Coates' Canons Blog: Is this letter worth the paper it's printed on?

By David Owens

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You have an official letter from a responsible town official responding to your query about zoning. Can you rely on that letter? What legal effect does it have? Consider this situation.

Hank Flagler is considering a sizable real estate investment. He has long believed his home town would greatly benefit from a resort hotel and golf course complex. Hank has amassed a considerable fortune from his chain of gas stations and convenience stores and is in a financial position to undertake this project. Sensing land prices have bottomed out and an economic recovery is just over the horizon, Hank is poised to start moving on his idea.

A large wooded tract of land along the river on the outskirts of town is on the market. Hank knows the site well, having hiked along the river there as a child and climbing its hills to take in some the area's best vistas. Hank thinks this would make an ideal site for his dream project. But even with the current real estate market, acquisition of this tract is going to cost millions. One of Hank's staff members recently met with the town planning director and was assured that a hotel, condominiums, a golf course, and a small retail complex would be allowed on this site under the current zoning. The staff member got the planning director (who is also the town's official zoning administrator) to put that in writing in a letter to Hank.

Before Hank writes a big check for this land purchase, though, he wants some additional assurance. So he calls in his attorney, Phyllida Erskine-Brown. "Tell me something, Phyl. I have an official letter from the town. The folks in charge of zoning tell me my project is entirely legal. Can I rely on their word? Am I safe to go ahead with this investment, at least from the zoning end of things? Is this letter worth the paper it's printed on?"

Phyllida responds like most good lawyers. "Well," she drawls, "it depends on just what sort of letter we're talking about. I suspect you can rely on this particular letter as an accurate statement of the town's laws. I'll be glad to confirm that for you, but I know the planner and she is very good at her job. I'd be greatly surprised if that letter is not entirely accurate."

"So I'm good to go then?"

"As to accuracy, almost certainly so," Phyl replies. Fortunately for Hank, though, his lawyer knows something about land use law. So Phyllida continues: "Before making out the check, you need to understand that this letter, accurate though it may be, does not in any way lock the town in to the current zoning. This letter doesn't give you any legal assurance that you can build the resort complex you have in mind. The town council could change the zoning before you get through the permitting process. It's unlikely anything will change, but with the size and location of your project, the neighbors just might raise enough ruckus to get it rezoned. Or the rules may require some design limits that would make what you have in mind infeasible. So I strongly advise adding a contingency to your purchase proposal that would allow us to cancel the sale if we can't get the zoning approvals that are going to be necessary to start work on the project."

Hank's lawyer just provided some good advice. The question of the legal implications of an official letter from a local government comes up in several contexts. In one context, a letter may contain a binding interpretation of an ordinance, triggering the time for appeal. In another, it may simply constitute an explanation of the current legal requirements but have no legal effect whatsoever. So the answer as to what legal effect the letter has depends on the context in which it is written.

A letter from the staff advising that a proposed use is consistent with current zoning is sometimes secured by developers in the course of acquiring and financing land purchases. Some local governments offer to provide such letters and charge a fee for them. These letters may be "official" but they are not equivalent to the mandated approval that authorizes a specific development project. These letters may be very useful, but they create no legal zoning rights for the recipient.

These advisory letters should not be confused with a “certificate of zoning compliance” that is sometimes required in the regulatory process.

A recent North Carolina case illustrates this principle. The plaintiffs were interested in developing an automotive sales park. They inquired as to the zoning of the property and received a letter from the town that automobile sales were a permitted use on the property, provided all requisite permits were obtained. The plaintiffs then acquired the property, entered into a contract with an automobile company for a franchise on the site, and began to prepare site plans and applications. After the town approved architectural plans, but prior to town action on a number of other required permits, the town approved a rezoning petition and took no further action on pending applications as the proposed use was no longer permitted in the new zoning district. In *MLC Automotive, LLC v. Town of Southern Pines,* 702 S.E.2d 68 (2010), the court of appeals confirmed that reliance on the existing zoning is not sufficient to establish a vested right. Reliance must be on specific approvals that are required, not a letter from the town staff explaining the existing regulations.

However, in other contexts an official letter from the town about zoning can have important legal consequences and is ignored at the recipient’s peril.

Another recent case illustrates this second type of letter. A land owner in Charlotte challenged the city’s interpretation of height limits and setbacks as applied to a residence being constructed on an adjacent lot. The zoning staff met on site during the construction with representatives of the builder and the neighbor to review the work and discuss how the zoning height limits would be applied. The zoning administrator then mailed a letter to the neighbor’s attorney and the builder stating his interpretation of the height limit and how it applied to this project. The letter concluded that the building would comply with the zoning ordinance. The letter also required a sealed survey be submitted prior to issuance of a certificate of occupancy to confirm final construction compliance with the plans. When that survey came in several months later, after the work was finished, the neighbor appealed the interpretation to the board of adjustment. The Charlotte ordinance required appeals to the board to be made within thirty days of a determination and the board concluded this appeal was not filed within that period. That conclusion was upheld by the court of appeals in *Meier v. City of Charlotte*, 698 S.E.2d 704 (2010). The court held that the letter was made at the request of affected persons, made by the person authorized by the ordinance to make official interpretations, and explained how the ordinance would be interpreted. It included a conclusion that if the project was built in accordance with the plans submitted it would be in compliance with the ordinance. The letter was definitive and authoritative and was thus appealable. Since the appeal was not timely under the ordinance, the board was correct in dismissing the appeal. So the failure of the neighbor to act upon the letter was fatal to his legal right to make an appeal.

One additional cautionary note about a letter of interpretation. To trigger appeal times or other legal rights, the letter must be an official decision that directly affects the legal rights of the party making the appeal. In In re Appeal of the Society for the Preservation of Historic Oakwood 153 N.C. App. 737, 571 S.E.2d 588 (2002), the court held that a memorandum from the zoning administrator to the city attorney’s office interpreting whether a land use was permitted in a particular district cannot be appealed to the board of adjustment. The court concluded that a letter “must have some binding force or effect for there to be a right of appeal. . . . Where the decision has no binding effect, or is not authoritative or a conclusion as to future action, it is merely the view, opinion, or belief of the administrative official.”

So, Hank’s lawyer was right. The legal effect of a letter from the town staff about zoning depends on the nature of the letter. A formal, binding interpretation in the form of a letter that is tied to a required zoning approval has substantial legal consequence. So would a written notice of violation, a permit denial, or similar written decision. On the other hand, a letter explaining the current law that would be applied to an application or offering general advice or information has little legal effect. It would be prudent for a land owner or neighbor who gets a letter from the local government about land use regulations to consider this distinction carefully. If a great deal is riding on the **letter**, it would be a good idea to check in with your land use lawyer pretty quickly to confirm just how much legal value it has.

Note: For a subsequent post on whether a letter from a zoning official is a binding, final determination upon which vested rights could be based, see thispost from May, 2011.

Links

- www.youtube.com/watch?v=4RnjWLVyMps

- canons.sog.unc.edu/?p=4531