
Coates' Canons Blog: Does Zoning Have to Provide a Place for Everything?

By David Owens

Article: <https://canons.sog.unc.edu/does-zoning-have-to-provide-a-place-for-everything/>

This entry was posted on May 10, 2010 and is filed under Land Use & Code Enforcement

Folks in the small town of Maycomb are riled up. The state recently funded construction of a new expressway that passes near the town. Most everyone in town likes that, as the new road will cut time off the trip up to Raleigh. What has them riled up is a proposed asphalt plant. A big out-of-town company got the contract for the expressway, along with several other substantial repaving projects in the area. Word has gotten out that they want to build a large new asphalt plant and construction staging yard on a vacant parcel out on the edge of town. The parcel is just outside the city limits, but in the town's extraterritorial planning area and subject to town zoning. The residents of the neighborhoods around this parcel are aghast at the prospect of all the trucks, noise, odors, and commotion associated with such an operation. A large group of these folks showed up at the town council meeting last night, all wearing big buttons saying "NO ASPHALT PLANT." The hastily organized group, Citizens for Preservation of Maycomb, presented a petition to the council requesting that the town amend its zoning ordinance to ban asphalt plants throughout the town and its small extraterritorial area. The petition was signed by nearly 1,500 persons, an impressive number considering that the town only has 6,000 residents. When the petition is presented, the Mayor turns to the staff and asks, "Can we even think about doing this?"

They can.

Many zoning ordinances were drafted with the maxim in mind, "A place for everything and everything in its place." Larger municipalities set aside land that would be available for a full range of expected uses – residential, commercial, industrial, institutional, and so forth. A couple of older zoning cases from other states held that it would be inappropriate to totally exclude an otherwise lawful use from the entire jurisdiction. The notion of some place being available for all lawful uses became part of many folks' understanding of underlying principles of land use law. A place for everything. But is that really legally required?

North Carolina does not have a case that directly addresses this question. We almost did. In a situation not too far off the example above, the Town of Hillsborough amended its ordinances to ban asphalt plants. The **Court of Appeals** proposed a rule that if a jurisdiction applies a total ban on an otherwise lawful use, that should remove the legal presumption of validity for the ordinance and the burden should shift to the town to establish that a legitimate public purpose adequately supports the ban. This case presented some complex legal issues regarding a moratorium, vested rights, and the procedures required by the town's own ordinance to process permit applications. When the case got to the **Supreme Court**, the court decided the case on those other issues and vacated the portion of the Court of Appeals decision that addressed our question. So our courts have not resolved this question.

A variety of land uses do have statutory protection that prevents a total exclusion. In North Carolina the legislature has, for example, prohibited a total exclusion of manufactured housing (codifying the holding of *Town of Conover v. Jolly*, 277 N.C. 439 (1970), a case ruling that the general police power could not be used to ban this use as it was neither a nuisance nor inherently a threat to the public health, safety, or general welfare). Other uses with statutory protection include family care homes in residential districts, facilities with a state ABC license, and bona fide farm uses in county jurisdiction. Federal statutes protect a few uses as well, such as prohibiting a total ban on wireless telecommunication towers. Other uses have constitutional protection. Courts have held, for example, that a total prohibition of non-obscene adult entertainment would violate First Amendment free speech rights. A total exclusion of places of worship would run afoul of First Amendment rights of free exercise of religion, as well as potentially violating federal statutes.



But if the use in question is not protected by a statute or constitution, can it be excluded? There is no North Carolina or federal statute that says every jurisdiction has to make space for an asphalt plant. Starting a new asphalt plant at a specified site is hardly free speech, the exercise of religion, or some other constitutionally protected right.

In these instances courts defer to the legislative judgment of elected policy-making officials. The land use regulatory policy choice of whether and where to allow a particular use is presumed by the courts to be valid unless it is arbitrary and capricious. The courts have, for example, routinely upheld decisions by jurisdictions to completely ban off-premise commercial advertising signs. It is important however to consider context – the type of use involved, the scale of its impacts, the size and character of the regulated area, and so forth. If a small, largely residential town excludes a heavy industrial use because there is just no place in the jurisdiction it can fit without substantial harmful impacts on its neighbors, the decision to exclude such uses would not be an arbitrary policy choice. On the other hand, it may indeed be arbitrary for a large city with substantial industrial areas to totally exclude a particular industrial use. So the answer on whether a total exclusion of a particular use is lawful depends on the context and the need to have a plausible, legitimate land use objective supporting the exclusion.

Total exclusion of a particular land use is a powerful tool that should be applied quite carefully. There is sometimes a temptation to just ban any controversial use. Difficult land uses have always been with us. In the 1950s folks worried about pool halls, bowling alleys, and drive-ins. Today it may be an asphalt plant or an internet sweepstakes gaming room. Before a total ban is adopted, a local government needs to focus on the land use impacts of the use. Those impacts should be identified, alternative measures to prevent those impacts discussed, and the impacts of excluding the use explored. Only then should a potential total ban be considered. If that process of careful consideration is followed, it is likely that in most contexts an appropriately focused exclusion would an option the town could lawfully consider.

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