Coates' Canons Blog: Club-A-Gone-Gone?

By David Owens

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Do two wrongs ever equal a right in a zoning dispute? Suppose someone starts a business that is not allowed at that site under the zoning ordinance. One wrong. Suppose further that this was done after the town zoning inspector had mistakenly issued a permit for that use. Second wrong. Add the fact that the business is in operation for some time before the errors come to light. Does all of this add up to a legal right to continue operating the business at this site?

Consider this situation.

Wally's Station prior to conversion to Wally's-A-Go-Go

For many years Wally ran a small gas station on the outskirts of town. After Wally passed away, local businessman Malcolm Tucker bought the property, expanded the building a bit, and opened a private club in the building. Things were pretty quiet as the club was discretely run for the benefit of a small group of Tucker's friends. Over time the club membership dwindled to the point that continued operation was not feasible. So in early 2010 Tucker decided to convert the building into a nightclub, a business similar to a nightclub he owns in Charlotte. He got a building permit for some modest interior renovations. When they were complete, he opened his nightclub—Wally's-A-Go-Go.

The neighbors, who had no problems with the private club, are not happy about a nightclub in their midst. In the few months the club has been open there has been increasing traffic, noise, and loitering around the building. Things came to a head this past Saturday night with a 2:00 a.m. brawl in the parking lot. After a Sunday afternoon visit from a delegation of irate neighbors, the mayor called the town manager to see what the town could do to get this troublesome nightclub out of the neighborhood.

Staff investigation on Monday revealed that Tucker's business is located in a zoning district that does not allow nightclubs. A review of the files indicates that the town issued a building permit six months ago for the renovation. The town inspected and approved the work that was done. The town collected a privilege license fee for the nightclub three months ago, shortly before it opened. The building permit for the renovation was issued by former town building inspector Bernard Fife, who was fired last month after he was once again found sleeping on the job. Fife had apparently not checked for zoning compliance in his building permit review. The zoning, adopted in 1966 and unchanged for this property since then, allows a limited number of small-scale commercial uses (including not coincidentally service stations and small convenience stores) in the zoning district applicable to Tucker's property. It also allows lodges and private clubs. But it clearly does not allow restaurants, bars, or nightclubs.

Armed with this information, the mayor and manager meet with Tucker on Tuesday morning. The manager lays out the facts from the staff review and says that since Tucker's nightclub is in violation of the zoning, the town intends to revoke all

its permits and wants the business relocated within 30 days.

Tucker blows his stack. “Move? You want me to move? Fife is a nincompoop, but he signed off on everything I did. I put in hard work building up this business in a tough economy. You want me to move? Are you nuts? That’d nip my business in the bud. No sir, I’m not about to move.” Tucker storms out, pausing at the door with his concluding shot. “Mayor, I suspected you’d try something like this. My lawyer says the club is grandfathered and you can’t touch us. Call her if you want to carry on this ridiculous conversation.”

“Well Mr. Manager, what now?,” asks the mayor. “Do I have to tell the neighbors we are stuck with one more of Fife’s bonehead mistakes or can you fix this?”

A classic zoning case from sixty years ago established the basic principle that a long-standing zoning violation is still a violation. The defendant in *City of Raleigh v. Fisher*, 232 N.C. 629, 61 S.E.2d 897 (1950), purchased land from the city and constructed a residence on the site. The defendant operated a bakery and sandwich business from the house continuously thereafter, even though the site was in a residential zoning district. The city was aware of the use and collected a privilege tax on the business for nine years. At that point, however, the city directed the defendant to discontinue the business because of its inconsistency with the residential zoning requirements. The court held the defendant had no right to continue operate the business within the residence, with Justice Sam Ervin writing, “[A] municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting such violator to violate such ordinance in times past. Undoubtedly this conclusion entails much hardship to the defendants. Nevertheless, the law must be so written; for a contrary decision would require an acceptance of the paradoxical proposition that a citizen can acquire immunity to the law of his country by habitually violating such law with the consent of unfaithful public officials charged with the duty of enforcing it.”

So what ideas might Tucker’s lawyer have in mind to get around this basic rule? The three most likely are that his business is a nonconformity that can continue, that he has a vested right to continue, or that the equitable doctrine of laches prevents an enforcement action.

Nonconformities are those land uses, structures, or lots that were legal when established but do not conform to the requirements of subsequently adopted or amended land use regulations. Most zoning ordinances allow nonconformities to continue, but usually limit their expansion or replacement. A critical part of this definition as it relates to Tucker’s project is that the action must have been lawful when it was taken in order to take advantage of the ordinance’s protection of nonconformities. An action started in violation of an ordinance does not enjoy nonconforming status. A recent example is discussed by the court in *Morris Communications Corp. v. City of Bessemer City Bd. of Adjustment*, 689 S.E.2d 880 (2010). The city issued a sign permit and the county subsequently issued a building permit for relocation of a billboard. Work was not initiated in a timely fashion under the sign permit, so the that permit expired. The county subsequently renewed the building permit in error and the sign was relocated. The court held that since the relocation was done without a valid sign permit, the sign was a violation and not a lawful nonconformity. So in our case, since location of a nightclub on the site was a violation of the zoning ordinance when it started, Tucker’s nightclub does not qualify as a lawful nonconformity.

What about *vested rights*? When a person makes substantial expenditures in good faith reliance on a valid permit and would suffer detriment if required to comply, the courts allow the person’s land use rights to vest in accordance with the rules in effect at that time. Tucker’s lawyer may have thought that since the town issued a permit for the nightclub and Tucker spent time and money afterwards, he has a vested right to continue operation of the nightclub. Her problem with this approach is that the building permit for the renovations was erroneously issued. A vested right must be based on a lawful permit. This requirement is illustrated by *Mecklenburg County v. Westbery*, 32 N.C. App. 630, 233 S.E.2d 658 (1977). Part of the property involved in that case was in a residential zoning district and part in an industrial district. The owner wanted to install a metal storage building that was permitted in the industrial district but not in the residential district. The building inspector mistakenly thought the site of the proposed building was in the industrial district portion of the lot, so a building permit was issued. In reliance on that permit the owner purchased and installed a manufactured home reconfigured to serve as a storage building. The county then discovered the mistake, notified the owner that the structure was in violation of the zoning, and revoked the building permit. The court held that since the permit was mistakenly issued, no vested rights could be based on it. This same rule would apply to Tucker’s nightclub, so it is highly unlikely he could get vested rights based on Fife’s mistakenly issued permit.

There is an exception to the rules noted above. The equitable doctrine of *laches* applies when a local government makes assurances to a person, then waits an unreasonable time after discovering that those assurances were incorrect, and that delay works a considerable disadvantage to the person.

The fact that several months went by after the nightclub opened and the town started enforcement action does not in and of itself help Tucker's case. In a number of cases the North Carolina courts have uniformly held that a delay in enforcement action does prevent the city or county from later enforcement. Recent examples include *MMR Holdings, LLC v. Charlotte*, 148 N.C. App. 208, 558 S.E.2d 197 (2001) (delay between warning citation that balloons at car dealership violated the sign regulations and initiation of enforcement action does not preclude enforcement) and *Capitol Outdoor, Inc. v. Tolson*, 159 N.C. App. 55, 582 S.E.2d 717 (2003) (non-enforcement of billboard height limit for ten years does not preclude subsequent enforcement). If the town had not told Tucker a business at this site was allowed, the fact that he had been open three months or three years would not affect the town's enforcement action.

Here, however, Tucker's lawyer will likely argue there is more than just delay. She will point out that Fife issued a permit, argue that the town knew of should have none of this error, that Tucker spent money and effort after that point, and it would thus be unfair to now enforce the zoning restriction. Could the laches doctrine get Tucker off the zoning hook?

One of the few cases to apply laches to a zoning dispute in North Carolina is *Abernathy v. Town of Boone Board of Adjustment*, 109 N.C. App. 459, 427 S.E.2d 875 (1993). A business obtained a lawful permit for a freestanding sign from the town. Subsequently, the business considered a move to a location within an adjacent shopping center. Aware that the city sign ordinance did not allow individual freestanding signs for businesses in shopping centers, the business conditioned their purchase of the new site on being allowed to retain their existing free-standing sign. Upon being advised by town staff that the sign could remain, the business purchased the site and relocated, incurring substantial expenses. Some three and a half years later, in response to complaints from other businesses at the shopping center, the city issued a notice of violation and ordered the sign removed. The court held that the town had notice of the violation for nearly four years before acting. This was an unreasonable lapse of time between knowing of the violation and acting upon it. This unreasonable delay resulted in a substantial change in position by the business and made it unjust to enforce the ordinance. The court emphasized that the general rule is that laches does not apply to preclude enforcement of municipal ordinances absent *both* an unreasonable delay after knowing of a mistake and an unreasonable disadvantage due to that delay. The court in *Town of Cameron v. Woodell*, 150 N.C. App. 174, 563 S.E.2d 198 (2002), reached the same conclusion after the town mistakenly told an owner that a site they proposed for a flea market and used car lot was not subject to town zoning, but then tried to enforce the zoning after the business opened and the town belatedly discovered the site was in the town's zoning jurisdiction.

So is the town here similarly bound by Fife's mistake? While it would take a court case to know for sure, it does not appear that Tucker can fit his situation into the narrow laches doctrine. While Fife's permit was an affirmative act by the town approving the project, it was issued in error and there is no indication others in the town knew of the mistake. The town promptly advised Tucker of the problem as soon as it was discovered. Tucker has experience with nightclubs and could be expected to be knowledgeable about local regulations that apply to them. The amount spent for renovations to convert the club to a nightclub was likely relatively modest. The time that elapsed between the mistaken permit decision and the initiation of enforcement action was relatively brief. The potential harm to the neighbors from continued operation of the nightclub may well be substantial. How the court would balance these equities is not certain, but it appears Tucker's laches case is not very strong. So the town can likely send the nightclub packing. Tucker's **Wally's-A-Go-Go** may soon be **gone-gone**.

Links

- www.youtube.com/watch?v=fn0-I1IxCa0
- www.youtube.com/watch?v=aH_p7h-Q-ow