Coates' Canons Blog: Can We Consider Ownership in a Zoning Decision?

By David Owens

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The heart of zoning ordinances are rules on land uses – rules on what uses can go where, standards on building setbacks, the size of structures, required parking, size of signs, and so forth. Sometimes, however, a question is raised about who is proposing a development. Is the identity of the applicant or the owner of the property a relevant consideration in zoning? Is this a legitimate factor that can be considered in a zoning decision?

Consider these situations –

1. The planning board has recommended a set of zoning amendments to promote more housing options and affordability. One proposal is an amendment to allow accessory apartments as a permitted use in all single-family zoning districts, provided some conditions are met regarding parking and setbacks. After hearing concerns raised at the public hearing, Mayor Juanita Beasley observes that this proposal could be a good thing in many instances. Given the increase in density it would allow in older neighborhoods where the houses are already pretty close together, she notes appropriate on-site management may well be needed to assure this works out to everyone's benefit. She asks staff if the proposed text could be amended to allow accessory apartments only if either the principal house or the accessory apartment is owner-occupied.

2. Rafe Hollister and Charlene Darling have proposed opening a brew pub/nightclub in a neighborhood shopping center. Darling will own the building and manage the club while Hollister will own and manage the brewing operation. A club at this location requires a special use permit under the town zoning ordinance. Near the close of the town council hearing on the application, Councilor Floyd Lawson raises a question. "It's clear from the testimony we've heard that this business will be a great thing for our small town. I've known **Charlene and her brothers** all my life. I'm sure she'll run this business in a way that will be absolutely first rate. Everybody around here is already familiar with Rafe's special home brews and they'd go great with some **local music**. But Charlene, like me, is getting on in years. In the wrong hands this club could turn into a real problem. We have joints in town that are just a mess – fights, noise, drugs, all sort of bad things. Charlene's retired and will really look after this business, but without her around, this club could be a real nuisance. Can we add a condition to the permit that live entertainment can be offered only as long as Ms. Darling is the owner or that they'd have to come back and get a permit amendment if she sells the club to someone else?"

Is it legally permissible for the town do either of these things?

In a word, the answer to both is no.

In North Carolina the courts have long held that development regulations may not be used to control the ownership—as opposed to the use—of property. A leading case on this point arose three decades ago in Chapel Hill. The council amended the zoning ordinance to require a special use permit for the conversion of multi-family rental housing to condominiums. The owners of an apartment complex built in 1928 – two buildings with twelve apartments each – wanted to convert their apartments to condos. The buildings did not meet current zoning setbacks and parking requirements, but it was a lawful nonconforming use since the buildings were there before zoning was adopted. The town council voted 7-1 to deny their special use permit. The owners promptly sued the town and won. In Graham Court Assocs. v. Town Council of Chapel Hill, 53 N.C. App. 543, 281 S.E.2d 418 (1981), the court held zoning can regulate land use, but not the form of ownership. The multifamily housing would have the same land use impacts whether occupied by renters or owners, so the zoning ordinance cannot legally distinguish between the two or require regulatory approval to change from one to the other.

More broadly, the courts have emphasized that land use regulations must be based on the land use impacts of property use, not the identity of the users of the property. In Gregory v. County of Harnett, 128 N.C. App. 161, 493 S.E.2d 786 (1997), the court invalidated a rezoning that moved property from a zoning district that allowed manufactured-home parks to a district that did not. The court held that the rezoning was arbitrary after the record disclosed that it was based on undocumented concerns about crime committed by residents of manufactured-home parks and the "type of people" who reside therein, with no evidence showing any consideration of the character of the land, the suitability of the land for various uses, the provisions of the zoning plan, or changing conditions in the area.

Land use regulations must be based on land use impacts, not the identity of the land owner or applicant. Land use permits are parcel-specific – they are attached to that parcel and are not personal rights of the applicant that can be freely transferred to other parcels.

These general principles preclude use of either of the two options raised above.

In fact, the court has ruled directly on the first question. In City of Wilmington v. Hill, 189 N.C. App. 173, 657 S.E.2d 670 (2008), the court held that a zoning ordinance may not provide that an accessory apartment is permissible only if it or the principal residence is owner-occupied. The city's development regulations permitted a garage apartment as an accessory use in a single-family zoning district, provided the property owner lived in either the main residence or the accessory apartment. The court held the ownership requirement unconstitutional as an impermissible regulation of ownership rather than a permissible regulation of land use. The court also held that the owner-occupant requirement was beyond the scope of delegated zoning powers.

So what about the concern about proper management of the night club raised in our second question above?

Proper management and operation of a land use is certainly a legitimate consideration in zoning decisions. For example, in Petersilie v. Boone Board of Adjustment, 94 N.C. App. 764, 381 S.E.2d 349 (1989), the court upheld the denial of a special use permit for an apartment building in a neighborhood of single-family homes. The court ruled that although the applicant submitted sufficient evidence to support the issuance of the permit, there had also been competent evidence before the board of adjustment regarding problems of noise, traffic congestion, crime, vandalism, and effects on property values to justify the denial of the permit. But, very importantly, these were potential problems posed by any multi-family housing at that particular site, be it occupied by renters or by owners.

How a sensitive use that is subject to a special use permit requirement is managed certainly has a bearing on what types of land use impacts the use will have. The council members in our second example have a legitimate concern. The proper management of a nightclub can undoubtedly affect how well it fits with its neighbors. But the land use regulatory decision has to focus on land use impacts. Is there adequate parking? Is there an appropriate buffer for nearby residences? Can the site handle the anticipated traffic? Is this the right location for this type of business? If the operation does not comply with land use regulations, enforcement actions can be brought and the town could consider permit revocation. The town can also adopt and apply rules that address proper operation of the club, such as a noise ordinance. The town can work with law enforcement to address any criminal activity and to enforce alcohol regulations. A public nuisance action could be initiated if serious problems arise.

But the town cannot use zoning to regulate who owns the nightclub despite the long-standing interest in this type of regulation. In fact, one of the cases cited approvingly by the court in the Graham Court case dealt with a similar situation and reflects. In 1947 the City of Moscow, Idaho adopted an ordinance that required zoning approval for a change in ownership of a pool hall, card room, or beer parlor by declaring any change in ownership to be a new business that required zoning approval. The Idaho court found such a requirement to be an arbitrary, unreasonable, and thus unconstitutional use of the city's regulatory authority. O'Connor v. City of Moscow, 202 P.2d 401 (Id. 1949). The Idaho court found, and the North Carolina court concurred, that zoning must address land uses, not ownership. So a town cannot tie a special use permit to a particular owner. It cannot require a new or amended special use permit when the ownership changes. The zoning authority is simply not broad enough to address those ownership issues.

There are a few instances where ownership is relevant for land use regulatory decisions. It is permissible to require an application to develop property be from the owner of the property, a duly authorized agent of the owner, or someone who has a legal right to undertake the proposed development. In the zoning realm, it is permissible to treat contiguous

nonconforming lots that are in common ownership as a single “lot” for zoning purposes. Another example would be where the statutes explicitly allow recent relevant past violations of an applicant to be considered in permit decisions, such as with G.S. 113A-120(b1) for CAMA permits. But there are very few instances where land ownership or the identity of the applicant will be a relevant factor.

While it is not unusual for a planning board or governing board to be curious about the identity of an applicant or land owner, that is rarely relevant to a zoning decision. Zoning decisions need to focus on what the potential land use impacts will be, not who is generating them.

Links

- www.youtube.com/watch?v=iQtXEb7C30o
- www.youtube.com/watch?v=xRsjszrf8xA