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Coates' Canons Blog: Quasi-Judicial Zoning Decisions and Property Values: Whose Opinion Counts?

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How many times have you been to a public hearing and heard opponents to a particular zoning proposal say that it will cause the values of their property to decline? The impact on property values is a theme that runs through most zoning decisions. Developers want to create value in their own real property and are wary of property use restrictions that have the opposite result. Owners of neighboring property sometimes benefit from nearby development because a rising tide of property values elsewhere may lift the boats of neighbors as well. Often, however, there is a tendency for neighbors to think that development projects on other people's land will have negative, perhaps unintended, consequences for the use and value of one's own land. But does the opinion of a lay person on such matters count in a quasi-judicial forum? This blog concerns the ability of property owners to offer legally competent opinions about the impact of such zoning decisions on their own property.

Quasi-Judicial, Judicial, and Legislative Hearings

As you might expect, the evidentiary rules concerning these three types of hearings differ. First, there are legislative decisions such as rezoning decisions. These hearings are not evidentiary hearings. Decision-makers are free to take opinions and assertions as well as facts into account. Participants in rezoning hearings are free to offer their personal, non-expert opinions, and the local governing board is under no obligation to adopt findings of fact and conclusions of law to justify their decision.

In contrast, the rules of evidence that apply to state administrative agencies and local zoning boards acting in a quasi-judicial capacity are similar to but generally not always as strict as those that apply in a courtroom. One of the key comparisons concerns the treatment of testimony offered by lay and expert witnesses. To the dismay of some zoning boards of adjustment, governing boards, and planning boards, the relatively strict rules of evidence that apply in court concerning property-value evidence and expert testimony also apply to quasi-judicial zoning decisions.

Competent Evidence

Local boards making quasi-judicial zoning decisions must base their decisions on material, substantial, and competent evidence. Competent evidence is simply evidence that is admissible before the local board or court that is making a zoning decision. Opinion evidence is generally inadmissible when the witness is unqualified to express an opinion because he lacks the necessary experience or factual knowledge to form the proper basis for it. In certain instances lay opinion about property values can qualify as competent evidence, but in many more cases it will not.

Effect of Zoning Restriction upon Value of One's Own Property

Obviously zoning regulations and decisions may affect one's own property. In North Carolina an owner of real property is generally competent to testify as to the value of her own property even though her knowledge on the subject would not qualify her as a witness were she not the owner. For example, in Responsible Citizens v. City of Asheville, 308 N.C. 255, 302 S.E.3d 204 (1983), the North Carolina Supreme Court held that it was an error for the trial court to exclude the testimony of three property owners concerning the damaging effect of a flood hazard ordnance on the value of their respective properties. This rule applies unless it appears that the owner clearly does not know the market value of her own property. An owner is generally expected to know what price the owner paid for the property and the uses to which the property may be put and to have a reasonably good idea of what it is worth. It is understood, of course, that the owner's opinion of the value of her own property may be subject to bias depending on whether it is in her interest to claim

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an appreciated value or depreciated value.

Testifying about the effect of a zoning decision on the value of one's own property is authorized when an owner is challenging the validity of zoning that applies to her own land in court. Moreover, statements by the owner can be competent evidence in a quasi-judicial proceeding such as, for example, one in which the owner has applied for a zoning variance.

However, the ability of a property owner to provide competent evidence about how a development proposal affects the value of other property is far different.

The Effect of a Zoning Decision with Respect to Property A on the Value of Property B

Suppose that the local development ordinance requires that the sponsor of a particular type of development project obtain a special-use permit in order to proceed. One of the ordinance standards requires that in order to qualify for the permit, the applicant must demonstrate that the project as proposed "will not substantially diminish the value of adjoining property." A neighbor, who owns property that adjoins the subject site, wishes to offer his opinion that the project would, in fact, diminish the value of his property by a certain amount. Would the neighbor's testimony qualify as competent evidence? No, not unless the neighbor qualified as an expert for purposes of ascertaining the effect of the project (and the existing zoning) on the neighbor's land. G.S. 160A-393 (k)(3)a. (made applicable to counties by G.S. 153A-349) provides that "competent evidence" is deemed to exclude "the opinion testimony of lay witnesses" as to how the "use of property in a particular way would affect the value of other property." The statute, adopted in 2009, appears to be consistent with prior law.

If lay testimony is not competent evidence, then what sort of expertise is required to qualify as an expert when it comes to estimating future changes in property values? An expert witness must first establish that he is in fact an expert. Then the expert must establish an adequate basis upon which his opinions are provided. Generally an expert witness is one qualified by knowledge, skill, experience, training, or education to provide specialized knowledge to help with the understanding of evidence or the determination of facts. In a court of law whether someone qualifies as an expert is largely a question of fact to be determined by the trial court judge. Whether someone qualifies as an expert in a proceeding before a local quasi-judicial board may be determined by the board acting through its chair. An expert witness does not need to be a specialist, to be engaged in a particular profession, or to be licensed by a North Carolina licensing board. Appraisers, realtors, real estate brokers, and general contractors have all offered expert testimony concerning the impact on other properties of proposed development projects in cases that have reached our appellate courts. But experts from certain professions do not enjoy categorically favored status. In the North Carolina Court of Appeals case of Mann Media, Inc. v. Randolph County Planning Board, the court accepted the testimony of a real estate appraiser as substantial and competent, but rejected the testimony of a realtor and a building contractor who testified for opponents. The appeals court ruled the appraiser's testimony competent "because petitioners' appraiser is a professional appraiser whose skill was acknowledged even by the opponent realtor described above." The North Carolina Supreme Court rejected this reasoning, ruling that the appraiser failed to conduct the analysis necessary to support his opinions; therefore his evidence was not competent.

Substantial Evidence Based on Adequate Analysis

In a remarkable number of North Carolina appellate court cases involving local quasi-judicial zoning decisions the issue has not been whether a particular individual was qualified to provide an expert opinion. Instead the issue has concerned whether the expert witness had conducted adequate studies and analysis to establish the basis for his opinion and whether they proved or disproved the ordinance standard concerning property values. In Mann Media none of the experts addressed the impact of a proposed telecommunication tower on "the value of adjoining or abutting property" as required by the ordinance because they failed to review any actual comparable property sales in that area. In Sun Suites Holdings, LLC v. Board of Aldermen of Garner, two witnesses failed to present "any factual data or background, such as certified appraisals or market studies, supporting their naked opinions." In yet another North Carolina Court of Appeals case, Humane Society of Moore County, Inc. v. Town of Southern Pines, an appraiser retained by opponents undertook seven case studies and surveys to try to isolate the impact of a proposed animal training facility/shelter on the values of abutting and adjoining property; all were found by the court to be immaterial or insubstantial. Finally, in Weaverville Partners, LLC v. Town of Weaverville Board of Adjustment, an ordinance standard for a special-use permit for multi-family residential complexes required that property values in the "neighborhood" not be "substantially diminished." The Court of Appeals

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held that a realtor's study of single-family residential values near existing multi-family projects failed to demonstrate that the values were substantially diminished by their close proximity to existing complexes.

Certain conclusions seem clear. Ordinance standards requiring proof that a project will not substantially diminish the value of adjacent or adjoining properties are more demanding than many planners and attorneys seem to assume. It is also possible that the time and effort required to establish an adequate analytical basis for expert testimony in this arena may be more costly than many have thought. Finally, many North Carolina zoning ordinances that use the "no-substantial-diminution-in-the-value-of-adjoining properties" standard for special-use permits put the initial burden of proof on the applicant. If the applicant fails to provide substantial, material, and competent evidence addressing the "no-substantial-diminution" standard, thus initially establishing a prima-facie case, then the zoning board must deny the permit. That is true regardless of whether opponents present any evidence on point or not.

It is ironic that neighborhood groups and those who advocate for third-party intervention in zoning disputes have tended to view the prohibition in G.S. 160A-393(k) a. on certain kinds of lay testimony as a substantial obstacle to their efforts. Given the apparent difficulty that real estate professionals have in conducting the proper analytical studies that can serve as bases for their expert opinions, those lay persons who might be emboldened to try their hand at estimating the impact of someone else's development project on the value of their own property may not realize how fortunate they are that G.S. 160A-393(k) a. discourages them from trying.

So, yes, the way many zoning ordinances are worded, it is the opinions of experts that really count in typical quasi-judicial zoning hearings. If this is to change, either the standards governing special-use permits need to be rewritten or development project opponents need to become adept at pointing out the flaws in the expert opinions of others.

Links

- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-393
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153A-349
- appellate.nccourts.org/opinions/?c=2&pdf=MjAwMS85OS0xNDc4LTEucGRm
- appellate.nccourts.org/opinions/?c=1&pdf=MjAwMi8xMTZBMDEtMS5wZGY=
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- appellate.nccourts.org/opinions/?c=2&pdf=MjAwOC8wNy0xODUtMS5wZGY=

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