Coates' Canons Blog: Stay What? Placing Development on Hold While Appeals Are Pending

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Controversy regarding a new house in a Raleigh historic district has garnered national and even international attention. Work on the house came to an abrupt halt when permits for it were revoked. A key element of the controversy – sparking outrage from the casual observer — is the fairness of having work on a nearly complete house halted. A number of press reports characterized this as the board of adjustment (BOA) yanking the proverbial regulatory rug from underneath the owner.

The substantive question of whether this particular house design is appropriate for the site and procedural issues about the BOA review are now before the courts. But what about the fairness of halting work so late in the construction process, after so much money has been sunk into the house?

Should construction on the house have been stopped immediately upon the appeal being filed? Is the choice left to the owner to proceed after an appeal has been made? Do the neighbors or the city have a role in making that choice? Who bears the risks and costs of proceeding or halting development? In short, how and when is development work or enforcement put on hold pending an appeal?

Action to carry out a regulatory decision can be put on hold pending review of that decision. In legal terms, a “stay” freezes or puts judicial or governmental action on hold and an injunction is a court order that “enjoins” or requires a party to take or to refrain from taking specified action. For example, work that has been cited as a violation could continue if the enforcement order is challenged and enforcement of the order is stayed. Or work authorized by a challenged permit could be halted by an injunction prohibiting development while the appeal is pending.

In some instances the law provides for an automatic stay. In most instances, however, the law is silent, and there is no stay unless one of the parties actively seeks it.

The Raleigh Controversy

Oakwood is a neighborhood of predominately Nineteenth and early-Twentieth Century homes near downtown Raleigh (click **here** for more on the neighborhood). In 1974 it became one of the state’s first designated historic districts. The landmark case upholding use of historic districts in North Carolina involved denial of permission to build an office building in the neighborhood on a site across the street from the Governor’s Mansion. A-S-P Associates v. City of Raleigh, 298 N.C. 207 (1979). See this **post** from Adam Lovelady and this **post** from Rich Ducker for the basics on historic preservation commissions in North Carolina.

An application was made in late August, 2013 for approval of a new two-story home on a vacant lot in the Oakwood historic district. In September the **Raleigh Historic Development Commission** issued a “certificate of appropriateness” for the contemporary design of the proposed residence. Neighbors who had vigorously opposed the modernist design during the commission’s review immediately gave notice of intent to appeal. In late October the owners (Raleigh architects) secured the required building permits and began site work. Two weeks later the neighbors formally appealed the historic commission’s decision to the BOA. The owner continued work on the house while the appeal was pending. In February, 2014, after hearings in December and January, the BOA voted to reverse the historic commission decision and revoke approval of the house’s design. When the board’s decision became effective in March, 2014, the exterior of the house was nearing completion (see photo). Construction on the home was ordered to stop. The owner has since been allowed to close in the house, but final construction work is on hold while judicial review of the BOA decision is underway.

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In this case, the persons making the appeal to the BOA did not seek a stay or injunction to halt work. Since the owners had a building permit, they could legally proceed with construction. Unfortunately, according to news reports, the owners did not have an attorney and did not learn until the BOA's initial hearing in December that they were proceeding at their own risk. At that point the foundation had been poured, so the owners elected to proceed. The result is the current litigation and controversy, sparking both vigorous defense of the proposed house (an example **here** from the N.C. Modernist Houses web site) and opposing it (an example **here** from the Oak City Preservation Alliance web site).

Appeals of Enforcement Orders

There is one situation in North Carolina zoning law where the law provides for an automatic stay. G.S. 160A-388(b1)(6) provides that an appeal of a notice of violation or other enforcement order to the BOA stays enforcement actions. The city or county is not allowed to act on an alleged violation while the appeal is pending.

There is an exception to the automatic stay of enforcement if the official who issued the enforcement order certifies to the BOA either: (1) that a stay would cause imminent peril to life or property; or (2) that the violation charged is transitory in nature and a stay would seriously interfere with enforcement. If one of those certifications is submitted, there is no stay of enforcement unless a court issues a restraining order.

In the event enforcement is not stayed due to one of these two circumstances, the person appealing can request an expedited hearing before the BOA, which then triggers a requirement that the board meet to hear the appeal within 15 days of the request being made.

Appeals of Interpretations to the BOA

Other than enforcement actions, there is no automatic stay when appeals are made to the BOA. The zoning and other development regulation statutes simply do not address the question of stays pending appeals and in the absence of requiring a stay, none is automatically applied.

G.S. 160A-388(b1)(6) (applicable to cities and counties) does provide that appeal of a decision granting a permit or otherwise affirming that a proposed land use is consistent with the ordinance does not stay the further review of applications for permits or permissions to use the property. Upon request, the BOA is authorized in these situations to grant a stay of a final decision on pending permit applications or building permits affected by the issue being appealed.

In the Raleigh historic district appeal described above there was no enforcement action, so there was no automatic stay. Rather there was a decision to issue a certificate of appropriateness, which is analogous in this context to a staff determination that the use is permitted. The analogy is not exact, since the historic commission decision was a quasi-judicial decision by a board rather than a ministerial decision by the staff. But G.S. 160A-400.9(e) creates a unique situation by requiring an appeal of a historic commission decision on a certificate of appropriateness to go the BOA prior to seeking judicial review. In terms of the timing of the BOA role, this effectively makes the appeal of a historic district commission decision similar to an appeal of a staff interpretation (although the board applies a different standard of review in this peculiar situation – a review in the nature of certiorari rather than a de novo review).

Once a person appeals an interpretation to the BOA, the parties have notice that the original decision may be invalidated

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on review, but permittees are free to proceed at their own risk with the project unless an injunction or stay is issued. Further, in these situations the BOA only has authority to stay final decisions on pending permits. In order to put a hold on work that has received all necessary building permits, a party would need to go to court and seek an injunction to halt work while the appeal to the BOA is pending.

If there is no injunction and substantial work proceeds while the appeal is pending, does that create any vested rights? No. If the development approval is subsequently revoked, none of the work done creates any statutory or common law vested rights. That is true whether the original decision is reversed by the BOA or later by the courts. A person who proceeds while an approval is being contested is doing so at their own financial and legal risk. Godfrey v. Zoning Board of Adjustment, 317 N.C. 51, 64 n. 2, 344 S.E.2d 272, 280 n. 2 (1986). The fact that opponents could have sought an injunction to halt the work and did not do so is legally irrelevant. Id. at 65-68, 344 S.E.2d at 281-82.

Appeals to Court

There is likewise no automatic stay during judicial review of a BOA decision (or during the judicial review of any other land use decision, such as an appeal of a special or conditional use permit decision or a challenge to a legislative decision such as a rezoning).

After the BOA decides a case, a party may appeal that decision to superior court. G.S. 160A-393 does not, however, provide for any automatic stays during judicial review. A party desiring to preserve the status quo during the pendency of litigation must seek a judicial order to enjoin action during this period. It is within the discretion of the superior court whether to issue an injunction to maintain the status quo if so requested.

If appellate judicial review of the superior court decision is sought, there is an automatic stay of the trial court's order, but only until the expiration of time for giving notice of appeal. Rule 62 of the N.C. Rules of Civil Procedure. To extend the stay, a party must seek an appropriate judicial order.

Conclusion

When decisions regarding development regulations are appealed, the only automatic stay is of governmental enforcement actions pending BOA reviews. Otherwise the burden is on one of the parties to seek an order from the board or the courts to stay or enjoin action pending review. The law presumes that it is not fair to halt approved work automatically during the time it takes for a BOA (and perhaps the courts after that) to decide an appeal, but allows a court to preserve the status quo on a case by case basis if a party requests it.

If no stay or injunction is sought, the parties proceed at their own risk while the appeal is pending. When a party takes that risk and the initial decision is reversed on appeal, the impacts can be severe. It can result in a court order to modify or remove what is later determined to be impermissible development.

Neighbors are sometimes surprised that work can continue after their appeal is filed. Owners are sometimes surprised that work can be halted at very late stages if they lose on appeal. This is one more reason that all of the parties to an appeal before the BOA need good advice about the legal implications and consequences of these proceedings.

Since many owners and neighbors are not represented by counsel at this point, local governments should clearly inform all parties to an appeal what is and is not put on hold while the appeal is pending. Basic information on how to request a stay or injunction, who can do so, and the risks involved in moving forward would also be very helpful. Providing that basic information allows all who are involved – applicants, permittees, and neighbors alike – to make informed choices in a timely fashion. The surprises that otherwise arise on occasion are often not happy ones.

Links

- www.historicoakwood.org/

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- canons.sog.unc.edu/?p=7335
- canons.sog.unc.edu/?p=2659
- www.raleighnc.gov/business/content/BoardsCommissions/Articles/RaleighHistoricCommission.html
- canons.sog.unc.edu/stay-what-placing-development-on-hold-while-appeals-are-pending/oakwood-cherry-cherry-6/
- www.ncmodernist.org/2014oakwood.htm
- www.oakcitypa.org/historic-oakwood/

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