Coates' Canons Blog: A Shot across the Bow of the Zoning Ship?

By Richard Ducker

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A shot across the bow of another ship at sea can provoke an international incident if the action is improperly interpreted, or the matter can be resolved quickly. But in either case a shot across the bow tends to get the attention of those on the receiving end. A recent zoning decision by the North Carolina Court of Appeals should demand the attention of those in the zoning community.

At first blush the case of Land v. Village of Wesley Chapel appears to involve a routine zoning interpretation case concerning a private shooting range in Union County in which a superior court judge and the Court of Appeals sided with the property owner. But a closer inspection of the Court of Appeals decision reveals language that possibly could be construed to put many North Carolina zoning ordinances in jeopardy.

Virtually all zoning ordinances are based on the premise that the ordinance shall list certain land uses that are permitted in each zoning district and that those uses not expressly permitted are prohibited. Indeed, the “permitted-use table” is a staple in most ordinances. If a new activity arises on the zoning scene that does not qualify as a listed permitted use, then it is presumed that the use is not allowed unless the ordinance is amended specifically to allow it.

However, a growing number of ordinances have added some variations on this theme. First, some ordinances have added supplemental provisions that expressly prohibit certain uses to bolster or clarify the conclusion that they are not permitted. The difficulty is that if the use is neither expressly permitted nor prohibited, then what? Another variation can spell even more trouble. Drafters of an ordinance may try to add flexibility by providing that if a use is not expressly permitted, the zoning administrator may allow it if it is sufficiently similar to a use that is expressly permitted. The idea is that an ordinance can thus accommodate various unlisted uses that seem to fit the purposes of the zoning district without beginning to look like an old-fashioned phone book.

In the case at hand Dr. Michael Land began using his 5.68-acre parcel for a private shooting range. The 1988 version of the Union County development ordinance that applied did not list shooting or firing ranges as permitted uses in any of its zoning districts. Apparently the zoning category that came closest to fitting a shooting range was a “privately-owned outdoor recreational facility,” for which a special-use permit was required. The ordinance, however, provided that since the list of permitted uses “cannot be all-inclusive, uses that are listed shall be interpreted liberally to include other uses that have *similar* impacts to the listed.” (Italics added.) It also went on to say that “all uses that are not listed in (the permitted-use table) and that do not have impacts that are similar to those of the listed uses are prohibited.”

When the Village of Wesley Chapel attempted to enforce the county ordinance after annexing the property and Dr. Land appealed, the Union County superior court judge who initially heard the case and the Court of Appeals jumped all over this ordinance language. The Court of Appeals declared as follows: “The text of the 1988 Ordinance clearly incorporates the following philosophy: everything is proscribed except that which is allowed. The problem with this philosophy, however, is that it fails to clearly place the public on notice as how a particular use is to be classified absent an explicit mention in the Land Use Ordinance. While this presumptive language may be useful in applying an ordinance with a comprehensive schedule of categories, it is of little value when no similar use is listed in any category.”

Later in the decision the Court of Appeals went on to say: “Were we to follow the logic of the 1988 Ordinance, a citizen seeking to use his land for otherwise legal purposes would have to speculate as to which governmentally permitted use was “similar to” a nebulous category in the county’s Land Use Ordinance and then conform his conduct thereto. This approach leaves the landowner exposed to the arbitrary and capricious whims of the zoning authorities who may disagree with a landowner’s decision concerning “similarity of use.”

The Court of Appeals referred to a variety of cases (many from the 1960s) in which the court invoked the maxim that

zoning is in derogation of private property rights and its provisions are to be liberally construed in the favor of the property owner. It neglected to mention the several dozen state appellate court cases in which our courts have employed less doctrinaire approaches in applying the language of a zoning ordinance to particular uses.

Ultimately, the Court of Appeals held that that Dr. Land was not required to obtain a special-use permit for his shooting range and that Dr. Land's shooting activity amounted to a legal nonconforming use.

So, what does this Court of Appeals decision (which has not been appealed to the North Carolina Supreme Court) mean for those interested in zoning? Is it a provocative threat to existing zoning law? Probably not. Does a proper reading of the case suggest that the holding and dicta are largely confined to the facts of the case and the language of the ordinance? Probably so.

Wesley Chapel will not spell an end to permitted-use tables. Nonetheless, planners, attorneys, zoning officials, and board members need to review their own zoning ordinances and procedures in light of this case and consider the following suggestions:

- Develop permitted-use tables that are as comprehensive and explicit as possible.
- Avoid listing both permitted and prohibited uses for the same zoning district.
- Integrate the coding from the North American Industry Classification System (NAICS) into the ordinance.
- Rid the ordinance of language that gives the zoning administrator substantial discretion in determining which activities are allowed in a particular district.
- If a zoning official rejects a proposal for a use that is not clearly disallowed in a particular district, then:

1. Ensure that the citizen is provided with a copy of the interpretation in writing.
2. Inform the citizen of the right to appeal the decision to the zoning board of adjustment.
3. Assist with the development of a proposed zoning text change allowing policy-makers to determine whether the proposed use should be an allowable use in the district or not.

Properly interpreted, the Wesley Chapel decision can have the positive effect of encouraging better zoning practice.

Links

- appellate.nccourts.org/opinions/?c=2&pdf=6335