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The Needless Conflict Between Aesthetics and Sustainability

Dudley Onderdonk, AICP New technologies and new needs can come into conflict with a community's existing standards. Sustainability can present some new challenges for planning officials. The Village of Glenview, Illinois, recently learned to resolve such a conflict between aesthetics and sustainability.

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The Kohl Children's Museum helps define the architectural character of the Glenview community, built on a former military base.

Mark Ballogg, Steinkamp Ballogg

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In their efforts to accommodate sustainable architecture, communities may encounter conflicting goals expressed in aesthetic design reviews and standards. Glenview struggled to resolve two goals that were seemingly contrary—that of accommodating rooftop solar panels on a public building built by a nonprofit while maintaining a high level of traditional community design.

This case study is of the Kohl Children's Museum, a regional educational facility located in the former Glenview Naval Air Station site. The museum, designed by the firm of Booth Hansen and Associates, is a LEED-Silver certified building. The strikingly modern facility, best known today for its iconic extended gull-wing-like roof, lacked one of the energy-saving features commonly found in sustainable architecture—rooftop solar panels. The modern building had stirred up some controversy from the start as it is located adjacent to a neotraditional downtown.

Courtesy of SoCore Energy

The solar panels were eventually placed on the museum in such a way as to lessen their visual impact on the building and the neighbors' sightlines.

The Challenge of Aesthetically Pleasing Retrofits

After the initial construction, the museum board embarked on the project to add solar panels. As required by local code, the engineering contractor appeared before the Glenview Appearance Commission to make the case. In Glenview, the commission has the following responsibilities:

> The Appearance Commission's role is to protect Glenview's distinctive character by regulating the general appearance of many of its developments. The goal is to ensure that developments are harmonious with their surroundings, contributing to a less cluttered, more attractive community. The seven-member Commission, appointed by the Board of Trustees, includes architects, landscape architects, and at least one owner, or an officer of a corporation owning a business, commercial or industrial property in Glenview. The Commission reviews, analyzes, and approves all aesthetic changes (including facade alterations, signage, and landscaping) to commercial, industrial, and multifamily residential developments and issues Certificates of Appropriateness.

Community Involvement is Key

"Communities are now actively addressing potential issues by putting guidelines or standards in place. These provide guidance to the development community as well as staff and commissioners in what is acceptable to the community. Additionally, it helps create a more objective, and transparent, process. Getting community input during the development of any new standards or guidelines will also help reduce future conflicts."

Visit www.planning.org/nationalcenters/green/research/index.htm for more information on planning for solar energy.

—Suzanne Rynne, AICP
APA Senior Research Associate and
Manger of the Green Communities Research Center

The review headed into conflict when the contractor neglected to address the visual impact of the solar panels on the structure. John Hedrick, former chair of the Glenview Appearance Commission reflected: "I try to note when the petitioner's representative is focusing on the broad benefits of a proposal or product—instead of the relevant design considerations" (which is what is relevant to the commissioners).

A second misstep was that the architectural firm that designed the project was not consulted about the visibility, location, or appearance of the solar panels.

Jill Ziegler, village staff liaison to the commission, adds: "There was concern originally that the architect had not been contacted prior to the proposal." Indeed, several commissioners expressed concern about the potential visual impact of the new solar panels on the adjacent neotraditional town houses that are the same height as the museum.

Sustainable Design Requires Early Coordination

What lessons can be learned from this case study? First, it simply did not occur to the contractor or the museum board that the village would be concerned with the location of the solar panels. After all, this was a technology issue that was supporting a worthy goal. Further, many aesthetics conflicts occur over historic buildings and not over adaptations of relatively new buildings. The museum board and its engineer did not consider that the solar panels could have an aesthetic impact on a building that the commission and members of the community had previously approved.

Sustainable integrative design may require communication among professionals and officials beyond the period in which a project or building is developed to later adaptations.

The overarching lesson? The time to resolve design and placement issues is prior to the review by the local appearance commission. Otherwise, unnecessary tension develops and the project can be delayed.

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Bringing Codes into the 21st Century

Carolyn Torma

Mark White, AICP

Modern codes are growing in flexibility and scope, incorporating new technology and becoming more outcome-specific and readable.

Beginning with New York City's 1916 Zoning Resolution and promulgation of the Standard Enabling Act in 1922, local governments in the United States have used conventional zoning as their major tool to regulate development. Conventional zoning provided a way to protect neighborhoods from incompatible uses, to preserve land for economically viable uses, and to control the impacts of uses on surrounding areas.

The scope of land development controls grew throughout the 20th century, with an increased focus on neighborhood, environmental, and infrastructure impacts. Subdivision regulations evolved from a way to facilitate property transfers to systems to control the quality of internal infrastructure. Communities began to require parks and open space, and to address off-site impacts. Rapidly growing communities used growth management controls to synchronize the pace of development in the availability of infrastructure, or simply to slow down development. In the 1970s, performance zoning created a series of ratios to control the amount of floor area and paved surfaces based on a site's topographic and environmental conditions.

In recent years, several important substantive and logistical trends have influenced the practice of code writing.

1. Design and Sustainability. The first is a growing emphasis on design and sustainability. Conventional zoning and subdivision regulations typically divide uses by district and include a simple set of setback, building height, and coverage standards. Older subdivision regulations include standards for road, utility, and stormwater management design that ensure streets are sufficiently wide to accommodate cars, service vehicles, and individual stormwater management facilities to avoid increases in off-site traffic flows. Newer codes challenge these conventions by encouraging a functional mix of uses and a lower emphasis on use segregation. They also encourage standards for building and site design, multimodal transportation systems with pedestrian and bicycle infrastructure, and naturalistic approaches to stormwater management. While there are many additional new issues that modern development codes address, most fall within these two broad categories.

2. Code Structure. Many communities are revisiting the practice of conventional residential, commercial, and industrial districts. The district structure in a modern code may follow a tier or transect system that flows from a wider comprehensive planning vision, and that provides a unifying framework for all of the development standards. For example, the St. Petersburg, Florida, Land Development Regulations establish Neighborhood, Corridor, and Center districts that relate directly to the development pattern established in the city's Vision 2020 Plan, and recognize the mixed use character of its traditional residential neighborhoods. Several model codes—see, for example, *21st Century Land Development Code (*APA Planners Press, 2008)—tie infrastructure, parking, landscaping, and other development standards to these districts or character areas. "Form-based" codes are growing in popularity, and emphasize building and site design typologies rather than permitted uses. The "composite zoning" approach used by Leander, Texas, allows a community to customize a code to a site's context instead of relying on a single package of use, dimensional, and site design standards for districts.

3. User-Friendly Documents. The third is a logistical trend made possible by advances in technology and a push toward user-friendliness. This is a growing emphasis on document design and graphics. While codes are legal documents, this does not mean that they have to be written in "legalese." The increasing emphasis on design has created a need for codes that illustrate development outcomes. In addition, while codes are legal documents, illustrations and simple language make them accessible and understandable to laypersons in addition to planning, engineering, or legal professionals. Advances in word processing and graphics production software, the Internet, and document design have made codes much more accessible than their older, legalistic counterparts. User-friendly writing styles, featuring concise sentences, matrices, and the integration of text with graphics, make code language easier to read. Logical code formats structures, with running headers and indexes, make information easier to find.

4. Public Outreach. Another trend is the use of wider and more sophisticated techniques for public outreach. Most states require notice, planning commission referral, and adoption by the legislative body (for example, a city council or county commission) for a code to become legally effective. Communities are going beyond the public hearing process to more actively engage and educate the public about the code update and build consensus with stakeholders. Conventional public participation techniques such as citizen advisory committees, focus groups, and public workshops are useful ways to build a constituency or a consensus for code reform. Some communities have tapped technology as part of the process, using online comments and collaboration, keypad polling, and model building to maintain a public dialogue.

Conclusion

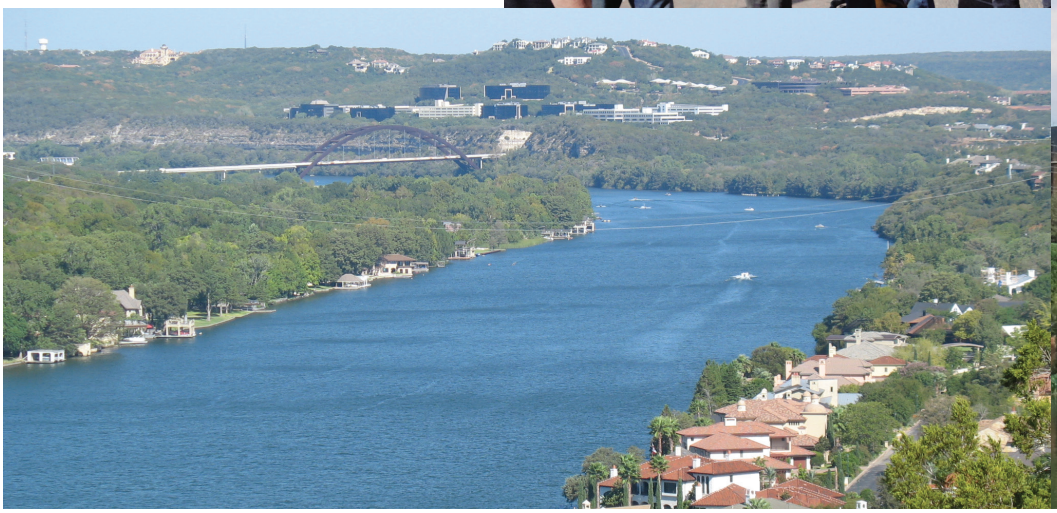
New approaches to codes include form- or design-based codes, composite zoning, and sustainable codes. While zoning codes are no longer 15 to 20 pages long, new approaches to code writing and publishing makes information easier to find and understand. The practice of writing and updating codes is significantly changing, providing new ways for communities to implement their comprehensive plans.

Austin Expands Planning Duties

Karen Finucan Clarkson

Austin, Texas, faces rapid growth while trying to preserve its distinct culture and character. The very popular South X Southwest Festival spills onto the streets; all residents enjoy easy access to the river and lake; and the downtown continues to develop.

Jacob Browning



City of Austin Planning and Development Review Department

For the past decade, land-use and zoning oversight in Austin, Texas, has been shared by two panels. "The planning commission is required by charter," notes Jerry Rusthoven, the city's manager of neighborhood planning and zoning. But an escalating workload and increasing desire to focus on neighborhood planning led to the creation of the zoning and platting commission (ZAP) in 2001.

"Some wondered where we were going to find 16 people, rather than just the nine planning commission members," says Rusthoven. "It turned out to be easier because instead of meeting every Tuesday night until all hours, commissioners only have to attend meetings twice a month."

The planning commission focuses on longer term issues, such as comprehensive and neighborhood plan development, while ZAP handles more of the current planning. They both, to different extents, consider zoning and subdivision requests. The planning commission's authority lies in areas covered by the 28 existing neighborhood plans; ZAP reviews requests from all other parts of the city.

Rules governing the two panels differ in that planning commissioners serve for two years while a term on ZAP runs three years. The city recently instituted term limits—nine consecutive years. "From a staff perspective, it's been helpful to have commissioners with some tenure; you hate to lose that institutional knowledge," says Rusthoven.

"Change can be good, too," says Dave Sullivan, chair of the planning commission. "I'd like to involve more younger people in what we do and this will help. Part of what I worry about is not that corruption creeps in but that boredom sets in. There's a risk of becoming less attentive when something becomes routine."

Currently, planning commission and ZAP members are appointed by the city council without regard to geography. That could change, notes Carol Haywood, planning manager of Austin's Comprehensive Division. Austin's mayor has suggested moving from all at-large seats to six single-member districts and two at-large seats, in addition to the at-large mayoral seat. "If we go to that, I would anticipate a larger geographic representation on the commissions," she says.

Austin Planning Commission

Dave Sullivan, Chair; Danette Chimenti, Parliamentarian; V. Saundra Kirk, Secretary; Mandy Dealey, Vice Chair; David Anderson; Richard Hatfield; Alfonso Hernandez; Jean Stevens; Donna Tiemann

Austin Zoning and Platting Commission

Betty Baker, Chair; Sandra Baldridge, Parliamentarian; Gregory Bourgeois, Secretary; Patricia Seeger, Vice Chair; Cynthia Banks; Jason Meeker; Gabriel Rojas

City of Austin Planning and Development Review Department

Sullivan would support greater geographic diversity on city boards. "Of nine members on the planning commission, only five zip codes are represented. The most recent member to be appointed lives just a block away from me."

ZAP and planning commission members put in anywhere from 10 hours per week to 10 hours per meeting, depending on the meeting, says Betty Baker, a former planning commission member who has served as chair of the zoning and platting commission since its inception. "Occasionally we'll be familiar enough with a site that we don't have to visit it, but not often."

Technology has, to some extent, reduced preparation time. More than that, says Sullivan, it has enhanced commissioners' understanding. "We can access Google Earth and look at the streets and neighborhood in different ways. We can get traffic counts online and see how much traffic there is on an arterial road."

While there is no formal training for new members, both Haywood and Rusthoven have developed information packets, which they share during an initial orientation. Commissioners are APA members and the city often pays for them to attend the state APA conference. There is no compensation for service.

Commission service has been an eye-opener for Sullivan, a former neighborhood activist. "People on the outside tend to look at things as either black or white. There are many gradations, which makes the decisions much harder. Serving on the planning commission gives you a very different perspective."

Short-Term Safety, Long-Term Vision

"Some of the issues we deal with can be frustrating to people, especially subdivisions, where state law compels us to approve them if they meet all the requirements," says Dave Sullivan, chair of Austin's planning commission. "They complain: 'Why have a public meeting if you can't do anything?' Public meetings shine a light on the problem. While we may not have discretion now, we can try to change things so that we have discretion in the future."

It's not just the public that brings potential issues to the commission's attention. "Many years back, firefighters did a tour of the western part of the city and told us that much of the development going on looked like California, where people would build on top of a hill, allowing the valley to fill up with brush," says Sullivan. "We did change some rules—shortened block length, required additional outlets, and looked at setbacks. Texas is a property rights state so you can't tell people they can't build there. I suspect that the [past summer's] fires will renew interest in safety."

Austin's population growth—up from about 656,000 in 2000 to 812,000 this year—has given rise to many issues "such as how best to do infill, compatibility within neighborhoods, housing—everything from large homes to garage apartments to granny flats—and tree preservation," adds Sullivan.

"Change is going to occur no matter what we do," Sullivan says. "To adapt to population growth, we need to focus on infill. By filling in downtown and along the major corridors, we will increase the number of people who can use public transportation or make trips on foot."

Many of these concerns have been discussed, in forums large and small, as the city prepares its first comprehensive plan in more than three decades. "One of the issues to come out of the process is how neighborhood plans relate to the comprehensive plan," says Carol Haywood, planning manager of Austin's Comprehensive Division. "Neighborhoods don't want the comprehensive plan dictating what they can do. So we are in the process of working all that out." The plan is expected to come before the planning commission in January.

The issue of short-term home rentals is another that will eventually make its way to the commission; one of its committees currently is exploring the topic, Sullivan says. Over the past year, concerns have been raised about how the rental of homes—by vacationers or other short-term users—affects neighborhood stability and safety. As many as 500 Austin-area homes have reportedly been listed for rent with companies such as HomeAway. "It's a tough issue," Sullivan adds. "But HomeAway is a national company, so I'm sure we're not the only ones grappling with this."

The Ever-Changing Landscape of Land-Use Law

Dwight H. Merriam, FAICP

Carolyn Torma

Mark Twain, who lived down the street from my office, famously said "if you don't like the weather in New England, just wait a few minutes" (according to the *Yale Book of Quotations*, ed. Fred R. Shapiro (2006), Yale University Press; attributed to Twain in Bennett Cerf's *Try and Stop Me* (1944)).

So it is for land-use law. Even those of us who live a deep-immersion life in land-use law are often overwhelmed by the volume of new statutes, regulations, and case law . . . and the constant change.

Sometimes the wildly unlikely becomes the law. Consider the idea of how tattoo parlors might press their case for more locations. Could this become a First Amendment issue? Skin illustrations are a kind of expression under the very edges of that broad umbrella that protects all speech except that which is pornographic, hateful, or tending to incite violence. The U.S. Court of Appeals for the Ninth Circuit held that a municipality had to provide some location for a tattoo parlor because what was inked under the skin was protected speech:

> Tattooing is a process like writing words down or drawing a picture except that it is performed on a person's skin. As with putting a pen to paper, the process of tattooing is not intended to "symbolize" anything. Rather, the entire purpose of tattooing is to produce the tattoo, and the tattoo cannot be created without the tattooing process any more than the Declaration of Independence could have been created without a goose quill, foolscap, and ink. Thus, as with writing or painting, the tattooing process is inextricably intertwined with the purely expressive product (the tattoo), and is itself entitled to full First Amendment protection.

To help public officials understand what affects what they do, let us look at some of the major issues affecting land use and a sampling of recent developments. These are enlightening and perhaps entertaining, but should help all commissioners and officials on the firing line.

Federal Override of Local Zoning for Religious Institutions

The Religious Land Use and Institutionalized Persons Act (RLUIPA) celebrated its 10th (aluminum) anniversary in 2010.

The U.S. Department of Justice explained in its press release that:

> RLUIPA protects places of worship and other religious uses of property from discrimination and unreasonably burdensome regulation in zoning and landmarking law, and also protects the religious freedom of persons confined to institutions such as prisons, mental health facilities and state-run nursing homes. RLUIPA was enacted by both houses of Congress unanimously and signed into law on Sept. 22, 2000. The law was a response to concerns that places of worship, particularly those of religious and ethnic minorities, were often discriminated against in zoning matters.

The federal law is a big stick and can override local zoning if it causes a substantial burden on the free exercise of religion or singles out religious institutions for different treatment ("equal terms") and there is no compelling reason for doing so.

On June 10, 2011, the U.S. Court of Appeals the Fifth Circuit handed down a decision critical of the zoning regulations in the City of Leon Valley, Texas (the full text is at http://tinyurl.com/6ekqsnm). Leon Valley had decided to strengthen its downtown commercial area, so it eliminated churches as a use permitted by special permit in the downtown B-2 area; however, it still allowed them in the B-3 district, which is intended for larger floor area uses. Other municipalities have excluded churches from downtown areas to allow more commercial development and sometimes have successfully defended themselves against RLUIPA claims, but Leon Valley lost.

After the zoning amendment, the church entered into a contract to buy a property in the B-2 district. When the city refused the church's request to rezone to B-3, the church went ahead and leased it anyway while it pursued its zone change. The city let the church operate a day care center there but not to hold church services. Other nonreligious uses, however, were allowed on other properties in the B-2.

This was Leon Valley's mistake. It did not treat religious uses on equal terms with the comparable nonreligious public assembly uses that were allowed in B-2. Here are two lessons from Leon Valley and other recent cases. First, treat the religious uses like the grange or VFW; treat them just the same or better than any other place of public assembly. My advice? Do not have any specific regulations for religious uses, just list them as a type of public assembly use in the definitions and stop there. Then regulate public assembly uses as a land-use type.

(Left) The list of what is protected by the First Amendment relative to free speech is ever evolving, including tattoos and access to tattoo parlors. (Below) As religious institutions provide support and services to congregants and community residents, they may challenge communities to expand permitted uses .

Lucy Merriam

The second lesson, made clear in other recent cases, is that even the most trivial of comments can come back and hound you forever. Transcripts of public hearings are "flat." They don't have an intonation to them; they are devoid of a smile or laughter. A harmless "icebreaker" joke or an off-the-cuff remark can appear inappropriate or even malicious in print.

If an unacceptable comment is made, it is almost always best for the chair to apply some "damage control," apologize, and explain the comment does not represent the views of the board, commission, or municipality. The idea is to make sure the public and participants know the real policy and to help a court later understand the comment in context.

A finding of blight to support a direct taking [under the provisions of eminent domain] seems to have become more important.

Eminent Domain

In 2005 the U.S. Supreme Court in *Kelo v. New London* upheld a taking of private property by eminent domain to enable redevelopment by a private developer (read more at http://tinyurl.com/67fvcy3).

The decision was consistent with the Court's precedent in decisions from 20 and 50 years earlier, but it highlighted, in stark terms, the extraordinary power government has over private property. The consequent political firestorm resulted in 43 states changing their eminent domain laws. Some changes limited the types of properties that could be taken, some added new more protective procedures, and some changed the standards for takings.

A recent analysis, however, suggests that the changes in state laws—more cosmetic than real in many instances—have resulted in few differences in state and local use of eminent domain. There are actually few *Kelo*-like takings; most purchases are negotiated and concluded voluntarily.

A finding of blight to support a direct taking seems to have become more important. In *County of Los Angeles v. Glendora Redevelopment Project*, 185 Cal. App. 4th 817 (Cal. Ct. App. 2010), the court followed the statutory requirements for finding blight, which require that the area be "predominantly urbanized," have one or more conditions of both physical blight and economic blight, and that these "blighting conditions must predominate in such a way as to affect the utilization of the area, causing a physical and economic burden on the community." Glendora did not meet the "physical blight" criterion and lost (http://tinyurl.com/6bx6ckk).

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[W]e all recognize that variances serve a useful purpose in adding some looseness to the joints of often arthritic zoning laws.

Regulatory Takings

Last year in *Stop the Beach Renourishment v. Florida*, the U.S. Supreme Court held there was no taking of private property as a result of Florida's establishing a fixed line for the high-water mark setting the limits of private ownership when the state renourished eroded beaches with sand (http://tinyurl.com/6378rrt).

Sometimes oddball facts reveal interesting and important issues. The city of Milwaukie, Oregon, pressure-cleaned its sewer lines and accidently caused raw sewage to be forced back up out of a home owner's bathroom drains:

> Plaintiff, in her home located between the two manholes, heard a "loud roar," felt the house shake, and witnessed "[b]rown and gray gunky sewer water that stunk" shooting from her toilets and bathroom faucets. Within seconds, the "gunky" water was dripping from the ceilings and "three or four inches thick" on the bathroom floor, "flowing" into the rest of her home.

Obviously, the city did not intend to cause harm and it was demonstrated that the damage could be remedied. The state appellate court, however, found that the home owner had stated a claim for a taking by inverse condemnation. It is called inverse condemnation because it is the inverse of the type of direct taking as seen in the *Kelo* case. With inverse condemnation, the government takes but does not pay just compensation—at least not until it is sued and loses.

It was sufficient, said the court, for an action for inverse condemnation that the harm is a "natural and ordinary consequence" of the government's action even if the government did not intend to take or damage the property. There need be only a "substantial interference" with the plaintiff's use and enjoyment of her property and damage to the property which in this case "significantly diminished the value" of the home. (Details of this case, *Dunn v. City of Milwaukie*, 250 P.3d 7 (Or. Ct. App. 2011), are at http://tinyurl.com/63xlub4.)

While this decision is only binding in Oregon, it is instructive. Commissioners need to consider both the intended and unintended consequences of planning and regulation. Sometimes it is useful to "game" proposed new regulations before enacting them. Try a few hypothetical applications of what you might adopt to see if you can bring to the surface any unanticipated harmful impacts.

The Wacky World of Variances

If I had a dime for every variance decision I have read, Warren Buffett would be working for me. While the general consensus suggests that many, many variances are granted to applicants that do not meet the "practical difficulty and unnecessary hardship" test, we all recognize that variances serve a useful purpose in adding some looseness to the joints of often arthritic zoning laws. And there are fully defensible reasons for granting variances.

One example is when a lot straddles two zoning districts as the court held in *Kettaneh v. Board of Stds. & Appeals of the City of New York*, 2011 NY Slip Op. 5410 (N.Y. App. Div. 1st Dep't 2011). The court concluded that the Board of Special Appeals rationally found that there were "unique physical conditions" peculiar to and inherent in the zoning lot such that strict compliance with the zoning requirements would impose "practical difficulties or unnecessary hardship" (see http://tinyurl.com/6co4hby for more).

Signs of the Times

Land-use law reports ooze First Amendment sign cases, sometimes in seemingly uncontrolled ways like an overstuffed bean burrito, cheese crepe, or cream puff. The basics? You can regulate the time, place, and manner of signs, but take care not to regulate content. Problem is, sometimes those lines are unclear. While we shy away from regulating political signs, you can regulate them to some extent. The federal court in *Kolbe v. Baltimore County*, 730 F. Supp. 2d 478 (D. Md. 2010), upheld a limit of eight square feet to prohibit a campaign sign that was regulated as part of a provision regulating "temporary" signs (http://tinyurl.com/6gly54m). The court found it was content-neutral because it ap-

Carolyn Torma

plied regardless of the content of the sign and advanced legitimate aesthetic and traffic safety interests of the county. In addition, other channels were open for political advertising and the county did not have any pre- and post-election requirements for placement and removal.

In *Wag More Dogs, LLC v. Artman*, 2011 U.S. Dist. LEXIS 14642 (E.D. Va. Feb. 10, 2011), the federal court ruled that a 960-square-foot cartoon mural of dogs, bones, and paw prints on the wall of a canine day care business facing a park used by dog owners violated a 60-square-foot size limit. The ordinance was not content-based, because it regulated signs based on size along with whether they were commercial advertising signs. The definition of a sign as "any word, numeral, [or] figure . . . [that] is used to direct, identify, or inform the public" was clear enough, said the court.

The answer may not always be evident, but do ask: "Are we regulating the content, or merely the time, place and manner?" If it is the latter, you should be safe.

Lucy Merriam

(Left) Signs, whether on bus shelters, buildings, on-site, or on billboards, have a long and ongoing history in case law. All communities need to stay current with these legal issues. (Above) Home businesses and telecommuting have led to more and more business uses in residential buildings. In the case of the doggie day care business, a recent court ruling found that such uses are best accommodated in areas zoned for business.

Spot Zoning

While there is a lot of talk about spot zoning, there are few cases to be found. It is not the size of the area alone, but how it is treated relative to its surroundings. An Iowa appellate court, for example, recently found that the rezoning of a single site with nonconforming use—a boarding house for African American students, to a historic landmark classification—was not spot zoning.

> We agree with the district court's conclusion that rather than illegal spot zoning, the Martin property is the continuation of a permissible nonconforming use. . . . We also agree there is a reasonable basis for distinguishing the use of the Martin house from the surrounding area. The property has historical and cultural significance to Ames. The council rezoned the property in an effort to preserve this heritage. (*Ely v. City Council of City of Ames*, 2010 Iowa App. Lexis 673 (June 30, 2010), http://tinyurl.com/65yb7pk)

Home Occupations

Has your community had a home occupation controversy? The problem is often the result of unclear regulations and the inventive new ways people make money. One home owner decided to do a little pet sitting at home. The zoning board found that it was more like a kennel and denied the use. The court agreed it was not a home occupation (*Lariviere v. Zoning Bd. of Review*, 2011 R.I. Super. LEXIS 65 (C.R.I. Super Ct. 2011)), http://tinyurl.com/5wwnhzc).

Tired? No, It's Just Exhaustion

This is a law worth knowing. No one can challenge your actions, with a couple of narrow exceptions, until they have exhausted all their avenues of relief. For example, in most states, property owners cannot claim their property was taken by overregulation, such as by an areawide change in the zoning that decreased density, until they applied for development and could not get any reasonable economically beneficial use from the property. Even then, it may be necessary for them to ask for a variance before going to court.

Courts have this rule because they don't want to waste time on cases that could have been resolved by administrative relief at the local level.

Out in Oyster Bay, New York, the state commissioner of the New York Division of Human Rights recently challenged a new "Golden Age District" as discriminatory. As to whether the case was "ripe" for adjudication the court said:

> Generally, 'one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law.' '[A]bsent extraordinary circumstances, courts are constrained not to interject themselves into ongoing administrative proceedings until final resolution of those proceedings before the agency.' The doctrine of exhaustion of administrative remedies applies to actions for declaratory judgments. However, there are exceptions to the exhaustion doctrine applicable where the agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or where resort to administrative remedies would be futile or would cause irreparable injury. (*Town of Oyster Bay v. Kirkland*, 917 N.Y.S. 2d 236 (N.Y. App. Div. 2d Dep't 2011), http://tinyurl.com/6xdwfav)

The Fair Housing Act

The federal Fair Housing Act is a little like RLUIPA in that it can negate your local zoning. The Act protects group homes for several classes of people, largely those covered by the Americans with Disabilities Act, and you as commissioners are required by law to provide a "reasonable accommodation" to allow group homes to be established.

The federal Fair Housing Act is a little like RLUIPA in that it can negate your local zoning.

In *King's Ranch of Jonesboro, Inc. v. City of Jonesboro*, 2011 Ark. 123 (Ark. 2011) the Arkansas Supreme Court held that the City violated the Fair Housing Act in refusing to waive the definition of family in the zoning ordinance to enable a group home operator to house eight children and two house parents in a single family unit. It is a decision worth reading and you can find it at http://tinyurl.com/6hrd84w.

Waiving the restrictive definition of family is one kind of "reasonable accommodation."

You might consider using a "functional family" definition to address some of these issues. Here is a decision holding that the term "functional equivalent of a traditional family" in zoning is not void for vagueness (*Matter of Morrissey v. Apostol*, 2010 N.Y. Slip Op 6714 (N.Y. App. Div. 3d Dep't (2010)), http://tinyurl.com/6jd7qw4).

The challenge for commissioners is to stay ahead of new developments in land use. Just 30 years ago it was video arcades. Then adult viewing booths. Now it's hookah bars and motocross tracks. That is our round up for this year. Keep up the good work and read everything you can get your hands on from APA. It will help keep you out of court and, if you do end up there, will improve your chances of emerging victorious.

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The time to resolve design and placement issues is prior to the review by the local appearance commission.

A Happy Ending and The Future

Fortunately, the appearance commission understood that both goals were worthy. It gave conditional approval to the project with several stipulations, one of which was a letter by the project architect endorsing the placement of the solar panels. Today the panels are in place and are not visibly obtrusive to the adjoining properties.

Another valuable outcome is that Glenview is now working on guidelines for the location of solar panels and wind-powered generators. If sustainability is a goal for communities, then the plan should contain a goal about sustainability and renewable energy. In addition, planners should also ensure that new technologies are properly defined and permitted in the community's ordinances or guidelines.

David Mann, a principal with Booth Hansen Architects, in a follow-up letter to the Appearance Commission, stated that the firm "fully supports the sustainable efforts by the Museum and believes that the installation (placement and size of the array) does not diminish the original design of the building." With that, the project came to a successful conclusion.

The author thanks John R. Hedrick, former chair of the Glenview Appearance Commission, for inspiring this article.

Updating Ordinances

APA Publications

Better Zoning on the Web
Don Elliott, FAICP
Zoning Practice, October 2008

Overhauling Your Zoning Code
V. Gail Easley, FAICP
Zoning Practice, December 2008

APAPlanningBooks.com

The products below are available from APA's online bookstore.

Books

21st Century Land Development Code
Robert Freilich and S. Mark White, AICP
APA Planners Press, 2008

Complete Guide to Zoning
Dwight H. Merriam, FAICP
McGraw Hill, 2005

Smart Codes: Model Land Development Regulation
Marya Morris, AICP
PAS Report 556, 2009

CD-ROM Training Packages

Form-Based Zoning
AICP Training, 2004

Smart Growth Codes
AICP Training, 2004

Updating the Zoning Ordinance
APA Training, 2010

Other Publications

A Better Way to Zone
Don Elliott, FAICP
Island Press, 2008

Tuesdays at APA—Chicago

205 N. Michigan Avenue, Suite 1200

Prioritizing Green Infrastructure Investments
November 29, 2011
5:30 p.m.

Planning for and with Ecosystems Services
January 24, 2012
5:30 p.m.

To listen to past programs online, visit www.planning.org/tuesdaysatapa/previous.htm

Audio/Web Conferences

Introduction to the Zoning Board of Adjustment
December 7, 2011

Resilient Planning Agencies
January 18, 2012

Informed Decisions: A Guide to Gathering Facts and Evidence
February 15, 2011

Urban Agriculture and Food Systems Planning
March 12, 2012

Monetizing Sustainability
May 2, 2012

Maintaining Neighborhood Character
May 16, 2012

Adapting Cities to Climate Change
June 6, 2012

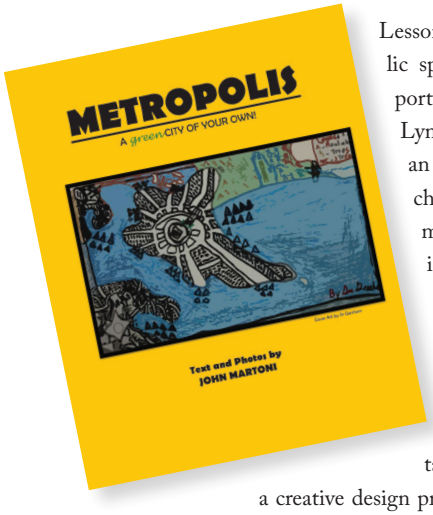
2012 Planning Law Review
June 27, 2012

To learn more and to register: www.planning.org/audioconference/index.htm

Creating a Green City

John Martoni
Teacher, South San Francisco

Alarmed that my students' vision of an "ideal city" consisted of mini-malls, parking lots, and big-box stores, I decided to take action. The result is *Metropolis: A Green City of Your Own!* a curriculum that exposes children to a variety of urban forms from around the world.



Lessons about edges, districts, public spaces, landmarks, and transportation (taken from Kevin Lynch's *Image of the City*) provide an organizing mechanism for children to design kid-friendly, multicultural, and green cities of their own. The lessons increase students' awareness of planning issues such as sustainability and sprawl, giving them an opportunity to express their heritage, interests, and ideas using a creative design process while learning skills in math, science, social studies, and language arts.

Lessons about edges, districts, public spaces, landmarks, and transportation provide an organizing mechanism for children to design kid-friendly, multicultural, and green cities of their own.

Metropolis also promotes an understanding of urban development that is environmentally sound, socially equitable, and culturally sensitive and encourages teamwork in local communities to solve global problems. I created lessons that are hands-on, fun, and relevant and that encourage problem-solving skills and help develop a responsible citizenry.

To introduce planning to school children, order a copy of *Metropolis* at APAPlanningBooks.com.

Housing All Americans: The Creation of HUD

Of the widespread changes occurring in the 1960s the most significant was the civil rights movement and the passage of Civil Rights Act in 1964. The concern over inequality led to major changes in education, housing, and community development, with federal and local governments partnering to bring about change.

After the passage of the Civil Rights Act, Rev. Martin Luther King, Jr. focused his work on education and housing. In 1966 he led the Chicago Freedom Movement. Two years later in the aftermath of his death, President Lyndon B. Johnson successfully urged Congress to pass Title VIII to the 1964 act, which became known as the Fair Housing Act of 1968. Johnson sought to honor King's dedication to accessible housing as a foundation of a just society.

Wikimedia Commons/Yoichi R. Okamoto, White House Press Office

President Johnson was arguably the president most focused on community building and urban life. He considered this so important for America that he created a cabinet-level agency, the U.S. Department of Housing and Urban Development, in 1965. Johnson and his advisors saw housing and community development as intertwined. Housing became the dominant program within HUD as it addressed housing for the elderly, Native Americans, the poor, the disabled, and the middle class. Today its programs extend from community development funding to healthy homes, mortgage insurance, and advanced technology.

Karen Finucan Clarkson is a public information consultant and journalist in Bethesda, Maryland. She wrote the article on pages 4 and 5.

John Martoni is a K–12 teacher who is also a trained planner. He teaches in South San Francisco, California. He wrote the column on page 11.

Dwight H. Merriam, FAICP, is a planner and attorney and partner in Robinson & Cole, LLP. He is the author of the article on pages 6 to 10.

Dudley Onderdonk, AICP, is the former community development director for the Village of Oak Park, Illinois, and an instructor at Roosevelt University. He wrote the article on pages 1 and 2.

Rana Salzmann is the APA knowledge management associate. She wrote the resource finder on page 10.

Carolyn Torma wrote the history feature on page 12. She is the APA director of education and citizen engagement.

Mark White, AICP, is an attorney and principal in the firm of White & Smith, LLC. He wrote the legal article on page 3.

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