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THE POWER TO ZONE

Who Has It and Where Does It Come From?

The statute granting municipalities the power to zone, NCGS §160A-381, was initially enacted by the N.C. General Assembly in 1923. As amended slightly through the years, it provides the following:

- (a) For the purpose of promoting health, safety, morals, or the general welfare of the community, any city may adopt zoning and development regulation ordinances. These ordinances may be adopted as part of a unified development ordinance or as a separate ordinance. A zoning ordinance may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land. The ordinance may provide density credits or severable development rights for dedicated rights-of-way pursuant to G.S. 136-66.10 or G.S. 136-66.11.
- (b1) These regulations may provide that a board of adjustment may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained, provided no change in permitted uses may be authorized by variance.

Some people think of zoning in a narrow sense, referring only to that set of ordinances which classifies land use into categories and determines which land uses may be conducted at what locations. But if you have looked at a zoning ordinance lately, you will find incredibly detailed rules governing building sizes, building heights, set-backs and aesthetic requirements.

The power to zone is drastic and pervasive. Government officials, including those you did not vote for and may have opposed vociferously, have the power to tell you what you can do on your land, where you can do it, how you can do it, and impose detailed and what some consider onerous regulations. How did a supposedly freedom-loving, individualistic people come to that?

This manuscript will begin with some possible answers to that question. Think back 100 years. America was beginning to become an urban nation. Many new towns were incorporated at that time. Primary reasons for doing so involved basic sanitation concerns, including for example local laws to prevent hogs from running wild in yards and wallowing in the streets, and to provide a financially viable entity which could repair the mud holes in those streets, and, if the community was ambitious, to pave those streets. A little later, municipalities obtained the power to zone.¹

The power to zone arises initially, and generally, from legislation granting municipalities “general police power.”² The “general police power” is granted in NCGS §160A-174(a) as follows:

A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or

¹ The General Assembly by local act in 1921 allowed cities and towns in Brunswick, New Hanover and Wake County to create planning commissions, p. - L.L., Ex. Ses. 1921, chaps 169, 246, amplified and expanded by Public Laws, 1923, ch. 250.

² *Vance S. Harrington Co. v. Renner*, 236 N.C. 321, 72 S.E.2d 838 (1952).

welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances.

The General Assembly granted a similar power to counties in 1959, codified as NCGS §153-266-17. The first general police power enabling act for counties was enacted in 1963. Statutory sources for various police powers are NCGS §160A-174 through NCGS 160A-200 and for counties, look at NCGS §153A-121 through 153A-143.

The term “police power” is still in use, although many of the ordinances are enforced by someone other than a policeman. The Founding Fathers would be intrigued to know that we now have grass police, junked car police, dog police, and zoning police, although they are known by different titles.

The oldest land use cases found in the annotated statutes are from the 1880’s and 1890’s, involving preventing hogs from running at large and forbidding the keeping of hog pens in a town.³ The current building code statutes, including the issuance of building permits and correction of building defects, date from the very early 20th century. Statutes and ordinances dealing with emissions of pollutants or contaminants and abatement of public health nuisances began appearing about then.⁴ Prior to the statute authorizing the power to zone, municipalities had used the “nuisance” concept to prohibit construction within the Town limits of such potentially dangerous things as a milldam, a sewage disposal plant or a hospital to treat tuberculosis.⁵ Similarly, prior to zoning *per se*, municipalities used their nuisance power to limit locations of gas stations in terms

³ *State v. Hord*, 122 N.C. 1092, 29 S.E. 952 (1898).

⁴ NCGS §160A-185.

⁵ *Berger v. Smith*, 160 N.C. 205, 75 S.E. 1098 (1912), holding that a sawmill could not be precluded, not being a nuisance *per se*.

of distances from other uses⁶ or prohibited them entirely in a described part of town.⁷

In addition to zoning powers at NCGS §160A-381 through 387, other statutory bases for planning and regulation of development are found in NCGS §160A-360 through NCGS §160A-366, for general powers, and for subdivision regulation, NCGS §160A-371 through NCGS §160A-376. The statutory source for building inspection, unsafe buildings, and minimum housing standards is NCGS §160A-411 through NCGS §160A-455.

The statutory basis for county regulation of zoning, planning and development is found in NCGS §153A-320 through 153A-398. Those sections range from building inspection and permits, which counties have had since the 1930's, to zoning and subdivision laws which were beginning in 1959 either cut and pasted from the municipal laws (e.g. zoning, vested rights, subdivision regulation) or which simply adopted the municipal law by reference (e.g., NCGS §153A-326, building set-back lines).

A municipality or county “has no inherent power to zone...”⁸ “A city has power to zone only as delegated to it by enabling statutes.”⁹ The source of the power to zone is the General Assembly, as follows:

It is well settled that a municipal corporation is a creature of the General Assembly and that a municipal corporation can only exercise such powers as are expressly conferred by the General Assembly or such as are necessarily implied by those expressly given. *Davis v. The City of Charlotte*, 242 N.C. 670, 89 S.E. 2d 406, 409 (1955). Municipal ordinances are ordained for local

⁶ *Ahoskie v. Moye*, 200 N.C. 11, 156 S.E. 130 (1930).

⁷ *Wake Forest v. Medlin*, 199 N.C. 83, 154 S.E. 29 (1930).

⁸ *Heaton v. City of Charlotte*, 277 N.C. 506, 178 S.E.2d 352 (1971).

⁹ *Sellers v. City of Asheville*, 33 N.C. App. 544, 236 S.E.2d 283 (1977).

purposes in the exercise of a delegated legislative function, and must harmonize with the general laws of the State.

The source of NCGS §166A-381 authorizing zoning was essentially a model act promulgated around the nation by the National Chamber of Commerce. Why would a Chamber of Commerce have promoted empowerment for local adoption of ordinances which can tell people how high their buildings can be, how big their buildings can be, whether lots can be occupied, the size that yards must be, how many people can live on a lot and where those buildings and uses can take place?

The willingness to engage in regulation of property came from the times. The “Progressive Era” of the earlier Twentieth Century followed a 50-year period of rampant capitalism, corporate greed, stock frauds in what was clearly an economic boom and bust time during that 50 years or so since the Civil War. It was the age of the Muckrakers, exposing filth in food preparation factories, dangerous working conditions and so on. It was the time of the trust-busting legislation and of a President who “walked softly but carried a big stick.”

Perhaps most importantly, it was the beginning of the age of the automobile and street trolleys. They created exponential freedom of movement which spurred the development of certain land uses in areas where they had not previously been developed.¹⁰ It is the author’s understanding that zoning was primarily created to protect single-family homes from multi-story apartment houses and gas stations.

¹⁰ “...apartment houses...come very near to being nuisances.” “Such regulations are sustained...which, before the advent of automobiles and rapid transit street railways would have been condemned as totally arbitrary and unreasonable.” *Euclid v. Ambler Realty Company*, 272 U.S. 365, 71 L.Ed. 303.

The power to zone, and police power in general, are limited by the Fifth Amendment to the U.S. Constitution, the Fourteenth Amendment to the United States Constitution, and Article 1, §19 of the North Carolina Constitution.

The Fifth Amendment to the United States Constitution includes the following:

no person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment to the United States Constitution states in part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1 §19 of the North Carolina Constitution Carolina states:

No person shall be...deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws....

The phrase “life, liberty, or property” comes directly from the writings of John Locke.¹¹ Locke defined governmental power as the right to make laws for

¹¹ Locke was involved with the “Glorious Revolution of 1688” in which England created a constitutional monarchy under William and Mary. In his *Two Treatises on Government*, published in 1690, Locke attempted to define a basis for use of government power other than the whims of a hereditary monarch. He formulated a “social contract” theory of government as the justification for both use of government power and limitations on it. Locke was for 15 years the confidential secretary to Anthony Ashley Cooper, one of the eight Lords Proprietors to whom

the regulating and preserving of property and of employing the force of the community for the execution of such laws... “and all this only for the public good.” He set forth a rational basis for a modern view of government.

The freedom of men under government is to have a standing rule to live by...a liberty to follow my own will in all things where that rule prescribes not, not to be subject to the inconstant, uncertain, unknown arbitrary will of another man.¹²

Look again at the language from the two constitutional clauses cited above: “due process of law,” and “the law of the land.” This philosophy establishes the concept that if government behaves in accordance with the rules and acts for the public good, it can preserve one person’s property rights even at the cost of another’s, so long as the result is solely for the public good. Most of North Carolina and other American land use law can be summed up in those few words.

The opinion of Justice Sharpe in *In Re Application of Ellis*¹³ expressed, in pure Lockean terms, the need to protect the enjoyment of one’s property from the unbridled will of the governing authorities as follows:

It is equally clear that if an ordinance is passed by a municipal corporation which, upon its face, restricts the right of dominion which the individual might otherwise exercise without question, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the governing authorities of the town or city, it is unconstitutional

Charles II gave “the Carolinas,” and the person for whom the two rivers on either side of Charleston are named.

¹² *Two Treatises of Government*, quoted in *Encyclopedia Britannica*, 1959 Ed., Vol. 14, p. 276.

¹³ 277 N.C. 419, 178 S.E.2d 77 (1970).

and void, because it fails to furnish a uniform rule of action and leaves the right of property subject to the despotic will of aldermen who may exercise it.

The “public good” of zoning was apparently evident to the appellate judges of that era, as the constitutionality of zoning was soon upheld. North Carolina’s first two appellate zoning case arose out of Raleigh’s adoption of a zoning ordinance in 1923 or 1924. The case arose out of a proposed gas station at the corner of Hillsborough Street and Ashe Street. Our Supreme Court noted that the issue of constitutionality was not preserved for appeal, and did not opine on it. Further zoning appeal arose from a criminal conviction for violating the Building Code. Durham enacted a zoning ordinance in 1925, requiring zoning compliance as a condition for issuance of a building permit. An entrepreneur who was denied a building permit built a gas station without one in a residential district.¹⁴

Constitutionality was not challenged.

North Carolina’s first appellate zoning case to deal squarely with the issue of constitutionality was *Elizabeth City v. Aydlett*.¹⁵ It too arose out of a proposed gas station in a residential district. Elizabeth City adopted a zoning ordinance in 1929. Again, the owner ignored the denial of his application for a building permit. Our Supreme Court held as follows:

The police power is not static. It expands to meet conditions which necessarily change as businesses progress and civilization advances.

The Court quoted from *Euclid v. Ambler Realty Company*,¹⁶ and cases from Illinois and Massachusetts, upholding the constitutionality of a zoning ordinance.

¹⁴ *Harden v. Raleigh*, 192 N.C. 395, 135 S.E. 151 (1926).

¹⁵ 201 N.C. 602, 161 S.E. 98 (1931).

¹⁶ 272 U.S. 365, 71 L.Ed. 303.

The property owner contended that to deny his gas station but to classify four others in the residential zone as a lawful non-conforming use was discriminatory. The court again relied on precedents from the Supreme Court of the United States¹⁷ and other states as to the lawfulness of such a classification. *Harrington & Co. v. Renner* noted the following:

Statutes which have been passed authorizing the governing bodies of municipal corporations to enact zoning ordinances prescribing that in certain areas only designated types of buildings may be erected and used have been generally upheld by the courts as an exercise of the police power of the State. *Kinney v. Sutton*, 230 N.C. 404, 53 S.E.2d 306; *In re Appeal of Parker*, 214 N.C. 51, 197 S.E. 706; *Ahoskie v. Moye*, 200 N.C. 11, 156 S.E. 130; *Euclid v. Ambler Realty Co.*, 272 U.S. 365.¹⁸

Zoning was originally a stand-alone proposition. By an amendment to statute NCGS §160A-381, zoning can now be “adopted as part of a unified development ordinance.” That 2005 amendment endorsed an existing practice. The implications of a statute allowing unified development ordinances is that often now when one reads a zoning ordinance, it is a hodge-podge of zoning regulation, development standards, police power standards, all thrown into the mix.

A zoning enabling statute similar to the municipal statute was enacted for counties in 1959, NCGS §153-340. Like the municipal statute, it provides for a planning board, a board of adjustment, and now, the unified development ordinance option. The county enabling statute also specifically requires that zoning be “in accordance with a comprehensive plan.” NCGS §153-341.

¹⁷ *Quong Wing v. Kirkendall*, 223 U.S. 59, 32 S.Ct. 192, 56 L.Ed. 350.

¹⁸ 236 N.C. 321, 72 S.E.2d 838 (1959).

LIMITATIONS ON ZONING

The “original” zoning power of the state is said to “repose in the General Assembly.”¹⁹ (The author is not aware of the actual use of the zoning power by that body, but it has that power as part of the police power.) The General Assembly “has delegated this power to the ‘legislative body’ of municipal corporations.”²⁰ A zoning ordinance is thus a local legislative determination as to what restrictions should be placed on the land.²¹ The power to zone is “...subject both to the... limitations imposed by the Constitution and to the limitations of the enabling statute.” Within those limitations, the enactment of zoning legislation “...is a matter within the discretion of the legislature body of the city and town.”²² The courts have traditionally been deferential: “A Legislative act is presumed to be constitutional and valid. This presumption applies to zoning ordinances.”²³ The presumption is a strong one:

And a municipal ordinance promulgated in the exercise of the police power ... will not be declared unconstitutional unless it is clearly so, and every intendment will be made to sustain it.²⁴

Notwithstanding, although usually declining to find zoning ordinances expressly unconstitutional, the appellate courts have imposed limitations on local legislative power emanating from the constitutional provisions noted above. In *Orange County v. Forest T. Heath*, the Court stated:

¹⁹ *Marren v. Gamble*, 237 N.C. 680, 75 S.E.2d 800 (1953).

²⁰ *In re: Markham*, 259 N.C. 566, 131 S.E.2d 329 (1963).

²¹ *Orange County v. Forest T. Heath*, 278 N.C. 688, 180 S.E.2d 810 (1971); *Kerik v. Davidson County*, 145 N.C. 222, 551 S.E.2d 186 (2001).

²² *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E.2d 325 (1968).

²³ *Supra*.

²⁴ *State v. Martin*, 7 N.C. App. 18, 20, 171 S.E.2d 115 (1969) and *Currituck County v. Willey*, 46 N.C. App. 835, 266 S.E. 2d 52 (1980).

Although the county commissioners have the power to rezone property when reasonably necessary for public health, safety, morals or welfare, this authority is limited in that it may not be exercised arbitrarily or capriciously.²⁵

Court-imposed limitations on zoning (all emanating from the constitutional safeguards of “due process” and “the law of the land,”) include the following:

1. Zoning must be in a public interest (e.g., “reasonably necessary to promote the public good,” also described as “the public safety, health, morals, welfare, and property...”)²⁶
2. Zoning must not be “arbitrary, unreasonable or confiscatory.”²⁷
3. Zoning must not be “in bad faith,” “whimsical” or “lack fair and careful consideration.”²⁸
4. Zoning must apply to all territory subject to the ordinance.²⁹
5. Zoning must apply the same restrictions to all property of the same class.³⁰
6. Zoning must allow the property owner the right to all uses within the class.³¹
7. Zoning must be reasonably specific.³²
8. Zoning must not be based on race.³³

²⁵ *Heath, supra.*

²⁶ *Helms v. City of Charlotte, 255 N.C. 647, 122 S.E. 2d 817 (1961).*

²⁷ *Helms v. City of Charlotte, supra.*

²⁸ *Zopfi v. City of Wilmington, supra.*

²⁹ *Allred v. City of Raleigh, 277 N.C. 930, 178 S.E. 2d 432 (1971).*

³⁰ *Allred, supra.*

³¹ *Allred v. City of Raleigh, supra.*

³² *Heaton v. City of Charlotte, supra.*

³³ *Clinard v. City of Winston-Salem, 217 N.C. 119, 6 S.E.2d 867 (1940).*

9. Zoning must not be the result of “oppressive” action,³⁴ which presumably would include bribery or other improper motives.
10. Zoning must not be the result of “unequal exercise of legislative power.”³⁵
11. Zoning must not be “discriminatory.”³⁶
12. Zoning power may not be delegated³⁷ (as distinguished from the delegation of permit issuance or variance issuance.)
13. Zoning may not be amended without notice as required by statute.³⁸
14. Zoning may not be amended without providing the public an opportunity to be heard.³⁹

With specific reference to zoning changes, the following limitations have been imposed:

1. Zoning must not create a contract with the owner (e.g., it must be subject to future legislative change.)⁴⁰
2. Zoning must not be granted in exchange for promises or inducements (except to the extent allowed under conditional use or conditional zoning.)for contractual consideration.)⁴¹
3. Zoning must not be illegal “spot zoning.”⁴²

³⁴ *Harrington Co. v. Renner, Supra.*

³⁵ *Chrismon v. Guilford County*, 85 N.C. App. 211, 354 S.E.2d 307 (1987).

³⁶ *Rose v. Guilford Co.*, 60 N.C. App. 170, 298 S.E.2d 200 (1982).

³⁷ *Jackson v. Board of Adjustment*, 275 N.C. 155, 166 S.E.2d 78 (1969).

³⁸ *Eldridge v. Mangum*, 216 N.C. 532, 5 S.E.2d 721 (1939).

³⁹ *Walker v. Elkin*, 254 N.C. 85, 118 S.E.2d 1 (1961).

⁴⁰ *Manner v. Gamble*, 237 N.C. 680, 75 S.E.2d 880 (1953); *Allred v. City of Raleigh, supra.*

⁴¹ *Manner, supra; Allred, supra.*

⁴² *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988).

4. At least one decision has stated that there should be a change in the surrounding circumstances of the property.⁴³

2005 AMENDMENT - STATING GROUNDS FOR ZONING VOTES

Your Board member says: “I vote my conscience when I vote for what’s in the public interest. What’s all this about stating reasons for my vote on a zoning change?”

A 2005 statutory change added a new limitation on exercise of “legislative” discretion. Senate Bill 814 modified NCGS §160A-383 and NCGS §153A-341. The 2005 statutory changes require that the board action contain language which reflects the reasons for granting or denying the zoning change.

⁴³ *Rose v. Guilford Co.*, 60 N.C. App. 170, 298 S.E.2d 200 (1982). The *Rose* opinion actually said “circumstances and location” of the property, but: Query: how can a property’s “location” change?

Specifically, the board must incorporate in its action an explanation of why the board considers the action to be reasonable and in the public interest.

Presumably, if a zoning vote fails to comply with this new requirements, it is subject to be (and likely to be) set aside upon judicial review.