
Coates' Canons Blog: Is This Spot Legal?

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At long last Malcolm Tucker had found a spot to locate his nightclub. After several failed attempts to locate his club in town, he decided to move out to the county. He found a vacant lot a couple of miles out of town on a well-travel road. The site was flat, had water and sewer lines across the road, and had plenty of space for his building and parking. The nearby property was mostly fields and woods, with a few houses scattered along the road.

Malcolm's staff advised him that the only problem to overcome before starting construction was getting a rezoning. The site, like all of the property in this part of the county, was zoned RA-40. This county zoning district allows residential development on one-acre lots, but no commercial uses. The county planner had suggested that Tucker seek a rezoning to the county's highway commercial district. That district allows a range of businesses, including a nightclub of the size and scale Tucker had in mind. So Malcolm had been exploring this rezoning idea with his friends on the county board of commissioners. He had chatted with all of the commissioners and each had let him know they would support his rezoning petition.

One of the commissioners, however, made a point in passing that was troubling Malcolm. She mentioned the term "spot zoning" and said something about the county's recently adopted land use plan calling for this area to retain its rural character. But she had told him not to worry as she was on board for his rezoning. But Malcolm was the worrying type. In an abundance of caution, Malcolm calls his lawyer. After laying out the situation, Malcolm asks, "Is this land use plan business going to hold me up? I've gotten commitments from all the commissioners that they'll vote for my rezoning, so I'm feeling pretty good about this one. I don't know what this "spot" business is all about. I don't need some disgruntled neighbor or hotshot lawyer messing me up at the last minute. Just tell me this isn't a problem." Does Malcolm have a problem?

The first thing to determine is whether this is indeed "spot zoning." Spot zoning is the practice of zoning a relatively small area, usually owned by a single person, differently from the surrounding property. In this situation, rezoning Tucker's single parcel for commercial use when all of the nearby property is zoned for low density residential-agricultural use is almost certainly spot zoning.

Spot zoning is not illegal in North Carolina, but if the county wants to do this, the burden is on the county to show that the rezoning is "reasonable." The leading North Carolina case on this point, laid out the following test for reasonableness of spot zoning:

Among the factors . . . are the size of the tract in question; the compatibility of the disputed zoning action with an existing comprehensive zoning plan; the benefits and detriments resulting from the zoning action for the owner of the newly zoned property, his neighbors, and the surrounding community; and the relationship between the uses envisioned under the new zoning and the uses currently present in adjacent tracts.

Chrismon v. Guilford County, 322 N.C. 611, 628, 370 S.E.2d 579, 589 (1988).

The public hearing record and minutes of the board's deliberations should reflect consideration of legitimate factors for differential zoning treatment of the property involved. Does the property have different physical characteristics that make it especially suitable for the proposed zoning, such as peculiar topography or unique access to roads or utilities? How does this fit with any relevant adopted county plans? Would the proposed range of newly permissible development be in harmony with the legitimate expectations of the neighbors? What implications would this have for future development on surrounding parcels? Would it be wise to rezone a larger stretch of the highway? Is there justification for the rezoning

beyond the fact that Malcolm has asked them to do so?

A key factor then in assessing whether the rezoning for Malcolm's nightclub is reasonable is compatibility with the existing comprehensive zoning plan. This involves an inquiry into whether the rezoning fits into a larger context involving rational planning for the community. Whether set forth in a formal comprehensive land use plan or reflected in an overall zoning scheme, zoning regulations must be based on an analysis of the suitability of the land for development (e.g., topography, soil types, wetland locations, and flood areas), the availability of needed services (e.g., water, sewers, roads, and rail lines), and existing and needed land uses. To the extent that a small-area rezoning fits into a logical preexisting plan that is based on this type of analysis, it is much more likely to be upheld if challenged in the courts.

An example of a zoning scheme involving relatively small parcels that was judged acceptable because it fit the context of the land and the surrounding uses is found in *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E.2d 325 (1968). The court there upheld the rezoning of a roughly 60-acre triangle, formed by two major highways, into three zoning districts with decreasing density moving away from the point of the highway intersection. A 27.5-acre parcel at the point of the intersection was zoned commercial, the next 12 acres were zoned for multifamily residential use, and the remainder was zoned for single-family residential use.

Three cases illustrate the growing importance of a formal comprehensive plan and the recommendations of the planning board in spot zoning analysis. These cases may give Malcolm's attorney some cause for concern. In *Mahaffey v. Forsyth County*, 99 N.C. App. 676, 394 S.E.2d 203 (1990), *review denied*, 327 N.C. 636, 399 S.E.2d 327 (1991), a 0.57-acre tract was rezoned from a residential and highway-business district to a general-business district. The comprehensive plan designated the area as "predominantly rural with some subdivisions adjacent to farms." The planning staff and the planning board recommended against the rezoning, but the board of commissioners adopted it. In ruling the action to be illegal spot zoning, the court pointedly noted, "[T]he County Planning Board and Planning Board Staff, made up of professionals who are entrusted with the development of and adherence to the comprehensive plan, recommended denial of the petition." *Id.* at 683, 394 S.E.2d at 207. A similar result was reached in *Covington v. Town of Apex*, 108 N.C. App. 231, 423 S.E.2d 537 (1992), in which the rezoning of a single lot from office and institutional use to conditional use business was held to be impermissible spot zoning. The court concluded that the rezoning contradicted the town's policies on location of industrial uses, as set forth in the comprehensive plan. The court also found minimal benefit to the public and substantial detriment to neighbors. In the third case, *Budd v. Davie County*, 116 N.C. App. 168, 447 S.E.2d 449 (1994), *review denied*, 338 N.C. 524, 453 S.E.2d 174 (1994), the rezoning of a 14-acre site along the Yadkin River, as well as a half-mile-long, 60-foot-wide access way, from residential-agricultural to industrial to accommodate a sand mining operation was invalidated in part because it directly contradicted the previously adopted policies for the area. The zoning ordinance's stated intent for the rural-agricultural district was to maintain a rural development pattern and to exclude commercial and industrial uses. Based on such considerations, the planning board twice recommended denial of the rezoning petition. The court held that the rezoning was in direct contravention of the stated purpose of the comprehensive zoning scheme, and this factored into invalidation of the rezoning.

The county board needs to directly discuss how this rezoning is justified when the county's land use plan call for a different development pattern. The land use plan is not binding and does not prevent the county from approving Tucker's petition (though some counties do amend the plan as well as the zoning ordinance if there would be an inconsistency). But the inconsistency must be acknowledged and discussed. If the county decides to go forward with the rezoning, the board needs to explain why it considers this to be in the public interest, being careful to touch on all of the points mentioned by the court in the *Chrismon* case. Given that the plan calls for a different land use pattern, it will be particularly important for the county to made the case that rezoning Tucker's land is indeed reasonable. And it would probably be prudent to update the plan if they conclude the rezoning should be adopted.