Coates' Canons Blog: Administrative Decisions by the Planning and Zoning Staff: Who is in the Loop?

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UPDATE September 2013: In the summer of 2013 the General Assembly enacted legislation that will enable an owner whose property is subject to a decision or interpretation by the zoning administrator or subdivision ordinance administrator to post a sign on the property that a "zoning decision" or "subdivision decision" has been made by the local government. The effect of the sign is to give constructive notice to third parties that a decision or interpretation has been made concerning the property upon which the sign is posted. *See* Sec. 1 of S. L. 2013 – 126, amending G.S. 160A-388(b1)(4).

An often-overlooked part of zoning and land subdivision control is the role of staff in interpreting regulations, making administrative decisions, issuing orders and permits, and granting development approvals. Crucial conversations and negotiations routinely occur among staff members and permit applicants and their representatives, sometimes resulting in revisions of plans. This administrative process, however, is often not designed to encourage participation by third parties such as neighboring property owners and nonprofit organizations. Two Court of Appeals decisions handed down yesterday demonstrate just how many obstacles these groups can face.

A significant problem faced by neighbors is their lack of notice that important administrative interpretations and permitting decisions are about to be made or have been made. They often are unaware of what is going on until it is too late for them to react. G.S. 160A-388(b) and G.S. 153A-345(b) allow an "aggrieved party" to take an appeal to the zoning board of adjustment of "any order, requirement, decision, or determination made by an administrative official charged with the enforcement" of the zoning ordinance. Neighbors are often capable of qualifying as "aggrieved parties" but unless they know that an interpretation has been made or an approval granted, the right to take an administrative appeal is of little use. What's more, most zoning ordinances and board of adjustment rules of procedure require these appeals to be filed within a period ranging from two weeks to two months after the decision or determination is made. The case law is cluttered with situations in which the neighbors attempted to appeal administrative rulings months or even years too late.

Those concerned with the rights of neighbors have taken a certain solace in the classic case of Town and Country Civic Organization v. Winston-Salem Board of Adjustment, 83 N.C. App. 516, 350 S.E.2d 893 (1986). In that case the zoning officer determined that "radio transmission towers" were allowed in a zoning district that permitted "utilities." The board of adjustment rules provided for an appeal of a zoning officer's decision within 30 days, and the zoning/building permit was to be posted on the site. The permit was not in fact so posted, but the neighbors filed their administrative appeal 100 days after the permit was issued. In response to the neighbors' claim that they had no notice that the interpretation had been made and the permit issued, the Court of Appeals pointed out that the radio towers had arrived on the site at least thirty days before the neighbors filed their appeal. Since the neighbors had a form of constructive notice for at least thirty days before they acted, they were not prejudiced by the running of the thirty-day rule. The court, however, noted in dicta that "where aggrieved parties entirely lack any form of notice of a zoning officer's decision, there might be a due process question."

Nonetheless, the Court of Appeals decision this week in Coventry Woods Neighborhood Association v. City of Charlotte, may have dashed hopes for any constitutional vindication. In *Coventry Woods* the staff had approved a preliminary subdivision plat that was based on a certain density bonus. Under the terms of the subdivision ordinance, only the developer received notice of planning staff decisions concerning preliminary plat approvals. (North Carolina's land subdivision statutes do not address appeals of plat approval decisions.) The ordinance provided a ten-day window within which "aggrieved parties" could appeal the staff decision. The neighbors were not entitled by the terms of the ordinance to any notice that a staff decision had been made. Since the neighbors apparently had no actual or constructive notice of the

decision until some months later, whether the ten-day appeal period applied to them was largely irrelevant. Instead, the neighborhood association chose to make a more fundamental claim—that the principles of constitutional due process entitled affected neighboring property owners to notice of the staff decision. The *Coventry Woods* court rejected this claim, noting that no one has a property right in having the status of adjacent property remain unchanged. But in a footnote the court dismissed the due-process references in *Town and Country* because the references did not discuss the extent to which the neighbors "had a constitutionally-protected property interest sufficient to support a procedural due process claim." The implication was that any property interest neighboring owners have in their own property when the value of it will be substantially affected by a proposed development project is inadequate to merit constitutional protection.

To make matters worse for neighbors (and, for that matter, for everyone else), it is often unclear just what planning or zoning official is authorized to render an interpretation that is appealable, or even when such an event occurs. The problem in identifying the appropriately authorized administrative officials in larger jurisdictions is that there may be too many choices. Consider the companion Court of Appeals case from this week of Bailey and Associates, Inc. v. Wilmington Board of Adjustment. In that case the planning manager for the City of Wilmington on February 8, 2005 declared in an email to the developer's architect that no portion of the relevant site was located within a special conservation overlay zoning district and was thus not subject to its setback requirements. In the process she sent a copy of the message to a planner she supervised and to the developer's architect. During October of 2006 the city's technical review committee (TRC) reviewed plans for the site. In August 2007 the planner emailed the developer stating that the TRC had decided that the creek adjacent to the site was indeed a tidal marsh and that the land to be developed was subject to special conservation setbacks after all. The developer appealed this 2007 interpretation to the board of adjustment. The board of adjustment affirmed the planner's interpretation, even though the ordinance provided only for appeals of interpretations, determinations, and the like by "the City Manager." Despite the objection of a group of intervening neighbors, the Court of Appeals upheld the superior court's reversal of the board's interpretation. But it never resolved the issue of who was authorized to render an appealable decision and when such a decision was made. Instead the court simply pointed out that the board of adjustment apparently accepted without objection the proposition that the planner was authorized to make such a determination and that the August 2007 email determination was appealable.

Compare the laissez-faire approach of *Bailey and Associates* with In Re Society for the Preservation of Historic Oakwood, 153 N.C. App. 737, 571 S.E.2d 588 (2002). In this latter case a crucial interpretation of the zoning ordinance was whether a facility sponsored by the Raleigh Rescue Mission was "transitional housing/emergency shelter" or simply "multi-family housing." A city council committee that had begun its review of a controversial site plan for the housing asked for an opinion from the zoning inspector supervisor concerning whether the proposed use of the property complied with zoning. The zoning inspector supervisor prepared a memo for the committee that was subsequently appealed to the board of adjustment by a neighboring property owner and an affected historic preservation organization. However, the Court of Appeals ruled that the board of adjustment had no jurisdiction to hear such an appeal because the memo was an advisory opinion rather than an "order, requirement, decision, or determination. . . " According to the court, such an action must have some binding force, such as by granting or refusing a permit, in order for there to be a right of appeal. Thus, if "the decision has no binding effect or is not 'authoritative' or a 'conclusion as to future action,' it is merely the view, opinion, or belief of the administrative official." Neighboring property owners, neighborhood associations, and their representatives are left to reconcile the two cases.

In summary, then, one of the difficulties neighbors face is the lack of notice that important interpretation and permitting decisions affecting land use and development are about to be made or have been made. It appears that groups such as these enjoy no constitutional right to be notified. Thus there is a substantial risk that periods for taking administrative appeals will have run by the time such groups are prepared to file an administrative appeal. Likewise, it is often unclear to neighbors and others involved in the administrative process just which staff members are authorized to render interpretations and make binding decisions. Finally, it may be unclear just when such decisions are made. Unfortunately for neighboring property owners and other third parties, these difficulties will likely continue to put them at a disadvantage when they try to participate in the administrative processes that are a part of our land development regulatory systems.

Links

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