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ZONING CHANGES

This manuscript will focus on how zoning changes are accomplished in the following four types of zoning:

- (1) General Use District Zoning;
- (2) Conditional Use Zoning;
- (3) Conditional Zoning;
- (4) Overlay District Zoning.

“Spot zoning ,” “contract zoning,” and significant 2005 statutory changes will also be noted.

GENERAL USE DISTRICT ZONING

NCGS §160A-382 “...provides a city with the legislative authority to divide its territorial jurisdiction into various zoning districts.”¹ This most basic, and also probably the best-known form of zoning, is General Use District Zoning.

General Use District Zoning encompasses designating specific areas of the jurisdiction for certain defined uses. Residential zoning typically creates a numbered range of uses, e.g., historically, often “R-40, R-20” with the number referring to square footage (e.g., 40,000 sq. ft. or 20,000 sq. ft.), or more recently, R-1, R-2, R-3, etc. Commercial zoning typically involves assigning a long list of specific types of businesses to a specific type of zone, e.g., business, office and institutional, industrial.

In General Use District Zoning, the city council or county commission simply designates a category (a “zoning district”) and the landowner may put the land to all uses within the list of uses which has been assigned to that zoning district.

A “zoning map” is a critical feature of district zoning as a visual aid. Theoretically, a zoning ordinance could be entirely verbal, with no map. To do so, the ordinance would presumably have to list each parcel in the jurisdiction and state the zoning restrictions, or zoning

category, for each. That would obviously be a difficult process, so a map is used instead. Nonetheless, it should be noted that the effect of a zoning ordinance is to impose specific restrictions on every parcel in the jurisdiction, and that when a parcel is re-zoned, the process which occurs is actually the amending of the Town's ordinances as to that particular parcel. Of the dozen and a half judicial limitations on zoning set forth earlier, two have predominantly figured in the zoning appeals to courts: "Spot zoning" and "contract zoning."

SPOT ZONING

The zoning map creates a graphic representation of locations of land use. "Spot zoning" implies a particular land use which stands out as unique, noticeable at the given location, something which appears to be out of place, like a spot on your tie or a spot on a dog. "The term 'spot zoning' has frequently been used by the courts and text writers when referring to changes limited to small areas."²

One Connecticut case from the 1950s described the evil to be avoided by spot zoning as "...an attempt to wrench a single small lot from its environment and give it a new rating which disturbs the tenor of the neighborhood."³

The head note in the case of *Chrismon v. Guilford Co.*,⁴ defines spot zoning as follows: A zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected, is called "spot zoning."

In many jurisdictions, spot zoning is a derogatory term. It is invalid *per se*. The fairly unique North Carolina case law twist is that spot zoning simply describes the noticeable difference in zoning as compared to the parcel's surroundings, and that further inquiry is required to determine if it is illegal, as follows.

Our North Carolina courts have held, as stated in *Blades v. City of Raleigh*⁵, that in a judicial appeal alleging spot zoning, there are two issues: (1) whether it is a "spot," as defined

¹ *Massey v. City of Charlotte*, 145 N.C. App. 345, 550 S.E.2d 838 (2001).

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

³ *Magnin v. Zoning Commission*, 145 Conn. 26, 138 A.2d 522 (1958).

⁴ 322 N.C. 611, 370 S.E.2d 579 (1988).

⁵ 280 N.C. 531, 187 S.E.2d 35 (1972).

above, and (2) whether the zoning authority made a clear showing of a reasonable basis for the zoning.

According to Shepard's (LEXIS), *Blades* has been cited in 71 decisions, 14 law review articles, and 16 treatises. That list of other court opinions is virtually a "who's who" of zoning cases. A headnote in *Chrismon v. Guilford County*⁶ explained spot zoning as follows:

"Spot zoning" is a descriptive term merely, rather than a legal term of art, and spot zoning practices may be valid or invalid depending upon the facts of the specific case. Spot zoning is not invalid *per se*. A spot zoning case poses not merely the lone question of whether what occurred on the facts constituted spot zoning. It also poses the additional question of whether zoning action, if spot zoning, is of the legal or illegal variety.

While spot zoning judicial appeals are probably less likely to occur now that many jurisdictions have adopted some form of conditional use or conditional zoning, spot zoning is still a viable objection to an unjustifiable zoning change, whether the zoning arises under general use district zoning, conditional use zoning or conditional zoning.

A recent example of a finding of spot zoning is *Good Neighbors of South Davidson v. Town of Denton*.⁷ The Town adopted a satellite annexation of a proposed chemical storage facility out in a rural setting in the County and approved industrial zoning for an expansion of the facility. The opinion of our Supreme Court held as follows:

In summary then, of all the individual factors deemed relevant to a spot-zoning inquiry under *Chrismon*, none provide defendant with the required clear showing of a reasonable basis for its actions. In fact, when considered collectively, the factors are rather suggestive of a cavalier unreasonableness on the part of the town. Specifically, there is no evidence demonstrating compatibility between the rezoning and an existing comprehensive plan; no evidence showing that the town's zoning authority considered the relationship between the envisioned uses of the property and the uses present in the adjacent tracts; no evidence of benefits beyond those to Piedmont and the Town of Denton; and strong, uncontested evidence of potential detriments to both immediate neighbors and the surrounding community as a whole. Thus, while we agree with the Court of Appeals'

⁶ *Chrismon, supra*.

conclusion that the action at issue constituted a form of spot zoning, we do not share its view that the activity was of the legal variety.

The foregoing quote foreshadows legislation adopted in 2005 requiring zoning boards to consider consistency with adopted plans and express reasons for zoning actions.

CONTRACT ZONING

“Contract zoning” is something of a misnomer. Its definition has evolved over the last half century. The sense in which “contract zoning” was used some half-century ago appears to have been more in the context of explaining that in enacting a zoning ordinance, “...a municipality is engaged in legislating and not in contracting.”⁸ It appears to have originated out of the concepts of zoning mentioned previously to the effect that the legislative body should be exercising its independent judgment in favor of the public interest as a whole, rather than being influenced by inducements made by the property owner. Early opinions found contract zoning is objectionable primarily because it represents an abandonment on the part of the zoning authority of its duty to exercise independent judgment in making zoning decisions.

The judicial objection to “contract zoning” was stated in *Allred v. City of Raleigh*,⁹ as follows:

Rezoning on consideration of assurances that a particular tract or parcel will be developed in accordance with restricted approved plans is not a permissible ground for placing the property in a zone where restrictions of the nature prescribed are not otherwise required or contemplated. Rezoning must be effected by the exercise of legislative power rather than by special arrangements with the owner of a particular tract or parcel of land. The term “contract zoning” took on additional meanings. One concept expressed was that the municipality would not bind itself to never change the zoning. In *Marren v. Gamble*,¹⁰ the Court explained as follows:

As a consequence, a zoning ordinance fixing the boundaries of zones does not result in a contract between the municipality and property owners precluding the municipality from afterwards changing the boundaries if it deems a change to be

⁷ 355 N.C. 254, 559 S.E.2d 768 (2002).

⁸ *Kinney v. Sutton*, 230 N.C. 404, 53 S.E.2d 306 (1949).

⁹ 277 N.C. 530, 178 S.E.2d 432 (1972).

¹⁰ 237 N.C. 680, 75 S.E.2d 880 (1953).

desirable.... Moreover, a zoning ordinance does not vest in a property owner the right that the restrictions imposed by it upon his property or the property of others shall remain unaltered.”

The case of *Hall v. Durham*¹¹ emphasized the “reciprocal obligations” aspect of what has been called “contract zoning,” as follows:

Illegal contract zoning properly connotes a transaction wherein both the landowner who is seeking a certain zoning action and the zoning authority itself undertake reciprocal obligations in the context of a bilateral contract.

The various restrictions that the landowners were often proposing in circumstances criticized as “contract zoning” were created in order to reduce neighborhood opposition to a proposed re-zoning in order to make the re-zoning application more palatable to the legislative body. Not surprisingly, an alternative zoning method was developed, a method which would allow a local governing board to apply a given broad zoning category to the property but limit the uses to only the one or two uses which the applicant really desired, and to a narrower range of uses which were less offensive to the neighbors.

For example, a re-zoning of a property to a commercial use adjacent or approximate to residential uses could modify the particular commercial or industrial category by excluding on a case by case basis certain uses, e.g. abattoirs, tanneries, junk yards, sex shops, gas stations or whatever. Thus, conditional use zoning evolved. It was initially not created by statute.

When the legality of conditional use zoning was first debated in our Supreme Court in *Chrismon v. Guilford Co.*,¹² our Court noted that it allows “greater zoning flexibility,” as follows:

Conditional use zoning anticipates that when the rezoning of certain property within the general zoning framework described above would constitute an unacceptably drastic change, such a rezoning could still be accomplished through the addition of certain conditions or use limitations. Specifically, conditional use zoning occurs when a governmental body, without committing its own authority, secures a given property owner’s agreement to limit the use of his property to a particular use or to subject his tract to certain restrictions as a precondition to any rezoning.

¹¹ 323 N.C. 293, 372 S.E.2d 564 (1988).

¹² *Supra*.

The process was summarized in a law review article published in 1968 entitled “*The Case for Conditional Zoning*”¹³, as follows:

Conditional zoning is an outgrowth of the need for compromise between the interests of the developer seeking appropriate zoning changes for his tract, and the neighboring landowner whose property interests would suffer if the most intensive use permitted by the new classification were instituted. In an attempt to reconcile these conflicting pressures, the municipality will authorize the proposed change but minimize its adverse effect by imposing conditions.

In *Chrismon*, adjoining land owners of a tract which was rezoned by way of a conditional use zoning sought judicial relief declaring that the amendment to the ordinance which rezoned the subject property in 1982 was void on the grounds that what the County called “conditional use zoning” was in fact “contract zoning,” among other grounds. Our Supreme Court’s opinion, by Justice Meyer, examined the history and evolution of conditional use zoning. He had noted that conditional use zoning had arisen at least in small part from a previous statutory authority to grant conditional use permits.

While the *Chrismon* case was in the appellate courts, the General Assembly, on July 4, 1985, amended NCGS §160A-382 and §153A-342, to allow cities and counties to establish conditional use districts. The Act was entitled “An Act to Make Clear the Authority of Local Governments...to Establish Such Districts.” Our Supreme Court affirmed the authority for a local zoning body to establish conditional use districts.

In conditional use zoning, the landowner signs a document agreeing to tailor or “condition” the general use category by limiting many of the possibly unpopular uses. The typical procedure would be for the applicant requesting a property to be rezoned by conditional use zoning to file as well a development site plan in the context of an application seeking a “conditional use permit.” Such permits had already been used for a number of years prior to that and there is a large body of case law governing them.

A Conditional Use Permit or (“CUP”) or Special Use Permit or (“SUP”) application is reviewed by a board rather than by an individual in the planning department. (The 2005 statute changes allow delegation to the planning board.) The standards of review in some municipalities are governed by common law. In others, a representative ordinance might provide, for example, that the development permit could be denied only if certain adverse conditions were found

¹³ Shapiro, 41 Temp. L.Q. 267.

following a quasi-judicial public hearing, and/or that the permit could be issued subject to various “reasonable conditions.”

Depending on the procedure set forth in the particular municipal or county ordinance, the conditional use permit application would be set for public hearing along with or after the conditional use zoning application. Alternatively, the ordinance might allow for the developer to file the conditional use zoning application first, go to public hearing on that, and see if it was approved, before incurring the land planning and engineering costs necessary to file the paperwork supporting the conditional use permit. If the zoning were denied, then those costs could be avoided.

The zoning hearing is legislative in nature. The CUP/SUP hearing is quasi-judicial in nature. The governing body sits in two very different roles in those two types of proceedings. One model, perhaps the norm, is a two-step process of (1) a joint public hearing resulting, if the application is approved, in the enactment of an ordinance establishing a conditional use zoning district, and then (2) a quasi-judicial hearing on the conditional use permit.

CONDITIONAL ZONING

It is difficult for a town board to shift gears and hold a quasi-judicial hearing on a SUP/CUP, involving the same proponents and opponents who have just appeared before it in a “legislative” hearing in which “testimony” may involve lay opinions and emotions. Then in the quasi-judicial hearing, the public must be told that their testimony is not competent. Also, the quasi-judicial context raises the *ex parte* communication issue. That limits citizen access to their elected officials.

One solution was to omit the quasi-judicial hearing, approve the zoning, and have the planning department issue the permit. That procedure was contested in *Massey v. Charlotte*.¹⁴ Charlotte’s procedure was to hold a public hearing on the conditional use zoning, and if it was approved, then to process the development permit application “administratively.” The zoning hearing remained “legislative.” A neighboring landowner opposed to the re-zoning appealed arguing that the City failed to follow lawful procedures. The Court of Appeals, noting that the City “administratively” approved the developer’s site plans, concluded that NCGS §160A-381(a) allows, but does not compel, a municipality to issue conditional use permits. See also *Summers v. City of Charlotte*.¹⁵

¹⁴ 145 N.C. App. 345, 550 S.E.2d 838, *review denied*, 354 N.C. 219, 554 S.E.2d 342 (2001).

¹⁵ 149 N.C. App. 509, 562 S.E.2d 18, *review denied*, 355 N.C. 758, 566 S.E.2d 482 (2002).

By deleting the opportunity to approve conditions, no quasi-judicial hearing was required. Thus, the local government can simply decide by its procedural ordinances whether there will or will not be a public hearing on the development permit and thereby avoid judicial review related to quasi-judicial proceedings focused on such issues as whether the hearing was fairly conducted, whether the rights of the parties were respected, whether the evidence upon which the decision was made was competent, material and substantial, and incorporated in sufficiently clear findings of fact. “Conditional zoning” as this process is called, was validated in the 2005 land use legislation.

After the validation and now frequent use of conditional use zoning or conditional zoning, it is probably likely that “contract zoning” claims will shrink in importance. An obvious exception is where the inducement by the developer is too far afield from the development issues presented by the ordinances and the project. The 2005 amendments to NCGS §160A-382(b) and NCGS §153A-342(b) require that the conditions be limited to “...those needed for conformance to plan, ordinance, or to address project impacts.” Query: whether a developer can offer as a “condition” to pay an impact fee which the courts have held the municipality cannot charge as a general proposition? “Spot Zoning,” however, is still as viable an objection to zoning as ever. One reason is that an obtrusive “spot” violates the fundamental concept that zoning should be rational and comprehensive.

OVERLAY DISTRICT ZONING

Your client reads the ordinance on the city’s web page, and asks “What’s an overlay zone anyway? Can they do that?”

Overlay District Zoning involves imposing certain additional land use regulations, particular to the specific geographical area and often aesthetic in nature, over an indeterminate number of contiguous districts already zoned for various uses. The additional rules are simply “laid over” or added on to the existing use district zoning. An overlay district will likely include parcels which are zoned for a variety of uses of different types and intensities under traditional General Use District Zoning and/or Conditional Use (or in a given jurisdiction, Conditional) zoning. The overlay zoning changes none of that. It simply imposes additional criteria applicable to the area. Three types of Overlay Districts come to mind: (1) historical, (2) environmental, and (3) aesthetic. Overlay Districts are specifically authorized by NCGS §160A-382.

The creation of a historic district, and the overlay district concept itself, were challenged on constitutional grounds in *A-S-P Associates v. City of Raleigh*,¹⁶ A-S-P Associates argued that “superimposing the Historic District on preexisting residential and office and institutional districts in which Associates’ property is located...violates the uniformity requirement of G.S. §160A-382, since its property is subject to the Historic District regulations while other property in the same office and institutional district is not. The Court held as follows:

G.S. §160A-382 only requires that the regulations of a particular use-district apply uniformly throughout the district. It does not prohibit by implication the creation of overlay districts. That the creation of an overlay historic district may impose additional regulations on some property within an underlying use-district and not on all of the property within it, does not destroy the uniformity of the regulations applicable to the underlying use-district.

Historic districts are based on express statutory authority. NCGS §160A-400, *et seq.* A historic district zoning ordinance imposes certain requirements protecting historic structures. The constitutionality of a historic district was also addressed in great detail in the A-S-P opinion. A-S-P Associates also contended, interestingly proposed, that the historic district could not apply to its vacant lot which contained no historic structure to be protected. The Court rejected that argument. Although NCGS §160A-400.4 provides that such a district may be “a special use district or an overlay district,” it is assumed that the latter is more prevalent since zoning of the underlying area probably occurred years before the historic district was created.

An environmental overlay district known to many in Wake County is the Swift Creek management plan, which precludes extension of municipal sewerage and restricts residential density in the area proximate to Swift Creek south of Raleigh, Cary and Garner. Initially developed as a agreement between Wake County, Raleigh, Garner and Cary as to future development, the parameters of the agreement were adopted as an overlay ordinance by Garner, in whose planning and zoning jurisdiction much of the area lies. The Swift Creek Conservation District ordinance regulated density, set forth detailed riparian buffer set-backs and road design standards.

As an example of an aesthetic overlay, attendees of this seminar may have driven today on I-40. They did not see a lot of billboards and other clutter. The I-40 Overlay District was promulgated by the Triangle-J Council of Governments and was adopted in many, probably all,

¹⁶ 298 N.C. 207, 258 S.E.2d 444 (1979).

of the municipalities and counties in this area. The I-40 Scenic Highway Overlay District (“SHOD”) includes all property within 1,250 feet from the outside right-of-way line of I-40. Where any portion of a building or parking area falls within the boundaries of the district, its provisions apply to all of the buildings and parking areas. The principal elements of the I-40 SHOD are as follows:

- All developments for which a site plan or subdivision plat approval is required are also required to receive a Special Use Permit;
- No building shall exceed 150 feet above grade;
- Additional minimum setbacks from the right-of-way based on building height;
- Buffering and screening;
- Detailed criteria for development of the buffer;
- Additional screening and landscaping requirements in front yards (set forth in detail);
- No clearing of vegetation generally allowed for any purpose, including agriculture and timber harvesting within the 50 foot buffer;
- Special limitations on outdoor storage or operations adjacent to the highway for truck stops, motor vehicle dealerships, lumber yards, heavy equipment dealers and similar uses;
- An additional list of prohibited uses in excess of those prohibited in the underlying zone district.

An overlay district is typically initiated by the governing board, planning staff, planning board, or as in the case of the I-40 SHOD, by inter-local interest. If your client the developer wants to change the impact of an overlay district, the effort could conceivably involve a redrawing of its boundary lines to escape from it, or more likely, a text change. A text change is simply a change in the language of a zoning ordinance (either an overlay or a district classification), rather than a change in the application of the classification system to the particular parcel. Text changes are subject to the same notice and hearing rules and other applicable limitations on zoning.

2005 CHANGES IN PLANNING LAWS

The most comprehensive changes in North Carolina zoning and planning legislation since 1923 took place last year. The two principal bills were Session Laws 2005-418 (S.518), entitled “An Act to Clarify and Make Technical Changes to City and County Planning Statutes,” and S.L. 2005-426 (S.814), entitled “An Act to Modernize and Simplify City and County

Planning and Land-Use Management Statutes.” Statutory changes encompassed in those two bills affected a multitude of zoning and land use practices and procedures.

The 2005 statute amendments included the following:

- Approve unified development ordinances (already in use in various municipalities).
- Change statutory term “planning agency” to “planning boards.”
- Require on-site posting of notice of hearings on zoning map amendments.
- Repeal the county exemption for mailing notices of initial zoning.
- Allow counties the option to publish half-page newspapers ads rather than mail notices.
- Limit protest petitions to zoning map amendments (excluding text amendments).
- Revise definition of area qualifying for a zoning protest petition.
- Apply zoning protest petitions to conditional zoning.
- Provide that a person filing a zoning protest petition may withdraw the protest prior to vote on the re-zoning.
- Require Planning Board review prior to initial zoning.
- Require Planning Board review of proposed re-zonings.
- Require written comments regarding the consistency of a proposed zoning amendment with the comprehensive plan and other adopted plans.
- Prohibit voting on ordinances if a board member has a direct, substantial, identifiable financial interest.
- Apply the same rule to Planning Board members.
- Require impartial board members for quasi-judicial hearings by Board of Adjustment and other boards.
- Prohibit participation or voting where the board member has a fixed opinion on the case prior to the hearing.
- Prohibit participation or voting where the board member has an undisclosed ex parte communication.
- Prohibit participation or voting in quasi-judicial hearing where board member has close family, business or associational ties with an affected person.
- Prohibit participation or voting on a quasi-judicial matter where the board member has a financial interest in the outcome.

- Create statutory authority for temporary moratoria of reasonable duration.
- Require clear statement of cause and effect of moratoria.
- Eliminate need for a public hearing on moratoria related to a substantial threat to public health and safety.
- Require public hearing for other moratoria.
- Limit renewal or extension of moratoria.
- Apply vested rights to projects potentially affected by moratoria.
- Approve conditional zoning (following *Massey v. Charlotte*)¹⁷.
- Limit conditions and site-specific standards “to those that address the conformance of the development and use of the site to city ordinances and an officially adopted comprehensive or other plan and those that address the impacts reasonably expected to be generated by the development or use of a site.” NCGS §160A-382(b).
- Require a statement of the reasonableness of proposed re-zonings.
- Allow planning boards to issue SUP’s and CUP’s.
- Change SUP/CUP from 4/5 vote to a simple majority.
- Expressly prohibit use variances (following case law).
- Clarify terms of alternate members of a Board of Adjustment.
- Clarify definition of “special exception as limited to minor modifications.”
- Give county Boards of Adjustment the subpoena power previously existing for municipalities.
- Approve differential major and minor subdivisions (already in effect in many jurisdictions).
- Modify procedures for performance guarantees of infrastructure improvements.
- Allow denial of building permits or subdivision ordinance enforcement, as well as zoning enforcement (overruling *Town of Nags Head v. Tillett*).¹⁸
- Approve pre-sale contracts for financing of subdivisions.
- Approve public/private development agreements applicable to large projects, including provision locking in zoning vested rights for up to 20 years.
- Authorize city and county/developer infrastructure agreements (already used, some by Local Acts).

¹⁷ 145 N.C. App. 345, 550 S.E.2d 838, *review denied*, 354 N.C. 219, 554 S.E.2d 342 (2001).

- Authorize municipalities to enter into intersection and roadway improvement agreements.

Other 2005 statutory amendment added the following:

- Modify NCGS §160A-392 relating to jurisdiction over state and other governmental entities (e.g. school boards) back to the pre-2004 status. See *Nash-Rocky Mount Board of Education v. Rocky Mount Board of Adjustment*¹⁹.
- Subject the State Ports Authority at Southport to municipal zoning.
- Limitation regulation of flag-flying to official government flags.
- Allow “reasonable non-discriminatory regulations” on flag size, number, location and height.

¹⁸ 314 N.C. 627, 336 S.E.2d 394 (1985).

¹⁹ 169 N.C. App. 587, 610 S.E.2d 255 (2005).