Coates' Canons Blog: Can We Add a Condition to this Rezoning?

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Article: https://canons.sog.unc.edu/can-we-add-a-condition-to-this-rezoning/

This entry was posted on June 14, 2011 and is filed under Land Use & Code Enforcement

A developer needs a rezoning to increase permissible densities on a tract in order build a project that may well be good for the community. The neighbors have legitimate concerns about the impact this more intensive development would have on quality of their neighborhood and their property values. Discussions between the developer, neighbors, planning board, and town council indicate a workable compromise might be possible. Can the town impose some site-specific conditions on the rezoning that will reconcile these competing interests?

In North Carolina the answer depends on what zoning tools the town uses to impose the conditions. While there are legal ways to accomplish this, the most direct and simple way of imposing conditions on a rezoning can create two separate legal problems: 1) the conditions are unenforceable, and 2) the rezoning is subject to being invalidated in court because it fails to consider all the permissible uses in the district.

Consider this example.

Local developer Lennie Rosenbluth bought a tract of land on the edge of town several decades ago for investment purposes. The tract, which was some distance from any other development when Lennie purchased it, is now pretty much surrounded by residential subdivisions. With the economy beginning to turn around, Lennie decides it is time to develop this tract. Based on some market analysis and his sense of what the town needs, he concludes there is a demand for multi-family housing for moderate to middle income families. He develops plans for a 40-unit apartment complex. The site is still zoned for single-family residences, just as it was when Lennie purchased the site. He petitions the town for a rezoning from the single-family district to a multi-family residential zoning district.

At the public hearing on the rezoning, planning board chair Tommy Kearns advises the town council that the planning board supports the rezoning. He notes that the land use plan calls for more housing of this type and the proposed location has all of the needed roads, water, and sewer to support the development.

Pete Brennan, one of the adjacent property owners and neighborhood spokesperson, appears at the public hearing on the rezoning. He says the noise, lights, traffic, and scale of the proposed apartment complex will harm his property values and the quality of his neighborhood. A dozen other neighbors raise similar concerns.

Town council member Joe Quigg asks Rosenbluth if there is anything he can do to address these neighbors' concerns. Rosenbluth says he wants a project that is good for the city and the neighbors as well as for himself, so he is willing to compromise. The town council then takes a short recess to get a cup of coffee and let the parties discuss matters.

Rosenbluth, Brennan, Kearns, and Quigg huddle in the hall. When the council meeting resumes, Rosenbluth says he is willing to stipulate that he will maintain a 50-foot vegetated buffer along the rear of the property instead of the 20-foot setback required by the zoning. He also agrees to limit use of the site to apartment buildings and that he will not pursue development of any of the other land uses permitted in the proposed multi-family zoning district. Brennan states that with these conditions, the neighborhood supports the rezoning. Kearns says this solution is fully consistent with town plans. Quigg moves to approve the rezoning, subject to the conditions just mentioned. The council unanimously adopts the motion to rezone with the two conditions added.

Is this a win-win for the landowner, the neighbors, and the town? Does this solution allow the needed apartment building to go up yet still assure that the special needs of the immediate neighbors will be protected? Is the compromise reached in the hallway legally enforceable? Is the rezoning with conditions valid?

While zoning law increasingly allows for such negotiation and tailored site-specific conditions, in our example the town

used the wrong tool to accomplish this. Conditions on rezonings to general use districts and a failure to consider all uses being allowed in a rezoning to a general use district are illegal.

Unlawful Conditions

Individual, particularized conditions on rezonings to a general use district are unenforceable in North Carolina. G.S. 160A-382 and 153A-342 provide that "all regulations shall be uniform for each class or kind of building throughout each [zoning] district." In *Decker v. Coleman*, 6 N.C. App. 102, 169 S.E.2d 487 (1969), the court held that this uniformity requirement precludes imposition of conditions on conventional, general rezonings. In that case Asheville rezoned a parcel from residential to commercial in order to allow construction of a shopping center. The rezoning was conditioned upon the owner's maintaining a 50-foot buffer without any access connections between the proposed commercial use and the adjacent residential neighborhood. Since such a buffer requirement was not uniformly applied throughout the zoning district, the court held that the city had no statutory authority to apply it as a condition of rezoning a particular parcel. The court thus held the condition invalid and unenforceable. The notion here is that if a 50-foot buffer is needed with this rezoning, it should be added to the text of the ordinance as a uniform standard for all properties in the district; if it is not needed for all properties in the district, it cannot be applied to just one property.

The inclusion of an invalid condition does not necessarily invalidate the rezoning. Barring other legal defects, the rezoning stands; its conditions do not. In *Decker* the city council included a specific severability clause and the court applied it to sever the condition, invalidate it, and leave the remainder of the ordinance amendment in place.

If this were to happen with our example, the rezoning would stand and Lennie could build his apartments (or any other use permitted in this district). He could observe the agreed upon 50-foot vegetated buffer, but he would also be legally entitled to put parking or a building there as long as he observes the 20-foot setback required by the zoning district.

Failure to Consider All Permissible Uses

But Lennie might not be totally out of the woods. A second problem with the rezoning is that a rezoning to a conventional zoning district that is based on a single project rather than on all permissible uses in the new zoning district is invalid. An example of this problem is provided by *Hall v. City of Durham*, 323 N.C. 293, 372 S.E.2d 564 (1988). In *Hall* the rezoning was from a single-family residential district to a commercial district. A detailed site plan submitted with the rezoning petition included the physical layout of the development and detailed restrictions on development, including a landscaped buffer. Most of the detailed conditions resulted from extensive negotiations with neighboring property owners. The city council based the rezoning on this carefully negotiated project but without considering all of the other possible uses in the new zoning district. The court ruled that although a site plan may be submitted, its submission does not remove the requirement that all potential uses in a new general zoning district be fully considered. The planning commission staff had recommended against the rezoning, noting that some of the twelve other uses permitted in the new district would not be compatible with the surrounding neighborhood. The court agreed and invalidated the rezoning.

If this were to happen with our example, Lennie would be out of luck. The court would invalidate the rezoning, so the property would retain its original single-family zoning and Lennie would have to start all over with a new rezoning petition.

The fact that specific plans are presented to the governing board, however, does not in and of itself invalidate a rezoning, so long as the record is clear that all permissible uses are considered. *Musi v. Town of Shallotte*, ___ N.C. App. ___, 684 S.E.2d 892 (2009); *Kerik v. Davidson County*, 145 N.C. App. 222, 551 S.E.2d 186 (2001). When a specific development proposal has motivated a rezoning request, many local governments note in the hearing record the full range of uses that would be allowed in a new zoning district. This is often done in a staff report that is presented to the governing board prior to a vote on the rezoning. It is not uncommon for the list to be read aloud at the hearing, along with a statement that any of the permitted uses (in addition to any specific project that has been mentioned) would be allowed if the property was rezoned. Such a recitation is sufficient to avoid invalidation of a rezoning on the basis that all potential permitted uses were not considered prior to action.

In our example, since a rezoning is a legislative decision, there is not a legal problem with the council member, developer, and neighbor discussing the matter outside of the council hearing. But when they are talking about a specific project, it is prudent for the substance of that conversation to be relayed to the full council. And it would be critical for the council to explicitly acknowledge that if the rezoning is to a conventional district with multiple permitted uses, they are well aware that

the use discussed is just one example of what could be developed if the rezoning is approved.

It is also important to note that rezoning a relatively small parcel this way can be **spot zoning**, which must be supported by a reasonable basis in order to be legal. But even if the rezoning in our example is reasonable, it still has some serious legal problems due to the conditions.

Doing It Right: Conditional Zoning

How could the town in our example incorporate the negotiated conditions in a legally acceptable, binding method? It could avoid the *Hall* problem by acknowledging that other uses could be built and would be acceptable should Lennie's plans change. Imposing binding conditions is a bit more difficult, but not impossible by any means. The most common method of imposing conditions would be to structure the ordinance to allow apartment buildings in the applicable zoning district only if they secure a special or conditional use permit. Another increasingly common approach is to use conditional use district zoning or conditional zoning instead of rezoning the property to a conventional or general use district. Those specialized tools, however, are the subject of a blog for another day.

By the way, for those not around in 1957, our characters' namesakes likely had something else in mind if told someone would be zoning them tomorrow night —

1957 National Champions. Standing: Joe Quigg, Pete Brennan, Lennie Rosenbluth, Coach McGuire; Kneeling: Bob Cunningham, Tommy Kearns

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