Coates' Canons Blog: Do We Have to Hold Another Hearing on this Zoning Case?

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The city council is holding a public hearing on a petition to rezone a parcel of land that fronts a highway leading into town. The owner has asked that the zoning be changed from a low-density residential district to a highway commercial district. The planning board recommended approval as the town's plan calls for this area to gradually transition to commercial uses. No one appears at the hearing to object. However, a neighbor a hundred feet down the road appears and asks that her lot also be rezoned to highway commercial. One of the council members asks the planning director if it would be a good idea to go ahead and rezone all of the property along this entire stretch of road to highway commercial. The planning director states that it probably will be necessary to rezone all of the property along this portion of the road at some point. The council member notes that such a broader rezoning is consistent with town plans, is noncontroversial, and that doing it now would save everyone time and money. He therefore moves to include all of the property along this portion of the road in the proposed rezoning. There seems to be unanimous council support for the motion. Can the council immediately do this?

No. An additional public hearing is needed to consider the modification to the rezoning proposal. The legislature has long imposed special procedural restrictions on consideration of city and county land use regulations. A city council or board of county commissioners may not adopt, amend, or repeal a zoning ordinance unless these mandatory procedures are followed. The procedures require referral of the matter to the planning board for a recommendation. The governing board must hold a public hearing on the matter and publish notice of that hearing in the local newspaper. With rezoning petitions, notice of the hearing must also be mailed to the neighbors and posted on the site. These procedural limitations are designed to assure that decisions about land use regulations are thoughtfully considered with full public input.

In the example above, we can assume that all of these procedural requirements have been met for the rezoning that was originally proposed. But the example presents the issue of how much that original proposal can be amended in response to comments made at the hearing without triggering the need for an additional hearing (with new hearing notices and referral back to the planning board for an updated recommendation). The governing board can always call for an additional hearing when it deems that would be useful, but when are they required to do so?

A 1971 case provides the basic rule that is to be used in determining when an additional hearing is mandatory. The Charlotte city council was considering rezoning a large tract that was zoned for single-family housing to zoning districts that would allow construction of multifamily housing and a shopping center. The neighbors in the surrounding single-family area objected. The planning board recommended that only part of the property be rezoned. The city council took the neighborhood and planning board concerns into account and rezoned an even smaller portion of the property. The neighbors were not entirely mollified and sued, claiming among other things that the rezoning actually adopted was different from the version advertised for hearing.

In *Heaton v. City of Charlotte*, 277 N.C. 506, 178 S.E.2d 352 (1971), the court set out a general rule — "Ordinarily, if the ordinance or amendment as finally adopted contains alterations substantially different (amounting to a new proposal) from those originally advertised and heard, there must be additional notice and opportunity for additional hearing." The key question is determing modifications to a proposed rezoning become "substantially different." While that determination must be made on a case by case basis, the court offered a few guidelines. "Insubstantial" changes are allowed without a new hearing. Changes that are favorable to complaining parties are also usually not deemed substantial. The city or county has more leeway if the hearing notice specifically says substantial changes may be made in response to comments received. The court said no additional hearings are required if the hearing notice includes that statement and any substantial changes that are made are "of the same fundamental character as contained in the notice, such changes resulting from objections, debate and discussion at the properly noticed initial hearing." In the *Heaton* case the court concluded no additional hearing was required as notice indicated substantial changes might be made, the city council amended the proposal as suggested by comments received at the hearing, and the changes resulted in fewer impacts on the

complaining neighbors.

So does the example above fall within the *Heaton* standard? Probably not. A key difference is that while the potential additional rezoning is of the same character as that originally proposed, it is for a larger area. It is one thing to do less than was advertised, but when the council wants to do more, a new hearing is usually needed. If new land is added to the rezoning, more intensive uses allowed, or substantially less restrictive conditions imposed, a new hearing (with new notice and referral back to the planning board) is almost always needed.

In our example, the council needs to give the owners of property that may be added to the rezoning an opportunity to review the proposal and make comments. They may well have concerns about the appropriate long-term development of their property or the impacts of an immediate rezoing on their property taxes. More neighbors would be affected by a larger rezoning and they may also have concerns that need to be addressed. City staff may have some concerns about supporting infrastructure needs, impacts on traffic and surrounding neighborhoods, or environmental issues. An additional hearing would allow the council to recieve and consider this potentially important new information.

In sum, if there is a real possibility that another hearing would not simply be a rerun of the first hearing, a second hearing is required. When there are different landowners, different neighbors, and potentially additional public impacts involved, a second hearing is required. It is not always easy to determine when a proposal moves beyond minor refinements and modest adjustments to a “substantially different” proposal. This is particularly difficult with the increasingly common situation of modifications to a proposed conditional rezoning. For example, the basic project may be unchanged but the mitigating conditions to be imposed may be modified at the last minute. A prudent city or county errs on the side of caution in close calls. If they are uncertain as to the need for an additional hearing, they hold it to be safe and assure that everyone’s rights are fully protected.