Coates' Canons Blog: Just Say No: The Denial of a Rezoning Petition

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The proposed rezoning makes poor planning sense. The neighbors oppose it. The petitioner is unpopular. So the governing board votes down the proposal. How may the petitioner challenge this action (or lack of action)? If adoption of a zoning amendment is a legislative action, then how can a petitioner challenge the refusal of the governing board to act? Or, alternatively, is a refusal to rezone subject to the same judicial review considerations as a challenge to a zoning amendment actually adopted? The answers to these questions under North Carolina law are just now beginning to emerge.

In a number of states (other than North Carolina) the general rule is that the petitioner whose rezoning petition is denied and who seeks judicial review must bring a declaratory judgment action concerning the preexisting zoning classification that was sought to be changed. In other words the petitioner must demonstrate that the existing zoning is invalid in order to prove that the denial of the proposed zoning is invalid. As practical matter, however, such actions often allow some consideration of the uses that the petitioner could make of the property if it were to be rezoned as proposed. But even if this were the law in North Carolina, few challenges to the denial of a proposed rezoning would ever be brought. Such a challenge would have to be filed within a mere 60 days after the existing zoning was originally adopted.

In North Carolina the validity of a denial of a proposed rezoning may be tested in a declaratory action focusing on the denial itself. This result would appear to favor the disappointed petitioner since the petitioner generally does not need to prove the existing zoning is invalid. But appearances may be deceiving. In Sherrill v. Town of Wrightsville Beach, 81 N.C. App. 369, 344 S.E.2d 357 (1986), the North Carolina Court of Appeals declared that for the court to find in favor of a disappointed petitioner would require the petitioner "to meet an extraordinarily high burden of showing the invalidity of the refusal of the Board to amend the zoning ordinance" and that in order for such a refusal to be constitutionally invalid as a violation of substantive due process, "the governmental body could have had no legitimate reason for its decision."

Without citing *Sherrill* the Court of Appeals in the case of Ashby v. Town of Cary, 161 N.C. app. 499, 588 S.E.2d 572 (2003), concluded that a refusal to rezone, like the adoption of a rezoning, would be upheld so long as the decision was neither arbitrary nor capricious. Furthermore, the court declared that it was not free to substitute its opinion for that of the legislative body so long as there is "some plausible basis" for the conclusions reached by that body and that a reviewing court was not free to "interfere with or control a municipality's zoning power or direct zoning ordinances to be repealed, enacted, or amended."

However, these standards that appear to defer to the judgment of the governing board seemed less obvious in the recent Court of Appeals case of Coucoulas/Knight Properties, LLC v. Town of Hillsborough, __N.C. App. __, 683 S.E.2d 228 (2009). In a 2-1 decision the Court of Appeals dismissed a series of claims by a developer that Hillsborough's refusal to rezone his land to a special Entrance Special Use District violated the owner's constitutional right of equal protection. The owner alleged that the rezoning proposal was turned down despite the fact that other similar development projects involving rezoning to this district had been adopted. But the court pointed out that the owner's project differed in various respects from those for which a rezoning was adopted. The owner also claimed that remarks made by several governing board members in open session showed that they were not impartial and that the board's decision was arbitrary and capricious. The Court of Appeals disagreed, noting that its task was not "to comb through the record for comments reflecting disagreements, mistakes, or misunderstandings."

Hillsborough also was the first appellate rezoning denial case involving the interpretation of G.S. 160A-383. That statute provides in part that "(w)hen adopting or rejecting any zoning amendment, the governing board shall also approve a statement describing whether its action is consistent with an adopted comprehensive plan and any other officially adopted plan that is applicable, and briefly explaining why the board considers the action taken to be reasonable and in the in the public interest." It further provides that such a statement "is not subject to judicial review." The Hillsborough board of

commissioners adopted a consistency statement, which provided that the developer's rezoning request was consistent with its comprehensive plan. The developer argued that adoption of the statement implied that the proposed rezoning could not validly be denied. However, the court rejected the argument, pointing out that there was no evidence that denying the rezoning and maintaining the status quo was necessarily inconsistent with the comprehensive plan either.

So where do we stand? Perhaps a half-dozen North Carolina appellate court cases have involved challenges to the denial of a proposed rezoning. The plaintiffs, typically owners or potential developers of the subject property, have so far lost every case. After all, it is not all that difficult for a local government to find some plausible basis for refusing to rezone. The requirement that a plan-consistency statement must be adopted by the local government to justify the rejection as well as the adoption of a proposed zoning amendment may not be as potent a tool for a disappointed rezoning petitioner as first thought. The Hillsborough case demonstrates that a positive plan-consistency statement for a proposed rezoning may not necessarily require that the proposed rezoning be adopted and need not mean that the denial of a rezoning must be invalidated. Hillsborough is the first indication in North Carolina case law that the existing zoning may be relevant in evaluating the legal defensibility of a decision not to rezone. The case is on appeal to the North Carolina Supreme Court.

One important but unresolved matter is whether a local government may by ordinance establish a process that allows it to halt the rezoning process before the matter ever comes to a governing board vote. For example, may a governing board refuse to schedule a public hearing on a proposal that it believes has no chance of being adopted? Is such a "decision" subject to the same form of judicial review as a zoning amendment defeated in a formal vote? Only future litigation or legislation will tell.