Recent Trends in Planning & Zoning from a Legal Perspective

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REGULATING SIGNS
Competing Interests in Sign Regulation

- Freedom of Speech
  - How is the speech being expressed?
  - When is the speech being expressed?
  - What type of speech is expressed?
    - Commercial
    - Non-Commercial
      - Religious
      - Political
      - Other

- Police Power
  - Safety
  - General Welfare
  - Aesthetics
  - Other
Determining Constitutionality of Regulations

- Content-neutral
  - Time, place, and manner restrictions
  - Size restrictions
  - Does not require evaluating the content of the message

- Content-based
  - Not content-neutral
  - Involves evaluating the content of the message
  - Subject to heightened scrutiny by courts
Regulating Commercial Speech

  - 4-part test to regulating commercial speech
    - Determine whether the 1st Amendment protects the speech in question.
      - Must concern lawful activity
      - Must not be misleading
    - Determine whether the asserted governmental interest propagating the restricting regulation is substantial.
    - Determine whether the regulation directly advances the governmental interest asserted.
    - Determine whether or not it is more extensive than necessary to advance that interest.
CBS Outdoor v. Cleveland BZA

- CBS was cited for violating Cleveland Codified Ordinance for a tri-face billboard that had “automatic changeable copy sign.”
- CBS argued that the prohibition applied to LED billboards, not rotating tri-face billboards, but also asked for a variance.
  - Cleveland BZA denied the variance, finding that 1) CBS could still have a beneficial use without the tri-face feature and 2) the billboard violated the spirit and intent of the zoning code.
- Court reversed and remanded. The record did not contain sufficient justification, just a summary statement without insight into lower court’s decision which affirmed the BZA’s decision to deny the variance.
Genesis challenged validity of zoning ordinance regulating billboards. Ordinance permitted billboards but required a 130-foot setback, as well as mounting and size restrictions.

Ordinance permitted billboards in Poland Township and did not qualify the type of content they could provide. Only limited size, structure, and setback requirements, which were not content-based.

Genesis acknowledged it would be possible to erect billboards by interfering with structures on some properties, which would be a business decision left up to the property owners.

Court affirmed that ordinance was not an outright ban on billboards, did not conflict with R.C. 519.20, was content-neutral, and did not implicate 1st Amendment concerns.

- Southtown requested to replace face panels on a non-conforming roof sign atop its building, but was denied by the BZA. Part of reasoning was that Southtown replaced its sign prior to submitting its application, and therefore it was not a “substitution” of a prior valid non-conforming use.

- Appellate court agreed with Southtown’s argument that the support structure for its roof sign was not “free standing”, and that it should be included as part of the roof sign. Contrary to trial court’s determination, Southtown’s removal of panels did not constitute removal of the roof sign since the non-freestanding support structure remained in place.

- Further, Southtown was not required to apply for substitution of a non-conforming use. Southtown was entitled to retain the legal non-conforming use status of its roof sign.
Plaintiff brought action against City of Cincinnati, challenging constitutionality of bench advertising municipal regulations.

Plaintiff alleged City was violating its First Amendment rights because it was not provided equal protection under certain regulations.

- The regulations limited advertising space on bench billboards and gave the City Manager the authority to modify or waive any of the requirements of the regulations “when required for public safety.”
- In comparison, the City allowed newsracks, street banners, and sandwich board advertising signs to remain on the public right-of-way without substantial regulation. Bus shelter signs also remained largely exempt from City regulation.

Court held Plaintiff was not similarly situated to the entities that were supposedly being treated differently under the regulations, even though they shared some commonalities with regards to how they advertised.

Constitutionality of bench advertising regulations upheld. District court dismissed some claims and granted City’s motion for summary judgment on others. Appellate court affirmed.

- Hucul sought permission to construct billboard on its property.
- Township denied Hucul’s application for violating zoning ordinance, Hucul appealed.
- The Court held that 4000-foot spacing requirement for digital billboards was a valid “time, place, and manner” restriction on speech.
- Hucul argued for the Central Hudson commercial speech test, claimed the application of “time, place, and manner” test for content-neutral restrictions on speech was improper. The Court disagreed, but also said the difference in application of the tests was insignificant in this case.
- The Court held that where an ordinance regulates both commercial and non-commercial speech and does not differentiate between the two, the application of time, place, and manner intermediate scrutiny is appropriate.
International Outdoor, Inc. v. City of Southgate, 556 Fed.Appx. 416 (6th Cir. 2014)

- Advertiser claimed that city ordinance’s blanket ban on billboards and off-premises signs deprived advertiser of 1st and 14th Amendment rights.
- The Court held that Advertiser lacked standing to challenge billboard ban, because even if the ban were held unconstitutional, Advertiser would still be prevented from building its proposed billboards due to height and size limitations.
- The Court held that the language of the ordinance limiting height and size applied even to those signs that were improperly banned.
- “Common sense also lends support to this interpretation of the ordinance. Although municipal legislators may not specifically have intended the height and size restrictions imposed by (the ordinance) to apply to billboards and other off-premises signs, it is hard to imagine that they would not desire those restrictions to apply to billboards and other off-premises signs if the municipal ban on such signs were struck down on constitutional grounds.”

- Maximum sign-face area for a single lot was proportional to lot’s frontage: 1.35 feet of sign area per foot of frontage.
- Practical implications meant more political signs than non-political signs in residential districts. A 100-foot-square corner lot could display only one personal/religious sign, but 45 political signs. In this respect at least, ordinance scheme favors political speech over non-political speech.
- District Court for N.D. Ohio partially granted Wagner’s motion for TRO, and later found that City’s restriction on residents’ political speech was content-based regulation which violated 1st Amendment under strict scrutiny.
- Appellate court reversed, found that ordinance was content-neutral restriction, and city had satisfied intermediate scrutiny.
STANDING TO CHALLENGE ZONING DECISIONS
**CABOOM v. Anderson Twp. BZA**  
2012-Ohio-6145 (1st Dist. Ct. App.)

- BZA approved zoning permits for conditional use of property as a mine, but with many restrictions including the need to enter into a “Good Neighbor Agreement” whereby they would pay the Township 5 cents per ton of material from the site.

- Various neighboring local governments objected to the BZA decision arguing that mining operations would negatively impact property values and cause increased truck traffic adversely impact their ability to maintain safe roadways.
  - Standing to object to a zoning decision doesn’t depend on whether the property affected is within the objecting local government’s territorial boundaries.
  - Can’t rely solely on increased traffic to demonstrate the kind of unique prejudice that confers standing. But where increased traffic affects the rights, duties, privileges of another person or entity (including local governments) that entity has standing to challenge decisions impacting them.

- BZA had nothing in the zoning resolution authorizing them to impose Good Neighbor Agreement requirement. Court didn’t want to void BZA decision or strike this clause, so remanded to BZA for reconsideration.
Lupo v. Columbus, 2014-Ohio-2792, (10th Dist. Ct. App.)

- Lupo testified at a BZA regarding construction of a Family Dollar store near her residence.
- She objected because she did not believe the community was given enough chance to voice concerns and opposition about proposed development. Also contended the development would create a hazard, increase traffic and noise. BZA orally voted to approve variances.
- The Court held that a third-party property owner has standing to appeal an administrative zoning order under R.C. 2506.01 when that owner 1) has opposed the proposed zoning change through active participation at the administrative hearing and 2) has been directly affected by the administrative zoning order.

- City Gospel Mission sought to relocate a homeless shelter to Queensgate from its existing Over-the-Rhine location. Businesses that owned property that neighbored the proposed relocation site in Queensgate filed suit against City Gospel as well as the City of Cincinnati, challenging City Council’s decision to pass an ordinance allowing the relocation.
- The Queensgate businesses sought a declaratory judgment, injunctive relief, and a writ of mandamus under the taxpayer standing provisions of Ohio Revised Code.
- The Court granted City’s motions to dismiss. Queensgate businesses lacked standing to pursue taxpayer claim for injunctive relief because they did not seek to enforce a public right, but merely a private benefit for themselves.
- Ancillary public benefits are not enough to confer taxpayer standing.
- City’s “notwithstanding” zoning ordinance was afforded presumption of constitutionality, not improper spot zoning, upheld.

- MacConnell entered into settlement agreement allowing City to appropriate portion of his property in exchange for compensation. Two years later, MacConnell filed complaint claiming that City’s use of appropriated portion had since rendered the remainder of his property unusable and of no commercial or practical value because it was surrounded by roads and the grade angle limited access.

- MacConnell had requested he be able to use the property for several different purposes, all of which were denied by the City. MacConnell claimed that the settlement he agreed to was only for the portion of property appropriated, not for any damages to the residue.

- The Court granted City’s motion to dismiss, citing to clear language in the settlement agreement that barred MacConnell from bringing any further claims for damages arising out of the appropriation.
PLANNED UNIT DEVELOPMENTS
**Planned Unit Development Decisions: Administrative or Legislative?**

- Depends on the circumstances – Courts have ruled both ways.
- The decision to change zoning designation is typically legislative, but it is usually accompanied by a plan for the affected site, which requires administrative approval.
Rockford Homes, Inc. v. City of Canal Winchester, 2014-Ohio-3609 (10th Dist. Ct. App.)

- In 2008, Developer submitted application for site development plan to build 112-unit multi-family apartment complex.
- Canal Winchester subsequently denied a 2012 application from Developer for a similar site plan.
- Municipal Court’s decision found Developer’s 2012 plan “to be essentially the same” as the 2008 application which was “approved by this Court and the Court of Appeals.” Court did not mention or address other material issues however.
- Appellate Court held that Municipal Court abused its discretion by failing to review the record and determine whether Canal Winchester’s denial of the 2012 application was supported by a preponderance of reliable, substantial, and probative evidence.
- Case was remanded, more to come later. Good reminder for all decision-making bodies that review of applications and subsequent decisions must be thorough.
AGRICULTURAL USE EXEMPTION CASES
R.C. 519.21(A)

- “[S]ections 519.02 to 519.25 of the Revised Code confer no power on any township zoning commission, board of township trustees, or board of zoning appeals to prohibit the use of any land for agricultural purposes or the construction or use of buildings or structures incident to the use for agricultural purposes of the land on which such buildings or structures are located, including buildings or structures that are used primarily for vinting and selling wine and that are located on land any part of which is used for viticulture.”
**Litchfield v. Nimer**

2012-Ohio-5431 (9th Dist. Ct. App.)

- Property owner operates beef jerky processing operation and claims zoning exemption for all activity related to beef jerky processing.
- Court held that: (1) jerky business is not agriculture; (2) caring for livestock is agriculture; and (3) processing and marketing beef products could be agriculture if secondary to the care of cattle.
- Here, they are the primary purpose, not secondary.
  - The business was almost all wholesale distribution, requiring large quantities of beef hearts almost all of which was purchased from outside sources.
  - Only about 71% of the rest of the meat processed came from cattle he purchases, maintains, and then processes.
  - Only had 21 head of cattle on property at time of trial, but the processing and operation entails thousands of pounds of meat nor raised by him or cared for by him on the land.
- Allowed to use other buildings for the care and raising of cattle, but not as an office or otherwise in support of the meat processing operations.
Scioto Twp. v. Puckett
2013-Ohio-703 (4th Dist. Ct. App.)

- Property owner operating pay pond cited for impermissible home occupation in an agricultural area.
- Property owner arguing that their operation of the pay pond is “aquaculture” and exempt under the agricultural use exemption
- The Court granted summary judgment finding that property owners were not engaged in aquaculture. Not a final appealable order, so still pending in trial court.
Jones v. Auburn Twp. BZA

2012-Ohio-6124 (11th Dist. Ct. App.)

- Property owner constructed wind turbine on farm and when hooked up to local utility company for backup and storage of excess energy, company classified their meter as “commercial.” Also stated purpose was commercial in applications for federal grants, even though intended to use primarily to support horse farm.

- BZA denied application, stating that property owner failed to convince them the energy produced would be used solely for agricultural purposes.

- The Court held that construction of wind farm could potentially be incident to agricultural use of property.
  - Statute does not say that structures must be exclusively for agricultural purposes.
  - An ancillary benefit like selling excess energy produced shouldn’t disqualify the structure from the exemption, as long as the primary purpose is agricultural.
OTHER INTERESTING CASES

- Nwankwos filed improvement application with Design Review Committee of Heritage Club HOA to construct covered gazebo attached to their house and additional landscaping. Not required by HOA or Zoning Code to seek approval for project from any neighbors.

- Baruks, neighbors, raised concerns regarding the proximity of improvements, including a firepit, to their property. Nwankwos had made changes to the plans included in their application that would have otherwise been rejected by the DRC.

- The Baruks attended an appeal hearing for the Nwankwos but chose not to speak and asked not to be questioned. They also chose not to respond to an email determination from the City of Mason regarding its zoning determination.

- The DRC ordered Nwankwos to cease construction, but HOA reversed. Baruks then requested their own appeal hearing, which was denied. Baruks then filed suit against Nwankwos and HOA in common pleas court, which granted Motion for Summary Judgment against Baruks on several of their remaining claims.

- The Appellate Court affirmed in part, but reversed and remanded in part.
  - Trial Court’s decision in favor of Nwankwos on Baruks’ claims alleging violation of Zoning Code, negligence per se, and violation of setback provisions of the HOA were affirmed. Trial Court’s decision in favor of Nwankwos on claims regarding drainage restrictions and nuisance provisions were reversed due to questions of material fact that still remained. Baruks’ also had common law claims alleging nuisance and trespass that remained pending, even though they attempted to voluntarily dismiss those claims.
Beck Energy received permit from ODNR to drill on property, but City filed for and received injunction claiming Beck didn’t comply with local permitting requirements for drilling, zoning, and rights of way construction.

Question is whether the comprehensive state statutory scheme for drilling in R.C. 1509 preempts local ordinances.

- Balancing state economic interests with potential burden and harm to local area’s infrastructure.

Because the local drilling ordinance was in conflict with state law, it was not enforceable.

But according to the plain language of the statute, the City could enforce right-of-way ordinances in the face of drilling activities, so long as they’re not enforced in a discriminatory manner against oil and gas well drilling.
Anderson v. City of Blue Ash, U.S. District Court, S.D. Ohio, 2014 WL 3102326
Anderson v. City of Blue Ash, U.S. District Court, S.D. Ohio, 2014 WL 3102326

- Anderson obtained a miniature horse in 2010, and soon after the City’s community development director and zoning administrator started receiving complaints from citizens, alleging extremely offensive smells, health issues, and actions that devalued surrounding homes.
- BZA again denied Anderson’s appeal to keep horses, finding that neither horse was a service animal under the ADA. City Council denied appeal as well in administrative decision, which Anderson never appealed.
- City eventually zoned out farm animals on residential property, and Anderson was cited. Anderson filed a Housing Discrimination Charge as well as a claim under the ADA.
- Court granted summary judgment to City.

- Bingham purchased parcel zoned industrial in Wilmington. Property was previously used as a lawn and garden business. When Bingham purchased the Property, a junk yard was not a prohibited use under the zoning code, but landowners were required to obtain a conditional use permit.

- In 2008, new ordinance prohibited junk yards from operating within city limits. In 2011, City sent Bingham notice that use of his Property as a junk yard was in violation and that he must discontinue such use. Further stated that he had failed to obtain a “Certificate of Occupancy” which may have allowed him to continue operating the junk yard as a nonconforming use.
Magistrate issued a decision finding the actions of the city and BZA to be illegal and unconstitutional. BZA filed objections to the decision, and the Trial Court overturned, finding that Bingham’s use of the Property did not qualify as a prior nonconforming use.

Appellate Court reasoned that Bingham was required to obtain a conditional use permit in 2004 when he opened the junk yard, but failed to do so. Thus when the zoning regulations were revised in 2008, the junk yard was not a nonconforming use, because it was not lawful at the time it was established.
Questions

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