Coates' Canons Blog: This Letter Deserves More Attention

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You are interested in starting a new land use on some property you own. Since you are not sure if the zoning allows that use, you ask the town zoning administrator if it would be permitted. You get a letter telling you it is. How much can you rely on the letter? Is the town bound by the letter?

A few months back we looked at **the legal effect of two types of zoning letters**. The first type of letter – general advice on the current zoning requirements applicable to a parcel – is not binding and has little legal significance. The second type – an authoritative interpretation with binding force – has major legal significance. How do we figure out which category a particular letter falls in? When is a zoning letter "advice" and when is it a "decision"? A recent case addressing a dispute over the location of an asphalt plant near Zebulon gives some important new guidance.

The S. T. Wooten Corp. operated a concrete plant on a 63-acre parcel in Zebulon's extraterritorial jurisdiction. The company wanted to add an asphalt plant at this site. The land was zoned "Heavy Industry," but the list of permitted uses for the district did not mention asphalt plants. So the company requested a zoning determination letter. The zoning administrator replied with a letter stating that since the ordinance permitted "clay, stone, concrete and cement processing and sale," an asphalt plant fell within that description or was similar enough to be grouped with them. He thus determined that an asphalt plant was a permitted use at this site. After securing air quality, driveway, and sedimentation permits and a building permit, the company operated a portable asphalt plant on the site. Eight years after getting its initial zoning determination, the company notified the town that it intended to place a permanent asphalt plant on the site. The town sent the company a second letter. This time the new zoning administrator advised the company that an asphalt plant was not specifically listed as a permitted use and that since it would have similar but greater impacts than those uses that were listed, it would require a special use permit from the town board. Did the company now have to apply for a special use permit? Was the town bound by its first letter?

In *S. T. Wooten Corp. v. Board of Adjustment*, 2011 WL 1344129 (April 5, 2011), the North Carolina Court of Appeals held that the first letter was binding on the town. The court initially designated this as an "unpublished" opinion, which settles the dispute between the parties but does not serve as legal precedent. Given the importance of guidance to local governments and land owners on this question, however, the court recently granted a request to publish the opinion.

In its decision the court acknowledged the two types of letters and their differing legal impacts. The court then laid out the factors that must be considered in determining into which category a particular letter will fall. It held that Zebulon's initial letter on the asphalt plant fell into the binding category for four reasons. First, as is true for almost all zoning ordinances, the ordinance specially authorized the zoning administrator to make interpretations of the ordinance. The letter in this instance was from the person duly authorized to make a formal interpretation. Second, the letter addressed a specific question of interpretation, whether a specified use was allowed as a permitted use on a particular parcel. The letter included a clear interpretation that an asphalt plant was a permitted use in this particular zoning district. Third, the fact that the letter included superfluous advice (that a site plan and building permit would be required prior to construction) did not render the interpretation any less binding on the question of whether the proposed use was permitted or not. Since the letter included an unequivocal zoning interpretation, it was a lawful and binding determination on that issue. Fourth, again as is true for almost all zoning ordinances, the ordinance specified an explicit route of appeal from determinations by the zoning administrator. It provided that appeals of the administrator's determinations go to the board of adjustment and further specified that appeals to that board must be made within 30 days of the date of the decision – and here the town had not appealed the initial interpretation. Given these four points, the court held that the town's first determination that the asphalt plant was a permitted use was binding and that it precluded the town from latter making the different interpretation that a special use permit was required.

What are the implications of this decision?

One is that zoning administrators must be aware of the different legal consequences that flow from sending a letter with general advice as distinguished from a formal determination. The administrator should consider the points noted above in making this distinction. It would then be wise to explicitly state in the letter which category the letter is intended to fall. While professionals in the land use business may know the difference between a nonbinding "zoning verification" letter (such as one merely stating what the current zoning of a parcel is and verifying the list of permitted uses) and a binding "zoning determination" letter (such as Zebulon's asphalt plant letter), many citizens would not recognize the distinction. A little explanation, in plain English, would be a good addition to these letters. So would a clear statement on how and when the decision can be appealed in those letters that are intended to be binding interpretations.

A second implication is that a more considered process is warranted when making formal interpretations and determinations. Among the process issues a local government should consider:

1. When drafting formal interpretations, it is prudent for the administrator to seek the input of other professionals within the jurisdiction, particularly getting advice from the city or county attorney. In some cases it may be useful to solicit input from others who would be directly affected. But it is important to remember that interpretation of the ordinance is a duty that is assigned to the zoning administrator, so that is the person who must make the decision.

2. Notice of the decision should be promptly provided to all persons who are directly affected by the decision. Since any appeal to the board of adjustment must be made within a reasonable time (and many ordinances specify a fairly brief time such as the 30 day period in the Zebulon ordinance), it is important to let those with appeal rights know of the decision and when the clock for appeals has started to run. Remember that both the neighbors who are directly affected and the local government have rights of appeal. So some system of providing prompt notice of formal zoning determinations to the petitioner, the neighbors, the city or county manager, and the governing board should be in place.

3. Since binding interpretations and determinations have long-term effect, a system of logging, tracking, and maintaining them must be in place. Future staff members and the public need to know what determinations have been made. Some local governments add interpretative annotations to the code, while others have more informal record-keeping. Whatever system is used, it clearly needs to be more systematic and formal than relying on the memory of zoning administrators that it is "somewhere in the files."

The *Wooten* case reminds us that zoning is indeed serious business and decisions can have lasting consequences. Zoning administrators must continue to make prompt, informal responses to queries about the ordinance. But when issuing **letters** that make a formal interpretation that has binding effect on land owners, neighbors, and local governments alike, it is increasingly important to treat that as the serious legal business that it is.

Links

- canons.sog.unc.edu/?p=3928
- www.youtube.com/watch?v=KseUrBSRBDA