Coates' Canons Blog: Dealing with Land Uses Not Specifically Addressed in a Zoning Ordinance: The Saga Continues

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If a person is considering undertaking a particular land use, it is important that they know whether or not that would be allowed by the zoning ordinance.

It is usually a simple proposition to determine whether or not the use is allowed. The owner finds out how the property is zoned – what zoning district applies to this parcel – and then sees whether the intended use is listed as a permitted use on the property. The ordinance may provide that the use is always allowed in the applicable zoning district (often referred to as a "use by right" or "permitted use") or only allowed with a special review (a special or conditional use permit). If the intended use is prohibited, the person must find a different site or seek to have the property rezoned to a district that allows the intended use.

But what if the zoning ordinance does not specifically address the intended use? Perhaps it is a new type of land use that was not contemplated when the ordinance was adopted. If the ordinance is more than a few years old it likely does not address solar farms, sweepstakes parlors or other "new" land uses. Perhaps it is a use the local government did not anticipate would be proposed in their community, such as a tattoo parlor, race track, or shooting range. Or perhaps the local government tried to shorten and simplify the ordinance by deleting page after page with detailed listings of specific uses in a permitted use table.

Whatever the reason, from time to time someone will propose to undertake a type of land use that is not expressly addressed by the ordinance. What happens then? In recent years our court of appeals has dealt with this question in a series of cases, with the state Supreme Court recently weighing in with some important conceptual guidance.

Prior Cases

The first in this series of cases involved a private shooting range in Union County. Dr. Michael Land, a gun collector and enthusiast, created a private shooting range on a six acre parcel he owned in what was then a relatively rural area. The surrounding area gradually filled in as new subdivisions were created and built. The property became a part of the town of Wesley Chapel. Eventually neighbors objected to continued use of the range, particularly for the semi-automatic and fully automatic rifle fire that Dr. Land and his guests occasionally enjoyed. The town concluded the shooting range was not allowed in the applicable residential zoning district.

The ordinance in effect at the time the range was established did not specifically list shooting ranges as a permitted use, special use, or prohibited use. The ordinance did include a provision that uses not listed were prohibited, but that since the list of permitted uses could not be all-inclusive, the ordinance stated that permitted uses should be interpreted to include uses with similar impacts. The town contended that the listed use with most nearly similar impacts was a "privately-owned outdoor recreational facility." Since that use required a special use permit and Dr. Land did not secure such a permit when he built the shooting range, the town contended the use was not a lawful nonconformity. The court noted the approach of prohibiting uses that are not expressly permitted is problematic for two reasons: (1) it fails to put the public on notice as to how an unlisted use would be classified; and (2) it is the antithesis of the axiom that zoning ambiguity is to be construed in favor of free use of property. The court of appeals thus held in **Land v. Village of Wesley Chapel**, 206 N.C. App. 123, 697 S.E.2d 458 (2010), that absent a clear provision regulating shooting ranges, Dr. Land was not required to get a special use permit for this unlisted use. Richard Ducker has a post on that decision **here**.

The next two cases involved a training facility for military, law enforcement, and security personnel proposed to be located on a nearly 1,000-acre site in a rural portion of Cumberland County. The proposed facility included multiple outdoor firing ranges. The ordinance did not specifically list this type of land use as permitted or prohibited. The property was in an Agricultural zoning district that included as a permissible use "School, public, private, elementary or secondary." The zoning administrator approved the plan, classifying the business as a "private school." Neighbors appealed. The court of appeals in **Fort v. County of Cumberland**, 218 N.C. App. 401, 721 S.E.2d 350, *review denied*, 366 N.C. 401 (2012), held the type of facility proposed was not a permitted use. The court concluded that inclusion of the terms "elementary or secondary" in the definition of "schools" was intended to exclude other types of schools.

The proposed project was back before the court of appeals in 2014. The zoning ordinance provided that all uses of property are prohibited if not permitted or otherwise allowed. It also provide that if a use was not specifically addressed in the ordinance, the standards for the land use that is "most closely related" to that use applied. As this particular use was not specifically addressed in the ordinance, the county this time around determined the use "Recreation/Amusement, Outdoor (with mechanized vehicle operations)" had the most similar impacts. As this was a permitted use, the project was approved. The neighbors again appealed. In **Fort v. County of Cumberland II**, 761 S.E.2d 744 (2014), the court held the intent of the adopting board was critical and in that context noted the ordinance expressly stated that all uses of property are allowed as a matter of right except where the ordinance specifically provides otherwise. The court held there was sufficient evidence to support a conclusion that this use was most nearly similar in impacts to an outdoor recreation activity with mechanized vehicles and was thus properly permitted.

The court of appeals also touched on this issue in **Fairway Outdoor Advertising, LLC v. Town of Cary**, 225 N.C. App. 676, 739 S.E.2d 579 (2013). The controversy was over a nonconforming billboard. The Cary ordinance had a provision on uses not specifically listed in the ordinance as permitted. The ordinance allowed the zoning administrator to permit unlisted uses upon making specified findings (click **here** for the Cary ordinance provision dealing with review of unlisted uses). Without addressing the conceptual issues regarding the ambiguity of unlisted uses, the court held that since the ordinance language was permissive rather than mandatory ("may" issue as opposed to "shall" issue), the administrator's decision not to approve this use would not be overturned absent showing an abuse of discretion.

Recent Decision

The most recent instance of the court wrestling with this issue again involved a shooting range. The ordinance in question, this time the zoning provisions in Franklin County's unified development ordinance, did not specifically address shooting ranges one way or another. The ordinance did include a provision that uses not specifically listed are prohibited. The staff first advised the owners to seek a zoning text amendment to include shooting ranges in the table of permitted uses in the applicable zoning district. The staff later concluded, however, that a shooting range could be considered as a "facility for open air games," which could be allowed as a special use. So the owners applied for a special use permit, which the county board of commissioners denied. The land owners appealed. The court of appeals in **Byrd v. Franklin County**, 765 S.E.2d 805 (2014), held it was improper to classify a shooting range as an "open air game" under the terms of the ordinance. The court construed the *Land* case narrowly, holding it applied only where the ordinance allowed unlisted uses if they had similar impacts to permitted uses. The majority on the court of appeals found the provision in this ordinance that uses not listed as permitted are prohibited was unambiguous. Since shooting ranges were not listed, they were prohibited. There was a dissenting opinion however that eventually carried the day. On November 6, 2015 the state supreme court **reversed** the court of appeals "for the reasons stated in the dissenting opinion." That dissenting opinion

read *Land* to "reject the notion that a zoning ordinance may prohibit uses not explicitly allowed." The dissent continued that *Land* "made it clear that the law favors uninhibited free use of private property over government restrictions."

So, while the court of appeals has in the past been sympathetic to an ordinance provision that unlisted uses are prohibited, the supreme court is clearly considerably less inclined to sanction this approach. The court does not favor interpretations or ordinance provisions that presume an otherwise lawful use of land is prohibited. The court has not said that every use must be allowed somewhere (see this **post** for more on that question). But the court has said prohibitions need to be clear and any uncertainty will be resolved against a prohibition.

Implications for Land Use Regulation

So what does this mean for zoning ordinances going forward?

As a practical matter, this issue does not arise frequently. For most types of land uses, ordinances are clear as to what is permitted and where it can be undertaken. But new land uses in unanticipated places arise from time to time. A recreational shooting range or go-cart track in a residential backyard. A sweepstakes parlor or adult cabaret in a vacant building in a small town. Some of these "disruptive uses" can be quite controversial, pitting the landowner's right to free use of their property directly in conflict with the neighbors' right to the peaceful use and enjoyment of their property.

While it is impossible to for a local government to foresee and address all of these controversies in advance, there are several measures a local government can consider that will minimize problems with unlisted uses.

First, clarity on uses that are not permitted is critical. While an ordinance cannot specifically list all conceivable land uses, it should include as much specificity as is feasible and should have clear general "catchall" categories for unlisted uses.

Second, a local government should periodically update the ordinance to list how the local government intends to address specific controversial or emerging land uses. It is one thing if an ordinance a decade ago had not addressed telecommunication towers, but something altogether different if it still does not do so. Keeping the ordinance clear and current will minimize these difficulties.

Third, the courts clearly favor a provision that unlisted uses should be treated the same as the most nearly similar use as opposed to a blanket prohibition of unlisted uses. This makes attention to the first two points all the more important. But it also means a zoning ordinance should give some definition and guidance to staff as to how to evaluate the similarity of uses to avoid placing an impermissible degree of discretion in the hands of the zoning administrator. It would be helpful for the ordinance to specify the factors to be considered, such as the type, density and intensity of development, environmental effects, and the anticipated amount traffic, noise, light, vibration, odor, and other impacts on neighbors and the community.

Taking these steps will provide clarity for landowners, neighbors, and the staff, which in turn makes for a better, and in these situations, a more legally defensible ordinance.

Links

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