Zoning, Rezoning, and Court Challenges

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The General Assembly's delegation of zoning authority to local governments

The authority to regulate land use is a legislative power that the North Carolina Constitution vests in the General Assembly. *See Jackson v. Guilford Cnty. Bd. of Adjustment*, 275 N.C. 155, 162-63, 166 S.E.2d 78, 83 (1969) (citing N.C. Const., art. II, § 1). The General Assembly has delegated its zoning authority to local governments, such as Orange County. See id.; N.C. Gen. Stat. § 160D-702.

Specifically, the General Assembly has delegated to local governments like Orange County the authority to divide their territories into zoning districts, and within those districts, to regulate construction and use of buildings, structures, and land. N.C. Gen. Stat. § 160D-703(a). Zoning districts may include conditional districts, in which site plans or individualized development plans are imposed. *Id.* § 160D-703(a)(2).

The General Assembly has placed certain limitations on its delegation of zoning power to local governments, however. First, the General Assembly requires each local zoning authority to develop a comprehensive plan to guide its zoning decisions. *See id.* § 160D- 701. A local zoning authority's "[z]oning regulations shall be made in accordance with [this] comprehensive plan." *Id.* Second, the General Assembly has provided that zoning decisions "shall be designed to promote the public health, safety, and general welfare." *Id.* (emphasis added). The General Assembly has also directed that, when dividing its territory into zoning districts, the districts must be of the "number, shape, and area deemed best suited to carry out" these purposes. *Id.* § 160D- 703(a) (emphasis added).

Rezonings are presumptively valid.

Unlike a municipality's consideration of an application for a special use permit, zoning is a legislative act. *Kerik v. Davidson Cty.*, 145 N.C. App. 222, 228, 551 S.E.2d 186, 190 (2001); *see also Marren v. Gamble*, 237 N.C. 680, 684, 75 S.E.2d 880, 883 (1953) ("In enacting a zoning ordinance a municipality is engaged in legislating and not in

contracting."). The same goes for a legislative decision to change the zoning of property. "A county's legislative body has authority to rezone when reasonably necessary to do so in the interests of the public health, safety, morals or general welfare." *Kerik*, 145 N.C. App. at 228, 551 S.E.2d at 190-91. Because a zoning ordinance is "a law enacted in the exercise of the police power granted the municipality, no one can acquire a vested right therein." *McKinney v. City of High Point*, 239 N.C. 232, 237, 79 S.E.2d 730, 734 (1954). Rather, a zoning ordinance is always "subject to amendment or repeal at the will of the governing agency which created it." *Id.*

Such a rezoning ordinance "is presumed to be valid. The burden is on the complaining party to show it to be invalid." *Graham v. City of Raleigh*, 55 N.C. App. 107, 110, 284 S.E.2d 742, 744 (1981); *see also Allgood v. Town of Tarboro*, 281 N.C. 430, 441, 189 S.E.2d 255, 262 (1972) ("There is a presumption that the Town Council adopted this amendment in the proper exercise of its police power."); *Heaton v. City of Charlotte*, 277 N.C. 506, 519, 178 S.E.2d 352, 360 (1971) (reiterating that "every presumption is in favor of the validity of a legislative act").

This Court has explained the proper lens through which these decisions should be viewed:

> Ordinarily, the only limitation upon this legislative authority is that it may not be exercised arbitrarily or capriciously. It is well established that the grant or denial of a rezoning request is purely a legislative decision which will be deemed arbitrary and capricious only if the record demonstrates that it had no foundation in reason and bears no substantial relation to the public health, the public morals, the public safety, or the public welfare in its proper sense. When the action of the legislative body is reviewed by the courts, the latter are not free to substitute their opinion for that of the legislative body so long as there is some plausible basis for the conclusion reached by that body.

Walton N.C., LLC v. City of Concord, 257 N.C. App. 227, 234-35, 809 S.E.2d 164, 170 (2017) (internal citations and quotations omitted).

Judicial review of zoning decisions

Zoning decisions of local governments are subject to judicial review. *See Allred v. City of Raleigh*, 277 N.C. 530, 544-45, 178 S.E.2d 432, 439-40 (1971). But, not just anyone can challenge a government's legislative decision. *See Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 138, 544 S.E.2d 821, 823 (2001) ("In passing on the validity of an annexation or zoning ordinance, one of the court's first concerns is whether the plaintiff has standing to bring the

action."). Regarding rezoning ordinances in particular, our Supreme Court has unequivocally declared as much:

> Of course, the validity of a municipal zoning ordinance, when directly and necessarily involved, may be determined in a properly constituted action under our Declaratory Judgment Act. However, this may be done only when challenged by a person who has a specific personal and legal interest in the subject matter affected by the zoning ordinance and who is directly and adversely affected thereby.

Taylor v. City of Raleigh, 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976).

The Court of Appeals has held that plaintiffs lack standing to challenge rezoning decisions when they fail to meet the *Taylor* standard articulated by the Supreme Court. In *Ring v. Moore County*, for example, the Court reiterated that "[a] county ordinance rezoning a tract of land is not subject to challenge in court by owners of an adjacent tract who fail to allege actual or imminent injury resulting from the rezoning." 257 N.C. App. 168, 168, 809 S.E.2d 11, 11 (2017). There, the plaintiffs generally alleged that a rezoning would increase traffic and noise and light pollution and make trespassing more difficult to control. *Id.* at 172, 809 S.E.2d at 13-14. The court dismissed the case for lack of standing.

"The mere fact that one's proposed lawful use of his own land will diminish the value of adjoining or nearby lands of another does not give to such other person a standing to maintain an action, or other legal proceeding, to prevent such use." *Jackson v. Guilford Cty. Bd. of Adjustment*, 275 N.C. 155, 161, 166 S.E.2d 78, 82 (1969). In this regard, North Carolina courts "appropriately have set a high bar for third parties to establish standing to bring actions relating to the exercise of police powers between the State and its citizens." *Cherry Cmty. Org. v. City of Charlotte*, 257 N.C. App. 579, 582, 809 S.E.2d 397, 400 (2018).

Standing is only conferred when a property owner demonstrates harm that is "distinct from the rest of the community." *Vill. Creek Prop. Owners' Ass'n v. Town of Edenton*, 135 N.C. App. 482, 485, 520 S.E.2d 793, 795 (1999); *see also Cherry v. Wiesner*, 245 N.C. App. 339, 347,781 S.E.2d 871, 877 (2016); *Casper v. Chatham Cty.*, 186 N.C. App. 456, 458, 651 S.E.2d 299, 301 (2007); *Sarda v. City/Cty. of Durham Bd. of Adjustment*, 156 N.C. App. 213, 214-15, 575 S.E.2d 829, 830-31 (2003). For example, a property owner has standing if he or she has an easement interest in the land being rezoned. *Budd v. Davie Cty.*, 116 N.C. App. 168, 171, 447 S.E.2d 449, 451 (1994).

Zoning decisions are often challenged as constituting illegal spot zoning or

arbitrary and capricious zoning. *See, e.g., Covington v. Town of Apex*, 108 N.C. App. 231, 236-40, 423 S.E.2d 537, 540-42 (1992) (addressing spot zoning); *Gregory v. Cnty. of Harnett*, 128 N.C. App. 161, 163-66, 493 S.E.2d 786, 788-89 (1997) (addressing arbitrary and capricious zoning).

The people who usually bring illegal spot zoning and arbitrary and capricious zoning claims are the people who own property in the vicinity of the parcel that is subject to the relevant zoning decision. *See, e.g., Blades v. City of Raleigh*, 280 N.C. 531, 533-34, 544, 187 S.E.2d 35, 36, 42 (1972); *Good Neighbors of S. Davidson v. Town of Denton*, 355 N.C. 254, 255, 559 S.E.2d 768, 769-70 (2002); *Chrismon v. Guilford Cnty.*, 322 N.C. 611, 614-15, 370 S.E.2d 579, 581-82 (1988); *Allgood v. Town of Tarboro*, 281 N.C. 430, 432, 189 S.E.2d 255, 257 (1972).

Spot zoning occurs when a parcel is rezoned in a way that benefits the owner of the parcel but imposes a detriment on the surrounding community. *See Chrismon*, 322 N.C. at 628-29, 370 S.E.2d at 589-90. As our Supreme Court has explained, spot zoning occurs when a zoning ordinance "singles out and reclassifies a relatively small tract of land owned by a single person and surrounded by a much larger area uniformly zoned." *Blades v. City of Raleigh*, 280 N.C. 531, 549, 187 S.E.2d 35, 45 (1972).

A rezoning decision will be invalidated as illegal spot zoning if it reclassifies a relatively small parcel that is owned by a single owner in a way that is inconsistent with the surrounding properties, disturbs the tenor of the neighborhood, and confers a benefit on the owner of the parcel with no commensurate benefit to the community. *Etheridge v. Cnty. of Currituck*, 235 N.C. App. 469, 475-76, 762 S.E.2d 289, 294-95 (2014). "Spot zoning is not invalid *per se* in North Carolina so long as the zoning authority made a clear showing of a reasonable basis for such distinction." *McDowell v. Randolph Cty.*, 256 N.C. App. 708, 715, 808 S.E.2d 513, 518 (2017). That is, spot zoning is "void only in the absence of a clear showing of a reasonable basis therefor." *Chrismon*, 322 N.C. at 627, 370 S.E.2d at 589.

Arbitrary and capricious zoning occurs when a zoning decision is inconsistent with the objectives set forth by the General Assembly in section 160D-701 and with the zoning authority's comprehensive plan. *See Gregory*, 128 N.C. App. at 164-65, 493 S.E.2d at 788-89. Because of the presumption of validity, courts will not invalidate zoning ordinances unless it "clearly appears" that the municipality had "no foundation in reason" and the zoning had "no substantial relation to the public health, the public morals, the public safety or the public welfare." *Armstrong v. McInnis*, 264 N.C. 616, 626-27, 142 S.E.2d 670, 677 (1965). Indeed, courts

will "never" interfere with local governments' exercise of discretionary powers "unless their action should be so clearly unreasonable as to amount to an oppressive and a manifest abuse of their discretion." *Id.* at 627, 142 S.E.2d at 678. That standard "is a very difficult standard to meet. A decision is arbitrary and capricious if it was patently in bad faith, whimsical, or if it lacked fair and careful consideration." *McDowell*, 256 N.C. App. at 711, 808 S.E.2d at 516.

A zoning decision will be invalidated as arbitrary and capricious if the commissioners did not appropriately consider the character of the neighborhood, the suitability of the land for the permitted uses in the new zone, the principles in the comprehensive plan, and whether circumstances had changed, or not changed, such as to justify (or not) a rezoning. *Id.* at 165, 493 S.E.2d at 789.

Under North Carolina law, "zoning decisions are typically afforded great deference by reviewing courts." *Childress*, 186 N.C. App. at 34, 650 S.E.2d at 59. The enactment of zoning legislation "is a matter within the discretion of the legislative body of the [local government]." *Zopfi*, 273 N.C. at 434, 160 S.E.2d at 330. Exercising that discretion necessarily entails policy-based judgments that should not be disturbed. Thus, "[i]f the conditions existing at the time of the proposed change are such as would have originally justified the proposed action, the legislative body has the power to act." *Walker v. Town of Elkin*, 254 N.C. 85, 89, 118 S.E.2d 1, 4 (1961). For example, when a local government's discretionary decision is "based on and consistent with the various reports and recommendations and entered after fair and careful consideration," it is not arbitrary or capricious. *Summers v. City of Charlotte*, 149 N.C. App. 509, 519, 562 S.E.2d 18, 25 (2002).

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Jeanette Doran has served as President and General Counsel of the North Carolina Institute for Constitutional Law since returning to the Institute to reorganize and restart the organization in July 2019.

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