Coates' Canons Blog: Does the HB2 Repeal Limit Zoning Authority?

By Adam Lovelady

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House Bill 142—the HB2 repeal—includes a provision that prevents local governments from adopting or amending ordinances "regulating public accommodations" until December 2020. Does that mean a local government in North Carolina cannot amend a zoning ordinance relating to restaurants, hotels, or other places of public accommodation? Are property owners required to wait until December 2020 to request and obtain a commercial rezoning?

Very likely no. The language of House Bill 142 and common rules of statutory interpretation indicate that House Bill 142 is limited to matters of bathroom access, private employment practices, and nondiscrimination ordinances. As outlined below, it appears that House Bill 142 does not prevent conventional zoning ordinances or rezoning requests.

The recently enacted House Bill 142 (S.L. 2017-4) followed a year of political debate concerning House Bill 2 (S.L. 2016-3). House Bill 2, the so-called bathroom bill, regulated access to restrooms in government buildings based on biological sex, placed limits on the contracting authority for cities and counties, and established the Equal Access to Public Accommodations Act that preempted local nondiscrimination ordinances in North Carolina.

House Bill 142 repeals House Bill 2 and a related law concerning nondiscrimination litigation (S.L. 2016-99). The new law preempts state and local public agencies from regulating access to multiple occupancy restrooms. My colleague Bob Joyce has written about the provisions concerning restrooms here. Additionally, House Bill 142 declares that until December 2020, no local government "may enact or amend an ordinance regulating private employment practices or regulating public accommodations." My colleague Norma Houston has written about the provision concerning regulation of private employment practices in the context of city and county contracting here.

This blog focuses on that last clause—"regulating public accommodations"—and its relation to local zoning ordinances. To be sure, the new law does prevent North Carolina cities and counties from adopting or amending local ordinances concerning nondiscrimination of access to places of public accommodation. Moreover, a North Carolina local government could not use conventional zoning as a backdoor to impose new or amended non-discrimination standards. Based on the language of the bill and the rules of statutory interpretation, however, there is a strong argument that House Bill 142 does not limit local government authority to engage in land use regulation otherwise authorized under state law.

Deciphering "Public Accommodations"

Under House Bill 142 no local government "may enact or amend an ordinance . . . regulating public accommodations." The law, however, does not offer any definition or qualification of the term "public accommodations."

Black's Law Dictionary (10th ed. 2014) defines "public accommodation" to mean: "A business that provides lodging, food, entertainment, or other services to the public; esp. (as defined by the Civil Rights Act of 1964), one that affects interstate commerce or is supported by state action." Similarly, the North Carolina Persons with Disabilities Protection Act states that a "'[p]lace of public accommodations' includes, but is not limited to, any place, facility, store, other establishment, hotel, or motel, which supplies goods or services on the premises to the public or which solicits or accepts the patronage or trade of any person." N.C.G.S. § 168A-3(8). House Bill 2 used the term "public accommodations" and cross-referenced to that same definition from Chapter 168A.

With these related definitions, House Bill 142 might be read broadly to mean that "[n]o local government in this State may enact or amend an ordinance regulating [*a business that provides lodging, food, entertainment, or other services to the public*]." Since zoning regulates such businesses, perhaps House Bill 142 prohibits local governments from adopting or amending a zoning ordinance regulating commercial land uses. That interpretation would mean that a city or county could

not adopt new limits on short-term vacation rentals or amend standards for retail development. Notably, that interpretation also would mean that a landowner could not obtain from a city or county a rezoning to allow for commercial or mixed-use development because a rezoning is an amendment to a zoning ordinance.

This interpretation would extend beyond mere land use zoning. If local governments cannot adopt or amend any ordinance regulating commercial enterprises that are places of public accommodation, then cities and counties cannot amend the local health code, cannot alter rules for business permitting, nor make any other adjustments to local regulations of commercial enterprises.

Such an interpretation, however, fails to account for the full meaning of "public accommodation," and it runs counter to the rules of statutory interpretation.

In North Carolina and federal statutes, the phrase "public accommodation" is used almost exclusively in laws concerning nondiscrimination. As noted above, "public accommodation" appears in Chapter 168A of the North Carolina General Statutes to protect the rights of persons with disabilities to have access to places of public accommodation such as hotels, restaurants, and retailers. More to the point, House Bill 2 included the term "public accommodations" as it established the Equal Access to Public Accommodations Act (now repealed). That act cross-referenced the definition of "places of public accommodation" in Chapter 168. N.C.G.S. § 143-422.12.

Another state statute uses the term "public accommodation" relating to transportation. In order to qualify for the NC Department of Transportation's Tourist-Oriented Directional Sign Program, among other things a business or facility must comply "with all applicable laws, ordinances, rules, and regulations concerning the provision of *public accommodations* without regard to race, religion, color, age, sex, national origin, disability . . . ." N.C.G.S. § 136-140.16 (emphasis added).

Federal statutes also use and define "public accommodation" with regard to nondiscrimination. The Civil Rights Act of 1964 lists the following establishments, among others, as places of public accommodation: inns, hotels, motels, and establishments providing lodging; restaurants and cafeterias; gas stations; and, theaters, sports arenas, and entertainment venues. 42 U.S.C.A. § 2000a(b). The Americans with Disabilities Act provides a similar list of private entities considered "public accommodations" including hotels, motels, and other places of lodging; restaurants and bars; theaters and other places of public gatherings; grocery stores and shopping centers; amusement parks and places of recreation; and schools and day care centers. 42 U.S.C.A. § 12181.

In these federal and state statutes—and in the cases interpreting them—the phrase "public accommodation" is effectively a term of art used in the context of nondiscrimination laws.

The phrase "public accommodation" is not used in any statutes authorizing land use zoning; indeed, a basic search indicates that "public accommodation" does not appear at all in the North Carolina statutes concerning authority of cities (Chapter 160A) or counties (Chapter 153A).

House Bill 142 plainly does negate the authority of North Carolina local governments to adopt or amend ordinances relating to nondiscrimination in places of public accommodation until 2020. Moreover, it is clear that a city or county cannot use zoning to implement new nondiscrimination policies. So, for example, a city could not use a zoning approval to require a property owner to allow access to restrooms based on gender identity.

Nevertheless, given the subject of House Bill 142 and the common usage of the phrase "public accommodations," one may most reasonably read the new law to have no effect on zoning authority. Of course, places of public accommodation still must comply with the mix of state and federal rules for nondiscrimination, as well as any existing local nondiscrimination ordinances that may apply.

Rules of Statutory Interpretation

To the extent that House Bill 142 is ambiguous, we must rely on rules of statutory interpretation to determine its meaning.

Legislative intent. "The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute. In seeking to discover this intent, the court should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish." Stevenson v. City of Durham, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972); see

also Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980)(citations omitted).

While there is no formal purpose and intent language in House Bill 142, the intent is reflected in the title: "AN ACT TO RESET S.L. 2016-3 [HB2]." In adopting House Bill 142, the General Assembly sought to undo the provisions of House Bill 2 and place a moratorium on certain local government actions related to those provisions. With the focus on House Bill 2, it is helpful to review the intent and provisions of that law. House Bill 2 created new statutes concerning multiple occupancy bathrooms, it amended the Wage and Hour Act relating to local government authority to impose requirements on private employers, and most notably for this discussion, House Bill 2 created Article 49B of the General Statutes, the Equal Access to Public Accommodations Act. That new article, now repealed, identified the state policy to protect the rights of individuals to access goods, services, and places of public accommodation free from discrimination based on certain categories (specifically including "biological sex"). Moreover, the statutory policy explicitly preempted any local ordinance or policy "that regulates or imposes any requirement pertaining to the regulation of discriminatory practices in places of public accommodation." Article 49B stated that "places of public accommodation has the same meaning as defined in G.S. 168A?3(8), but shall exclude any private club or other establishment not, in fact, open to the public."

House Bill 2 used the phrase "public accommodations" because it created a new law concerning Equal Access to Public Accommodations. Now, as House Bill 142 seeks to "RESET S.L. 2016-3 [HB2]," the new law repeals House Bill 2 and prevents local governments from regulating public accommodations until 2020. With regard to "public accommodations," the intent of House Bill 142 appears to be to prevent local ordinances "regulating [discriminatory practices in places of] public accommodations." There is no indication that House Bill 142 was intended to alter basic authority for land use and zoning ordinances.

Avoid absurd or illogical outcomes. "Under the normal rules of statutory construction, the language of a statute will be interpreted to avoid absurd or illogical consequences." Helms v. Powell, 32 N.C. App. 266, 269, 231 S.E.2d 912, 914 (1977). To interpret the House Bill 142 to apply to *any* ordinance concerning commercial enterprises open to the public would result in illogical outcomes. Such an interpretation would mean that property owners cannot obtain a rezoning to a zoning district for commercial land uses for the next four years. No rezonings for grocery stores or fast food restaurants or hotels or movie theaters. No North Carolina city or county could relax the parking requirements for shopping centers nor relax review requirements for mixed-use development.

Given the purpose and intent of House Bill 142, a four-year moratorium on commercial rezonings and amendments to zoning rules for commercial land uses is an illogical outcome.

The specific controls the general. "It is a well established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application." State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969). For nearly a century North Carolina local governments have had authority to regulate land uses through zoning. That authority is clearly and specifically outlined in the North Carolina General Statutes at Article 19 of Chapter 160A (for municipalities) and Article 18 of Chapter 153A (for counties). If House Bill 142 were intended to reduce zoning authority, it is general in nature. House Bill 142 makes no mention of or reference to the specific authority for land use zoning. When general provisions conflict with specific provisions, the specific provision controls, and in this case the specific authorization for zoning controls.

Conclusion

House Bill 142 addresses matters of equal access and nondiscrimination. It repeals House Bill 2, preempts local regulations relating to multiple occupancy restrooms, and places a moratorium on local ordinances regulating private employment practices and regulating public accommodations. On quick reading of that last clause—"regulating public accommodations"—one may think that local governments cannot adopt or amend zoning regulations relating to places of public accommodation. With a closer read, however, it appears unlikely that House Bill 142 affects the authority for conventional zoning ordinances. The purpose and intent of House Bill 142, the common usage of "public accommodations," and the rules of statutory interpretation all point one way: House Bill 142 limits local nondiscrimination ordinances, not local zoning ordinances.

Links

- www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2017&BillID=h142&submitButton=Go
- www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2015E2&BillID=h2&submitButton=Go
- www.ncleg.net/Sessions/2015/Bills/House/PDF/H169v8.pdf