Planning and Local Government Law Update

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Court Finds No Review Possible on Denial of Special Use Permit

In this case, the plaintiffs applied to the Town of Weaverville for a special use permit in order to open a bed and breakfast guest inn. Ballas v. Town of Weaverville, 121 N.C. App. 346 (1996). The Town's Board of Adjustment, which considers these permit applications, denied the permit because the plans did not meet specific design criteria. The plaintiffs appealed to the trial court, which affirmed the Board's decision and held that the plaintiffs had not produced sufficient evidence to show compliance with the Town's zoning ordinance. The Court of Appeals reversed the trial court's decision and remanded the case for entry of a new decision with further findings of fact.

One section of the ordinance required the plaintiffs to show that the special use permit would not substantially diminish and impair neighborhood property values. Testimony of a real estate appraiser showed that a bed and breakfast would lower surrounding property values by 11% to 23%. The court found that such evidence could support a finding that the bed and breakfast would substantially diminish property values, but it did not mandate such a finding.

Another section required a showing that adequate utilities and necessary facilities would be provided. Although the plaintiffs showed that they had installed public water and sewer lines, the Town had not yet accepted the utilities for maintenance. The court found that such evidence is not sufficient to support a finding that the utilities were inadequate.

Because the lower court's decision had not specified that the denial was based on impaired property values, the court could not review the validity of the Board of Adjustment's decision, and so remanded the case to Superior Court for further consideration. The case highlights the requirement that a Board of Adjustment or other decision-maker make explicit findings in regards to a zoning permit decision, and it should serve to remind landowners of the need to closely read the local zoning ordinance and comply with all of its terms.

First Town in the U.S. Sued by the Justice Department for Antitrust Violations

Stilwell, Oklahoma, population 2,700, recently became the first municipality ever to be sued by the federal government for antitrust violations. The Justice Department sued Stilwell for using its monopoly power over water and sewer to force purchase of its electricity, which is against the law. The Justice Department is currently investigating other cities and towns across the nation for similar violations.

When a developer built a new apartment complex in Stilwell, he planned to buy electricity from an out-of-town utility offering a better deal than the town. However, Stilwell threatened to deny him water and sewer service unless he bought its electric service, so

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he changed his mind.

Apparently, this practice of using one municipal service to force purchase of another service, and thereby keeping competitors out, is not so uncommon among municipalities; the Justice Department wants to send a clear signal to other violators.

Sparsely populated areas often receive electricity service from rural co-ops, which are member-owned utilities first authorized by Congress in 1936 to serve such areas. As municipalities expand, these co-ops are clashing with towns and cities competing for business. In Stilwell's case, the town first attempted to buy the local co-op's power lines, but it would not sell. Stilwell then sued the co-op, asserting that state law allows it to claim power lines within city limits. This case is pending in federal court.

An editorial written in a local newspaper first brought up the possibility of antitrust violations by Stilwell. When the editorial was faxed to the Justice Department, the investigation began. Despite a recision of the utility policy by the Stilwell City Council, the Justice Department ordered the town to make compliance reports for the next ten years.

This case not only sends a message to cities and towns who engage in these types of activities, but it also provides developers and other landowners with options when faced with similar situations.

Statutes Protecting a Developer's Opportunity to Develop Property

Several states, including North Carolina, have recently enacted development agreement statutes. These statutes could prevent severe disappointment on the part of developers. See Daniel J. Curtin, Jr. and Scott A. Edelstein, *Development Practice in California and Other States*, 22 Stetson L. Rev. 761 (1993); reprinted in 1994 Zoning and Planning Handbook 491 (Kenneth H. Young, ed., Clark Boardman Callaghan).

Developers spend considerable amounts of time preparing for approvals. After going though all the necessary steps of the land use permitting process, including financial feasibility reports, environmental studies and hearings, they can receive "final" approval which turns out to be less than final.

Subsequent legislative action, in the form of rezonings, moratoriums or voter-approved initiatives, can destroy the approval. This can occur if the developer does not have a vested right to proceed with the project.

North Carolina has two statutes which provide stability for private developers. N.C. Gen. Stat. §§ 160A-385—160A-385.1 (1994). Changes in zoning will not effect the plans of a developer if valid approval or a building permit was obtained prior to the changes or if a vested right was established. Approval of a site specific plan or a phased development plan will result in a vested right running for two to five years. Accordingly, a developer can proceed with the approved plan despite any subsequent zoning changes. This is subject to a few exceptions and leaves open the question of when a right vests if no building permit has yet been granted.

With these laws, North Carolina has attempted to strike a balance between the public's interest in zoning and the private expectations of developers. Such legislation provides a useful planning device for both developers and the government.

Court Upholds a Town's Right to Provide Water Service in Competition with a Private Company

The North Carolina Court of Appeals recently upheld the right of a town to provide water service in competition with a private company in Carolina Water Service v. Town of Atlantic Beach, 121 N.C. App. 23 (1995). The plaintiff utility had claimed tortious interference with contract, unfair trade practices, and equitable estoppel, which are all claims alleging unfair behavior on the part of the town.

Prior to the Town's annexation of certain areas in 1987 and 1988, Carolina Water had provided water service to these areas which was equal to that offered by the Town to its customers. Because the services were comparable, the Town did not extend water service at that time. Subsequently, the Town added fluoride and water softener to its water, but Carolina Water did not provide these additives. Upon a request by landowners in 1992 to extend water to the areas, the Town voted to extend services in the same manner as to any newly annexed area, which included waiving the impact fee and offering a reduced tap-on fee. The result was that the Town extended lines parallel to Carolina Water's lines, and numerous people switched over to the Town's service.

Although Carolina Water alleged that the Town had tortiously interfered with its contracts and committed unfair trade practices, the court found that the Town is authorized by law to construct its own utilities to compete with private companies. Further, the Town had not encouraged citizens to terminate their contracts with Carolina Water, but rather had

offered a competing product which was different because of the water additives. Therefore, the court found that Carolina Water did not have a claim because the Town's actions were neither unfair nor deceptive, and the Town had established its own water service lawfully.

This case demonstrates that municipalities are free to compete with private businesses in the provision of public services and can succeed in the competition if they offer a superior product.

County Held Responsible for the Taking of a Driveway Easement

The North Carolina Court of Appeals recently held that a county was responsible for the taking of an easement, despite the fact that government regulations forced the taking. Tolbert v. County of Caldwell, 121 N.C. App. 653 (1996).

Caldwell County operates a landfill adjacent to the plaintiffs' property. In 1980, the County and the plaintiffs' predecessor in title made an agreement, which created a sixty-foot easement across the landfill for his use and the use of his heirs and assigns. The easement would be opened to the public when the County ceased operation of the landfill or in ten years, whichever occurred first. A state agency later promulgated regulations mandating that landfill operators control public access. Following these regulations, Caldwell County limited the plaintiffs' access to the easement by installing gates and fences and by allowing the plaintiffs to use the easement only during the landfill's operational hours (8:00 a.m. to 5:00 p.m. weekdays and a few hours on Saturdays).

The County admitted that the action was a temporary taking but denied that it was the responsible party because state and federal regulations had forced it to restrict access to the landfill. The court rejected this argument and held that Caldwell was the party responsible for the taking. The court stated that the County was the party that had taken or condemned the easement because it operated the facility, executed the agreement with the plaintiffs' predecessor, and closed the road. As an aside, the court ordered the County to pay damages and costs, but it did not specifically rule on whether the County could look to state and federal agencies to help pay these damages and costs.

Although this case places counties in an awkward position between complying with state and federal regulations and takings claims by landowners, it is positive for landowners and their ability to find relief for the loss of their property rights.

Court Finds That City Satisfies the "Public Benefit" Test

In a decision that may have great ramifications for land condemnation law, the North Carolina Court of Appeals recently upheld a trial court's decision to deny plaintiffs' claims for injunctive relief to prevent the condemnation of their land. Stout v. City of Durham, 121 N.C. App. 726 (1996). The City of Durham intended to condemn portions of the plaintiffs' properties for construction of a sewer outfall pursuant to its power of eminent domain.

Plaintiffs claimed that the move was an unlawful and unconstitutional exercise of the City's power to condemn property because the proposed sewer outfall would primarily benefit the private developer of a shopping center. They contended that the condemnation was improper because it was for a private, rather than a public purpose. City governments have no authority to condemn or take property for a private purpose. Any attempt by city government to do so would be void.

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To stop the condemnation, plaintiffs had to establish that the City's condemnation was for a private purpose. The Court of Appeals found that they had failed to do so.

The court stated that the sewer outfall would contribute to the welfare and prosperity of the entire community, and also benefit others in the area, who would have an equal right to connect to the system. Thus, this public purpose and benefit outweighed any incidental benefit to the private developer, and the court concluded that the City had met the "public benefit" test.

This case highlights municipalities' broad power of eminent domain and the generous reading of the "public benefit" test given by the courts. As long as citizens have equal rights to use an improvement, the benefits to private individual entities may be deemed incidental and the condemnation found valid. CP