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Coates' Canons Blog: A Few Thoughts on Community Appearance and Design Controls

By Richard Ducker

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One of the many bills that has drawn public and media attention this spring has been House Bill 150, a bill dealing with residential "design controls." With certain notable exceptions it generally prohibits zoning or land subdivision regulations related to "building design elements" from being applied to one- and two-family dwellings. "Design elements" applicable to manufactured housing and historic landmarks and structures in historic districts are excepted. Likewise elements that are integral to the State Building Code, and flood hazard regulations associated with the federal flood insurance program, are also not subject to the bill. The bill has passed the House and awaits further action in the Senate.

One of the more bizarre arguments in support of the bill is that local government regulation of community appearance ("design") is, except with respect to the situations noted above, statutorily unauthorized. In other words some argue that the activity proposed to be banned has been illegal all along. Is that so? If it is not so, what tips can be provided to those local governments who wish to proceed with such regulations?

Opponents of "design controls" would say that the complexion of the debate about whether such standards are legal has changed since the North Carolina Supreme Court case of Lanvale Properties, LLC v. County of Cabarrus, __N.C.__, 731 S.E.2d 800 (2012), was handed down last summer. In that case our state's highest court ruled that the "adequate public facilities (APF)" provisions of the Cabarrus County Unified Development Ordinance, as applied to public schools, were invalid. A critical element of the program was the payment by developers of "voluntary mitigation fees (VMF)" as a means of ameliorating the lack of capacity in schools that would serve the new development. The court compared VMF with school impact fees, which had been ruled invalid in an earlier case involving Durham County. Among other things, the *Lanvale* court concluded that the North Carolina zoning enabling statutes clearly failed to authorize APF programs with VMF components.

The court in *Lanvale* first noted that G.S. 153A-340(a), which lists the types of zoning standards that may be used to achieve zoning purposes (e.g., standards affecting the percentage of lots that may be occupied; those affecting the height, location, and use of buildings, structures, and land) did not expressly authorize the county's APF and VMF provisions. Likewise G.S. 153A-341, which describes the permissible purposes of zoning (e.g., preventing "the overcrowding of land," "avoiding undue concentration of population," "conserving the value of buildings and encouraging the most appropriate use of land") also did not provide express authorization.

The court then concluded that G.S. 153A-4 did not apply either. That statute calls for county statutes to be "broadly construed" and grants of power "construed to include any powers that are reasonably expedient to the exercise of that power." According to the court, G.S. 153A-4 applies only when statutes are ambiguous, and the referenced zoning statutes were not ambiguous. Furthermore, the court concluded that APF provisions were not a "reasonably expedient" method of ensuring that school facilities were adequate. (Apparently the court viewed the fees charged either as being unreasonably high, or, perhaps, simply an unreasonable fee-based means for achieving the otherwise allowable purpose of facilitating the efficient and adequate provision of schools.)

How, then, does this case relate to community appearance issues? The zoning enabling statutes for cities are virtually identical in relevant respects to the county statutes interpreted in *Lanvale*. The words "appearance," "aesthetics," and "design" are not mentioned in the zoning statutes. Yet a moderate number of municipalities in North Carolina have adopted "neighborhood conservation districts," zoning districts that do not qualify as historic districts, but in which residential appearance standards apply to new development and alterations to existing development. Other cities have adopted more unconventional design standards that apply in districts where traditional lot-related standards and use standards have given way to form-based standards. These may include aesthetic standards regarding architectural style, exterior materials, and color that seek to ensure that a development project conforms to the purposes of the community's comprehensive plan. Does *Lanvale* imply that all of these community appearance standards that apply to buildings other

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than historic properties or manufactured housing units are legally impermissible?

Not necessarily. Below are a few reasons why that conclusion is unwarranted.

The law in North Carolina has long held that reasonable regulation based on aesthetic considerations alone may constitute a valid basis for the exercise of government's regulatory power. In State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982), the North Carolina Supreme Court upheld an ordinance which required owners of junkyards and auto graveyards in certain areas to screen their premises over objections that the purpose of the ordinance and the means for achieving it were not legally justifiable. Since then, a number of North Carolina courts have upheld or applied zoning measures based on community appearance considerations in particular situations involving signs, telecommunications towers, resource conservation districts, accessory buildings and structures, historic preservation, fences, and manufactured housing. Our courts have held that these measures may be used to protect property values, promote tourism, and preserve the character of the community. G.S. 160A-383 provides that zoning regulations shall be made "with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the city." The use of appearance and design standards is an obvious way to achieve these ends.

If a local government is interested in proceeding with community appearance standards , what should the community keep in mind?

First, appearance standards and design controls, particularly those affecting buildings should be carefully conceived and developed with an eye to how they affect the property owners subject to them. The *Jones* case reminds us that any diminution in value of an individual's property must be balanced against the corresponding gain to the public from the regulation. Appearance standards that are applied to buildings have the potential for affecting values more than appearance standards that may apply to incidental commercial signs or landscaping.

Second, the design controls and appearance standards for buildings that work best are those that are based on the context of the affected structures. The standards are based on an inventory of the features and elements of the area or neighborhood in which the regulated property is located that provide its character. Design controls and appearance standards allow new development to fit into those existing areas that give the standards and elements context. The suitability of regulatory standards must, then, reflect both a prior identification of visual themes for the area and be consistent with future plans for the area. If this sounds like it is similar to the process for planning, developing, and applying historic district and landmark standards and guidelines, it is.

Third, it is probably unwise to establish a design review board or similar organization to administer appearance standards or design controls that apply to properties other than historic properties. Boards of this type are generally established in order to exercise permitting authority and discretion in the process of approving development projects. But this can be a legal problem in circumstances where there is no express enabling authority for the board to make such decisions. Community appearance commissions (see G.S. 160A-452) have been authorized for decades, but they are not allowed to make final decisions regarding permits and approvals. Indeed, the court in the *Jones* case warned that "(w)e feel compelled to caution local legislative bodies charged with the responsibility for and the exercise of the police power in the promulgation of regulations based solely upon aesthetic considerations that this is a matter which should not be delegated by them to subordinate groups or organizations which are not authorized to exercise the police power by the General Assembly." (305 N.C. at 531). This delegation-of-power problem is potent in part because the role North Carolina historic preservation commissions play in issuing certificates of appropriateness is spelled out in the general statutes in considerable detail.

Fourth, appearance standards and design controls that apply to properties that are not parts of historic preservation efforts need to be concrete and specific. Regulation of appearance and design is plagued by the perceived notion that those regulated are subject to the whims and arbitrariness of regulators with wide-ranging discretion and that decisions are based on highly subjective notions of good taste and beauty. Making standards specific and spelling them out in an ordinance is one way to curtail the risk of arbitrariness that comes with discretion. Doing so also provides some assurance that the standards will not be found to be impermissibly vague. Well-conceived standards can be administered by staff if they are concrete and specific enough.

Fifth, even the court in *Lanvale* declared that local governments "enjoy flexibility" in developing and applying zoning regulations and have "considerable latitude" in exercising their zoning power. Some of the most important concepts in

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urban planning today, such as form-based development and traditional neighborhood development, include strong aesthetic and appearance themes. Courts are influenced by emerging ideas and trends that affect their disposition of cases, even as they interpret legislative intent. Courts do not want to seem oblivious to the changing complexion of planning and zoning. It is in the interest of local governments to develop programs that enable that tendency.

House Bill 150, which curtails certain appearance standards and design controls, is on its merry way and may be adopted by this General Assembly in 2013. If adopted, any uncertainty about the application of design standards to single-family residential development would be resolved by the prohibition. The considerations and suggestions noted above, however, would still be important with respect to the use of design standards for multi-family residential development and nonresidential development. In any event, to suggest that the use of community appearance standards for non-historic development projects is at the moment categorically invalid and unauthorized is to miss the mark.

Links

- www.ncga.state.nc.us/Sessions/2013/Bills/House/PDF/H150v4.pdf
- appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80MzhQQTEwLTEucGRm
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=153A-340
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