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======== Start of Answer #1 (1837 words) ========

TO: Lou Estepe

FROM: Applicant

SUBJECT: Tehema County v. Tepee Campground

DATE: July 29, 2014

I. Issues Presented and Short Answers

1. 1. Are RPTs recreational vehicles (RVs) or are they structures being used as lodging?

No.

2. Are RPTs an enlargement, expansion, or material increase in intensity of a nonconforming use, or a change to another nonconforming use?

No.

II. Discussions And Analysis Of The Charges Made In The Notice To Abate

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1. Are RPTs recreational vehicles (RVs) or are they permanent structures being used as lodging?

A. Discussion and Analysis

Campgrounds are defined in the Land Development Regulations ("LDR") as "establishment providing overnight or short-term sites for recreational vehicles, trailers, campers or tents, that have permanent structures..." LDR, Section 222.1

General definition of RV

Under Federal Manufactured Home Construction & Safety Standards Act, which governs "manufactured homes," "recreational vehicles" are excluded from the category of "manufactured homes." Recreational vehicles are defined as: (1) built on a single chassis; (2) 400 square feet or less when measured at the largest horizontal projection; (3) self-propelled or permanently towable by a light duty truck; and (4) designed primarily not for use as a permanent dwelling, but as temporary living quarters for recreational, camping, travel, or seasonal use. 24 CFR, Section 3282.8(g), *Tall timbers Resort*

In *Tall timbers Resort,* the applicable administrative regulation in the State of Oregon defined the RPT as a trailer-type unit that is primarily designed to provide temporary living quarters for recreational, camping, or seasonal use if it (1) is built on a single chassis mounted on wheels; (2) has a gross trailer area not exceeding 400 square feet in setup mode, and, if less than 320 square feet in the setup mode, would require a special movement permit for highway transit; and (3) is certified by the manufacturer as complying with standards set by the recreational part industry.

Here, LDR is silent on both the RPT use, but there are several references we can use to examine this issue.

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County Building Department (Department)

According to the Memorandum from the Department, the Tehema County Building Code has no provision on RPTs or RVs. The Building Code does not make a distinction between types of RVs and it considers them all to be RVs. However, the Building Code does not regulate RVs. Department seemingly supported the RPTs by stating that RPTs pose less of a risk to the public than a conventional RV and therfore should not be subject to anything they are not willing to require of fifth wheels, towable trailers or motor homes, provided that the property was located in an area zoned for such use.

Recreational Park Trailer Industry Association (RPTIA)

According to the letter from (RPTIA), all RVs in the US have been classified by the states and federal government using the criteria as the Federal Manufactured Home Construction & Safety Standards Act. They concluded that RPT is a vehicle, although it might look like a building.

Tehema County Planning Department

According Traffic Impact Assessment by Tehema County Planning Department, the development in Tepee Campground will cause slight reduction in traffic entering and leaving the campground, replacing the less nimble fuel-inefficient RVs with passenger cars.

Comparison with Tall Timbers Resort Case (Appellate Division of State of Oregon, 2010)

In *Tall timbers Resort,* a seller of RPTs, the owner of campground in which RPTs are installed, and the owners of an RPT challenged the adoption of a new

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regulation by the state Construction Department that determined the RPT as "structure" and "building." The case has very similar facts and arguments.

In *Tall Timbers Resort*, the Oregon Construction Code Act delegated authority to the Commissioner of the Department to 'adopt a State Construction Code for the purpose of regulating the structural design, construction, maintenance and use of buildings or structures to be erected and the alteration, renovation, rehabilitation, repair, maintenance, removal or demolition of buildings or structures already erected. This is different from our situation. Department in our case has no legal authority to make decision and they are only making recommendation to the County Commissioners to make the determination.

The appellants in *Tall Timbers*, argued that RPTs should be classified as recreational vehicles (RVs) by relying on the definition of RVs in the Federal Manufactured Home Construction & Safety Standards Act.

The Department in *Tall Timbers* argued that RPTs should be defined as structures and buildings because they are close constructions, typically used as vacation homes, and constructed in generally the same manner as single family dwellings and incorporate the same types of electrical, plumbing, and mechanical systems as dwellings.

The Appellate Division in *Tall Timbers* held that the court held that the RPTs should be defined as structures, not based on the arguments regarding the classifications, but because the Legislature had delegated authority to the Commissioner of the Department and the Department has determined that RPTs are structures.

Unlike, Tall Timbers, the Department in Tehema County has no provisions for RVs or RPTs. However, they are reluctant to determine RPTs as structures and regulate.

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B. Evaluation Of Our Chances Of Prevailing

According to the references, we are likely to prevail on this claim in determining the RPTs as RVs. Under Supremacy Clause, federal statutes preempts local and state statutes. As the federal provision determines RPTs as RV, there is a high likelihood that we can prevail in this.

C. Arguments Likely To Be Made By The County

The County will argue that RPTs should be classified as structures and they would require building permits and be subject to the County Building Code requirements for buildings. The County will also argue that neither short-term rentals of lodging nor mobile home parks wold be permitted in a rural/residential zone without a conditional use permit.

2. Are RPTs an enlargement, expansion, or material increase in intensity of a nonconforming use, or a change to another nonconforming use that is not a materially less intense use?

A. Discussion and Analysis

Nonconforming use

Nonconforming use means any use of land, building or structure which was established pursuant to the zoning and building laws in effect at the time of its development, but which use is not permitted by these LDRs for the zoning district in which it is located. LDR, Section 540.

A nonconforming use shall not be enlarged or expanded in areas of structure or land occupied; it shall not be materially increased in intensity; it shall not be

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changed to another nonconforming use unless any new use is a materially less intense nonconforming use; the determination of the level of intensity shall include consideration of traffic generated, perceived level of activity, operational characteristics and potentially adverse impacts on neighborhood lands. LDR 541.1~4

Permitted nonconforming use

A use is permitted by right at the time of its development, but now designed as a nonconforming use for the zoning district in which it is located, is a permitted nonconforming use. A Conditional Use Permit is not required to continue the existing use, but a Conditional Use Permit is required for any change of use. LDR, Section 540

Here, Tepee Campground has been in existence since the mid-1970s and it was permitted nonconforming use even after the first LDRs were adopted.

However, after the current LDRs were adopted and all properties were rezoned in 1994, the new zoning required a Conditional Permit Use Permit (CUP), but the county denied to grant CUP and sent a notice of abatement after determining that RPTs violated the LDR, Section 541.1~ 3

Comparison with County of Los Banos v. Leskiewicz (Columbia Court of Appeal, 2000)

In Los Banos, the defendants owned the 14-acre tract and used it as a picnic area-campground before the County adopted its zoning ordinance which did not permit commercial uses, such as campgrounds. Meanwhile, the defendants expanded their business to have the rental sites for camping trailers and tents, which resulted in adding 20 picnic-camping sites. Although the defendants were granted the variance for nonconforming use, the County concluded that the

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defendants had no right to enlarge its camping operation.

The court dealt with the same issue as the instant case and held that the burden of establishing that the use in question is fundamentally the same use and not a new and impermissible one is on the party asserting it, but the use cannot be interpreted in such a way as to unlawfully reduce the original vested interest acquired by the nonconforming use.

The court in Los Banos provided several factors to consider in determining whether the particular activity is within the scope of the established or acquired nonconforming use as following:

1) To what extent does the use in question reflect the nature and purpose of the prevailing nonconforming use?

2) Is it merely a different manner of utilizing the same use or does it constitute a use different in character, nature, and kind?

3) Does this use have a substantially different effect on the neighborhood?

The court finally concluded that the degree to which the original nature and purpose of the undertaking remains unchanged largely determines whether there has been a change in the preexisting use.

Here, our client has the burden to show that her use is fundamentally the same use and not a new and impermissible one.

To what extent does the use in question reflect the nature and purpose of the prevailing nonconforming use?

Here, the use is identical to the existing non-conforming use of campground. The customers stay for short periods of time; the vehicles may meet the federal definition of RVs; and the owner intends no expansion of the existing pads.

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Is it merely a different manner of utilizing the same use or does it constitute a use different in character, nature, and kind?

Here, it is a rather a change in the operational characteristics of what exists of the property. the only differnce is the amount of payment she charges.

Does this use have a substantially different defect on the neighborhood?

Here, although there were complaints from the neighbors that the campground has expanded the number of sites over time, and that the introduction of RPTs will further increase in site density. However, there are a lot of positive effects on the neighborhood.

1) RPTs will not be bigger than many RVs.
2) Some neighbors and nearby businesses have supported the appearance of the attractive wood-sided RPTS and the enhanced landscaping.
3) As discussed in details above, the COunty Transportation Department estimated that a slight reduction in traffic ingress and egress leaving the campground.
4) the campground is one block from a county bus shelter and the site has safe, convenient, and direct access to public transportation.

B. Evaluation Of Our Chances Of Prevailing

As discussed above, there is a substantial likelihood that we can prevail on this claim as well.

C. Arguments Likely To Be Made By The County

The County will argue with the neighbors' complaints mainly and they will also argue that the history shows that the long-term use was an established and

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historical use.

Question #1 Final Word Count = 1837

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