

---

## Coates' Canons Blog: Keep Your Distance: Requirements to Keep Certain Land Uses Apart

By Richard Ducker

Article: <https://canons.sog.unc.edu/keep-your-distance-requirements-to-keep-certain-land-uses-apart/>

This entry was posted on May 01, 2014 and is filed under Administration & Enforcement, General Local Government (Miscellaneous), Land Use & Code Enforcement, Ordinances & Police Powers, Statutory Authority & Construction, Zoning

---

Keep your distance! Robert Frost said that good fences make for good neighbors. Maybe keeping potential neighbors physically apart is an even better way of making for good neighbors. Zoning is based on the idea of separating incompatible uses by including them in different zoning districts, thus indirectly keeping the pig out of the parlor. Use-separation requirements, however, typically ignore zoning district boundaries and try to distance certain potentially detrimental uses from certain protected uses more directly. This blog is about how such use-separation requirements may be used.

Use-separation requirements have a long and colorful history dating back to England in the Middle Ages. Today, such requirements even appear in the North Carolina General Statutes. G.S. § 168-22(a), which applies to the location of family care homes for the care of the handicapped (disabled), provides that a political subdivision may prohibit a family care home from being located within a one-half mile radius of an existing family care home. G.S. § 14-202.11(a), which restricts the location of “adult establishments,” prohibits anyone from permitting “any building, premises, structure, or other facility that contains any adult establishment to contain any other kind of adult establishment.” A third example of a statute separating land uses is the Swine Farm Siting Act. According to G.S. § 106-803(a)(1)-(4), swine houses and lagoons must be located at least 1,500 feet away from an occupied residence; 2,500 feet away from a school, hospital, or church; and 500 feet away from “any property boundary” or “well supplying water to a public water system.”

Despite these statutes, use-separation requirements in North Carolina are most prevalent at the local level. They have served as simple forms of land-use regulation, sometimes predating zoning. In the case of *State v. Moyer*, 200 N.C. 11, 1456 S.E. 130 (1930), the North Carolina Supreme Court upheld an Ahoskie ordinance making it unlawful for anyone to operate a gasoline filling station within 150 feet of the outside boundaries of a school. More recently, in *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002), a federal court upheld as a valid exercise of the county’s general ordinance-making power the Ashe County’s Polluting Industries Development Ordinance. That ordinance prohibited the location of a polluting industry within 1,000 feet of residence or within 1,320 feet of any school, daycare, hospital, or nursing home.

Use-separation requirements come in two general forms.

Requirements of the first type are those that are designed to separate “regulated” uses from “protected” uses. Regulated uses may include higher-impact, potentially nuisance-causing uses, such as sexually oriented businesses, junkyards, group homes, feed-lot operations, telecommunication towers, funeral homes, video sweepstakes operations, certain waste-disposal operations, even outdoor advertising signs. “Protected” uses often include residences, residential districts, churches, parks and playgrounds, public swimming pools, schools, day-care centers, and nursing homes. The justification for separating regulated uses from protected uses is based on the deleterious, detrimental, or blighting effects that the higher-impact, nuisance-like uses can have on residential areas and vulnerable populations gathering in other areas (e.g., school children, nursing patients, park visitors). These justifications are familiar ones in zoning circles and are typically accepted by courts, even when First Amendment issues are involved.

Requirements of the second type are designed to separate one regulated use from another regulated use. The purpose is to prevent the concentration of adult businesses, outdoor advertising signs, family-care homes, or video sweepstakes operations in one area. Presumably, preventing such a concentration of higher-impact, potentially nuisance-causing uses serves to disperse and mitigate the deleterious impacts more widely and to prevent the gradual blighting of surrounding areas. This idea of avoiding undue concentration of uses derives from attempts in the 1960s to control sexually oriented businesses in large cities to avoid the crime and nuisance problems associated with “combat zones” where such businesses tended to cluster. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), the United States Supreme Court held that provisions of the Detroit zoning ordinance prohibiting the location of an adult theater within 1,000 feet of

---

any two other “regulated uses” did not violate the First or Fourteenth Amendment. More recently, in the 2007 case of *Pitt County v. Dejavue, Inc.*, 185 N.C. App. 545, 650 S.E.2d 12 (2007), the North Carolina Court of Appeals upheld Greenville’s prohibition on a sexually oriented business being located within 1,320 feet from another such business.

Use-separation requirements have gotten a favorable treatment from the courts. Nonetheless, planners, attorneys, and elected officials should still be careful when devising and adopting such standards. A few special considerations are listed below.

(1) Note that use-separation requirements can have implications beyond zoning district boundary lines. As a result, one “regulated” use may be treated differently from another “regulated” use in the same zoning district. There is no direct legal precedent for the notion that this violates the so-called uniformity provision of zoning statutes G.S. § 160A-382(c) and G.S. § 153A-342(c), but the argument could still be raised.

(2) Watch out for the anti-competitive effects that use-separation requirements can have. Such requirements can create a geographic monopoly. In other cases they may serve to exclude a regulated use from a jurisdiction entirely, making the justification of the regulation more difficult. This is particularly true if the use enjoys some protection under the First Amendment or a statute, such as certain adult establishments, churches, outdoor advertising signs, and housing for the disabled. In this regard note the case of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), in which the United States Supreme Court upheld the constitutionality of an ordinance that effectively reduced the permissible location of certain adult establishment to a little over 5% of the territorial jurisdiction of the city.

(3) Do not ignore the fact that the legal defensibility of G.S. § 168-22(a) is still uncertain. That statutory authorizes a local government to prohibit a family care home from being located within a one-half mile radius of an existing family care home. In *Oxford House, Inc. v. City of Raleigh*, No. 5:98-CV-113-BO(2), 1999 WL 1940013 (E.D.N.C. Jan. 26, 1999), a federal court upheld the city’s 375-yard minimum separation between “supportive housing residences,” which included facilities serving disabled persons. Wilmington’s half-mile separation distance between family care homes was upheld by a federal court in *Oxford House, Inc. v. City of Wilmington*, No. 7:07-CV-61-F, 2010 WL 4484523 (E.D.N.C. Oct. 28, 2010). However, similar use-separation provisions have been held by courts in some other states to violate federal Fair Housing Act provisions prohibiting discrimination in housing on the basis of disability.

(4) Anticipate measurement problems that can hamper enforcement. Are distances measured in a straight line from one location to another? Or are distances measured along the streets that the land uses abut? Are distances measured from one property line to another? Or are they measured from building to building? How are uses handled in shopping centers and rented spaces. In the 2009 North Carolina Court of Appeals case of *Mangum v. Raleigh Board of Adjustment*, 196 N.C. App. 249, 674 S.E.2d 742 (2009), the court had to determine whether a karate school in a commercial center was a protected use for purposes of locating a proposed adult establishment and whether the distance was measured to the portion of the karate school premises closest to the adult use or to the edge of the entire property of which the karate school was a part.

(5) Make sure that your ordinance does not ignore the nonconformities created by the use-separation requirements. If two regulated uses are nonconforming, do restrictions on expansion or alteration apply to both? In the case of a protected use, may the protected use voluntarily violate the separation requirement that is designed to protect it? If so, how does this action affect the regulatory status of the regulated use? Some local governments apply amortization provisions to preexisting regulated uses that are closer than permitted to protected uses. The Charlotte provisions discussed in the 1998 N.C. Court of Appeals case of *South Blvd. Video & News, Inc. v. Charlotte Zoning Bd. Of Adjustment*, 129 N.C. App. 282, 492 S.E.2d 693 (1998), provided a period of eight years for such nonconforming adult establishments.

(6) Provide special standards for granting a variance from use-separation requirements. The version of the Gastonia ordinance litigated in *321 News 7 Video, Inc. v. City of Gastonia Bd. of Adjustment*, 174 N.C. App. 186, 619 S.E.2d 865 (2005), authorized a variance from a requirement that certain adult establishments be located at least 500 feet away from certain protected uses. According to the ordinance, a variance could be granted if there were a “freeway or Interstate-type highway, traffic circulation patterns, structures, or other natural or man-made geographic or topographic features ... likely to provide an adequate means of protection for the protected zoning or use from any secondary effects of the adult establishment.” Standards such as these can be particularly helpful.

Use-separation requirements are simple, easy to understand, and popular with elected officials. They also seem to be favorably received by our courts. However, administration of the requirements may not be as simple and straight-forward



---

as it appears, and these standards also raise certain unresolved legal questions that await resolution. In any case use-separation requirements can be effective regulatory tools if ordinance provisions are carefully drafted and administered. Only then can governments justify telling the sponsors of certain activities to keep their distance.

## Links

- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=168-22](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=168-22)
- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=14-202.11](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=14-202.11)
- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=106-803](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=106-803)
- [scholar.google.com/scholar\\_case?case=6248443185977603334&q=Tri+County+Paving+,+Inc.+v.+Ashe+County&hl=en&as\\_sdt=6,34&as\\_vis=1](http://scholar.google.com/scholar_case?case=6248443185977603334&q=Tri+County+Paving+,+Inc.+v.+Ashe+County&hl=en&as_sdt=6,34&as_vis=1)
- [caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=427&invol=50](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=427&invol=50)
- [appellate.nccourts.org/opinions/?c=2&pdf=1542](http://appellate.nccourts.org/opinions/?c=2&pdf=1542)
- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160A-382](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160A-382)
- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=153A-342](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=153A-342)
- [caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=475&invol=41](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=475&invol=41)
- [appellate.nccourts.org/opinions/?c=2&pdf=5058](http://appellate.nccourts.org/opinions/?c=2&pdf=5058)
- [appellate.nccourts.org/opinions/?c=2&pdf=14107](http://appellate.nccourts.org/opinions/?c=2&pdf=14107)
- [appellate.nccourts.org/opinions/?c=2&pdf=24849](http://appellate.nccourts.org/opinions/?c=2&pdf=24849)