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Coates' Canons Blog: Who says I can’t rezone my rezoning?

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Several years ago the Town Council approved The Green as a 400 acre development with phases to include apartments, townhouses, and large single-family homes, as well as modest retail and office fronting the major thoroughfare. After a couple of good years of strong development and sales, the down economy caught up with The Green. Today the project is half-built. The apartment phase was sold and leased out; the commercial properties were built, but are mostly empty; a small portion of the single family lots were developed and sold; and none of the townhomes were built. The developer lost the townhome phase to the bank and sold her remaining interest in the single-family phase to Money Investment Group.

Now, with hopes of an improving economy, Money is ready to resume development of the single-family phase of the property, but they don’t want to develop according to the original plans. They suspect that the market has changed and that smaller housing products will sell, and, in order to make the numbers work, they need to develop on land that had been set aside as open space. Can Money rezone the rezoning? And if so, who has to consent to the change? The answer depends, to some extent, on how The Green was initially approved—as a conventional rezoning, as a conditional zoning approval, or as a development agreement. And the implications are two-fold. In the narrow sense, developers and local governments may face procedural hurdles as they rework prior zoning approvals. More broadly, this discussion underscores the need to design long-term development approvals with flexibility to evolve as conditions, ownership, and economies change.

Before we jump into the details, it is worth noting that this discussion is concerned with the statutory requirements and limitations of altering zoning. Of course, any given project will be subject to other requirements that may limit the extent to which it can change the development, such as deed covenants, conditions, and restrictions.

Standard Zoning Districts

If the phases of The Green were approved as separately rezoned parcels with standard zoning districts—commercial zoning for the office and retail portions, multifamily zoning for the apartments and townhomes, and low-density residential for the large single-family homes—then the rezoning is fairly straightforward. Money may petition for rezoning to the desired new zoning district for the portion of property that they own. Such an action would be subject to the standard public notice and hearing requirements for a rezoning. New homeowners within The Green, the bank, and other interested neighbors may voice their like or dislike of the proposal through the standard process. And, of course, Money still has to meet the requirements of the new district and persuade the Town to approve the rezoning. Overall, this will be a typical rezoning.

Conditional Zoning

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The analysis grows more complicated if The Green was initially approved as a conditional rezoning or with a conditional use permit (You can read more about the different conditional approvals here. For simplicity, I'll refer to them together as conditional zoning approvals). As Dave Owens has discussed previously here, North Carolina courts have ruled that when developer has benefitted from such a conditional zoning approval, the local government may hold the developer to the terms of the approval. In a recent case, the Court of Appeals upheld a local board's refusal to relieve a developer of promised open space. In 1999, an existing golf course was designated as open space in a planned unit development as part of a special use permit (in excess of minimum open space standards). The developer developed the property in accordance with the SUP. In 2009, after the golf course lost economic viability, the developer sought modification of the 1999 SUP to reduce the open space requirement to comply with minimum standards. The Board of Commissioners refused to conduct a public hearing to consider the request, and the court affirmed that decision by the local board. *Wake Forest Golf & Country Club, Inc. v. Town of Wake Forest*, 711 S.E.2d 816 (N.C. Ct. App. 2011) *appeal dismissed*, *review denied*, 365 N.C. 359, 719 S.E.2d 21 (2011) and *review denied*, 303P11, 2011 WL 9159353 (N.C. Nov. 9, 2011).

Beyond the issue of holding a developer to agreed-upon conditions, there is a separate issue: who may (or must) request such a change to conditional zoning approvals? The courts have not clearly addressed this distinct issue.

The zoning enabling statutes, at G.S. § 160A?382(b), state that "[p]roperty may be placed in a special use district, conditional use district, or conditional district only in response to a petition by the *owners of all the property* to be included." This provision typically applies to the initial placement of a property into a conditional district; the application of conditional zoning approvals only occurs at the request of the owner. In a case like The Green, however, this provision may require consent from all property owners for a subsequent change to the conditional zoning approval, depending on how the initial conditional rezoning was framed.

Consider this. If The Green was initially approved as one integrated conditional zoning approval—comprehensively addressing open space, parking, transportation, and other factors across all of the phases—then Money will need to adjust conditions that were applied for the project as a whole. The procedural effect of this, arguably, amounts to a new conditional zoning approval for the entire 400 acres. Money must get consent from the homeowners, the bank, the commercial property owner, and any other owners of the property that was subject to the initial rezoning.

Alternatively, if the initial conditional zoning approval was arranged for the several distinct phases of development (a separate analysis and conditions for each), a court may allow a new conditional zoning approval for a particular phase, leaving the initial conditional zoning approval in place for the other phases. Even so, for the Green, Money would still need consent from all of the homeowners to make changes to the conditional zoning.

If desired by the governing body, a city-initiated rezoning may be an option to address this procedural scenario. Note, however, that such an action would have to be for conventional district rezoning (not conditional), and the action could raise questions of vested rights that deserve a separate blog.

Development Agreement

Finally, if The Green was approved through a development agreement, the rezoning may have complications. Legislation starting at G.S. § 160A-400.20 authorizes local governments to enter into development agreements outlining arrangements for the uses, improvements, and conditions of large-scale projects. If Money were seeking to revise the development agreement, they would encounter challenges similar to, or greater than those outlined above. G.S. § 160A-400.28 states simply that "[a] development agreement may be amended or canceled by mutual consent of the parties to the agreement or by their successors in interest." Any purchaser of property subject to the development agreement would need to consent to a change to the agreement. So Money would need consent from all homeowners, the bank, and any other investors in The Green to make changes to the development agreement.

A developer or a local government may be better served to terminate the development agreement pursuant to G.S. § 160A-400.27. Of course, if there are outstanding commitments for infrastructure improvements by the developer, this may not be a preferable option for the local government. And, termination of a development agreement would create additional procedural burdens for either (i) negotiating new development agreement(s), or (ii) rezoning or applying new conditional zoning approvals to the various phases of the property.

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Beyond Zoning for Now

As noted, these scenarios raise to important issues, one narrow and one broad. Developers are already beginning to seek adjustments to zoning permits from the last decade. As the market improves, we will likely see more re-rezonings, and these questions of ownership, consent, and procedure will increase. The issues are more manageable when the property is held by one owner. For those projects that are partially developed, subject to multiple owners, or emerging from bankruptcy, it is much more complicated to unravel the development approvals and put them back together.

More broadly, these scenarios reflect the challenge of zoning approvals for large-scale, long-term development projects. Conditions change, markets change, and development models change. We must structure zoning approvals flexible enough to accommodate this inevitable change, while still enforcing the necessary conditions and assurances for home-buyers, neighbors, and the community at-large.

Links

- canons.sog.unc.edu/?p=6916
- canons.sog.unc.edu/?p=5639#more-5639
- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_160A/GS_160A-382.pdf
- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_160A/GS_160A-400.20.pdf
- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_160A/GS_160A-400.28.pdf
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