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PRACTICE ZONING ENFORCEMENT

Enforcing the Zoning Code

By Linda S. Pieczynski

If zoning violations seldom occur in a local jurisdiction, staff may struggle to determine when and how to take action. Consider these scenarios.

An owner of a single-family home with a large yard begins renting parking spaces to landscape companies, and the neighbors complain to the city. A rental unit in a strip mall that was supposed to be a church counseling center is being used for worship services attracting 200 people on the weekend, causing traffic issues and fire safety concerns. The owner of an office complex allows the storage of fireworks in a unit, disregarding the zoning code and safety of the other tenants.

All of these violations need to be addressed by enforcing the zoning code. But what are the best methods to achieve compliance? Will gaining compliance be expensive? How long will it take to reach a resolution?

Sometimes the first reaction is to ignore the matter and hope it goes away. However, once a violation is brought to the attention of the zoning administrator, it is seldom a good idea to delay enforcement unless some type of written agreement for compliance is reached. Employees leave their positions, retire, or move away. Memories fade, and records become more difficult to retrieve. It is also difficult to argue in court that enforcement is urgent when there has been a 10-year delay before the jurisdiction takes legal action.

This article will explore the zoning enforcement practices and procedures most likely to achieve results in the shortest time possible based on my experience as a municipal prosecutor handling these kinds of cases.

CONSULTING THE CODE

Most zoning violations are straightforward, and a few photographs will convince a judge that the responsible party is in violation. However, there are procedural requirements that can derail a case if they are not followed properly. The first step, whenever there is a possible infraction, is to read the zoning code provisions relevant to the violation as well as any other local ordinance that may be important. For example, if an office building is converted into a day care center, not only will there be a zoning violation but there will probably be violations of the local building and fire codes as well. People who violate the zoning code seldom obtain building permits to do the alterations necessary for unlawful conversions.

The zoning code will not only describe the violation itself but will set forth requirements regarding who can enforce the code, what type of notice must be given, and pos-

Kelly Ambach

Illegal outdoor storage often starts small.

Addressing the Authority to Designate Enforcement Officers

This example from Burr Ridge, Illinois, shows how a zoning ordinance can give power to the zoning administrator to appoint enforcement officers:

> For the purposes of this Ordinance, the Community Development Director shall be that person or persons designated by the Village Board of Trustees as the head of the Community Development Department. The duties are as follows:
>
> 1. Enforcement Powers
>
> ....d. Issue violation notices requiring compliance and advising suspected violators of their right to appeal; to issue citations for violations of this Ordinance; and to designate enforcement officers with the same authority (§XIII(B)).

sible defenses (e.g., legal nonconforming use). If these procedural steps are ignored, the defendant may file a motion to dismiss the complaint. This delays enforcement and creates a possible due process challenge to the action.

The zoning code also determines who is responsible for abiding by the code. Usually it will be the owner of the property, but it might also be a tenant or agent of the owner. This is why reading the code is so important.

POWER TO ENFORCE THE CODE

A few years ago, I was appointed as a special prosecutor on a zoning case that had been brought against a city official. The prosecution was unsuccessful because the zoning code required that the zoning official enforce the code. However, a code enforcement inspector who was not the zoning official had drafted the complaint. The zoning official had never appointed the inspector as a deputy zoning official nor did the code give the zoning official the power to delegate powers to another person. The only testimony available was from the code enforcement inspector. Consequently, a motion to dismiss was granted. The town did not wish to start the complaint process anew so the case ended. I advised the city to amend its code so that the zoning official had the power to appoint deputy zoning officials and inspectors to carry out his or her duties so the same problem would not reoccur.

Code amendment for deputy authorities

It is not unusual for employees of local governments to wear multiple hats when enforcing local ordinances. The building official is often the zoning administrator. It is imperative that the local code allow enforcement of the code by multiple employees. If it does not, any action taken must be by the person designated for enforcement by the ordinance.

If the zoning administrator delegates certain duties based on the zoning code, it is wise to have written documents setting forth the appointment of such employees in their personnel files so that it is clear that an employee possessed the power to enforce the code prior to the date of the violation.

IDENTIFYING THE RESPONSIBLE PARTY

One of the most important tasks when enforcing the zoning code is to correctly identify the party that is responsible for the violation. While this sounds like an easy step, it can be complicated when the owner or tenant of the property is not an individual but a legal entity that exists only on paper. Because of liability, the preferred method of owning commercial property is to set up a corporation, limited liability corporation (LLC), limited liability partnership, or trust as the owner. Therefore, it is rare for the owner of a commercial building or large apartment complex to own the property in his or her name. One of the most common mistakes zoning inspectors make when enforcing the code is assuming the owner is a person instead of a legal entity.

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Many municipalities prohibit parking commercial vehicles in residential districts.

How do you determine who owns property? The gold standard is to check the records of the recorder of deeds in the county in which the property is located. The zoning official needs to determine who owns title to the property by examining the last deed that transferred title to the current owner. Many documents are now available online at the website of the county recorder of deeds. The website can be searched for ownership based on a property index number, address, or name. Title companies will perform an ownership search for a fee, and I recommend doing this before engaging in any complex litigation. The inspector should never skip verifying who the responsible party is. Relying on tax records or the assessor's files alone is dangerous because anyone can pay taxes on a property. While these records supply information, they are not sufficient to confirm ownership.

Verification of the responsible party

If the responsible party is a tenant (which is often the case when dealing with defendants that are businesses), it may be possible to uncover its identity using records from the local government, especially if the code or the local taxing authority requires a business license. The zoning inspector can always ask an employee for a business card of the entity or question him or her directly about the tenant's legal name. The owner of the property may cooperate to avoid being named as a codefendant or even file an eviction lawsuit for violation of the lease once the problem is brought to the owner's attention. For example, when "adult entertainment" is being offered at a place that is supposed to be a spa, landlords will often cooperate with law enforcement to evict the tenant to solve the zoning issue.

Unless the owner or tenant is an individual, the next step is to verify the legal existence of the entity in question. In most states, the business corporation division of the secretary of state administers the creation and existence of corporations and limited liability companies. Most of these public agencies have websites where the names of these companies can be searched. The websites verify the existence of the entity and whether it is in good standing. They list the name of the registered agent required for every cor-

poration or LLC as well as information on the president and secretary of the corporation. If the entity is an LLC, it may list the name of the manager(s). These valuable sites can be used to confirm that the entity exists and provide addresses needed for proper notice.

If a corporation or LLC is involuntarily dissolved, the officers and directors may be personally liable for the violation. If the registered agent cannot be served, most states allow service on the secretary of state as the default registered agent.

Kelly Ambach

Clear definitions and standards for outdoor storage are important for interpreting zoning violations.

NOTICES OF VIOLATION

Notice process

The zoning administrator must be familiar with what the zoning code requires for notices of violation. If there is a procedure set forth in the code, it must be strictly followed, otherwise a motion to dismiss by the defendant would be proper due to the lack of due process.

The zoning official should also determine whether notice is required by the code. If so, who is entitled to serve the notice? What information must the notice contain? How must the notice be served?

Even if notice is not required, sending notice is a helpful step to take because most people will comply once they are educated about the problem (e.g., failure to obtain a zoning certificate of compliance). If it is required, notice should be sent individually to each responsible party (e.g., an owner and a tenant or spouses) to the place required by the code, often a last known address.

When multiple parties are responsible, everyone should receive a notice. This increases the odds of compliance if at least one of the responsible parties responds to the notice of violation.

If the code requires that the notice contain specific information, it must be in the notice. The zoning administrator can always add more information but never less than what is required. This usually includes the location's address, date of the inspection, the nature of the violation, the section of the code that was violated, date for compliance, and the process for an appeal.

If the code requires that the notice be served in a specific way, that procedure must be followed. Frequently, notice may be served by regular mail, certified mail, in person, by posting it on the property in question, or by notice in the newspaper if the responsible party cannot be found. A corporation or LLC can be notified properly by serving the registered agent. It is very important to consult the code to be sure the chosen method is allowed. Failure to serve the notice properly can result in a motion to dismiss and will delay compliance.

TYPES OF EVIDENCE

The most important evidence in a zoning enforcement case are the observations of the zoning administrator or inspector. This is why it is very important that the zoning administrator or inspector gathers the evidence in a systematic way. Good notes are crucial so they can be used to refresh the witness's testimony regarding statements made by the defendant to the witness. Admissions by responsible parties are important in proving the case.

Defendants often make admissions during conversations or while exchanging emails or texts with the inspector. These are admissible against the defendant as long as the inspector can testify about when the admission was made, who was present, and what was said.

Photographs of the zoning violation can be used to corroborate the observations of the witness. Aerial photographs are frequently used in zoning cases, especially when it is alleged by the defendant that there is a legal nonconforming use. The photographs may show that the initial legal use of the property was expanded and changed over time, thereby cancelling the legal nonconforming use of the property. For example, an auto junkyard may have been legal when it was created as a business, but if the area where the salvage material is located has tripled in size since that time, the legal nonconforming use may have been extinguished.

A certified copy of the local government's zoning map can be used to prove the zoning classification of the area in question.

If business records are used as evidence, the inspector or another witness must establish that they were kept in the ordinary course of business and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter.

It is permissible to visit a business "undercover," that is, pretending to be a patron. For example, if a person is repairing vehicles at a single-family residence, and that is not a permitted home occupation, it is legal to ask the violator to perform a service on a vehicle, such as an oil change, and then use that as evidence of the illegal activity.

One of my favorite examples of undercover activity dealt with a salon that was illegally using the basement of a building for spa treatment rooms. The zoning certificate of occupancy did not cover that space because it was not protected by a sprinkler system. The owner denied using the space and said that all business was being conducted at the street level. The village sent a female inspector into the business to get a pedicure, which

Systematic evidence collection

Kelly Ambach

In extreme cases, outdoor storage in residential areas may violate both zoning and property maintenance ordinances.

took place in the basement treatment room, to demonstrate that the defendant was in violation of a court order. When the matter was heard in court a couple of days later, the inspector appeared in court to show the judge she had received the spa service. The defendant was held in contempt of court for violating the court order.

ISSUES OF CONCERN

There are a number of situations that require specific approaches. These include problems with violations of conditional or special use permits, certificates of zoning, illegal conversions, and legal nonconforming uses.

Special Use Permits

When there is a violation of a special use permit, there are two potential courses of conduct, and one or both of them can be pursued. The first involves filing a complaint in court for the specific violation of the ordinance establishing the special use if compliance is not forthcoming. The second action is to suspend or revoke the special use permit if the defendant is recalcitrant. The fear of losing the special use permit will usually convince the defendant to come into compliance and cease the illegal activity.

However, because this may be viewed as an aggressive posture, the philosophy of the local government usually determines which course of action to take.

Failure to Obtain a Certificate of Zoning

Most of the violations that end up in court deal with the failure to obtain a certificate of zoning before occupying a structure. These are easy cases to prove once the inspector gathers evidence showing that the defendant is engaged in a business for which no certificate of zoning exists.

In some of these cases no compliance is possible because the local government cannot issue a certificate of zoning. For example, the use must cease because it is not permitted in the zoning district in which it is operating. Or expensive fire code upgrades are required for the use, but the defendant doesn't have the financial resources to pay for them. In these types of situations, swift action is critical so the defendant is not allowed to establish the illegal activity for a lengthy period of time. Judges are reluctant to order the cessation of a use the longer it is allowed to continue.

There are times when seeking imposition of a daily fine is justified. When a defendant refuses to cease engaging in the illegal activity after repeated attempts to gain compliance, it may be necessary to make it too expensive to stay in business at that location by seeking a fine for every day the violation occurs. When people purchase property intending to engage in a particular business, they do not always hire attorneys who are familiar with land-use issues. Most real estate lawyers want to make sure that title passes to their clients at the closing. That is their most important goal. Unless the client tells the attorney about the plans for the business and the attorney knows that the zoning ordinances are important, no one does the research as to whether the use is permitted.

Owners who buy a property before performing due diligence to check for all of the possible regulations involved may end up with property they can't use as they intended. For example, I had to prosecute an individual for illegally crushing stone on a vacant lot. The zoning district regulations required that there be a physical building on the lot before that type of business was allowed. Because he had no building or resources to build one, he ended up with a piece of property that was of no use to him.

If a business has a certificate of zoning but then begins to engage in an activity not permitted by that certificate, suspending or revoking the certificate of zoning is a proper procedure to use if the business refuses to comply after receiving notice of the violation. An example would be a business that begins selling vehicles when it is only allowed to repair them.

However, no certificate of zoning should be suspended or revoked without giving the defendant the right to challenge the action. The defendant has the right to confront the witnesses and to present evidence before being deprived of a vested right. There should be a means to appeal the decision of the zoning administrator.

In tough economic times, a company may expand or even change its business to remain viable. This is an example of how businesses get into trouble if they don't pay attention to the zoning ordinances. Problems happen when a business expands into an activity not allowed in the zoning district where it is located. The city has a dilemma in that it doesn't want to put the owner out of business but also wants to maintain the integrity of its zoning code. In this type of situation, the community development office may be able to come up with an alternative plan for the owner if there is a location elsewhere in the city with the proper zoning classification for the use. This type of solution is better than litigation if it is feasible.

Illegal Conversions

Illegal conversions of buildings are common in residential areas—for example, a single-

family home that is converted into a three-unit apartment building. Multifamily buildings are generally not permitted in a single-family residential area unless there is a legal nonconforming use. The first step is to determine if the use was ever legal. Older buildings converted before the zoning ordinance took effect may be legal and grandfathered in under the zoning code.

If the building has been illegally converted to a use that is not permitted, a complaint can be filed, not just for the zoning violation, but also for any building code violations. Typically, when a building is converted improperly, the owner does not obtain building permits for the construction and often violates the building code by doing improper electrical or plumbing work. These types of buildings may also violate the fire code when people are living illegally in the attic and the basement. An emergency condemnation under the property maintenance code may be necessary if the occupancy constitutes an immediate hazard to the residents.

Once there is compliance, how does the local government assure there is no reconversion? One possibility is to record the notice of violation with the recorder of deeds so that a future purchaser knows that the building is a single-family residence. Once the defendant complies, a notice of compliance should be recorded. Anyone who buys the property after that cannot claim that they did not know the property was a single-family residence because it will appear on a title search at the real estate closing.

Legal Nonconforming Uses

In a city or county that contains older buildings, both commercial and residential, defendants will try to argue that their use is "grandfathered in." While the burden of proof in most jurisdictions is on the defendant to show that the use was legal when it began, it is important to have systems in place that can retrieve documents regarding the property decades later. Many of these cases go back decades, after three or more major revisions of the zoning code. If the zoning administrator cannot access the necessary information to show that the use was never legal or that the use was illegally expanded or intensified, it will hamper negotiations to resolve the issue. At times, the language used in the older zoning code is vague, which leads to disagreements over interpretation. Rather than rushing into litigation, the zoning administrator, with the proper legal advice, needs to honestly review whether the ambiguity in the old ordinance will make it unlikely that a court action will succeed. A rule of legal construction requires that any ambiguity in an ordinance be resolved against the party that wrote it (i.e., the local government).

Most zoning ordinances have a provision whereby a legal nonconforming use is abandoned if the structure is empty for a set period of time. The owner will usually counter with an argument that he or she always had an intent to resume the use and did not truly abandon the property. This becomes an issue of fact that the city or county needs to rebut. This is why casual conversations with owners can become critical evidence. These encounters need to be documented so that the inspector can refresh his or her recollection months or even years later.

CHOOSING THE PROPER COURT VENUE

Whenever an enforcement action is brought against a defendant, there needs to be a decision as to whether the case should be brought as a simple complaint versus an action in the chancery division of the circuit court. Most

Establishing Clear Discontinuance Provisions

This example from Woodridge, Illinois, shows how a zoning ordinance can clarify when a nonconforming use is considered to be discontinued:

> A nonconforming building, structure or portion thereof, all or substantially all of which is designed or intended for a use which is not permitted in the district in which it is located, and in which the use has ceased by discontinuance or abandonment on the effective date hereof or thereafter is abandoned and remains unoccupied, or is not used for a continuous period of one year, shall not thereafter be occupied or used, except by a use which conforms to the use regulations of the district in which it is located (§9-9-2-5).

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Many zoning codes prohibit parking vehicles within front- or side-yard setbacks.

simple complaints are heard in courtrooms that deal with civil, quasi-criminal, or criminal violations of a minor nature. In some states, zoning violations are civil matters with a fine being the only punishment. In others, they are considered criminal matters for which a defendant can be sentenced to a fine or jail. The third classification of violations is quasi-criminal. These are civil in form but criminal in nature. In some jurisdictions, the court may have the power to order that the defendant comply with the code or be held in contempt of court. The court system determines in which courtroom the violations are heard. Typically zoning violations may share the docket with traffic tickets, building code violations, or other ordinance violations such as unlawful possession of alcohol by underage persons.

A chancery court, or court of equity, is a court that has special powers to force a party to conform to the law using its contempt powers as well as the power to impose fines. Parties can force each other through the process of discovery to reveal information pertinent to the case prior to trial. A local jurisdiction may apply for an injunction to immediately halt the illegal activity. Judges appointed to chancery court are usually more experienced in zoning matters than in the courts that hear simple complaints.

Some states may have criminal statutes that can be used in enforcement. For example, if someone is conducting a business that violates the use requirements of the zoning code and is polluting the environment, a criminal prosecution can be pursued in addition to any zoning action that is appropriate.

In deciding what type of action is appropriate, the following questions must be addressed. Will the defendant comply if a simple ordinance violation is brought? Will the court force the defendant to comply if an ordinance violation is charged? How complicated is the zoning violation? Can the local jurisdiction afford the cost of an action in chancery?

Unless it is clear that the issues are very complicated or the defendant is so defiant that compliance is unlikely, most local governments will choose to send a notice of violation and follow it up with a simple complaint against the defendant.

If the defendant still refuses to comply, charging the defendant for each day the violation exists and asking for daily fines is the next step. Fines motivate most defendants.

If compliance is not obtained with an ordinance violation prosecution, the local government still has the option of pursuing an action in chancery court seeking to force compliance on the defendant. Fortunately, most cases are resolved by filing an ordinance violation complaint, and few cases end up in chancery court.

However, there are situations when chancery court should be used. If there is a threat to the public, the city may need an emergency injunction to stop the illegal and dangerous use. If the facts are complicated and depositions of witnesses are necessary, chancery court is the proper venue.

Key Provisions for Zoning Enforcement

If the zoning code is not properly drafted, it will be a barrier to enforcement. If a law is vague, courts will decide against the jurisdiction that adopted it.

Well-functioning zoning codes and enforcement programs possess the following characteristics:

- Specific provisions regarding who can enforce the zoning code and how that power can be delegated
- Language that is clear and direct with definitions of critical concepts and land uses
- Comprehensive provisions dealing with legal nonconforming uses
- Clear standards regarding regular versus special uses
- Violation provisions that are sufficient to deter illegal behavior (e.g., provisions that make each day a new violation subject to a fine)
- Specific provisions for First Amendment activity (e.g., adult entertainment or noncommercial signs)
- Annexation provisions that adequately address nonconforming uses in annexed territory
- Uniform application of variance criteria

CONCLUSION

When a zoning violation occurs, enforcement should not be delayed in seeking compliance. The zoning official must understand the code provisions, follow the procedural requirements set forth in the code regarding who can enforce the code, gather the proper evidence, create and serve notice properly, and choose the proper venue for court. The zoning official should recognize that there are special considerations in cases involving conditional or special use permits, certificates of zoning, illegal conversions, and legal nonconforming uses in order to be ready for the types of defenses or delays in litigation that may occur.

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