

# **Planning Issues and the Law**

**Planning Board Workshop  
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**David Owens  
School of Government  
The University of North Carolina at Chapel Hill**

## **Spot Zoning and Contract Zoning**

*Spot zoning* -- Zoning a relatively small area differently from the surrounding area is illegal unless the government establishes a *reasonable basis* for the spot zone. The burden is on the local government to establish reasonableness, so it is important that staff reports, planning board recommendations, and governing board decisions explicitly consider these factors. Factors for determining reasonableness include:

- (1) Size of area and its particular characteristics
- (2) Relation to comprehensive plan
- (3) Degree of change in uses allowed
- (4) Relative harm and benefit to owner, neighbors, and the community

When a planning board reviews a proposed spot zoning, the written recommendation to the board should address each of these factors. It is also important to take into account the policies behind the original zoning and the informal policy precedent that is being set. The governing board statement on reasonableness should specifically address these four points.

*Contract zoning* -- If there are mutual promises between the city and the applicant or if the governing board does not consider all permissible uses, this is illegal in North Carolina. A local government may not receive something of value in trade for a rezoning. Individual conditions on rezonings to a general use district are unenforceable. Whenever a rezoning to a general use district is made, the governing board must clearly and explicitly consider the full range of possible uses that would be allowed, not just a single project proposed by the owner.

*Conditional use districts* are legal. It is permissible to rezone to a new zoning district that has no permitted uses, only conditional or special use permits, and to concurrently consider a conditional or special use permit for an individual project. This can only be done if requested by the landowner.

*Conditional zoning* is also legal. This is similar to conditional use district zoning, but is done without a conditional use permit. The detailed standards and conditions for development are incorporated into the zoning ordinance. This can only be done at the request of the landowner. Anyone can propose specific conditions to be imposed, but only those acceptable to both the landowner and city council can be adopted. Conditions are limited to those needed to bring the project into compliance with city plans and ordinances and those to the reasonably anticipated impacts of the project involved.

### Case for Discussion

A petition has been presented to the planning board that would rezone a 50-acre site from AR-40 (agriculture/low density residential). The requested new zoning is for 40 acres to R-10 (residential, 4 units per acre) and 10 acres for highway commercial. The petition is presented from a large out-of-state business that intends to construct a 150 unit residential subdivision with an adjacent strip mall. The parcel is now a farm field with some woodland along a creek on the backside of the property. There is a 15 home single-family residential subdivision across the road, but the rest of the immediate area is all agriculture and woodland. The site is about two miles past the bypass that was constructed around a nearby town three years ago.

1. What factors should the planning board consider in making its recommendation?
2. If approved, would this be illegal spot zoning?
3. The petitioner submitted a detailed site plan along with the rezoning materials. If rezoned would this be illegal contract zoning?
4. After the hearing a planning board member suggests recommending approval of the rezoning with two conditions: (1) that a fifty vegetated buffer be left along the stream in the rear of the property; and (2) that the road be widened to add a turn lane for each entrance into the property. Would either of these conditions be legal?

## **Conflicts of Interest**

*Legislative and advisory decisions* -- If a decision would have a direct, substantial, readily-identifiable financial impact on a member, that member must not vote on a legislative zoning decision. The member may participate in the discussion, but not the vote. This rule applies to both the planning board and the governing board.

*Quasi-judicial decisions* -- The Constitution and the statutes give parties to a quasi-judicial decision a legal right to an impartial decision maker. Thus boards must avoid conflicts of interest. In addition to financial impact, bias (defined as a predetermined opinion that is not susceptible to change), undisclosed ex parte communications about the case, and close family or business ties also disqualify members from participating. Nonparticipation includes the discussion as well as voting. Unlike legislative and advisory decisions, it is not permissible to participate in the discussion and then abstain from voting.

### **Some Problems for Discussion: Conflicts**

A rezoning comes before your board. Is it permissible for a board member to participate in the board's decision in the following instances?

a. A board member is a Realtor who has listed the property for sale. The requested rezoning would allow commercial use of the area which is currently zoned for residential use only.

b. The rezoning is submitted by a board member's father-in-law.

c. A church is seeking the rezoning of a recently purchased lot adjacent to the church in order to build a new education building. A board member is also a member at that church. What if the church is applying for a special use permit for the project?

## **Vested Rights**

This is the legal right to continue or complete a use even if the regulations have changed. To qualify, the use must have been legal when started. There are four ways vested rights can be established in North Carolina:

*Common law* -- The owner must have made substantial expenditures in good faith reliance on a valid specific approval.

*Valid building permit* -- The owner has a vested right only as long as the building permit remains valid and only for the work approved by the building permit. G.S. 153A-344; 160A-385

*Site specific development plans* -- This is a special provision mandated by state law that allows plans defined by each local ordinance to get a two year vested right. Local governments have an option of allowing up to a five year vested right for more general phased development plans. G.S. 153A-344.1; 160A-385.1.

*Development agreements* – Authority for development agreements was added to the statutes effective 1/1/2006. This is optional for local governments. It must include at least 25 acres and can last up to 20 years. The statute has detailed provisions on adoption. G.S. 160A-400.20 et seq. and 153A-379.1 et seq.

## **Nonconformities**

*Definitions.* These are land uses, lots, or structures that were legal when started, but which no longer conform to current ordinance requirements. If something was a violation when initiated, it does not secure legal nonconforming status no matter how long it has been in place.

*Termination.* Immediate compliance with new rules can be required, but only if necessary to protect public health or safety.

*Limitations.* Most zoning ordinances allow nonconformities to be continued, but subject to restrictions set by the ordinance. The most common restrictions are that the nonconformity not be expanded or enlarged, it may not be changed to another use, and that it not be reestablished if abandoned or discontinued.

*Amortization.* Many ordinances include an *amortization* requirement for some nonconformities; this requires the nonconformity be phased out over time. This is legal if a reasonable time is allowed. State and federal law restrict amortization provisions for some off-premise advertising signs.

## Subdivision Regulations

*Coverage.* Subdivision ordinances apply to any division of land for the purpose of sale or building. State law lists five exceptions to the definition of "subdivisions. These include creation of 10 acre lots where there is no street dedication and division of a two acre or smaller lot into three or fewer parcels that meet all subdivision standards.

*Common Ordinance Requirements.* A typical subdivision ordinance requires all subdivisions to be platted. Typical design standards are that all lots must front on an approved street, lots and streets must be properly designed, plans for water supply and sewage disposal must be approved, and certain improvements (such as streets and utilities) must be provided. Decisions must be based solely on the standards set forth in the ordinance.

### *Typical Approval Process.*

- Sketch plan -- This is a general concept of the proposed division. It usually requires only informal staff consultation.
- Preliminary plat -- This is the critical approval of layout of lots and planned improvements. Once approved, the improvements may be installed. Some limited pre-sales contracts of potential lots may be made upon preliminary plat approval.
- Final plat -- This is the final check and comes after the improvements are built. Once approved, the plat can be recorded and lots sold.

*Agencies Involved.* The planning department typically coordinates review of subdivisions. Approval of preliminary and final plats may be made by either the planning board or the governing board. Each local government must have a plat review officer to sign off on all plats presented for recordation, even those that are not "subdivisions." Agencies typically involved in review of a proposed subdivision include the public works and utility departments, county health department, parks and recreation department, and the state Department of Transportation.

*Exactions of fees, land dedications.* Exactions are requirements imposed as a part of a development approval that a developer provides a public improvement at the developer's expense. Typical forms of exactions include:

- Dedication of land for streets and utility easements
- Construction of specified public improvements, such as roads, sidewalks, water and sewer lines
- Dedication of land for open space
- Dedication of land and construction of facilities for parks
- Setting aside land for future government purchase for school sites

These are allowed if there is a *rational relation* to needs generated by subdivision. The amount or size of the exaction must be *roughly proportional* to the public facility needs generated by the development being approved. The determination of whether an exaction is proper must be made on an individualized basis.

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## **Plan Consistency and Comments on Zoning Amendments**

*Planning Board Review.* State law requires that all proposed amendments be reviewed by the planning board (sometimes called the “planning commission” or “zoning commission”) prior to action by the governing board. The planning board must be given up to 30 days for this review (the governing board can proceed with the proposed amendment if no written comment is received within this time). The planning board report must address whether the proposed amendment is consistent with the comprehensive plan and any other officially adopted plans that are applicable. The planning board can also address any other issues it deems appropriate.

There is no requirement for a positive recommendation from the planning board. The recommendation is advisory only. Yet because the planning board often has detailed familiarity with the comprehensive plan and with neighborhood concerns and has given the proposal a thoughtful review, their recommendation is usually given considerable weight by the governing board.

There is no statutory requirement for a public hearing by the planning board before it makes a recommendation. Some zoning ordinances require a planning board hearing, some provide for a joint public hearing by the planning board and governing board, and some just provide that the planning board have a public meeting to discuss the proposal.

*Governing Board Statement.* The decision to adopt, amend, or repeal a zoning ordinance is a legislative policy choice of the governing board. Formal findings of fact are not required, as is the case for all quasi-judicial decisions. However, the zoning statutes were amended in 2005 to require that city and county governing boards adopt a statement explaining the rationale for their decisions on zoning amendments.

Whenever the city council or board of county commissioners makes a decision to adopt or to reject a zoning amendment, the board must approve a written statement describing whether the action is consistent with an adopted comprehensive plan. The statement must also address why the board considers the action taken to be reasonable and in the public interest. The board is not required to follow its adopted plans in zoning decisions, but it must carefully consider the plan and lay out for public inspection its reasons for deciding to follow the plan or not.

*Zoning Consistency with the Plan.* Plans are *not* regulations. They do not have binding legal effect. Land use ordinances (such as zoning or subdivision regulations) and capital improvement programs are necessary for plan implementation. If a community does adopt a land use plan, there is no legal requirement that all zoning decisions exactly match up to it. The plan is just that—a plan or guide and not a regulation. But the plan, and all of the studies and discussion that led to it, does provide the general policy foundation for zoning decisions. The law, as well as good planning practice and common sense, suggests that those policies be carefully considered as each zoning decision is made.

State zoning statutes provide that all zoning must be “in accordance with a comprehensive plan.” The North Carolina courts have not, however, read this to mean that all zoning decisions must be precisely measured against a separately adopted land use plan. Rather, the courts have ruled that zoning decisions must be based on a reasoned consideration of land use issues facing the entire community, which means that competent technical studies must serve as the foundation of zoning decisions and that such studies and plans and public input must be thoroughly considered as zoning decisions are made. A zoning amendment that is clearly contrary to the policies in an adopted city or county plan, particularly if the rezoning involves only a small area of land, is suspect and may well be invalidated by the courts unless a clear public purpose

for the amendment has been established.

As noted above, cities and counties must explicitly consider its adopted plans when acting on proposed amendments to its zoning ordinance. The planning board is required to make a written report on plan consistency to the city council or county board of commissioners as part of the amendment review process. The governing board must then approve a written statement that addresses plan consistency when it approves or rejects any proposed zoning text or map amendment.

## **Moratoria**

Given the time needed to complete the procedures required for adoption or amendment of development regulations or to even rezone property, local governments sometimes adopt moratoria on development to preserve the status quo while plans are made, management strategies are devised and debated, ordinances are revised, or other development management concerns are addressed. Moratoria are also sometimes used when there are insufficient public services necessary to support development, such as inadequate water supply or wastewater treatment capacity.

Prior to 2005 there was no explicit statutory authority in North Carolina to adopt moratoria on development, with the exception of adult business siting. It was generally assumed by the courts that North Carolina local governments had the implied power to adopt reasonably limited moratoria under their general police power and their zoning authority.

In 2005 the General Assembly amended the zoning enabling statutes to explicitly authorize use of development moratoria and set a number of rules regarding their use. G.S. 153A-340(h) and 160A-381(e) allow use of temporary development moratoria to be placed on any city or county development approval. These statutes establish the general rule that the duration of a moratorium must be reasonable in light of the specific conditions that led to its imposition and may not exceed the time period necessary to address those conditions.

These statutes provide that if there is an imminent threat to public health and safety, the moratorium may be adopted without notice and hearing. Otherwise, a moratorium with a duration of sixty days or less requires a single public hearing with a notice published not less than seven days in advance of the hearing; a moratorium with a duration of more than sixty days (and any extension of a moratorium so that the total duration is more than sixty days) requires a public hearing with the same two published notices required for other land use regulations.

When adopting a moratorium, the ordinance establishing it must expressly include the following four points:

(1) A clear statement of the problems or conditions necessitating the moratorium, what courses of action other than a moratorium were considered by the city or county, and why those alternatives were not deemed adequate.

(2) A clear statement of the development approvals subject to the moratorium and how a moratorium on those approvals will address the problems that led to its imposition.

(3) An express date for termination of the moratorium and a statement setting forth why that duration is reasonably necessary to address the problems that led to its imposition. The U.S. Supreme Court has suggested that a moratorium with duration of more than twelve months will likely receive close scrutiny under the takings clause. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 341 (2002).

(4) A clear statement of the actions, and the schedule for those actions, proposed to be taken by the city or county during the moratorium to address the

problems that led to its imposition.

These statutes exempt several types of projects from the coverage of moratoria. Absent an imminent threat to public health and safety, moratoria do not apply to projects with legally established vested rights—those with a valid outstanding building permit, an outstanding approved site specific or phased development plan, or where substantial expenditures have been made in good faith reliance on a prior valid administrative or quasi-judicial permit or approval. The statutes also provide that moratoria do not apply to certain projects for which complete applications have been accepted by the city or county prior to the call for a public hearing to adopt the moratorium. These include special or conditional use permits and preliminary or final plats. If a preliminary plat application is subsequently approved while a moratorium is in effect, that project can also proceed to final plat approval.

Renewal or extensions of moratoria are also limited by these statutes. Extensions are prohibited unless the city or county has taken all reasonable and feasible steps to address the problems or conditions that led to imposition of the moratorium. In addition to the four points noted above, an ordinance extending a moratorium must explicitly address this point and set forth any new facts or conditions warranting the extension.

Finally, these statutes provide for expedited judicial review of moratoria. Any person aggrieved by its imposition may petition the court for an order enjoining its enforcement. These actions are to be set for immediate hearing and are to be given priority scheduling by both trial and appellate courts. The burden is on the city or county in these challenges to show compliance with the procedural requirements of the statutory provisions regarding moratoria adoption.

## **Property Rights and the Takings Clause**

The Fifth Amendment of the U.S. Constitution dictates that when private property is taken for public use, the owner must be fairly paid for the property. This was a simple proposition as long as it was applied to those instances where the government actually took title to or possession of private property, such as taking a person's land to build a road, a school, or a military base. Usually the only question in those instances was how much the land was worth and what would be just or fair compensation.

The legal situation as it relates to land use regulation got considerably more complicated when the United States Supreme Court ruled in 1922 that a regulation that restricts property use could be so onerous that it has the same practical effect as a seizure of property. Thus, an individual property owner could not be singled out to bear a burden that should be borne by the public as a whole. Moving beyond this general concept to its application has proved difficult. This notion that an overly restrictive regulation can be a taking of property has become one of the most hotly contested and legally confusing areas of land use law.

With more than a dozen United States Supreme Court decisions on this topic in the past thirty years, a few rules have emerged. First, a zoning restriction that requires a physical invasion of a person's property is automatically a taking. For example, regulatory requirements that the public be allowed to use a private boat basin and that apartment building owners be required to allow cable TV wiring on their roof have both been held to be takings. Second, a regulation that renders a property completely worthless is a taking. A severe reduction in value, such as might occur when a property is rezoned from a valuable commercial use to a less valuable residential use, is not itself a taking. For there to be an automatic taking, the regulation must remove all practical use of the property so that it has no reasonable value left.

If a case does not fit into one of these two rather narrow categories, the courts conduct an individual review of the case to determine if a regulation has gone too far and is thus unconstitutional. An important factor in these reviews is the economic impact on the person affected, with particular emphasis on the impact on "distinct investment-backed expectations." The character of the governmental action is also an important factor. For example, a land use restriction enacted to protect public health and safety is far less likely to be a taking than one adopted for improper purposes, such as to reduce the value of the property as a prelude to public purchase.

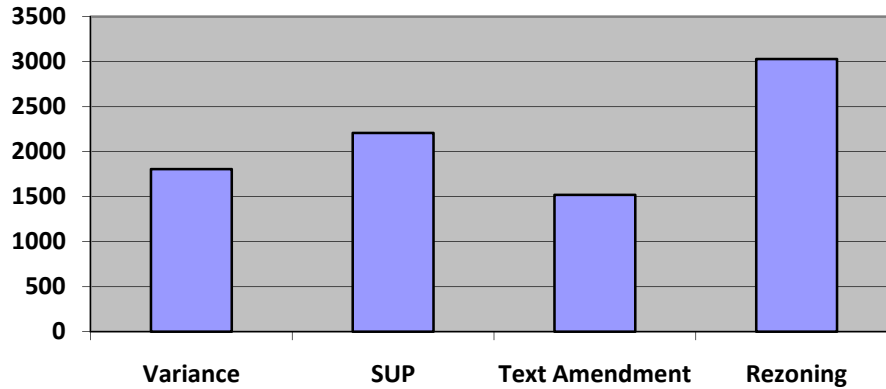
It is extremely unusual for the courts to hold that a zoning restriction is a taking. Most local governments reach the political limits of what they deem to be fair and reasonable well before they get close to constitutional limits. But the uncertainty of the law in this area has provoked a great deal of controversy, debate, and litigation.

## Appendix. Some Data on North Carolina Experiences with Zoning Amendments

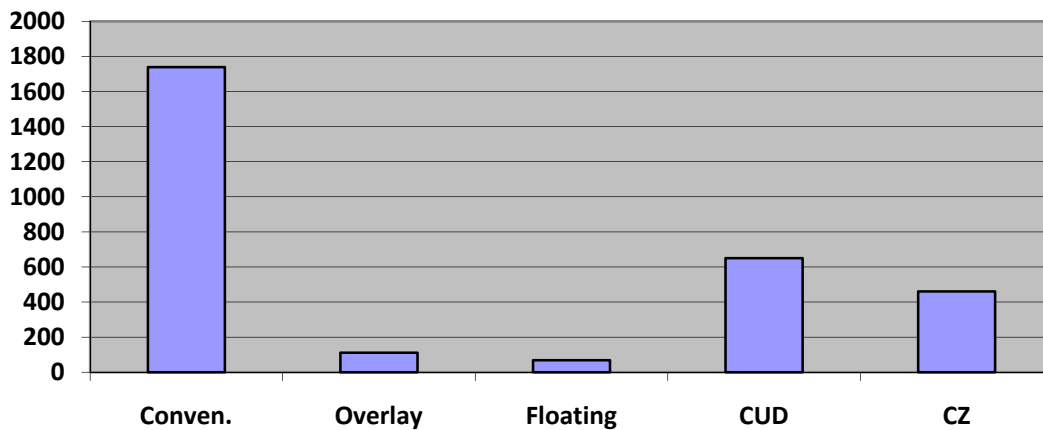
{Data from 2006-07 survey of all NC cities and counties with zoning}

### *Types of Approvals*

**Annual Volume of Approvals Sought**



**Type of Rezoning Sought**



### *Staff analysis*

| Staff information provided at rezoning hearing<br>(n=228) |                             |
|---|-----------------------------|
| <i>Type of information</i>                                | <i>Percentage Providing</i> |
| Factual information on petition                           | 98%                         |
| Background information on site                            | 87%                         |
| Information/analysis on relation to plan                  | 81%                         |

|  |     |
|--|-----|
| Recommendation on decision                     | 72% |
| Site plans                                     | 64% |
| Video, photographs, building elevations        | 51% |
| Information on similar past rezoning petitions | 45% |

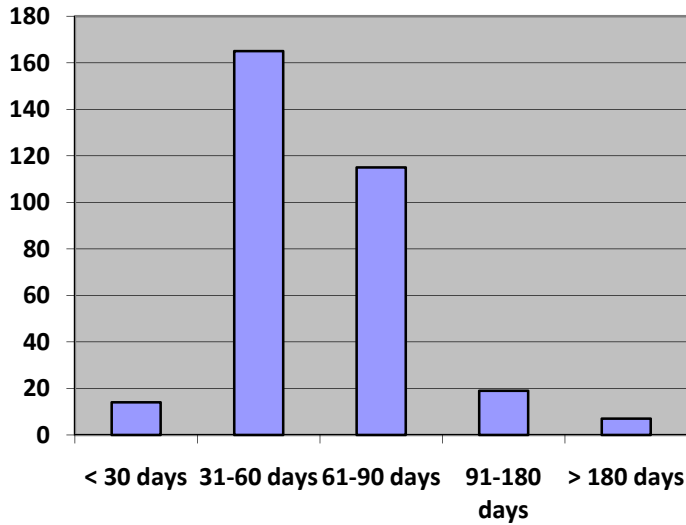
*Hearings*

| Length of Time Board Spends on Typical Hearing |   |  |   |
|--|---|--|---|
| Length of Time                                 | Percentage for Text Amendment<br>( <i>n=316</i> ) | Percentage for Conventional Rezoning<br>( <i>n=307</i> ) | Percentage for Conditional Rezoning<br>( <i>n=226</i> ) |
| < 15 minutes                                   | 10%   | 11%  | 6%  |
| 15-30 minutes                                  | 42%   | 43%  | 28%   |
| 30-60 Minutes                                  | 30%   | 26%  | 36%   |
| > 60 minutes                                   | 18%   | 18%  | 30%   |

*Decisions*

| Approval Rates for Proposed Rezoning |                         |                        |
|--------------------------------------|-------------------------|------------------------|
| <i>Type of Map Amendment</i>         | <i>Percent Approved</i> | <i>Percent Pending</i> |
| To Conventional District             | 78%                     | 7%                     |
| Add Overlay District                 | 67%                     | 9%                     |
| To Floating District                 | 69%                     | 16%                    |
| To Conditional Use District          | 73%                     | 10%                    |
| To Conditional District              | 77%                     | 11%                    |

**Time to Reach Decision on Typical Rezoning**



| Most Common Grounds Cited for Denial of Rezoning<br>(N=292) |                          |
|---|--------------------------|
| <i>Reason</i>   | <i>Percentage Citing</i> |
| Inconsistent with surrounding land uses                     | 85%                      |
| Inconsistent with plans                                     | 51%                      |
| Traffic impacts   | 43%                      |
| Environmental impacts                                       | 18%                      |
| Inadequate water or sewer                                   | 12%                      |
| Inadequate school capacity                                  | 5%                       |
| Miscellaneous others  | 11%                      |

| Frequency rezoning decision is consistent with staff recommendation (n=295) |                   |
|---|-------------------|
| <i>Frequency</i>  | <i>Percentage</i> |
| Never   | 1%                |
| Rarely  | 1%                |
| Occasionally  | 5%                |
| Frequently  | 37%               |
| Almost Always   | 52%               |
| Always  | 4%                |

| Frequency rezoning decision is consistent with planning board recommendation (n=329) |                   |
|--|-------------------|
| <i>Frequency</i>   | <i>Percentage</i> |
| Never  | 0%                |
| Rarely   | 0%                |
| Occasionally   | 3%                |
| Frequently   | 35%               |
| Almost Always  | 55%               |
| Always   | 6%                |

Additional information is available on the NC Planning web page maintained by the School of Government. Log on at: <http://ncinfo.iog.unc.edu/organizations/planning/index.html>

Under the “Publications” link at that page, you will find online copies of several publications that may be of interest, including –

A SURVEY OF EXPERIENCES WITH ZONING VARIANCES (Special Series No. 18, Feb. 2004)

SPECIAL USE PERMITS IN NORTH CAROLINA ZONING (Special Series No. 22, April 2007)

ZONING AMENDMENTS IN NORTH CAROLINA (Special Series No. 24, Feb. 2008)

Books available include:

INTRODUCTION TO ZONING (3rd. ed. 2007)

LAND USE LAW IN NORTH CAROLINA (2006)