Coates' Canons Blog: Does the County Have to Comply with City Zoning?

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Article: https://canons.sog.unc.edu/does-the-county-have-to-comply-with-city-zoning/

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Ralph Kramden is working his way through the morning paper, waiting for his second cup of coffee to kick in. He suddenly jumps up, knocking his coffee to the floor in the process. “Alice, did you see what those yahoos in the county did last night?” The query is to his wife of forty years, who has just joined him in the kitchen. ”Just look at this,” he shouts. “Those clowns want to build an animal shelter right behind us. They are going to drive me over the edge, Alice. One of these days, I tell you, one of these days. Are you going to let them get away with this? Can’t you do something?”

Alice takes a seat and skims the article that has Ralph so agitated. The article is a report on last night’s meeting of the board of county commissioners. Towards the end of the article is a mention that the county has obtained an option to purchase a vacant lot in town for the purpose of relocating and expanding its county animal shelter. The vacant lot in question just happens to back up to the Kramden property.

Ralph quietly expresses his concerns about the county animal shelter to Alice.

Since Alice is the town’s mayor, Ralph assumes she can do something about the county’s plans. Alice knows that this vacant lot is zoned for single-family residential use under the town zoning ordinance. She is pretty sure animal shelters are not a permitted use in this zoning district. But does the county have to comply with town zoning? She decides to call the town attorney to find out before Ralph breaks another coffee cup.

The town attorney is going to reassure her that the county will have to get town zoning approval before they locate and construct the building housing the new county animal shelter. In North Carolina, a city has to comply with its own zoning when it builds a town hall. A county has to comply with city zoning when it builds a jail or a county office building. A community college or state university must comply with zoning when it adds a new classroom building or dormitory. The state must comply with local zoning when it builds a prison or a NCDOT maintenance garage.

This has been the case at least for the past sixty years. An early North Carolina case, McKinney v. City of High Point, 237 N.C. 66, 74 S.E.2d 440 (1953), held that zoning did not apply to construction of a city water tower. But the North Carolina zoning statutes were amended in 1951 to add an explicit provision that makes local zoning applicable to governmental buildings. G.S. 153A-347 and 160A-392 make city and county zoning regulations applicable to “the erection, construction, and use of buildings by the State of North Carolina and its political subdivisions.” Thus if a building is involved, zoning restrictions apply to land uses owned or operated by cities, counties, and the state. The construction at issue in the McKinney case was underway when this statute was enacted, so the new law was not considered in that case.

We have a number of cases that have arisen when zoning is applied to governmental buildings. For example, county

zoning rules for a state prison were at issue in Carter v. Stanly County, 125 N.C. App. 628, 482 S.E.2d 9, *review denied*, 346 N.C. 276, 487 S.E.2d 540 (1997). In that case the court upheld the adequacy of a published notice of hearing on a zoning text amendment that added "government owned buildings, facilities, and institutions" to a list of permitted uses in the applicable county zoning district. The suit had been brought by neighbors objecting to the subsequent location of a state prison on the site, making the unsuccessful claim that the hearing notice should have specified that prisons were one of the government institutions that could be newly permitted in their neighborhood. Another recent example is McDonald v. City of Concord, 188 N.C. App. 278, 655 S.E.2d 455 (2008), where neighbors challenged a conditional use permit issued by the city to the county for a new government complex that included a sheriff's office, an annex, and a jail.

Since a "building" is required to trigger application of zoning to governmental land uses, an open-air use of land without a building (such as a parking lot) is not be subject to local zoning. In Nash–Rocky Mount Board of Education v. Rocky Mount Board of Adjustment, 169 N.C. App. 587, 610 S.E.2d 255 (2005), the court held that a new parking lot constructed at an existing high school was not subject to city zoning jurisdiction (the new parking lot was needed to accommodate both additional buses to serve the school and to relocate buses previously parked at other schools). The school board secured a driveway and fence permit and then constructed a gravel lot. Adjacent neighbors complained about the lot's noise, dust, traffic congestion, and trash. The city then advised the school board that a special use permit would be required for continued operation of the lot. The city denied the special use permit and the school board appealed. The court held that the parking lot could not be considered a "building" under the statute; thus the city could not require a special use permit to limit use of the parking lot. In 2004 the General Assembly addressed this issue by amending G.S. 160A-392 (but not the comparable county provision) to make municipal zoning applicable to the use of land as well as to the construction and use of buildings. S.L. 2004-199, sec. 41(e). That statutory amendment was short lived. School boards and the University system objected to the amendment and in 2005 the General Assembly repealed the 2004 change so that the statute now again provides that local zoning only applies to the state and local governmental entities when a building is involved. S.L. 2005-280.

When a building is involved, all aspects of that project are subject to zoning, including parking, signage, accessory uses and structures, and landscaping associated with the regulated building. This principle arose in a recent dispute about expansion of the Orange County courthouse and office complex in downtown Hillsborough. The town zoning ordinance required a conditional use permit for a proposed new building in the complex. In order to meet the zoning requirements for parking for the new building, the county agreed as a permit condition to provide a remote park and ride lot. After the building was completed, the county proposed an alternative for meeting its parking needs. The town board of adjustment refused to approve the modification and the zoning staff then issued a notice of violation and denied approval of the **certificate of occupancy**. The county appealed, making the argument that under the Nash-Rocky Mount case rationale, its parking was not subject to town zoning. In Orange County v. Town of Hillsborough, 2012 WL 540076, N.C. App., February 21, 2012, the court of appeals rejected that argument. The court held the town had the authority to apply its zoning to the courthouse addition, including the zoning provisions that mandated adequate parking to support the use of the regulated building. The court did go on to find that the county had presented an acceptable, satisfactory alternate remote parking facility and thus the county had met the zoning permit requirements.

There are a few local laws that change the rules in particular instances. The General Assembly in 2007 amended G.S. 143-345.5 to provide that Raleigh's zoning does not apply to any state-owned building built on state-owned land located within six blocks of the state Capitol without the consent of the Council of State. S.L. 2007-482. On the other hand, in 2005 the General Assembly adopted a law to provide that all docks, buildings, and land under control of the State Ports Authority at Southport are fully subject to municipal zoning jurisdiction. S.L. 2005-305, sec. 11(a),

There is one area where some modest legal uncertainty remains. In Davidson County v. City of High Point, 85 N.C. App. 26, 354 S.E.2d 280, *modified and aff'd*, 321 N.C. 252, 362 S.E.2d 553 (1987), the court of appeals ruled that a sewage treatment plant was not a "building" under G.S. 153A-347 but rather was a "public enterprise" under G.S. 153A-274 and thus was not subject to zoning control. The state supreme court affirmed on different and narrower grounds and expressly refused to address the correctness of this rationale of the court of appeals. Given the express coverage of government buildings in the zoning statutes and the statutory and case law developments of the past twenty-five years, it seems unlikely that a North Carolina court today would find an implied "public enterprise" exemption from zoning, but only litigation or a statutory clarification will resolve the lingering uncertainty on this point.

Ralph should, however, be glad that it is the county rather than the federal government proposing something on the adjacent lot. The land and facilities of the federal government are not subject to local zoning. Under Supremacy Clause,

federal agencies not required to comply with local land use regulations. Federal law encourages the General Services Administration (GSA) to coordinate federal agency land acquisition, use, and disposition with local zoning in urban areas. 40 U.S.C. § 531 (2006). The GSA is directed to carry out its work “to the greatest extent practicable,” consistent with zoning and land use practices. The administrator is directed, “to the extent he determines practicable,” to comply with zoning in the acquisition or change of use of any real property in an urban area. 40 U.S.C. § 533 (2006). But if the federal government concludes it is appropriate to override local zoning, it can do so.

So, in our situation the county should examine the town zoning ordinance carefully before they exercise an option to purchase land in town. Assuming the county will need to construct and use a building for its shelter, town zoning will apply to the county.

Links

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