Coates' Canons Blog: Tick Tock! The Clock Is Now Running for Zoning Enforcement

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Jimmy lives on a large lot in a residential area of town. Back in January 2013, he started a small auto repair shop in the garage behind his house. You can hardly see the shop from the road because of the house and topography, but Jimmy did post a small sign near his mailbox to direct folks around to "Jimmy's Auto Repair." The town's zoning enforcement officer saw the sign in September 2013. The zoning ordinance prohibits auto repair in residential districts, so the officer sent a letter to seek compliance. Because of limited staff, many other zoning matters, and the lack of complaints about Jimmy's operation, the zoning officer has not pursued enforcement any further. This year a new neighbor moved in next door, saw and heard the auto repair shop, and called the town to complain. Can the town now enforce the zoning ordinance against Jimmy's commercial business in this residential area? The law on this is changing.

A new law sets specific statutes of limitation for land use enforcement litigation. This blog explores the new limitations and practical considerations for moving forward. The new law may spark local governments to initiate additional zoning enforcement actions over the next year (in anticipation of the law's 2018 effective date) and to take a more proactive stance on zoning enforcement generally.

Land Use Enforcement

A land use violation can take many different forms. It could be a business operation in a residential district, a building too close to the property line, or the failure to maintain a vegetative buffer. A zoning violation could take the form of commercial trucks parked at a residence, the disregard of a special use permit condition about hours of operation, or an unpermitted adult business. Some land use violations are quickly and easily resolved, but other violations involve greater cost and permanence. The commercial trucks can be driven elsewhere easily, but moving a building is not so easy. The ease of movement also invites intermittent violation. The owner might move the commercial trucks this month, but bring them back again next month.

Local governments have several options for enforcing land use ordinances. G.S. 160A-365 and 153A-324 authorize cities and counties to use the general ordinance enforcement tools in order to enforce land use ordinances. Those general tools include informal notifications, formal notices of violation, civil penalties, fines, criminal prosecution, court-ordered injunctions and abatement, and court-ordered equitable remedies. A local ordinance may treat each day's continuing violation as a separate and distinct offense. Some communities withhold building permits to ensure compliance with zoning and other development regulations on a property under G.S. 160A-417(e) and 153A-357(f).

Given limited budgets and capacity, many local governments have traditionally enforced land use ordinances on a complaint basis. Some communities, though, have a procedure for routine field inspections for zoning violations.

Prior Time Limits

There are time limits for when an individual may challenge to a zoning decision. An individual has thirty days to appeal a staff decision or a quasi-judicial decision like a variance. If a property owner is challenging the validity of a rezoning, she or he has two months. In order to challenge the validity of the ordinance an individual has one year.

Up to now, however, there has not been a specific time limit on when a local government may bring a zoning action against a violator. There was not a statute of limitations to bar zoning enforcement. Moreover, North Carolina courts have held that the defense of estoppel generally does not protect against zoning enforcement. "A city cannot be estopped to enforce a zoning ordinance against a violator due to the conduct of a zoning official in encouraging or permitting the violation." City of Winston-Salem v. Hoots Concrete Co., 47 N.C. App. 405, 414, 267 S.E.2d 569, 575 (1980) (citing Helms v. Charlotte

, 255 N.C. 647, 122 S.E.2d 817 (1961); Raleigh v. Fisher, 232 N.C. 629, 61 S.E.2d 897 (1950)). The notion has been that zoning is an exercise of the police power of the state, and a citizen cannot "acquire immunity to the law of his country by habitually violating such law with the consent of unfaithful public officials charged with the duty of enforcing it." City of Raleigh v. Fisher, 232 N.C. 629, 635, 61 S.E.2d 897, 902 (1950).

That is not to say there has been no limit to zoning enforcement. Generally, the common law doctrine of laches prevents legal action when so much time has passed that the condition of the property or the relation of the parties has so changed that it would be unjust to allow the action to go forward. North Carolina courts have applied the doctrine of laches to protect a property owner from zoning enforcement when (i) the local government made affirmative assurances about the zoning regulations; (ii) the individual substantially relied upon those assurances (to their detriment); and (iii) there was considerable delay by the local government in bringing an enforcement action after the government learned of the violation. Abernethy v. Town of Boone Bd. of Adjustment, 109 N.C. App. 459, 427 S.E.2d 875 (1993); Town of Cameron v. Woodell, 150 N.C. App. 174, 563 S.E.2d 198 (2002).

Additionally, in 2013 new language was added to G.S. 160A-364.1 and 153A-348 that limits zoning enforcement related to nonconforming uses. Under that statute of limitations, if a use is grandfathered as a nonconforming use and then that grandfather status is terminated for some reason, then the local government must bring zoning enforcement within 10 years of the date of termination of the grandfather status.

New Limits

S.L. 2017-10 (SB 131) amends N.C.G.S. 1-51 and 1-49 to establish specific statutes of limitation for actions "[a]gainst the owner of an interest in real property by a unit of local government for a violation of a land-use statute, ordinance, or permit or any other official action concerning land use carrying the effect of law." Importantly, the time limit is a deadline for bringing a lawsuit in court, not necessarily a limit no administrative enforcement actions. The limitation is either five years or seven years depending on the facts known by the local government and the visibility of the violation.

The new limits on court-ordered enforcement do not apply when a dangerous condition exists. Under the new statutes, even if the statute of limitations has run, a local government may still seek a court-ordered injunction "for conditions that are actually injurious or dangerous to the public health or safety."

For other violations, though, the clock for enforcement is ticking. If the local government knew—directly through personnel or indirectly through public records—about the violation, the time limit for filing a court action is five years. The clock for legal action starts running on the earlier of the following:

- "The facts constituting the violation are known to the governing body, an agent, or an employee of the unit of local government."
- "The violation can be determined from the public record of the unit of local government."

If the violation is unknown to the local government, but it is visible to the public, then the time limit for filing a court action is seven years. In these cases, the clock for legal action starts running on the earlier of the following:

- "The violation is apparent from a public right-of-way."
- "The violation is in plain view from a place to which the public is invited."

The notion behind these limits is this: If a zoning violation has existed for some time, and the local government has known about it (or should have known about it) but taken no action for years, then the local government should be prevented from enforcing against that violation. This is akin to the doctrine of laches, but notably that common law rule requires some affirmative approval from the local government in addition to the other elements. While the notion of the new limits may be fair, the language of the statutes and practical considerations raise questions about the precise scope and impact of this new law.

Triggers to start the clock

As outlined above, the statute lists four triggers that begin the clock running for zoning enforcement lawsuits. Let's walk through each of those events that can start the clock.

"The facts constituting the violation are known to the governing body, an agent, or an employee of the unit of local government."

This triggers the five-year limit. When the zoning inspector knows about the violation, the clock has started ticking. The clock also starts ticking if other local government staff know of the violation. When a staff member from parks and recreation sees an unpermitted salvage yard, the clock for zoning enforcement starts ticking. This trigger also is phrased to apply when facts "are known to the governing body." It is not clear if that means the entire elected board needs to know or if knowledge by an individual elected official is sufficient. Additionally, the clock begins to run if an agent of the local government has knowledge of the violation. If a municipality contracts for the county inspections office to handle permitting, then the county building inspector likely is acting as an agent of the municipality when he or she goes out for a building code inspection. If the county employee learns about a zoning violation, the clock starts ticking for the municipality to bring an enforcement action. It appears that the clock would not necessarily start if a violation was known by an employee of another government unit that is not acting as an agent. For example, if an employee of a water and sewer authority (a public body independent from the local government) noticed a zoning violation while checking meters, that would not constitute knowledge of a zoning violation by "an agent, or an employee of the unit of local government." Of course, coordination between these interrelated and overlapping public bodies would be beneficial for all.

Do the individuals need to know that the situation is a zoning violation? Apparently not. The statute of limitations is triggered when "the facts constituting the violation are known." Thus, the clock starts running when the parks and recreation staff member sees the unpermitted salvage yard, even if he or she does not know the zoning ordinance or zoning districts. There is no specification about how the individual learns the facts constituting a violation. Those facts, it appears, could be obtained from a complaint from a neighbor, images on social media, or observations by employees when they are not on duty. Of course, for any of these scenarios there will be questions about proving knowledge of the facts. If there is written or photographic documentation of the facts that may be relatively easy, but for some examples proof of knowledge many be illusive.

"The violation can be determined from the public record of the unit of local government."

This triggers the five-year limit. Because this provision uses the term "public record," it raises many questions about scope and applicability. The intent of the language, arguably, is to establish constructive notice for the local government about zoning violations: If the local government has *some record* of the violation and should have known about it, then the statute of limitations begins to run. For example, if the local government has permitting documents, inspection records, or business licenses that evidence a zoning violation, then the local government must act upon that information within five years.

The plain language of the statute, however, uses the term "*public record*," a specific term defined at G.S. 132-1 and subject to an array of exceptions and limitations. The term is not defined differently for the new statute of limitations, so it seems prudent to apply the statutory definition of public record under Chapter 132. My colleagues Frayda Bluestein and David Lawrence have written extensively on what constitutes a public record in North Carolina, in the book Public Records Law for North Carolina Local Governments and in many blog posts.

Some records that would be useful for documenting potential zoning violations are not "public records" under the statutory definition. Consider a police investigation into an illegal gambling operation at a retail store. During the course of the investigation, the police photographed online sweepstakes machines, sale of tobacco pipes and vape supplies, and adult entertainment, none of which is permitted in the zoning district. Has the clock now started to enforce the zoning violations? Under G.S. 132-1.4, records of criminal investigations are not public records.

Consider also records about utility hook-ups. If the owner of a single-family home requested and obtained four separate meters for her house, that would be useful information indicating that the owner converted the home to a multi-family residential use. Under G.S. 132-1.1, however, public enterprise billing information is not a public record. There is a carve-out to allow sharing records for law enforcement and public safety, and billing information, arguably, may be disclosed to the public under the unit's policy. The trigger for the new statute of limitations, though, applies to "public records," and

under the statute utility billing information is not a public record. My colleague Kara Millonzi has written about disclosing utility customer information here.

Control of the public record is important to determining if the statute of limitations is triggered. The law specifically references the public record "*of the unit of local government*." Thus, the statute of limitations is not necessarily triggered for a municipal zoning violation if the public record that shows the violation is a county health permit, a county tax record, or a state environmental permit. As noted above, however, coordination among these different units and agencies of government would be prudent.

"The violation is apparent from a public right-of-way."

Starting with the time at which a zoning violation can be seen from the public street or sidewalk, the local government has seven years to bring a court action to enforce the land use regulation. The language for this trigger is straightforward, but the practical application may be challenging given the temporary nature of some violations.

Suppose that starting in January 2012 a homeowner hosted a yard sale on the first Saturday of each month. The local zoning ordinance only allowed two yard sales per year. Given the frequency of sales, the homeowner was operating an unpermitted flea market. It was visible from the right-of-way, but only on those Saturdays. Toward the end of the year, the homeowner stopped hosting the flea market. A couple of years later, in 2014, the homeowner started up again, operated flea markets for a couple of years, and stopped again. In the fall of 2018, the homeowner begins hosting flea markets again on the first Saturday of each month. By January 2019, it has been seven years since the violation was visible from the public right-of-way. Is the property owner now free to host a flea market every month? It is not clear. Perhaps each new flea market is its own violation and may be enforced as such. Or, perhaps the "violation" that is apparent from the right-of-way is the current round of violation starting in fall of 2018. It is inherently challenging to identify the start and stop of an intermittent violation such as this.

"The violation is in plain view from a place to which the public is invited."

This triggers the seven-year limit. This is similar to the public right-of-way trigger, but even more challenging to monitor. A place to which the public is invited would include the seating area of a restaurant, the general merchandise area of a shop or gas station, and the public reception area of an office. The public also is invited to private subdivision streets that are open to the public.

What about websites and social media? What if a private club posts to its website photos of unpermitted activities? What if a property owner makes their property available through a short-term rental website such as AirBnB? That is unclear.

Initiate court action before the clock runs out

Note that the statute of limitations sets a time limit for the local government to bring an "action," or court proceeding. As defined at G.S. 1-2, "[a]n action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense." In other words, the local government must file the lawsuit for court-ordered enforcement before the time limit runs out.

That is important because in a typical zoning enforcement case the court action follows a long enforcement process, including initial inspection, notice of violation, follow-up notice (if no response), negotiations with the landowner of acceptable resolution, re-inspection for compliance, and issuance of fines or civil penalties. Moreover, the property owner would have the right to appeal the staff decision to the board of adjustment. Such a process easily can stretch from months to a year. *The lawsuit against the violating landowner is the action that must be completed within the specified time limit, and all of the initial enforcement steps and administrative appeals must be completed in advance of that.*

A strategic violator may draw out enforcement negotiations—promising compliance soon, asking for an extension, requesting a variance or ordinance amendment, renegotiating terms of compliance—to let the statute of limitations run.

What happens after the clock runs

As noted earlier, regardless of the statute of limitations, a local government may seek a court-ordered injunction to prevent "conditions that are actually injurious or dangerous to the public health or safety."

For other land use violations, however, if the statute of limitations has run, the local government's ability to remedy the violation will be substantially limited. Administrative enforcement may still be available—to an extent. The plain language of the statute applies to court action, not administrative enforcement actions. If an old zoning violation is discovered and the statute of limitations has run, the local government apparently could still issue a notice of violation and charge civil penalties. A local government arguably could still withhold permits from a property that has a zoning violation under G.S. 160A-417(e) and 153A-357(f).

Court action may still be available—to an extent. Statutes of limitation are an affirmative defense to court action. In other words, the violator has to raise the defense and show that the time limit has run. A local government is not barred from filing a court action to enforce the ordinance, but if the violator successfully raises the statute of limitation as a defense, that will prevent the local government from getting court-ordered enforcement.

Next Steps

The new time limits of S.L. 2017-10 become effective October 1, 2018, and it applies to actions commenced on or after that date. In the near term, cities and counties should initiate investigation and enforcement steps now against any old zoning violations so that there is time to file court action, if needed, before October 2018. Communities must follow their own ordinance and procedures for enforcement and administrative appeals, and as discussed above, that may take many months. Given the October 2018 deadline, local governments must start the administrative enforcement process now.

Looking ahead, local governments also may consider new processes for zoning investigation and enforcement. Here are a few:

Adjust the zoning ordinance. While this blog focuses on the technical aspects of enforcement, communities should also carefully consider what they are enforcing. If no one has complained about a zoning violation for five or ten years, maybe that activity should not be a zoning violation. As local governments document zoning infractions, new and old, they should consider adjustments to the use table and limits on various land uses.

Proactive and prioritized investigation and enforcement. Many communities have relied on complaint-based zoning enforcement. The new time limits, however, may necessitate a coordinated and proactive inspection and enforcement process with more time in the field. Communities will benefit from prioritizing certain violations for enforcement actions. Departments may also want to make it easier for citizens to report violations (Here is a blog from Frayda Bluestein on anonymous tips).

Staff and board knowledge. Knowledge of the "governing body, an agent, or an employee" of the local government is enough to trigger the five-year limit. It may be useful for planning and zoning staff to survey board members and local government staff for zoning violations of which they are aware, and to set up systems to make it easy for them to report violations. Additionally, it is prudent for the planning office to provide basic training to inspectors from other departments about the basics of zoning regulation and enforcement. This might include fire and police officers, building inspectors, housing inspectors, public health inspectors, animal control officer, and others.

Public records review. It may be too costly and time-intensive to go back through historic public records for information of zoning violations. Going forward, though, a local government could establish processes so that staff who handle certain public records will flag potential zoning violations. These might include building permits, business licenses, utility hook-ups, and other public records related to land uses and property improvement.

Violation tracking. It is not enough to increase the local government knowledge about violations. The local government also needs a procedure for tracking the time of when the clock for enforcement will run out.

Proactive lawsuits. If a violator knows that the statute of limitations will soon expire, the violator may well drag their feet for compliance. As the deadline for a particular violation approaches, a local government may need to file a lawsuit and then continue negotiating a resolution.

Conclusion

So what about Jimmy? In January 2013, he started an auto repair shop in his back yard, but the zoning ordinance prohibits auto repair in that district. The zoning inspector sent a compliance letter back in September 2013, but has not followed up. In 2017, a new neighbor moved in and started complaining. Can the town enforce the zoning ordinance against Jimmy's shop? If the town acts quickly it can bring initial enforcement actions to remedy the violation. If the town needs to file a lawsuit, though, it must do so before October 1, 2018, when the new statute of limitations on zoning enforcement becomes effective (and more than five years after the zoning inspector learned about the violation). After October 1, 2018, the new statute of limitations will shield Jimmy and property owners in a similar situation from court enforcement actions.

Links

- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_160A/GS_160A-365.pdf
- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_153A/GS_153A-324.pdf
- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_160A/GS_160A-417.pdf
- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_153A/GS_153A-357.pdf
- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_160A/GS_160A-364.1.pdf
- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_153A/GS_153A-348.pdf
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- www.sog.unc.edu/publications/books/public-records-law-north-carolina-local-governments-second-edition