Land Use Law Quarterly

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The Chair's Comments

Tom Johnson

Welcome to the first edition of the Land Use Quarterly for 2014-15. I am honored to have been selected to serve as the Chair of the Zoning, Planning and Land Use Section Council for this year. I am excited to serve with John Carmichael as Vice Chair, LeAnn Nease Brown as Secretary and T.C Morphis as Treasurer. I also thank those who are serving as committee chairs. Please consider volunteering as a member of one of our committees—an excellent way to contribute to the success of our Section.

This year we have two projects that will have a tremendous impact on the Zoning and Land Use Practice in North Carolina. As a follow up to the successful passage of the revisions to the Board of Adjustment statute—NCGS §160A-388—in the 2013 Session of the General Assembly, we have decided to jointly produce with the UNC School of Government an update to the School of Government's publication, "The Zoning Board of Adjustment in North Carolina." Significant changes in practice before boards of adjustment have occurred since this book was published in 1984, not the least of which being the recent amendment to §160A-388. The book has served as an essential resource for local boards of adjustment for many years but needs to be updated. T.C. Morphis has volunteered to lead this project with David Owens and Adam Lovelady at the School of Government. If you are interested in becoming involved in this project, please contact T.C.

The Section was so successful in the amendment to NCGS §160A-388 that a committee consisting of David Owens, Tom Terrell, LeAnn Nease Brown and Mike Brough, is working with the Bar Association to introduce a modernization and update of the zoning and land use statutes in Chapters 160A and 153A to

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Can a Group Home be Zoned Out of the Neighborhood?

By David Owens

Most zoning ordinances have residential zoning districts. One of these is usually a district where the primary permitted land use is single family detached housing. Multifamily housing and group living arrangements (as well as commercial and industrial land uses) are usually not allowed in these zoning districts.

Use of these zoning districts presents the question of where to draw the boundary between a "single family" residence and a "group" residence. This question is particularly important in determining how to treat small group homes for persons with disabilities, facilities that are designed to provide housing, personal care, and habilitation services in the quiet residential setting of a single family zoning district.

Suppose a zoning ordinance provides that no more than four unrelated individuals are allowed to reside in a "single family" home. Group homes, health care, and institutional uses are allowed in other zoning districts, but not in this district. Under this wording, which of the following group homes would be allowed to locate in that zoning district, assuming they secure the necessary social service license?

- A regional mental health support organization owns a single-family ranch house. They use it to house six adults with moderate developmental disabilities, providing a structured living environment with a resident manager.
- A local church owns a large Victorian home. They are using it as a group home for six teenage girls. They provide a safe living environment, counseling, remedial education, and other services for teenagers who have dropped out of school or been convicted of a criminal offense that did not result in incarceration.

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The Chair's Comments, *continued from the front page*

be codified as a new Chapter 160D. A draft of this legislation has already been circulated to the Section for review and will be circulated among all interested parties in the coming weeks. Our goal is to gather comments and suggestions by the end of the year and introduce a bill for consideration during the 2015 Session. If you have any comments, please send them to me (***tjohnson@nexsenpruet.com***) or Tom Terrell (***tom.terrell@smithmoorelaw.com***). The end result will be a modern and up to date set of laws that will help guide the zoning and land use practice for many years to come. Thank you to this committee for its great work.

As you can see, we have a busy year in front of us. Please volunteer for a committee or write an article for the Quarterly. We can only be successful with your help.

Tom Johnson, Chair

Group Home, continued from the front page

- A national nonprofit organization owns a large home and uses it for a residential program for persons recovering from substance abuse. The organization has a zero tolerance policy for substance abuse by the residents. There are nightly counseling sessions held in the home. The home currently has twelve residents.
- A for-profit company provides residential treatment for emotionally disturbed teenage boys. The company is using a home to house six boys who have been diagnosed as emotionally disturbed. The home houses six of these boys and it just began operation across the street from the group home described in example one above.

Each of these group homes share common attributes. They provide needed social services. They are relatively small. They provide services in a residential setting, helping to integrate their clients into the community. Given their positive contributions and small scale, a local government could certainly choose as a matter of local policy to allow each of these as a permitted use in their most restrictive residential zoning district or perhaps to allow them as a special or conditional use with site-specific restrictions imposed as needed to assure neighborhood compatibility.

But in this case the city involved has decided to limit homes in this particular residential zoning district to no more than four unrelated residents. This may well reflect the city's balancing of the community need for these facilities with the interests of residents in the district for a quiet, stable, family neighborhood. After all, at some point the traffic, noise, and other land use impacts of congregate living facilities (be they rooming houses, fraternity houses, or group homes) can be incompatible with a low density residential neighborhood. Here the city set that dividing point between a "single family" residence and an institutional "group home" use at four unrelated persons. Since each of the group homes in our example has more than four unrelated residents, are they all in violation of the local zoning ordinance?

No. Even though each of the facilities is too large to be a "single family" home under the zoning ordinance, state and federal housing laws will in some of these situations override the local zoning restriction.

State statutory protection

North Carolina statutes recognize the important public service provided by group homes that provide health, counseling, or related services to a small number of persons in a family type of environment. The General Assembly recognized that there is often neighborhood opposition to these facilities and that some local governments may unduly restrict this socially desirable service. The General Assembly also recognized the social desirability of allowing local governments to maintain a quiet low-density residential character for some neighborhoods. The need to balance these two legitimate concerns is reflected in provisions added to the statutes in 1981 related to zoning of small group homes.

G.S. 168-22 provides that local zoning ordinances must treat certain "family care homes" as if they were single-family homes. They cannot be prohibited in a zoning district that allows single-family residences. They cannot be subject to any special review requirements, such as a special or conditional use requirement. G.S. 168-23 further provides that private restrictive covenants must also treat family care homes the same as a single family residence.

To qualify for this treatment under North Carolina law, the facility must be designed to provide room, board, and care for six or fewer disabled persons in a family environment. A disabled person for the purposes of this statute includes those with permanent or temporary physical, emotional, or mental disabilities but not those who have been deemed dangerous to themselves or to others (cross-referencing the statute for involuntary commitment to define "dangerous" for purposes of this statute). G.S. 168-21. The identity of the owner or operator of the home—be it a nonprofit organization, a for-profit business, an individual, or a religious entity—does not matter for zoning protection purposes.

The group home described in our first example meets this definition of a "family care home" and must be allowed without special review in any single family zoning district. It serves six or fewer residents who have a physical, mental, or emotional disability. While it will have to meet setback, height limit, and all other zoning requirements applicable to other residences in this district, it must not be treated any more restrictively than any other single family home.

The group home described in our second example—the home for troubled teenage girls—illustrates the limits of the protection offered by the state law. To be treated as the equivalent of a single family residence for zoning purposes, the group home must serve persons with a disability. Here the home serves girls who have a very real need, but one that is not a disability as defined by the state law. The residents have dropped out of school or been convicted of a criminal offense. The state zoning protection kicks in only if they have a permanent or temporary physical, mental, or emotionally disability. Unless such a diagnosis is part of the admissions process, this facility would be subject to treatment under the zoning ordinance as a "group home" rather than as a "single family residence."

Federal statutory protection

What about our third example, the home serving twelve persons who are recovering from substance abuse problems? To resolve the zoning status of this group home we must add consideration of federal law to our analysis.

The Fair Housing Act makes it unlawful to make a dwelling unavailable to a person because of race, color, national origin, religion, sex, familial status, or disability. A statutory violation is established by showing that a policy or practice of a local government has a disparate impact on a protected class. Prohibited discrimination includes failure to make reasonable accommodation in rules and policies when such is necessary to afford a protected person equal opportunity to use and enjoy a dwelling. 42 U.S.C. § 3604(f)(3) (2010). The protections afforded persons with disabilities by the Americans with Disabilities Act (ADA) closely parallel those provided under the Fair Housing Act.

As with our first two examples the initial question is whether the home is serving persons with qualifying disabilities. In the Fair Housing Act, the term "handicap" is used (in contrast with many federal statutes, which favor the word "disability") and it is defined to include persons with physical or mental impairments

that substantially limit one or more major life activities. 42 U.S.C. § 3602(h)(1) (2010). The definition does not cover persons with either current illegal use of or addiction to a controlled substance, persons convicted of crimes involving the manufacture or sale of illegal drugs, or those who constitute a direct threat to the health or safety of others. However, recovering substance abuse patients are covered. So in our third example the persons residing on site are disabled and qualify for protection.

But the home in our third example has twelve residents. This takes the home out of the state statutory protection, as that is limited to homes with six or fewer residents. But that is not the end of the inquiry for federal statutory purposes, as that law requires local governments to make a "reasonable accommodation." Would allowing this home to have twelve rather than six residents be a reasonable accommodation mandated by federal law? The answer is unclear and depends in part on the particular facts of each situation. There has been a good deal of litigation around the country about just how much accommodation regarding the number of residents must be made. Is eight residents reasonable in a particular home and site, or must ten, twelve, or more residents be allowed? A federal court upheld Wilmington's limit of eight residents, finding there had been no showing that nine rather than eight residents was a necessity for the successful operation of the home. **Oxford House, Inc. v. City of Wilmington**, No. 7:07-CV-61-F, 2010 WL 4484523 (E.D.N.C. Oct. 28, 2010). But this inquiry is inherently fact specific. I It is impossible to generalize beyond saying some accommodation is required, but only a reasonable amount.

Our fourth example raises the question of whether a local government can impose a minimum separation requirement between facilities in order to maintain the single-family, non-institutional character of a neighborhood. The state law, G.S. 168-22, allows a half-mile separation requirement, so that would allow a local government to prohibit a second family care home across the street from an existing home, provided that requirement in written into the zoning ordinance. But what about the requirement in federal law for reasonable accommodation? While some federal courts have upheld separation requirements, others have invalidated substantially similar requirements. As with the number of residents, the question of how much accommodation is "reasonable" depends on the particular facts involved. Nationally, the larger the minimum separation is, the less likely it is to be upheld. In North Carolina, the court in **Oxford House, Inc. v. City of Raleigh**, No. 5:98-CV-113-BO(2), 1999 WL 1940013 (E.D.N.C. Jan. 26, 1999), upheld the city's 375-yard minimum separation between "supportive housing residences," which included facilities serving disabled persons. While Wilmington's half-mile separation was upheld in the Oxford House, Inc. v. City of Wilmington case noted above, courts in other states have invalidated substantially similar restrictions. It is reasonable to conclude that some separation is allowed, but as that distance approaches a half mile, the need for some accommodation in individual cases needs to be given careful consideration.

Group homes that provide services to a relatively small number of persons with disabilities in a residential setting meet an important social need. Both state and federal statutes mandate that local zoning ordinances recognize and support these facilities. A North Carolina zoning ordinance may not keep all of them totally out of a single family zoning district. At a minimum, a group home providing care and services for six (and perhaps seven or eight) disabled persons must be treated just like a single family home. A local government may well decide to provide similar zoning treatment to a broader range of other group homes—those serving other populations or larger homes–the same way. But any local zoning restriction that attempts to exclude protected group homes will be invalidated if challenged. Therefore, North Carolina cities and counties must carefully consider and balance the needs of these protected group homes as they also consider the interests of single family neighborhoods.

The Property Tax Appeal Process: Great Fun Every Eight Years! (Insert Sarcasm)…

By Brian T. Pearce

As sure as the FIFA World Cup and the Summer and Winter Olympics will occur every four years, every county in North Carolina has its own tradition that will occur every eight years. What is that tradition you may ask? Property Tax Revaluation. Though not quite as exciting as blockbuster sporting events, Property Tax Revaluation's have far ranging effects on the values of property in the county undergoing the revaluation. So how does the process work?

Before getting into the details, it is important to note that the North Carolina counties are on different cycles so revaluation years vary from county to county. When it is a revaluation year for a county, property owners will start receiving notices from their county's Tax Department, usually starting in March of that year, regarding the "new" assessed value for their properties. As always occurs with a revaluation, the "new" values are sure to stir controversy and dismay among property owners. With that in mind, property owners should realize they do not have to just blindly accept the "new" values. Instead, there are avenues for property owners to appeal the assessments.

The first avenue for appealing a "new" value is to contact the County Tax Department directly and ask for an informal meeting. Many tax departments notify their citizens that they would rather be contacted by email or regular mail than by phone to arrange these meetings. If you do choose email or regular mail to arrange the meeting, be sure to follow up if you don't get a prompt reply.

The Board Of Equalization And Review Appeal | If the informal process does not work, a property owner can go ahead and file a written notice of appeal with their county's Board of Equalization and Review. The North Carolina statutes state the written notice of appeal needs to be filed before the Board of Equalization and Review adjourns for the year, however many counties actually set an actual set deadline for filing such appeal rather than waiting for the actual date of adjournment.

The property owner's hearing before the Board of Equalization and Review will be informal, meaning the testimony is not sworn and the rules of evidence do not apply. But, the property owner should attend prepared to argue her case. In that light, the property owner should have evidence with her as to why the assessment does not accurately reflect the fair market value of her property. After hearing the evidence, the Board of Equalization and Review will determine whether the property has been appraised and taxed in conformity with statutory requirements.

The North Carolina Property Tax Commission Appeal | If the Board of Equalization and Review does not provide the relief the property owner seeks, the property owner can then appeal to the North Carolina Property Tax Commission. This appeal must be filed within 30 days after notice of the Board of Equalization and Review is mailed to the property owner. The notice of appeal is marked as received by the Property Tax Commission either on the day that the notice is post marked by the United States Postal Service, or if not post marked by the United States Postal Service, on the day the Property Tax Commission actually receives the notice. If the notice of appeal is not received within the required time period, there are grounds to automatically dismiss the appeal. If the notice of appeal is received on time, the Property Tax Commission will provide the property owner with a form AV14 (Request for Hearing). The form AV14 needs to be returned to the Property Tax Commission within 30 days of its mailing. The form AV14 can only be completed by the property owner or an attorney licensed in North Carolina.

Once the form AV14 is filed, it is typical that there will be a lengthy delay before the matter is actually set for hearing. During this time, the parties can serve each other with written discovery. A party can also request an informal meeting with the tax department by contacting the Property Tax Commission or the Tax Department. Often times, employees assigned to the Property Tax Commission can help arrange this meeting and will agree to serve as informal mediators at the meeting.

When the matter goes to hearing before the Property Tax Commission, the hearing will be quasi-judicial, meaning testimony will be sworn and the North Carolina Rules of Evidence will apply. There will be a presumption that the assessment is correct. This presumption can be rebutted by the production of material, substantial, and competent evidence that tends to show that either an arbitrary or an illegal method of valuation was used and that the assessment substantially exceeded the true value in money of the property.

The North Carolina Court Of Appeals Appeal | If the property owner does not get the relief they sought from the Property Tax Commission, the property owner then has a right to appeal to the North Carolina Court of Appeals. This appeal must be filed within thirty (30) days of entry of the final decision by the Property Tax Commission.

The Appeal To Superior Court | Another avenue for appeal is an immediate right to appeal to Superior Court that arises if the property owner alleges that the tax that was imposed was imposed through clerical error, was an illegal tax, or was levied for an illegal purpose. These cases are rare, but the relief is available if the facts are in place.

All in all, a property owner can appeal a property tax valuation through several levels in an effort to get a fair value assessed to their property. However, throughout the process, the property owner should keep in mind they must present meaningful and competent evidence to support their case and must comply with the time frames and rules discussed in this article in order to ensure they have a chance to be successful in getting the value they seek.

Brian T. Pearce is a member with Nexsen Pruet, PLLC's Greensboro office.

As The Locals Do: Case Management for Land Use Cases in Superior Court

By Shannon R. Joseph

Before law, I worked in a lot of different jobs: grocery store cashier; lifeguard; waiter; restaurant hostess; school bus driver; and receptionist, just to name a few. (That's right. I said school bus driver.) No job brought as much daily variety, though, as serving as a judge in superior court. Although I had been a busy litigator before I was a judge, I confess that I had *no idea* the staggering array of subject matters and procedures that the superior court adjudicates on a daily basis. Notwithstanding that variety, in civil court the majority of matters are the prototypical case in which the plaintiff sues the defendant for breach of something and wants a jury trial.

Wondering why this matters to you as a Land Use Attorney?

The cases that Land Use Lawyers bring to superior court are factually interesting and layered with multiple legal frameworks. In many counties, however, you probably will not find the perfect road map for your case in many counties' local rules and case management systems. That said, there are judicial districts that have Local Rules or Case Management Guidelines that work well with land use cases. If you like rules you find in one judicial district, there are ways to implement those rules in your land use practice throughout the state, particularly in jurisdictions that do not have local rules governing the track of a land use matter.

When filing a land use appeal, a good first step is to check the Local Rules to see what rules may be applicable to your case when you file it. Every judicial district strives to meet the challenge of promptly adjudicating a wide variety of subject matters while allowing for an array of practice approaches and scheduling conflicts of lawyers. At the same time, every judicial district also is dealing with personnel shortages and older technology. Court personnel have a tough job that they take very seriously. To account for these issues and to work toward the efficient and fair administration of justice, most judicial districts have adopted their own Local Rules or Case Management policies that they believe are best suited for their districts.

Finding the Local Rules for a particular judicial district is easy: search by county at ***http://www.nccourts.org/Courts/CRS/Policies/LocalRules/Default.asp***

Some counties that have heavier dockets and multiple courtrooms have adopted more comprehensive rules. These Rules generally specify timing for actions by the parties, including briefing, and specify the mechanism by which cases will be calendared for hearing. Where there are Local Rules that apply to your case, be sure to recognize and follow them. If for some reason the rules will not work for your case, confer with the opposing side if at all possible before contacting the trial court coordinator to propose a plan for your case. Promptly conferring with opposing counsel after filing your case will improve your chances of having your proposed solution approved, as will having all parties join in the request.

If you find you have filed your case in a jurisdiction that does not have Local Rules governing land use matters, your first reaction may be frustration or confusion, particularly if you are accustomed to working in a district with a heavier docket and more comprehensive rules. My experience has been that there is no cause for concern. Instead, look at it as an opportunity to propose a schedule for your case to the trial court administrator or coordinator. These courthouse professionals are dedicated to enabling parties and their lawyers to diligently pursue adjudication of their cases while making efficient use of court time. They want to handle cases in ways that will facilitate those ends. When you are able to propose a way to do that, it simply makes the judicial system better.

Be proactive in seeking approval for your proposed plan from the trial court coordinator. Make contact soon after the case is filed. Acknowledge that you have reviewed the Local Rules and confirm that no Local Rules apply to your case. Ask the best way to propose a schedule for your case. If you have had a good experience with Local Rules in another judicial district, you might mention that the schedule you are proposing has been tried in other jurisdictions and works well enough to remain codified in those Local Rules.

That said, remember that the demands and challenges of our judicial districts vary greatly throughout the state: there often are very good reasons for the differing approaches to rules and calendaring between the districts. Not only are there different case volumes in different counties, there also are disparate staff levels and responsibilities.

Variety is one of the wonderful things about superior court. It also is one of the challenges superior court faces in making the system work well for everyone. Take an active role in the scheduling of your case from the outset of its filing in superior court. Trial court administrative personnel will welcome your respect of existing local rules and will appreciate your thoughtfully suggested solutions for the best way to efficiently handle your case. Remember, just like you, they are trying to do the best work possible to serve the needs of the parties before the court. Good lawyers who take an active role in proposing a scheduling plan for their cases—both to opposing counsel and in collaboration with case management court personnel—not only aid the cause of their clients, but also enable the system to better serve the ends of justice.

Shannon R. Joseph is an attorney with Morningstar Law Group in Raleigh.

TIF Districts: A Primer

By Adam C. Parker

For many, the acronym TIF may bring to mind a quarrel. For a public finance attorney, it conjures a type of development financing used in North Carolina for community and economic development. This article provides a primer on the latter.

TIF – Basic Definition | Tax Increment Financing ("TIF")[1] allows local governments to issue debt to incentivize development in a TIF district (a particular area within a governmental unit defined after a public hearing process). The local government finances public improvements in a TIF district, which in turn benefits the TIF district and incentivizes development.

Like most debt, TIF requires a pledged security. With TIF, the pledged security is the incremental difference between (a) the original property tax revenues derived from the pre-TIF property values and (b) the increased property tax revenues after improvements are made in the TIF district. This "increment" acts as the repayment source for the loans. For example, if pre-TIF property tax revenues in the TIF district were $100 and post-TIF property tax revenues in the TIF district were $150, the $50 difference is the increment used to repay the debt that financed the public improvements in the TIF district. The other $100 of property tax revenues is treated as normal property tax.

TIF Features and Process in North Carolina | Under the statute, local governments can finance a wide variety of public improvements intended to help spark private development in a TIF district. North Carolina's TIF regime requires a city or county to establish a TIF district before issuing TIF debt. City and County TIF districts must be (a) blighted; (b) suitable for rehabilitation or conservation; or (c) suitable for economic development. Municipal TIF districts may also be deemed part of a "redevelopment area" by a city's planning commission.

The issuing governmental unit must also create a "Development Financing Plan," which has ten elements and, if the plan includes construction of a manufacturing facility, the plan must also be approved by the North Carolina Department of Environment and Natural Resources. If a TIF district is located outside a city's central business district, no more than twenty percent of the district's land may be used for retail, hotels, banking, financial services for consumers, or other commercial uses besides office space. Additionally, no more than five percent of the total land in a city or a county may be used to establish a TIF district.

A public hearing must be held before a TIF district is established, and notice of the hearing must be provided in advance. There are also notice requirements between a county and a municipality—both must provide notice to the other party if they want to establish a TIF district. Counties may not locate a TIF district within a municipality's limits unless both governments agree to establish the TIF district. Like most debt in North Carolina, the Local Government Commission must approve TIF bonds.

Once the plan is approved, the tax assessor in the local government determines a base property value in the TIF district. That base value is used for the life of the TIF district and cannot be changed unless property is added or subtracted from the TIF district, except through revaluation. Revaluation of property in the TIF district *does not* affect the increment; the statute is designed to ensure the increment does not change simply because of a general rise in overall property values that a revaluation recognizes.

To add security to TIF debt (and to increase its marketability), local governments can pledge additional sources such as sales tax revenues, bank letters of credit, or a mortgage interest in the financed asset. Combining the pledge of incremental TIF revenues with the pledge of these other assets (used in several other forms of debt) may help some projects obtain financing that might not otherwise be financed.

To date, only two TIF districts exist in North Carolina: the Roanoke Rapids Theatre (since renamed the "Royal Palace Theatre") and a second TIF district to build the town center in Woodfin (near Asheville). A third was authorized in Kannapolis, but not implemented.

'Synthetic TIF' | "Synthetic TIF" is the use of another financing tool (usually a general obligation bond or an installment financing) to accomplish the same ends as a TIF. A general obligation bond pledges a government's full faith and credit, while installment financing pledges the underlying asset being financed. Essentially, rather than issuing TIF bonds and creating a formal district, the local government borrows via installment or general obligation bonds and builds an asset. The local government then funds the debt service associated with the borrowing from the incremental change in property tax revenues, but doesn't do so formally. This has been a popular route for development in North Carolina (perhaps because North Carolina was one of the last states to adopt TIF), and has been used in several cities, including Charlotte and Raleigh.

Closing | TIF (or synthetic TIF) helps spur development in an area that is not naturally attracting private development (such as a brownfield redevelopment or a blighted area). TIF includes some risk because a local government will have to pay the debt service if sufficient development does not occur after the asset is built. Anyone considering a TIF should spend ample time researching potential development partners and working with a non-quarrelsome bond attorney to effectuate their ends.

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(Endnotes)

1 TIF is called "project development financing" in North Carolina.

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