

## **Land Use Case Briefs**

Lucy Wilkinson, Graduate Extension Assistant, ISU Community & Regional Planning  
Gary Taylor, Assistant Professor & Extension Specialist, ISU Community & Regional Planning

### ***Kistler v. City of Perry (Iowa Supreme Court, August 11, 2006)***

On November 6, 2002, the city of Perry sent a fourteen-day notice to the Kistlers to remove a number of vehicles that it considered junk from one of their lots. The plaintiffs declined, and the city, acting under authority of its nuisance-abatement ordinances, seized twelve vehicles from the Kistler's property. The Kistlers then challenged the constitutionality of the nuisance-abatement provision, arguing that it placed sole discretion over nuisance abatement in an administrative officer, without providing for a due-process hearing. The notice presented to the Kistlers did not inform them of any opportunity to have a hearing on the matter, and the city conceded that neither the notice to abate nor the ordinance provides for any such hearing. The city argued that because "Junk Vehicle" is defined and expressly prohibited elsewhere in the city code, it falls under the category of an "undisputable nuisance" which may be abated without notice or hearing.

The Supreme Court disagreed. Because junk vehicles are neither so "clearly and palpably nuisances" that they could be legally seized without notice or hearing, nor defined specifically enough in the code to give meaningful notice as to what constitutes junk, an opportunity for a hearing is a necessity. The Supreme Court held that the ordinance, as applied, denied the plaintiffs their procedural due process rights in violation of the 14th Amendment to the U.S. Constitution and art. I, sec. 9 of the Iowa Constitution. The Supreme Court declined the plaintiff's request to declare the ordinance unconstitutional on its face because the ordinance does not require the enforcement officer to seize vehicles without a hearing; it only authorizes the officer "to determine on a case-by-case basis whether to utilize the nuisance abatement procedure or to issue a citation..." Under this ordinance, the enforcement officer could follow either alternative by providing a notice and hearing, thereby avoiding constitutional problems.

### ***City of Asbury v. Iowa City Development Board and City of Dubuque (Supreme Court of Iowa, October 27, 2006)***

The City of Asbury challenged the tactics that the City of Dubuque used to voluntarily annex 704 acres located between the two cities, Dubuque offered the following transition benefits to property owners who voluntarily annexed to Dubuque: (1) a five-year partial exemption from city property taxes; (2) a reduced cost to voluntarily connect to Dubuque sanitary sewer lines; (3) a reduced cost to connect to Dubuque water lines; (4) consideration by Dubuque to enlarge Middle Road; and (5) deferral of any sewer connection costs until the property is sold. All but a small percentage of the annexed property owners consented to the voluntary annexation agreement.

After the City Development Board (CDB) approved Dubuque's annexation application, Asbury appealed to the district court. The district court reversed the CBD's decision and ruled in favor of Asbury. On review, the Supreme Court reversed the District Court's decision and ruled in

favor of Dubuque. The Supreme Court concluded that *Iowa Code* 368.7(3), which explicitly allows city councils to offer property owners in territory proposed for annexation a partial tax exemption, applies to 100% and 80/20 voluntary annexations, and allows a city to discriminate in benefit dispersal between consenting and non-consenting property owners. Dubuque's home rule authority also allows it discretion to provide a partial exemption from city property taxes to property owners in an annexed territory and to offer service-based financial benefits, such as a reduction in sewer and water hook-up costs and the deferral of sewer hook-up costs until the property is sold, as long as these services do not amount to a tax. Finally, the Supreme Court concluded that Dubuque did not coerce property owners into consenting to the annexation by offering them tax and other financial benefits because these tactics are not prohibited by law. Inasmuch as the property owners did not join the lawsuit nor withdraw their consents, Asbury could not argue economic duress and coercion on behalf of them.

***Newt Marine v City of Dubuque and Dubuque Board of Adjustment***  
***(Iowa Court of Appeals, October 25, 2006)***

Gary and Karen Newt own Newt Marine, Inc., and Dubuque Barge & Fleeting Service, referred to collectively as "Newt Marine," which performs a variety of industrial, manufacturing, and commercial activity and is located in the south part of the Ice Harbor area in the City of Dubuque. In April 2002, Dubuque enacted an ordinance which changed the zoning of Newt Marine's property from heavy industrial to planned unit development (PUD). Under the ordinance, Newt Marine is engaged in a prior nonconforming use of its land. The ordinances provided that prior nonconforming uses could continue to operate, "but may not expand in gross floor area nor change in use from one nonconforming use to another nonconforming use."

In October 2003, Newt Marine filed requests for variances to: (1) build a storage and distribution building on its property in Ice Harbor after learning that the Iowa D.O.T. intended to condemn Newt Marine's land upon which sat their warehouse in another location; (2) build four new storage tanks to replace tanks that were removed in 2001 (prior to the rezoning to PUD); and (3) be exempt from the screening requirements of the PUD ordinance. The Board of Adjustment denied these requests. Newt Marine challenged the decision, but the district court upheld the denial. Newt Marine then further appealed to the court of appeals.

The court of appeals first concluded that building a new storage and distribution building on the Ice Harbor property would be an impermissible expansion of a nonconforming use that could only be accomplished through a variance. The court of appeals upheld the denial of the variance because Newt Marine did not have any evidence that it could not earn a reasonable rate of return on the property without the new warehouse, and the subject property did not suffer a singular disadvantage under the PUD ordinance when compared with other properties in the district. The court also upheld the denial of the variance for the construction of the storage tanks because the storage tanks were not in existence at the time the PUD ordinance became effective, and evidence was indisputable that Newt Marine had not endured an unnecessary hardship during the years it was without the four additional tanks. Finally, the court upheld the denial of the variance from PUD screening requirements, citing again the fact that the requirements did not place Newt Marine's property at a singular disadvantage to other properties, and Newt Marine would still earn a reasonable rate of return, even if required to follow the screening requirements.