

The Law Office of

**JOHN F. ASMAR, P.A.**

November 23, 2015

Mr. Rick Outzen  
Publisher  
Independent News  
Post Office Box 12082  
Pensacola, Florida 32591

Re: Long Hollow drainage basin commercial communication tower

Dear Mr. Outzen:

During our telephone conversation, you asked me to provide you with a legal opinion as to whether the original commercial communication tower and its respective use which was located at the Long Hollow drainage basin could lawfully be replaced/restored, extended, expanded and/or enlarged on the same site. Based upon my review of Chapter 163 of Florida Statutes, the City of Pensacola's Comprehensive Plan, hereinafter referred to as the "Plan", and the City of Pensacola's Land Development Code, hereinafter referred to as the "LDC", it is my legal opinion that given the facts as presented, Florida Statutes, the City's Plan and the City's LDC specifically prohibited the replacement/restoration, extension, expansion and enlargement of the original Long Hollow drainage basin commercial communication tower structure and the extension, expansion and enlargement of the tower's use.

The original Long Hollow drainage basin commercial communication tower was a non-conforming structure and non-conforming use as defined by the City's LDC. Commercial communication towers were/are specifically prohibited within the zoning district in which it is located and used. Since the original commercial communication tower existed prior to the enactment of the City's LDC, the original tower and its use were allowed to continue to exist with conditions. F.S. § 163.3177(6)(a)(2)(e) of Florida Statutes, Objective FLU-1.2 of the City's Plan and Section 12-1-6 of the City's LDC, entitled "Non-Conforming lots, structures and uses" governed the structure and use separately.

Chapter 163 of Florida Statutes requires the elimination of non-conforming structures and uses which are inconsistent with the character of the community. (F.S. § 163.3177(6)(a)(2)(e)). The City's Plan prohibits existing non-conforming land uses which are incompatible or inconsistent with the Plan to be expanded, enlarged and/or rebuilt. (Objective FLU-1.2 of the City's Plan).

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Section 12-1-6(C) of the City's LDC declares that a non-conforming structure may be maintained but not enlarged in a way that increases its nonconformity. Section 12-1-6(D) of the City's LDC states that a non-conforming use cannot be extended to occupy any greater area of land or extended to occupy any land outside any buildings on the same parcel. Finally, Section 12-1-6(E) of the City's LDC only authorizes the restoration of a non-conforming structure, by right, if the non-conforming structure is destroyed to the extent of not more than seventy-five (75) percent of its value by fire, explosion, or other casualty, or act of God, or the public.

The removal of the original 250 foot +/- tower and the construction of a newer, larger, 350 to 400 foot tower constituted a replacement/restoration, extension, expansion and enlargement of a nonconforming structure and extension, expansion and enlargement of a non-conforming use in violation of the City's Plan and the City's LDC. The replacement/restoration permitted perpetuation of the non-conforming structure and the extension, expansion and enlargement of a non-conforming use contrary to the clear and stated intent of the regulations contained in Chapter 163 of Florida Statutes, the City's Plan and the City's LDC. These regulations were enacted to promote the eventual elimination of all non-conforming structures and non-conforming uses while safeguarding the rights of persons affected.

Further, Chapter 163 of Florida Statutes requires that all development approved by the City be consistent with the City's Plan and the City's LDC. In the instant case, the City's action(s) was/were not consistent with the City's Plan and the City's LDC, and thus, was/were not permitted and/or authorized by Florida law.

In support of my opinion, I offer the following:

### **FACTUAL BACKGROUND**

According to the City Attorney, on November 1, 1974, a portion of the Long Hollow drainage basin was previously leased by the City to Pensacola Broadcasting Corporation for use as a radio tower and antenna site; and pursuant to the lease terms, a radio tower was lawfully constructed and operated in compliance with the City's open space zoning classification in which the Long Hollow drainage basin was located. Subsequently, in 1991, during the initial term of the lease, the open zoning classification was changed to a conservation district, hereinafter, referred to as a "CO" district, a zoning classification under the City's LDC. Section 12-2-44(2) of the City's LDC, commercial communication towers was/are specifically prohibited within a CO district. As a result of the change in zoning district and the prohibition of commercial communication towers, the then *pre-existing* Long Hollow drainage basin commercial communication tower, became a non-conforming structure and a non-conforming use.

On August 24, 2012, the City of Pensacola executed a lease with Divine World Radio, a not for profit organization. The lease required Divine World Radio to demolish and allowed the replacement of the Long Hollow drainage basin commercial communication tower at Divine World Radio's expense. Subsequently, while the original 250 +/- tower remained operational, Divine World Radio constructed a new, larger, 350 to 400 foot commercial communication tower adjacent to the original tower within the Long Hollow drainage basin. Eventually, the original tower was demolished.

## **GOVERNING PROVISIONS OF FLORIDA STATUTES, THE CITY'S PLAN AND LDC**

### **Chapter 163 of Florida Statutes**

The Community Planning Act, hereinafter referred to as the "Act", as adopted by the Florida Legislature provides incorporated municipalities with the power and responsibility to adopt and amend comprehensive plans to guide their future development and growth. (F.S. § 163.3167(1)(b)). Each local government must maintain a comprehensive plan and prepare amendments to its existing comprehensive plan to conform to the requirements of the Act. (F.S. § 163.3167(2)).

A comprehensive plan must include a future land use element designating proposed general distribution, location, and extent of the uses of land. (F.S. § 163.3177(6)(a)). This element must establish the long-term end toward which land use programs and activities are ultimately directed. (*Id.*) The future land use plan must include the need for redevelopment, including renewal of blighted areas, *and the elimination of non-conforming uses which are inconsistent with the character of the community.* (F.S. § 163.3177(6)(a)(2)(e)).

*After the adoption of a comprehensive plan in conformity with the Act, all development undertaken by, and all actions taken in regard to development orders by, a local government in regard to land covered by such plan must be consistent with the comprehensive plan as adopted.* (F.S. § 163.3194(1)(a)). Further, all land development regulations within the LDC, enacted or amended by the local government must be consistent with the adopted comprehensive plan. (F.S. § 163.3194(1)(b)).

### **City of Pensacola's Comprehensive Plan**

Pursuant to Chapter 163 of Florida Statutes, the City of Pensacola adopted the City's Plan on October 14, 1990. The Mayor, or designee, was/is responsible for the general administration of the City's Plan. The City Planner, or designee, was/is responsible for reviewing all codes, ordinances, and evaluating all development orders pursuant to the City's Plan. (Section 12-0-4 of the City's Charter entitled "Administration"). The City's Plan required/requires the City to amend its LDC as needed *to remain consistent* with the Act so that all future growth and development will continue to manage through the preparation, adoption, implementation and enforcement of land development regulations consistent with the Plan. (Policy FLU-1.1.2 of the Plan).

*Existing non-conforming land uses which are incompatible or inconsistent with the City's Plan are not allowed to expand, to be enlarged, or to be rebuilt or reopened if destroyed, pursuant to provisions adopted in the LDC and consistent with the requirements of Chapter 163 of Florida Statutes. (Objective FLU-1.2 of the City's Plan). Expansion or replacement of land uses, which are incompatible with the City's Plan, are prohibited. Existing non-conforming uses are permitted as provided in the LDC. (Policy FLU-1.2.1 of the City's Plan)*

Among other things, as aforementioned, the City's Plan created the CO zoning district. The district was established to preserve open space as necessary for protection water resources, preserving scenic areas, providing parklands and wilderness reserves and preventing flood damage and soil erosion. (Policy FLU-1.15 of the City' Plan).

The following definitions apply within the City's Plan:

"Land use" means the development that has occurred on the land, the development that is proposed by a developer on the land, or the use that is permitted or permissible on the land under an adopted comprehensive plan or element or portion thereof, land development regulations, or a land development code, as the context may indicate. (F.S. § 163.3164(27)).

"Objective" means a specific, measurable, intermediate end that is achievable and marks progress toward a goal. (F.S. § 163.3164(33)).

"Policy" means the way in which programs and activities are conducted to achieve an identified goal. (F.S. § 163.3164(36)).

#### The City of Pensacola's Land Development Code

Pursuant to Chapter 163 of Florida Statutes and the City's Plan, on October 4, 1990, the City adopted the City's LDC. The regulations and requirements set forth therein were to implement the applicable goals, objectives and policies of the City's Plan. (Section 12-1-3 of the City's LDC). The LDC required/requires the City to amend the LDC from time to time to be *consistent* with Chapter 163 of Florida Statutes and the City's Plan. (Id.)

*The City's LDC prohibits the erection, reconstruction, and the use of any building or land in a manner which did/does not comply with all district regulations (zoning) for the district in which the building or land is located. (Section 12-1-4 of the LDC). Further, the City's LDC required/requires that all development authorizations be consistent with the City's Plan. (Id.)*

Like the City's Plan, Section 12-2-2(A) of the City's LDC, also created a CO zoning district. Consistent with the Plan, the district was established to preserve open space as necessary for protection water resources, preserving scenic areas, providing parklands and wilderness reserves and preventing flood damage and soil erosion. To that end, structures and uses within the district were/are limited. (Section 12-2-2 (B) of the LDC). *Accordingly, Section 12-2-44(2) of the City's LDC, prohibited/prohibits commercial communication towers to be located within a CO district as they were/are determined to be incompatible with the permitted uses in the district.*

Within the City's LDC a commercial communication tower is defined as:

"Commercial communication tower" means a structure on which may be mounted one (1) or more antennas intended for transmitting or receiving television, radio, or telephone communications, but which is neither (i) used primarily for the provision of personal

wireless services nor (ii) used exclusively for dispatch communications. (Section 12-14-1 of the LDC).

*Prohibited, regulated, or restricted lots, structures, uses of land and/or structures, and/or characteristics of use were/are defined as non-conformities under the City's LDC. (Section 12-1-6(A) of the City's LDC). The intent of the City's LDC was/is to allow non-conformities to exist but not to encourage their continuation. (Id.) Such uses were/are declared to be incompatible with the permitted uses in the district (zoning) involved. (Id.)*

The City's LDC regulates and restricts non-conforming structures as follows:

*Nonconforming structures. Where a legal structure exists that would not be permitted under the terms of this title by reason of restrictions on area, lot coverage, height, yards, or other characteristics of the structure or its location on the lot, such structure shall be declared a non-conforming structure and may be maintained provided that no such structure shall be enlarged in a way which increases its non-conformity. (Section 12-1-6(C) of the City's LDC).*

Under the LDC, a non-conforming structure was/is defined as:

"Nonconforming structure" means any structure which does not meet the limitations on building size *and location* on a lot, for the district in which such structure is located. (Section 12-14-1 of the City's LDC).

"Structure" means anything constructed or erected on a fixed location on the ground, or attached to something having a fixed location on the ground, including but not limited to, a building, mobile home, wall, fence, tower, smokestack, utility pole, overhead transmission line or sign. (Section 12-14-1 of the City's LDC).

The City's LDC also regulates and restricts non-conforming uses as follows:

*Nonconforming uses of land and structures. Where a legal use of land exists that would not be permitted under the terms of this title, as enacted or amended, such use shall be declared a nonconforming use and may be continued subject to the following provisions:*

*(1) Extension of nonconforming use. No such nonconforming use may be extended to occupy any greater area of land or extended to occupy any land outside any buildings on the same parcel.*

*(2) Discontinuance of nonconforming use. If a nonconforming use is discontinued, removed or abandoned for a period of not less than three hundred sixty-five (365) days, any future use of the land and structure shall be in conformity with the provisions of this title.*

*(3) Where the cessation of a nonconforming use is the result of fire, explosion or other casualty, or act of God, or the public enemy the nonconforming use shall not be declared discontinued until six (6) months after the initial three hundred sixty-five (365) day period. Additional time may be granted by the zoning board of adjustment upon proof*



by the landowner that the landowner has proceeded with diligence to restore the use and circumstances beyond the landowner's control have made the period of time inadequate.

(4) Nothing in this title shall be interpreted as authorization for, or approval of, continuation of any illegal use of a building, structure, premises or land, in violation of any ordinance in effect at the time of the passage of this title. The casual, intermittent, temporary, or illegal use of land, building or structure for any length of time shall not be sufficient to establish the existence of a nonconforming use. (Section 12-1-6(D)(1-4)) of the City's LDC).

In addition, according to the City's LDC, non-conforming structures or a buildings housing a non-conforming use destroyed to the extent of not more than seventy-five (75) percent of its value by fire, explosion, or other casualty, or act of God, or the public enemy can be restored.(Section 12-1-6(E)(1-4) of the City's LDC). A non-conforming structure or a building housing an existing nonconforming use destroyed to the extent of more than seventy-five (75) percent may be reconstructed and the nonconforming use continued provided the following requirements are complied with:

1) Public hearing. A public hearing is held after notification of same being mailed to each owner of property within five hundred (500) feet of the property in question subject to regulations in subsections 12-12-3(F)(1)(g) and (i) of the City's Code of Ordinances.

(2) City council approval. Seven (7) members of the city council must vote in favor of a permit to allow the reconstruction of a nonconforming structure and/or the continuance of a nonconforming use in order for same to be effective.

(3) Building restrictions. The structure, as reconstructed, shall not exceed the its former dimensions, either in ground floor area, total floor space, or number of stories unless it complies with all the lot line and setback restrictions of the particular zoning district in which the property in question is located.

(4) Appeals. Once such a petition has been denied, it shall not again be entertained for one year after the date of denial. (Id.)

Under the City's LDC, non-conforming land, uses and structures were/are defined as:

"Land" means the earth, water, *and air, above*, below, or on *the surface*, and includes any improvements or structures customarily regarded as land. (F.S. § 163.3164(24)).

"Land use" means the specific purpose for which land or a building is designated, arranged, intended, or for which it is or may be occupied or maintained. (Section 12-14-1 of the LDC).

"Nonconforming use" means any use of land which is inconsistent with the provisions of this chapter or amendments thereto. (Section 12-14-1 of the City's LDC).

## LEGAL ANALYSIS

The original Long Hollow drainage basin commercial communication tower was a non-conforming structure and non-conforming use as defined by the City's LDC. (*See Section 12-1-6(A), Section 12-1-6(C), Section 12-14-1 and Section 12-14-1 of the City's LDC respectively*). Commercial communication towers were/are specifically prohibited within the zoning district in which it is located and used. Since the original commercial communication tower existed prior to the enactment of the City's LDC, the original tower and its use were allowed to continue to exist with conditions. F.S. § 163.3177(6)(a)(2)(e) of Florida Statutes, Objective FLU-1.2 of the City's Plan and Section 12-1-6 of the City's LDC, entitled "Non-Conforming lots, structures and uses" governed the structure and use separately.

Chapter 163 of Florida Statutes requires the elimination of non-conforming structures and uses which are inconsistent with the character of the community. (F.S. § 163.3177(6)(a)(2)(e)). The City's Plan prohibits existing non-conforming land uses which are incompatible or inconsistent with the Plan to be expanded, enlarged and/or rebuilt. (Objective FLU-1.2 of the City's Plan). Section 12-1-6(C) of the City's LDC declares that a non-conforming structure may be maintained but not enlarged in a way that increases its nonconformity. Section 12-1-6(D) of the City's LDC states that a non-conforming use cannot be extended to occupy any greater area of land or extended to occupy any land outside any buildings on the same parcel. Finally, Section 12-1-6(E) of the City's LDC only authorizes the restoration of a non-conforming structure, by right, if the non-conforming structure is destroyed to the extent of not more than seventy-five (75) percent of its value by fire, explosion, or other casualty, or act of God, or the public.

In 1966, the Fourth District Court of Appeal reviewed a case with similar facts and circumstances as in the instant case. In Bixler v. Pierson, 188 So.2d 681 (Fla App. 4<sup>th</sup> Dist., 1966), the 4<sup>th</sup> DCA, the Court granted a mandatory injunction ordering a removal a new trailer on grounds the placement of the new trailer was in violation of zoning regulations. Id. at 683. The Defendant-Appellee, prior to the enactment of zoning regulations, maintained an old house trailer upon his property. Id. Zoning was imposed which prohibited the use or presence of trailers. Id. The Defendant-Appellee's trailer was permitted to remain under the non-conforming use provision found in the zoning ordinance. Id. The zoning ordinance enacted at the time prohibited non-conforming buildings, structures and uses of land from being extended or enlarged. Id. at 682. The Defendant-Appellee, with the permission of the zoning director, replaced the old trailer with a new and larger trailer on his property. Id. The Court held that the trailer was a structure and the removal of the old trailer and the placement of the new trailer constituted an alteration, extension and enlargement of a non-conforming structure which was prohibited by the zoning regulations. Id. Further, the Court stated that the substitution permitted perpetuation of the non-conforming structure contrary to the clear intent of the zoning regulations construed as a whole and the purpose of the zoning regulations governing the same were to eliminate non-conforming structures overtime. Id. at 683.

Like Bixler, in the instant case, the removal of the original 250 +/- foot tower and the replacement of a newer, larger, 350 to 400 foot tower constituted the replacement/restoration, extension, expansion and enlargement of a non-conforming structure but not the use of the trailer. Bixler v.

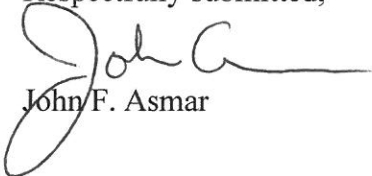
Pierson, 188 So.2d 681, 682 (Fla App. 4<sup>th</sup> Dist., 1966). Unlike Bixler, in the case at bar, the extension, expansion and enlargement of the non-conforming tower structure also extended, expanded and enlarged the tower's non-conforming use. All of which were was in violation of the City's Plan and the City's LDC. Bixler v. Pierson, 188 So.2d 681, 682 (Fla App. 4<sup>th</sup> Dist., 1966). It should be noted that in accordance with the City's LDC, the non-conforming use could have continued but not extended, expanded and/or enlarged. There was no evidence that the use was discontinued, removed and/or abandoned for more than one year.

Further, like the Court's holding in Bixler, the replacement/restoration permitted perpetuation of the non-conforming structure and the extension, expansion and enlargement of a non-conforming use was contrary to the clear and stated intent of the regulations contained in Chapter 163 of Florida Statutes, the City's Plan and the City's LDC. Id. at 683. These regulations were enacted to promote the eventual elimination of all non-conforming structures and non-conforming uses while safeguarding the rights of persons affected. Id.

In conclusion, it is my legal opinion that given the facts as presented, Florida Statutes, the City's Plan and the City's LDC specifically prohibited the replacement/restoration, extension, expansion and enlargement of the original Long Hollow drainage basin commercial communication tower structure and the extension, expansion and enlargement of the tower's use. Further, Chapter 163 of Florida Statutes requires that all development approved by the City be consistent with the City's Plan and the City's LDC. In the instant case, the City's action(s) was/were not consistent with the City's Plan and the City's LDC, and thus, was/were not permitted and/or authorized by Florida law.

If left uncorrected, the City's action(s) could set a legal precedent for future proposals for the redevelopment of non-conforming structures and non-conforming uses. Like the holding in Bixler, the new, extended, expanded and enlarged Long Hollow drainage basin commercial communication tower should be removed from the site. Id. at 683.

Respectfully submitted,



John F. Asmar

Enclosures

Cc: File



**188 So.2d 681**  
**S. Fordham BIXLER, Dorothy**  
**Alexander, David Serafin and W.**  
**Richards, Appellants,**  
**v.**  
**Floyd H. PIERSON, Appellee.**  
**No. 219.**  
**District Court of Appeal of Florida,**  
**Fourth District.**  
**July 19, 1966.**

Header ends here. William H. Robinson and Robert Dyer, of Akerman, Senterfitt, Eidson, Mesmer & Robinson, Orlando, for appellants.

Edward R. Kirkland, of Kirkland, Johnson, Smith & Ervin, Orlando, for appellee.

WALDEN, Judge.

This is an appeal from a final decree which denied a petition for mandatory injunction. The petition was aimed at defendant-appellee, Floyd H. Pierson. Its purpose was to obtain the removal of a trailer which had been emplaced by Pierson upon certain property owned by him and his wife.

Prior to enactment of zoning regulations Pierson maintained an old house trailer upon the premises. Zoning was imposed which prohibited the use or presence of trailers. Pierson's trailer was permitted to remain under the non-conforming use provision found in the zoning ordinance. Pertinent parts of the ordinance provide as follows:

**'SECTION 14. NON-CONFORMING USES**

The lawful use of any building, structure or land existing at the time of the

adoption of this resolution may be continued altho such use does not conform with the provisions of this resolution, provided the following conditions are met.

1. Unsafe structures or Buildings. Any structure or building or portion thereof declared unsafe may be restored to a safe condition.

2. Construction Approved Prior to Resolution. Nothing herein shall require any change in plans, construction or designated use of a building or structure for which a building permit has been issued and the construction of which shall have been diligently carried on within six months of the date of such permit.

3. Alteration. A non-conforming building may be maintained and repairs and alterations may be made, except that in a building which is non-conforming as to use regulations, no structural alterations shall be made except those required by law. Repairs as plumbing or the changing of partitions or other interior alterations are permitted.

4. Extension. Buildings or structures or uses of land which are non-conforming shall not be extended or enlarged.

5. Non-Conforming Use of Land. When a non-conforming use of land has been discontinued its future use shall revert to the uses permitted in the district in which said land is located.

6. Change to Another Use. A non-conforming use now existing may be changed to another non-conforming use of equal or improved character when approved by the Zoning Commission, or the Zoning Director without public hearing.

7. Restoration. A non-conforming building or structure which is hereafter damaged or destroyed to the extent of seventy-five (75) per cent or more of its assessed value, by flood, fire, explosion, earthquake, war, riot or act of God may not be reconstructed or restored for

use except in compliance with the regulations of this resolution.

8. Abandonment. A non-conforming use of land or of a building which has been vacated or abandoned for one hundred and eighty (180) days shall not thereafter be occupied by any non-conforming use.'

Thereafter, the act about which complaint is made took place--Pierson replaced his old trailer with a new and larger trailer. This was accomplished with the permission of the zoning director. The consent was based upon his interpretation of subsection 6 of section 14, supra, which provided that an existent non-conforming use may be changed to another use of equal or improved character.

We think that the zoning director completely misinterpreted the effect of subsection 6. That subsection is not involved in the problem here. It should be noted and emphasized that this subsection deals only with a change from one use to another use. In this instance there was no change in use. The old trailer and the new trailer were used in exactly the same manner and for the same purpose, that is, a dwelling. The zoning regulations define a structure and a trailer. A trailer placed on land for use as a dwelling is a structure. The removal of the old trailer and the placing of the new trailer on the land constituted an alteration, extension and enlargement of a non-conforming structure which was prohibited by subsections 3 and 4. The substitution permitted perpetuation of the non-conforming structure contrary to the clear intent of the zoning regulations construed

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as a whole. <sup>1</sup> The regulations look forward to the eventual elimination of all non-conforming structures and uses by attrition, abandonment and acts of God as speedily as is consistent with proper safeguards for the rights of those persons affected. <sup>2</sup>

Pierson makes a post-trial point out of the fact that his wife, the property being owned as a tenancy by the entireties, was not made a party to this proceeding. It appears that Pierson was the only actor in exchanging the trailers and that the new trailer is owned by persons other than Mr. and Mrs. Pierson. While Mrs. Pierson could be considered a proper party we do not think she was an indispensable party. <sup>3</sup> Under the circumstances it is our judgment that the trial court had before it sufficient parties to award the relief sought. More specifically, we think that Pierson could be caused to undo that which he alone had done.

The decree appealed is reversed with instructions to grant the relief prayed. However, because the exchange was approved by the zoning director, our further instructions are to permit Pierson, if he wishes and acts within a reasonable time, to return the old trailer unit to the property so as to restore the original status of affairs.

Reversed.

SMITH, C.J., and AQUILINO LOPEZ, Jr.,  
Associate Judge, concur.

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1 The reason for such interpretation was pointed out in *Goodrich v. Selligman*, 1944, 298 Ky. 863, 183 S.W.2d 625, where the court stated at 627--628:

'Here a new structure was substituted for an old one. If it is proper to do this once it will be proper to do it again and thus the life of the non-conforming structure will be indefinitely prolonged, and the whole purpose of the zoning ordinance will be defeated.'

*State ex rel. Miller v. Cain*, 1952, 40 Wash.2d 216, 242 P.2d 505 states at 507:

'The holdings are practically unanimous that a nonconforming building devoted to a nonconforming use cannot be replaced with a

new and larger nonconforming building even though it would be devoted to the same use.' (citations omitted)

See also 87 A.L.R.2d 4, 110.

2 See Hanna v. Board of Adjustment, 1962, 408 Pa. 306, 183 A.2d 539, 544; 101 C.J.S. Zoning §§ 181--182.

3 Bengier Lab. Ltd. v. R. L. Laros Co., E.D.Pa.1959, 24 F.R.D. 450; see also Hofgesang v. Kasey, Ky.1964, 382 S.W.2d 571.