Planning and Development Regulation

Special Use Permits: Need for Adequate Guiding Standards

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Since decisions on special use permits involve applying legislatively established standards to individual applications, it is essential that the zoning regulation itself include adequate guiding standards for quasi-judicial decisions.[1] It would be illegal to provide for a special use permit without including standards to guide decision-making for those permits. Adequate guiding standards are required even where the governing board is making the quasi-judicial decision.[2]

If there are no standards, or if the standard provided is so general as to leave the board unbridled discretion in its decision, the courts will invalidate the ordinance provision as an unlawful delegation of legislative authority. A board may not legislate through ad hoc quasi-judicial decision-making.

Zoning-regulation provisions that have decision standards for special use permits that are so general as to offer little practical guidance for individual decisions are invalid. *Jackson* sets the basic rule:

> Delegation to an administrative officer, or board, of authority to issue or refuse a permit for the erection of a specified type of structure in a given area, dependent upon whether such officer, or board, considers such structure in such area, under prevailing conditions, conducive to or adverse to the public interest or welfare is a different matter. Such delegation makes the determinative factor the opinion of such officer, or board, as to whether such structure in such area, under prevailing conditions, would be desirable or undesirable, beneficial to the community or harmful to it. This is a delegation of the power to make a different rule of law, case by case. This power may not be conferred by the legislative body upon an administrative officer or board. . . .
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> So much of . . . this ordinance as requires the Board of Adjustment to deny a permit . . . unless it finds "that the granting of the special exception will not adversely affect the public interest" is, therefore, beyond the authority of the Board of County Commissioners to enact and so is invalid.[3]

In re Ellis confirms that this same restriction applies to the governing board.[4] In response to the adverse ruling in the *Jackson* case, the Guilford County Board of Commissioners adopted a resolution moving special use permit decision-making from the board of adjustment to the governing board. The commissioners subsequently denied the applicant's request for a special use permit for a mobile-home park under the "public interest" standard, making no findings of fact and stating no reasons for their decision. On appeal the court ruled that governing boards have no more discretionary power for individual special use permits than does a board of adjustment:

Like the board of adjustment, the commissioners cannot deny applicants a permit in their unguided discretion or, stated differently, refuse it solely because, in their view, a mobile-home park would "adversely affect the public interest." The commissioners must also proceed under standards, rules, and regulations, uniformly applicable to all who apply for permits.[5]

Thus, it is clearly the nature of the zoning decision, not the identity of the decision maker, that determines what procedures and standards must be applied. When a governing board acts in a quasi-judicial capacity, it must observe quasi-judicial, not legislative, standards.

Continuing with the line of cases that have held various standards to be so general as to offer inadequate guidance to decision makers, the North Carolina Supreme Court held a requirement that a special use be consistent with the "purpose and intent" of the zoning ordinance to be an insufficient standard and thus an unlawful delegation of authority.[6] In another case the court ruled that it was improper for the Nags Head governing board to deny a special use permit for a planned-unit development on the grounds that it was inconsistent with the goals and objectives of the land use plan, even though the ordinance specifically listed the plan as one of the factors in determining the suitability of a special use permit.[7] The state appeals court also held that it was improper to deny a special use permit for an adult bookstore on the grounds that it would be incompatible with the character and use of surrounding buildings.[8] Its inclusion as a special use by the ordinance is conclusive on the policy question of general use compatibility, the court concluded.

Even so, it is permissible to use relatively general standards for decisions. In a key decision, *Kenan v. Board of Adjustment*,[9] the court of appeals approved the use of four fairly general standards for special use permits. Many North Carolina zoning ordinances now incorporate these same standards, which require that the use

1. does not materially endanger the public health or safety,
2. does meet all required conditions and specifications,
3. will not substantially injure the value of adjoining property or be a public necessity, and
4. will be in harmony with the area in which it is located and in general conformity with the comprehensive plan.[10]

Some zoning ordinances also add more detailed, specific standards for particular uses and often apply those in combination with these general standards.[11]

The standards to be applied in particular quasi-judicial decisions must be clearly identified as such by the regulation. Only those standards specifically listed as applicable may be applied when making special use permit decisions. Additional standards may not be developed on an ad hoc basis.

C.C. & J. Enterprises, Inc. v. City of Asheville[12] illustrates this rule. The city council there denied a special use permit after finding the application met all of the technical requirements and development standards in the regulation, basing the denial on a general concern about impacts on health and safety (citing street conditions, topography, access, flooding potential, and proposed density). The court held that since the ordinance did not in fact list promotion of the public health, safety, and welfare as a standard for special use permit decisions (though it would have been permissible to do so), it was inappropriate for the city council to use it as a standard in reviewing the application. A general statement of intent that "adequate standards will be maintained pertaining to the public health, safety, welfare, and convenience"[13] was not a permit standard and could not be used in decision-making. Similarly, in *PHG Asheville, LLC v. City of*

Asheville, the court held that an applicant for a special use permit is not required to rebut concerns raised by board members that are not within the range of issues and data required by the relevant standards in the regulation.[14]

The same rule applies to imposition of conditions on special use permits. Only the standards actually in the regulation can be used as the basis for imposition of conditions on a special use permit that is issued. The authority to impose appropriate conditions and safeguards "cannot be used to justify unbridled discretion" in framing permit conditions.[15]

In making its decision, the board must clearly state whether each of the applicable standards has been met. A board may vote on each standard separately or on a single motion that specifies which standards have been met (so long as the board's conclusions about each standard are clearly discernable).[16]

[1]. Evidence must be presented that the standards used to make the decision are actually included in the regulation. Jubilee Carolina, LLC v. Town of Carolina Beach, 268 N.C. App. 90, 834 S.E.2d 665 (2019).

[2]. In re Ellis, 277 N.C. 419, 178 S.E.2d 77 (1970). *See also* Town of Spruce Pine v. Avery Cnty., 346 N.C. 787, 488 S.E.2d 144 (1997) (upholding water-supply-watershed-protection statute, noting guiding standards need be only as specific as circumstances permit); Adams v. N.C. Dep't of Nat. & Econ. Res., 295 N.C. 683, 249 S.E.2d 402 (1979) (upholding delegation of rulemaking and quasi-judicial authority to state Coastal Resources Commission); City of Roanoke Rapids v. Peedin, 124 N.C. App. 578, 478 S.E.2d 528 (1996) (impermissible for county board of health to make legislative judgments in its rulemaking).

[3]. 275 N.C. at 165–167, 166 S.E.2d at 85–87. *See also* Howard v. City of Kinston, 148 N.C. App. 238, 246, 558 S.E.2d 221, 227 (2002).

[4]. 277 N.C. 419, 178 S.E.2d 77.

[5]. *Id.* at 425, 178 S.E.2d at 81.

[6]. Keiger v. Bd. of Adjustment, 278 N.C. 17, 23, 178 S.E.2d 616, 620 (1971). *See also* Nw. Fin. Grp., Inc. v. Cnty. of Gaston, 329 N.C. 180, 190, 405 S.E.2d 138, 144 (1991) (holding approvals under mobile-home-park ordinance may not be based on general concern about hazards to public welfare).

[7]. Woodhouse v. Bd. of Comm'rs, 299 N.C. 211, 261 S.E.2d 882 (1980).

[8]. Harts Book Stores, Inc. v. City of Raleigh, 53 N.C. App. 753, 281 S.E.2d 761 (1981).

[9]. 13 N.C. App. 688, 187 S.E.2d 496, cert. denied, 281 N.C. 314, 188 S.E.2d 897 (1972).

[10]. Kenan, 13 N.C. App. at 692–93, 187 S.E.2d at 499.

[11]. A 2005 survey of North Carolina local governments by the School of Government indicated widespread use of these four general standards. Eighty-nine percent of the responding jurisdictions use the standard of public health and safety; 92 percent use the standard of meeting all required conditions; 84 percent use the standard of not injuring adjoining property values; and 90 percent use the standard of maintaining harmony with the surrounding area. (Sixty-nine percent also require conformity with a comprehensive plan.) Thirty-six percent of the responding jurisdictions also included more-specific standards for particular special uses.

[12]. 132 N.C. App. 550, 512 S.E.2d 766 (1999). *See also* MCC Outdoor, LLC v. Town of Franklinton, 169 N.C. App. 809, 813, 610 S.E.2d 794, 797, review denied, 359 N.C. 634, 616 S.E.2d 539 (2005) (denial of special use permit for sign cannot be based on findings not related to ordinance standards for decision); Knight v. Town of Knightdale, 164 N.C. App. 766, 596 S.E.2d 881 (2004) (applying rule to quasi-judicial site-plan approval). This same rule applies to subdivision-plat approvals. Nazziola v. Landcraft Props., Inc., 143 N.C. App. 564, 545 S.E.2d 801 (2001).

[13]. C.C. & J. Enterprises, 132 N.C. App. at 553, 512 S.E.2d at 769 (quoting Asheville, N.C., City Code § 30-6-1 (1993)).

[14]. 374 N.C. 133, 839 S.E.2d 755 (2020).

[15]. Hewett v. Cnty. of Brunswick, 155 N.C. App. 138, 146, 573 S.E.2d 688, 694 (2002).

[16]. Richardson v. Union Cnty. Bd. of Adjustment, 136 N.C. App. 134, 523 S.E.2d 432 (1999) (permissible for board to combine two of four standards in their vote on a special use permit).

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