
Coates' Canons Blog: Civil Penalties and Zoning: Why Fight 'Em, Just Cite 'Em

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The expansion of a certain nonconforming junkyard and auto salvage yard violates the zoning ordinance, a condition that has existed for some time. Warnings have gone unheeded. The local government has sought to accommodate every promise made that the violator will comply, but has little to show for it. There is relatively little interest in spending public funds to litigate the matter. Should civil penalties be assessed against violators such as these? Why should we fight them when we can just cite them?

The Advantages and Disadvantages of Civil Remedies

If my impressions are to be trusted, civil penalties to enforce zoning ordinances are more available for use and are actually used more today than ever before, particularly by municipalities. It is almost a badge of honor to be able to say that your city or county ordinance provides for the use of this remedy. And yes, civil penalties can have a deterrent effect. They can serve as a tangible indication that a town or county is willing to take action against violators, even when there is little chance that equitable relief will be sought or a criminal action will ever be initiated. Likewise citations are relatively easy to use and often result in voluntary compliance.

On the other hand many civil penalty citations go unpaid. Only when amounts accrue to a substantial size is it worth the time of a zoning official to try to secure a judgment in small claims court or to call in the city or county attorney. Those who violate zoning ordinances are also more likely to resist service or to be judgment-proof. Then, of course, there are examples like the club owner that receives so much publicity from illegal signs advertising his venue that the resulting revenues exceed the amount of whatever civil penalties may accrue while the signs are displayed.

Setting the Amount of the Penalty

A variety of North Carolina state administrative agencies and regulatory entities are authorized to impose civil penalties for violations of state statutes or administrative rules. In most cases agency determinations concerning these penalties may be appealed to an administrative law judge (ALJ) and the North Carolina Administrative Procedures Act clarifies such matters as the factors to be taken into account in setting penalty amounts, how notice is to be served, and how appeals are to be taken. What's more, the North Carolina Supreme Court in the case of *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989), upheld the ability of state administrative agencies to set civil penalties within statutory parameters, taking into account a series of factors concerning the nature of each individual violation of the law.

By comparison, the use of civil penalties by local governments is more of a frontier. Subsection (c) of G.S. 160A-175 and G.S. 153A-123 declares that civil penalties are to be provided for by ordinance in order to be used. We know that all procedural requirements called for in an ordinance must be followed if penalties are to be upheld, even though relevant statutory procedures are, for practical purposes, nonexistent. We know that each day's continuing violation constitutes a separate offense.

Within what range may the amount of a civil penalty for a zoning violation be set? There is no directly relevant statutory guidance. G.S. 14-4 does provide that the violation of a local government ordinance may be prosecuted as a criminal misdemeanor punishable by a fine of no less than \$50 but no more than \$500. Local ordinance civil penalty amounts for zoning violations tend to fit within this range. Most local governments establish a set penalty amount for any zoning violation, thereby avoiding the delegation of too much authority to a zoning administrator or running afoul of various unknown limitations on their authority. The blessing that a skimpy but arguably flexible statute provides can become a curse.

Compare this approach with that authorized in subsection (d) of G.S. 113A-126 of the Coastal Area Management Act

(CAMA). It sets statutory maximum penalty amounts for violations of major development permits (\$10,000) and minor permits (\$1,000). It then authorizes the Coastal Resources Commission in determining the amount of civil penalties in individual cases to consider the following factors: (a) the degree and extent of harm, including, but not limited to, harm to the natural resources of the State, to the public health, or to private property resulting from the violation; (b) the duration and gravity of the violation; (c) the effect on water quality, coastal resources, or public trust uses; (d) the cost of rectifying the damage; (e) the amount of money saved by noncompliance; (f) whether the violation was committed willfully or intentionally; (g) the prior record of the violator in complying or failing to comply with programs over which the Commission has regulatory authority; and (h) the cost to the State of the enforcement procedures. Anyone who is assessed a civil penalty may also be assessed the reasonable costs (for major development permit violations, up to \$2,500) of any investigation, inspection, or monitoring that results in the assessment of the civil penalty. The CAMA statutes thus set out a comprehensive legislative framework for the administrative use of civil penalties. The legislature, or perhaps even a local government when it adopts an ordinance enforceable by civil penalties, could establish a similar set of criteria for determining the amount that may be assessed under a local ordinance.

Procedures and Appeals

Civil penalties are often assessed by zoning officials in the form of hand-delivered “citations.” Zoning boards of adjustment may also impose, modify, or waive civil penalties since such a board, on appeal, has all of the powers of the official from whom the appeal was taken. One common practice is for a notice of violation (NOV) to provide that the violator must either comply with the ordinance within a specific period of time (which often corresponds to the period for appealing any decision of the zoning official) or be assessed a civil penalty for each day the violation continues once this period expires. One issue that remains unresolved is whether an appeal of the assessment of a civil penalty may be appealed independently from an appeal of the underlying NOV. Some ordinances try to address this matter by providing that if the NOV provides for the contingent initiation of civil penalties at a later date, either or both matters must be appealed during the period that begins to run from the date the NOV is served.

Where the Money Goes

Then there is the matter of the money collected. As one planning director posed the question, “The money is to go **where?**” In the case of most local governments the funds will need to be identified and transferred to the public schools in the county where collected, pursuant to Article IX, Section 7 of the North Carolina Constitution. In the absence of any provision in the zoning ordinance to the contrary, the violation of a zoning ordinance is a criminal misdemeanor, requiring the proceeds of both civil penalties and criminal fines collected for the breach of this penal law to be earmarked for the public schools. (For a fuller treatment of this subject see Dave Lawrence’s blog of November 6, 2009.) There is one circumstance, however, when a local government may retain the proceeds from civil penalties collected for zoning violations. If the local unit amends the zoning ordinance to decriminalize zoning violations, civil penalties are no longer associated with the breach of the penal laws of the state and need not be transferred to the schools, at least to the extent that the penalty appears to be remedial rather than punitive in nature. Nonetheless, relatively few local governments have taken advantage of this option. For some, the possibility of using criminal prosecution as a weapon for zoning violations remains too attractive. In any event civil penalties have not up to now served as the money-maker that some elected officials may have assumed.

What does the future hold? The use of civil penalties is likely to increase, even though the popularity of the tool may exceed its effectiveness. Since many local governments are looking for ways to supplement their revenues, more and more of them may try to find a way to keep the penalty funds they collect. But only when comprehensive civil penalty legislation is adopted will this ordinance enforcement tool reach its full promise.

Links

- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-175.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-123.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-4.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_113A/GS_113A-126.html
- www.ncga.state.nc.us/Legislation/constitution/article9.html