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Robert L. Cusack, Assistant County Attorney (563) 326-8231

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Dear Tim,

I am writing in response to some of the questions posed by P&Z members related to the Industrial Floating Zone. In writing this opinion I relied on relevant statutes and case law. I am also incorporating your memo to P&Z dated January 8, 2016 regarding procedure and intent behind the Industrial Floating Zone. Citations are omitted in this opinion but are available upon request.

There is no case law that directly addresses the validity of a "floating zone" pertaining to its inclusion in a comprehensive plan. Essentially, a floating zone is synonymous with spot zoning[1]. Because, as discussed below, spot zoning is not automatically invalid it is the opinion of this office that inclusion of the Industrial Floating Zone in the comprehensive plan is not illegal. In other words, as some applications of the floating zone can be legal, inclusion of the floating zone in the comprehensive plan is legal. The legal challenge arises when an attempt is made to actually implement the provisions of the floating zone.

The issue is really what will happen if the provisions of the floating zone are implemented in an attempt to rezone agricultural land to industrial. This will present the question of whether this is spot zoning and, if so, whether the spot zoning is valid. Assuming the rezoning is spot zoning, the courts then determine if it is valid. The courts consider a three prong test: (1) whether the new zoning is germane to an object within the police power, (2) whether there is a reasonable basis for making a distinction between the spot-zoned land and the surrounding property, and (3) whether the rezoning is consistent with the comprehensive plan. It is also worth noting that the courts do not favor spot zoning.

Police power is related to the public health, safety, morals or general welfare designed to serve the best interests of the community as a whole. Spot zoning for the benefit of the property owner, or business owner, is unreasonable. The courts will weigh the benefits to the community against the benefits to the owner. This particular prong is rarely discussed in case law and is really only relied on as a reason to deny the zoning – in cases where only the owner of the property benefits.

The second prong is the most relied upon and discussed by the courts. In determining whether there is a reasonable basis for spot zoning, the court considers the size of the spot zoned, the uses of the surrounding property, the changing conditions of the area, the use to which the property has been put and its suitability and adaptability for various uses. The factor

[1] "Spot zoning" results when a zoning ordinance creates a small island of property with restrictions on its use different form those imposed on the surrounding property.

of primary importance is whether the rezoned tract has a peculiar adaptability to the new classification as compared to the surrounding property.

The third prong, whether the zoning is consistent with the comprehensive plan is fairly self-explanatory. This prong is usually referred to when the zoning is denied. Without the Industrial Floating Zone in Scott County's comprehensive plan, a court would most certainly find that spot zoning within an agricultural district was against the comprehensive plan.

Two recent rezoning issues in Scott County provide examples of how the courts may view spot zoning. The first was a proposed fertilizer plant to be situated between Davenport and Walcott off of Highway 6 in Scott County. The second was approximately 8 acres between Davenport and Eldridge off of Slopertown Road.

The fertilizer plant represents one extreme of spot zoning. It was to be situated on 300 acres of farmland surrounded by other farmland. Spot zoning without a doubt. It would have faced difficult legal challenges for several reasons. It definitely was not consistent with the comprehensive plan (prong 3). The proposed changes to the plan will give the County an argument that such a proposal is now within the plan. However, just because a proposal is consistent with the comprehensive plan does not end the question. A court then continues its analysis under prongs 1 and 2.

Again, courts have not really addressed the police powers prong. Theoretically, the boost to the economy of the County, through an increase in jobs and tax base, would be a strong argument that the project is in the best interests and general welfare of the community. However, that would be balanced against the benefits to the owner of the property being converted from farmland to industry.

The real problem with the rezoning presented is prong 2, whether there was a reasonable basis for treating this property different from those surrounding it. Although courts have said that the size of the spot is not that important, that was said regarding requests to rezone a small parcel, 5 acres. The court would probably consider 300 acres to be more important in this type of case. With the fertilizer plant, the surrounding area would have remained farmland and the conditions of the area would have remained most conducive to continued farming. The only argument in favor of the suitability of the particular site would have been the access to railroad and utilities. This could be countered by other sites that have similar access not requiring rezoning. Simply said, there were no compelling reasons to treat this property different from other property surrounding it such that a manufacturing plant should be built on the property. There was nothing really special about this property that made it more suitable for a factory than the neighboring properties. It is doubtful this project would have survived a legal challenge.

The example at the other end of the spectrum is the 8 acre tract between Davenport and Eldridge. At the time of rezoning, it was actually an island with farmland surrounding it. Davenport has not yet annexed the adjacent land. This tract was rezoned from agriculture to manufacturing for a couple of different reasons. First, it is adjacent to the proposed Oscar Mayer plant. The remainder of the property for the plant is to be annexed by Davenport. This small parcel is between that property and Slopertown road. Second, and most important, the parcel could not be annexed by Davenport because it would have brought the borders of

Davenport and Eldridge together. This would create an "island" of unincorporated County property to the east. Such an island of property is prohibited by state law. By keeping this 8 acre county property, it created a bridge between the island to the east and county property to the west.

This rezoning would have survived legal challenge. It was within the police powers of the county to stay within state law and was in the best interests of the county residents to the east. The property adjacent to the parcel will soon be manufacturing, so it is reasonable to treat this parcel differently from how it has been treated in the past. In this case, the property is more suitable to be added to the manufacturing property that is going to be there rather than as farmland. It could be argued that the current comprehensive plan should have precluded this rezoning. Courts have carved out exceptions to prong when the other criteria far outweighed the plan consideration by allowing amendments to the plan for cases like this.

In addition, the criteria judges consider are very subjective so close cases can be decided either way. Again, the two examples set forth above are from the extreme ends of the scale and each case presented will be different.

Most importantly, rezoning can almost always be challenged in court. Rezoning issues can be decided through the district courts through a declaratory judgment, which can occur fairly quickly – within 6 months. However, even if the rezoning is upheld at the district court level, an appeal can be filed. It can take over two years to get a decision on appeal. It is doubtful a developer would be willing to put a project on hold for that long depending on favorable result from an appeals court. Winning a rezoning in court does the County absolutely no good if the developer moved its project somewhere else two years before the case was finally decided.

I hope the above addressed the issues posed by the P&Z. Please do not hesitate to contact me if you have further questions.

Sincerely,

Robert L. Cusack