

## Strike, You're Out! How Zoning Codes Are Being Invalidated

*Law360, New York (August 15, 2014, 10:36 AM ET) --*

It is well-settled that local municipalities may exercise police power to promote reasonable objectives in the regulation of land use through zoning ordinances. New York City was the first city to adopt a zoning code in 1916, and others followed suit creating ordinances for the orderly development of residential, commercial and industrial uses of property; nonetheless, local zoning ordinances are subject to federal law and have been stricken for failure to comply with federal statutes and the United States Constitution.

The following are examples of federal statutes that have impacted zoning ordinances:

The Federal Housing Amendments Act of 1988 (FHAA) extends protections under the Fair Housing Act of 1968 and prohibits discrimination in housing opportunities. The FHAA was the basis for striking a zoning ordinance that included a one-year moratorium on new adult care facilities for persons with disabilities. In the Southern District of Ohio, the federal court found that the ordinance was a "classic case of discriminatory treatment because ... the ordinance was passed with the intent to discriminate against" persons with mental impairments. *Epicenter of Steubenville v. City of Steubenville*, 924 F. Supp. 845, 850-52 (S.D. Ohio 1996).

The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) protects religious institutions such as churches, synagogues and mosques from discrimination. The Eleventh Circuit cited RLUIPA as the basis to void a zoning ordinance that prohibited churches in a zoning district where private clubs were permitted. *Midrash Sephardi Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).

The Communications Act of 1934 (TCA) regulates "interstate and foreign commerce in communication by wire and radio." The TCA created the Federal Communications Commission, which enforces the TCA. In 1996, the FCC generated amendments to the TCA in order to deregulate the communications industry, incorporate the Internet and modify regulations on cable services. In the Southern District of New York, the federal court relied on the TCA of 1996 to find that local zoning laws were unconstitutional because they attempted to regulate wireless communications in violation of federal law. *New York SMSA Ltd. Partnership v. Town of Clarkstown*, 603 F.Supp.2d 715 (S.D.N.Y. 2009).



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The Lanham Act, also known as the federal Trademark Act, passed in 1946 and served as the basis for voiding a local zoning ordinance in Tempe, Arizona. The Ninth Circuit Court of Appeals held that the municipality “may not require the alteration of a federal mark.” *Blockbuster v. City of Tempe*, 141 F.3d 1295 (9th Cir. 1998).

The Natural Gas Act of 1938 was passed to regulate interstate natural gas sales. Citing the Natural Gas Act of 1938, the United States District Court in Maryland invalidated sections of the local zoning code that prevented a company in the business of providing gas transportation and storage services from constructing and operating a compressor station. *Dominion Transmission v. Myersville*, No. 13-0338 (D. Md. Oct. 7, 2013).

The Americans with Disabilities Act of 1990 protects persons with disabilities by prohibiting discrimination in areas of employment, transportation, communication, public accommodations and public services. Courts have held that local zoning decisions are subject to the ADA. The Sixth Circuit found “that the blanket prohibition of all methadone clinics from the entire city is discriminatory on its face” in violation of the ADA. This example shows how federal law impacts zoning decisions not by serving as the basis to strike an ordinance, but by serving as the basis to find an ordinance exclusionary. *MX Group Inc. v. City of Covington*, 293 F.3d 326, 345 (6th Cir. 2002).

In addition to federal statutes, local zoning ordinances and land use regulations have been struck down for violating the First, Fifth and 14th Amendments of the United States Constitution.

The First Amendment was the basis to strike zoning ordinances relating to “signs” and “adult cabarets.”

In a case involving the content of commercial speech, the U.S. Supreme Court invalidated a local ordinance that prohibited the posting of “for sale” or “sold” signs. The court found that “an ordinance regulating the content of commercial communication, as opposed to the form of such communication, must be justified by both the compelling importance of the state’s interest in such regulation and evidence that the regulation is necessary to meet the government’s stated purpose or objective.” *Linmark Associates Inc. v. Township of Willingboro*, 431 U.S. 85 (1977).

The Court of Appeals of Ohio found that a Cleveland zoning ordinance relating to “adult cabarets” was unconstitutional and violated First Amendment rights. The court determined that, “[i]t is the fact that only 3.6 acres out of nearly fifty thousand acres are available for adult expression which renders the ordinances unconstitutional. While this court is hesitant to enter the realm of calculating what amount of zoned adult usage is actually necessary to meet constitutional standards for fear of becoming a supreme zoning board of municipalities, appellee has presented no authority where restrictions having the effect of those herein have been upheld, and we decline to do so on the record before us.” *Brookpark News & Books Inc. v. City of Cleveland*, 66 Ohio App.3d 613 (1990).

The Fifth Amendment served as the basis for striking a zoning regulation in South Carolina known as the Beachfront Management Act. The Supreme Court found that the act constituted a taking where the act’s prohibition against building on the property rendered the owner’s property valueless. *Lucas v. South Carolina Coastal*, 505 U.S. 1003 (1992).

The 14th Amendment’s due process and equal protection clauses have also served as the basis for striking zoning laws.

The Supreme Court indicated that the due process clause of the 14th Amendment of the U.S.

Constitution was violated when an East Cleveland zoning ordinance allowed relatives to live together as long as they met a very narrow definition of “family.” U.S. Supreme Court *Moore v. East Cleveland*, 431 U.S. 494 (1977).

In the Western District of Pennsylvania, the federal court found that a local ordinance violated equal protection where the ordinance lacked any rational basis for “singling out” a developer’s property and precluding construction of a landfill. *Khodara Environmental Inc. v. Beckman*, 91 F. Supp. 2d 827 (W.D.Pa. 1999).

### **What's Next?**

What federal law will be the next basis to strike a zoning ordinance? The answer is not clear. Despite the Controlled Substances Act’s (CSA) prohibition of marijuana, earlier this year, the Michigan Supreme Court found no preemption and struck down a local zoning ordinance that in effect banned medical marijuana from being grown or used in city limits. *Beek v. City of Wyoming*, 495 Mich. 1, 846 N.W.2d 531 (2014).

It is possible the federal law outlawing marijuana may change before another court contrastingly rules on the question of preemption of local ordinances involving marijuana regulation. Just last month, a bill was introduced in Congress that would amend the CSA and allow for limited use of marijuana.

Now there are 23 states that have legalized the use of medical marijuana and two states that have legalized the use of recreational marijuana. More cities, including Las Vegas and Chicago, are passing zoning code regulations regarding marijuana that will be subject to scrutiny. Certainly, this is an area of law where challenges are expected. It will be interesting to see what constitutional challenges are raised, including due process challenges --- should a marijuana dispensary be treated any differently than a chain pharmacy? Or a liquor store? Depending upon which state has jurisdiction, the state constitution may offer even greater protections to property owners.

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