
Coates' Canons Blog: Singled Out. A Problem in Enforcement?

By David Owens

Article: <https://canons.sog.unc.edu/singled-out-a-problem-in-enforcement/>

This entry was posted on April 13, 2010 and is filed under Land Use & Code Enforcement

The city has just issued you a notice of zoning violation. Other folks are doing the same thing you are and none of them have been cited. You believe the citation was prompted by the personal animosity of a city official rather than a concern about protecting the neighborhood or community. If your suspicions are right and you have been singled out for an enforcement action, is that a defense to the city's action?

Consider this scenario. Brigid O'Shaughnessy operates a single-chair beauty shop in the garage behind her house. It is well known in the community that a dozen or so of these informal beauty shops are operated in various residential neighborhoods around town. Kasper Gutman, who lives down the block from Brigid, has been on the town council for a decade. In the last municipal election, Brigid supported Kasper's opponent. Relations between Brigid and Kasper, once cordial, cooled considerably.

The week after Kasper was narrowly reelected, a city zoning inspector knocked on Brigid's door and told her an anonymous complaint had been made that she was operating a business in her garage, something not allowed in that zoning district. After she showed the inspector the beauty shop, he wrote a notice of violation and ordered the shop shut down immediately.

After learning how much it would cost to move her shop downtown, Brigid went to see Kasper. "You sent the zoning police to my house, didn't you?" "Well," Kasper replied, "sometimes you reap what you sow." His indirect admission infuriated Brigid. "I've had this shop for years and nobody ever complained. Your wife used to come. She has hair done over at Effie's house now — a shop just like mine. This is not about my shop. It's all about the election isn't it?" Kasper just smiled. "I do like a feisty lady. I do indeed. But maybe you'll show a little more respect in the next election."

Assume everything Brigid says is true. She has operated her shop without incident for years. There are a number of other operations like hers around town. All are in violation of the zoning ordinance, but she is the **only one** who has been cited and ordered to shut down. The city inspection was triggered by the personal animosity of a neighbor. Is any of this a legal defense for her in the zoning enforcement action?

Probably not. The decision on whether to initiate an enforcement action is left to the discretion and judgment of the zoning administrator. Each step that follows in the enforcement process — from notice of violation to seeking a court injunction to compel compliance — requires the local government to exercise discretion in determining what action to take. Only a flagrant abuse of that discretion provides any relief for those accused of a violation.

The fact that a similar violation by someone else has not been prosecuted is not a valid defense. In *City of Gastonia v. Parrish*, 271 N.C. 527, 157 S.E.2d 154 (1967), the court held that an allegation of unequal enforcement of the zoning ordinance is no defense to an illegal act (an illegal junkyard in a residential district in that case). Laxity of prior enforcement against others does not in and of itself establish a defense. So the fact that there are other illegal beauty shops in town does not help Brigid. Similarly, the fact that her illegal shop has been in place a long time without complaints being made does not make her current situation any less a violation (and what distinguishes a long-term violation from a lawful "nonconformity" is a post for another day).

Selective enforcement can be a valid defense in extreme instances. In *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 358 S.E.2d 372 (1987), the court held that to show impermissible selective enforcement, a party must establish a pattern of conscious discrimination rather than laxity of enforcement. *Brown v. City of Greensboro*, 137 N.C. App. 164, 528 S.E.2d 588 (2000), is illustrative of the difficulty in showing this type of discrimination. The plaintiff alleged unlawful



discrimination by the city in its enforcement of off-street parking regulations for her hair salon. The court upheld a dismissal of the claim, noting that a party alleging unlawful selective enforcement must establish a pattern of conscious and intentional discrimination done with “an evil eye and an unequal hand.” This threshold for showing impermissible unjust discrimination was first set out by a U.S. Supreme Court decision, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In *Yick Wo* the Court invalidated a San Francisco ordinance that on its face appeared to be even-handed but that was applied in a way that effectively barred Chinese-owned laundries.

Allegations of unfair enforcement against a single person can be challenged on equal protection grounds, but this likewise requires particularly egregious conduct by the local government for such a claim to be successful. *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). A plaintiff must show differential treatment from other similarly situated persons and intentional or purposeful discrimination. Examples of this type of willful misconduct include situations where an inspection officer deliberately provides fraudulent information for purposes of personal gain, where a town uses zoning inspections to constantly harass a citizen who has been engaged in other disputes with the town, or there is a clear pattern of citing members of a religious or ethnic minority for violations while ignoring the same violation by others.

In our example, it is hardly a model of good government if Kasper called in a zoning complaint as an act of political revenge. But petty politics and a personal vendetta as the basis for a single complaint is not a pattern of conscious and intentional discrimination by the town that would get Brigid off the zoning enforcement hook.

The example does, however, point to a larger issue the town should carefully consider. If town officials believe there is nothing wrong with having a small beauty shop in the backyard in residential areas, the town should amend its zoning code to allow that use (with whatever limitations and safeguards the town deems appropriate). On the other hand, if town officials think the prohibition of beauty shops in residential neighborhoods is appropriate, they should enforce the prohibition even-handedly. Only enforcing the zoning regulations when there is a complaint, which is a common practice, can produce the unfortunate (but not illegal) circumstances that befell Brigid.

Links

- www.youtube.com/watch?v=QT-JUj-0bg8