from private property to a public road. However, the court found that Watson's property rights were not impacted under the facts of the case. The court found that the proposed access road sat entirely within the public right-of-way, which was "not Watson's property to use or enjoy." The court also found that the City had not imposed a regulation on Watson or limited his business operation. And, the court found that although the access road might make travel "inconvenient" for Watson and his customers, it would not "substantially impair" their access to and from his business via the public right-of-way. In other words, the court concluded that "because the right-of-way [was] not part of Watson's property, and because any property interest he [did] have [would] not be deprived, Watson received all the process he was due through the general public notice of the [C]ity [C]ouncil meeting." Accordingly, the court concluded that Watson's procedural and substantive due process claims failed.

The court also rejected Watson's claims that the ordinances authorizing access roads in the City were unconstitutionally vague as applied to Watson. The court rejected those claims finding that the ordinances did not regulate Watson's conduct in any way. Rather, found the court, the ordinances simply permitted access roads and the creation of a particular access road over a public right-of-way in the vicinity of Watson's property.

In summary, the court concluded that Watson had not been deprived of a property interest nor was he subjected to any vague law within the meaning of the Due Process Clause of the Fourteenth Amendment.

See also: *State ex rel. Merritt v. Linzell, 163 Ohio St. 97, 56 Ohio Op. 166, 126 N.E.2d 53 (1955).*

Zoning News from Around the Nation

HAWAII

The Hawaii County Council Planning Committee recently advanced a bill to regulate the "Big Island's" short-term vacation rentals. With its vote, the committee recommends Bill 108, which will next go before the full County Council. Among other things, Bill 108, "defines where short-term vacation rentals would be allowed, establishes regulations for their use, and provides a way for an owner or operator to obtain a nonconforming use certificate that would allow them to operate in a non-permitted district."

Source: *Big Island Video News; www.bigislandvideonews.com*

MARYLAND

The Montgomery County Council appears to have tabled a "long-awaited vote on proposed legislation that would allow small cell antennas into residential area." The bill would allow small cell antennas that are 12 to 20 cubic feet in size, attached to an existing utility pole or as part of a new replacement pole. A recent amendment to the bill provides that replacement poles would be a conditional use.

Source: *Bethesda Magazine; https://bethesdamagazine.com*

WASHINGTON, DISTRICT OF COLUMBIA

In late October, the D.C. Council asked the city's zoning commission to amend zoning laws to make short-term rental use legal. The zoning commission has now asked the D.C. Office of Planning to study the issue and make recommendations. Meanwhile, the D.C. Council reportedly intends to vote on a short-term rentals bill in November. Under current D.C. law, residential district property owners may not rent their homes on a short-term basis of fewer than 30 days.

Source: *Washington Post; www.washingtonpost.com*

