

**The Town of Pine Knoll Shores, Board Room
Planning Board Special Meeting
December 4, 2019 5 PM
Meeting Minutes**

In attendance for the meeting:

Planning Board Members present were, Bob Holman, Paul Payne (Chairman), Ike Pipkin, Kathy Werle, Bud Daniels, Michelle Powers, George Greene, and Doug Browne.

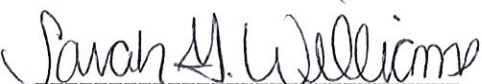
Non-voting members Marsh Cobin and Bruce Beasley were absent.

Staff: Brian Kramer (Town Manager), Kevin Reed (Town Planner), and Sarah Williams (Town Clerk)

Legal Brief

Town Planner Kevin Reed gave a brief background of why the special meeting was called. He explained that the Planning Board was interesting in looking into what their regulatory rights were. He then introduced Town Attorney Neil Whitford.

Town Attorney Whitford gave a legal brief to the Planning Board on what their regulatory rights were. His packet is included herein by reference and attached to these minutes.



Sarah G. Williams, Town Clerk

Town of Pine Knoll Shores

Zoning Issues

By Neil Whitford, Town Attorney

December 4, 2019

Theme: Zoning ordinances are in derogation of the rights of private property and should be liberally construed in favor of the property owner. *Clark v. Richardson*, 24 NC Court of Appeals 566 (1975)

Relevant Constitutional Limits

Amendment V – U.S. Constitution

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV - U.S. Constitution

. . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Article I, Sec. 19. N.C. Constitution

No person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land. . . .

Article I, Sec. 35. N.C. Constitution

A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.

General Background on Zoning

The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable. (N.C. Constitution, Article VII, Section 1.)

The power to zone is the power of the state and rests initially in the General Assembly. *Zopfi v. City of Wilmington*, 273 N.C. Supreme Court 430 (1968)

A municipality has no inherent power to zone its territory. *Heaton v. City of Charlotte*, 277 NC Supreme Court 506 (1971)

The General Assembly may delegate power to a municipal corporation to enact zoning ordinances in the exercise of police power of the state. *Jackson v. Guilford Co. Board of Adjustment*, 275 N.C. Supreme Court 155 (1969).

The General Assembly has delegated to town councils the power to adopt zoning regulations for the purpose of promoting health, safety, morals or the general welfare of the community. *Allgood v. Town of Tarboro*, 281 NC Supreme Court 430 (1972).

The General Assembly cannot delegate to a municipal corporation more extensive power to regulate the use of private property than the General Assembly itself possesses. *Zopf v. City of Wilmington*, 273 N.C. Supreme Court 430 (1968)

"In a wide variety of contexts, the government may execute laws or programs that adversely affect recognized economic values without its action constituting a "taking," and, in instances such as zoning laws where a state tribunal has reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land use regulations that destroyed or adversely affected real property interests." Syllabus of *Penn Central v. New York City*, 438 U.S. Supreme Court 104 (1962).

But a total deprivation of all economically beneficial uses of property under land use regulations is a "taking" under the 5th and 14th Amendments of the U.S. Constitutions. *Lucas v. South Carolina*, 505 U.S. Supreme Court 1003 (1992) [South Carolina CAMA deprived ocean front lot owner of all use of his land.]

The first delegation of zoning authority by the General Assembly to municipalities under the general statutory law was in 1923. Some rudimentary zoning authority was delegated to municipal governments in their charters prior to 1923. For example, when the Town of Beaufort was incorporated by the Colonial General Assembly in 1723, the charter required minimum house sizes of 15 feet x 20 feet, lots were to be cleared, streets were to be 66 feet wide, and fences were regulated.

"The General Assembly empowered municipalities to regulate setbacks when it granted cities the authority to "regulate ... the size of yards, courts and other open spaces, ... and the location... of buildings [and] structures ... for... residence ... purposes." *Pine Knoll Shores v. Evans*, 331 N.C. Supreme Court 361 (1992). [Deck encroaching into setback.]

State Zoning Statutes

Chapter 160A of the N.C. General Statutes, Article 19, Part 3.

"For the purpose of promoting health, safety, morals, or the general welfare of the community, any city may adopt zoning and development regulation ordinances. . . . A zoning ordinance may regulate and restrict the height, number of stories and size of buildings and other structures, the

percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land." N.C. Gen. Stat. § 160A – 381.

"... [T]he city may divide its territorial jurisdiction into districts of any number, shape, and area that may be deemed best suited to carry out the purposes of this Part; and within those districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures, or land. Such districts may include, but shall not be limited to, general use districts, in which a variety of uses are permissible in accordance with general standards; overlay districts, in which additional requirements are imposed on certain properties within one or more underlying general or special use districts; and special use districts or conditional use districts, in which uses are permitted only upon the issuance of a special use permit or a conditional use permit and conditional zoning districts, in which site plans and individualized development conditions are imposed." N.C. Gen. Stat. § 160A – 382(a).

Some Limits in Zoning and Other Statutes

"Any zoning and development regulation ordinance relating to building design elements . . . may not be applied to any structures subject to regulation under the North Carolina Residential Code . . . except under one or more of the following circumstances: . . . (6) Where the regulations are adopted as a condition of participation in the National Flood Insurance Program. . . . For the purposes of this subsection, the phrase "building design elements" means exterior building color; type or style of exterior cladding material; style or materials of roof structures or porches; exterior nonstructural architectural ornamentation; location or architectural styling of windows and doors, including garage doors; the number and types of rooms; and the interior layout of rooms. The phrase "building design elements" does not include any of the following: (i) the height, bulk, orientation, or location of a structure on a zoning lot; (ii) the use of buffering or screening to minimize visual impacts, to mitigate the impacts of light and noise, or to protect the privacy of neighbors; or (iii) regulations adopted pursuant to this Article governing the permitted uses of land or structures subject to the North Carolina Residential Code for One- and Two-Family Dwellings." N.C. Gen. Stat. § 160A – 381(h).

Nitty gritty: Fence wraps displaying signage affixed to perimeter fencing at a construction site are exempt from zoning regulation pertaining to signage as long the signage is for a person directly involved in the construction project. N.C. Gen. Stat. § 160A – 381(j).

N.C. General Statute § 160A-174:

(b) A city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with State or federal law when:

- (1) The ordinance infringes a liberty guaranteed to the people by the State or federal Constitution;
- (2) The ordinance makes unlawful an act, omission or condition which is expressly made lawful by State or federal law;

- (3) The ordinance makes lawful an act, omission, or condition which is expressly made unlawful by State or federal law;
- (4) The ordinance purports to regulate a subject that cities are expressly forbidden to regulate by State or federal law;
- (5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation;
- (6) The elements of an offense defined by a city ordinance are identical to the elements of an offense defined by State or federal law.

The fact that a State or federal law, standing alone, makes a given act, omission, or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition. (1971, c. 698, s. 1.)

Theory of Zoning

Do local governments give permission for specified uses of land or does a property owner have the right to use his land as he sees fit unless his use is prohibited by a zoning regulation; the problem with prohibiting all uses not specifically permitted:

Answer: If not prohibited by ordinance, then the use is allowed.

Provisions in zoning ordinances prohibiting all uses not explicitly permitted are in derogation of the common law and are without legal effect. *Byrd & Combs v. Franklin County*, 368 N.C. Supreme Court 435 (2015) adopting dissent in the Court of Appeals decision. [Gun range not specifically listed as a special use.]

(Above case puts "permitted use tables" under a cloud, not because they are not useful, but because we cannot envision all possible compatible uses.)

From Professor David Owens at the UNC School of Government:

"While it is impossible to for a local government to foresee and address all of these controversies in advance, there are several measures a local government can consider that will minimize problems with unlisted uses.

First, clarity on uses that are not permitted is critical. While an ordinance cannot specifically list all conceivable land uses, it should include as much specificity as is feasible and should have clear general "catchall" categories for unlisted uses.

Second, a local government should periodically update the ordinance to list how the local government intends to address specific controversial or emerging land uses. It is one thing

if an ordinance a decade ago had not addressed telecommunication towers, but something altogether different if it still does not do so. Keeping the ordinance clear and current will minimize these difficulties.

Third, the courts clearly favor a provision that unlisted uses should be treated the same as the most nearly similar use as opposed to a blanket prohibition of unlisted uses. This makes attention to the first two points all the more important. But it also means a zoning ordinance should give some definition and guidance to staff as to how to evaluate the similarity of uses to avoid placing an impermissible degree of discretion in the hands of the zoning administrator. It would be helpful for the ordinance to specify the factors to be considered, such as the type, density and intensity of development, environmental effects, and the anticipated amount traffic, noise, light, vibration, odor, and other impacts on neighbors and the community.”

Regulation of Vacation Rentals

The initial question on this subject is whether municipal governments have the authority to prohibit short-term “vacation” rentals (“STR”) of residential property through zoning. Neither the General Assembly nor the courts in North Carolina have specifically addressed this issue. However, the UNC School of Government is predicting that local governments do have such authority. But the SoG does hedge its bet in its publications on the subject. For example, in February of 2018 Prof. Rebecca Padgett raised the question “Do North Carolina cities have authority to regulate STRs?” She then answered the question:

“Probably, but to what extent is still unknown. . . . It seems likely that our courts would hold that municipalities are vested with authority to regulate STRs under the police powers, just as they may regulate hotels, motels, boarding or rooming houses, and B & Bs”.

In September 2019 Professor Owens published a paper on current legislation affecting planning and development regulation. He notes

“... [T]here is a strong argument that a local government may define short-term rental as a separate land use in the same way the local governments have long defined conventional bed-and-breakfast as a separate land use. For short-term rentals, as with bed-and-breakfast, development regulations may identify the districts where a land use is permitted and established development standards for that land use (size, occupancy limits, parking, lighting, etc.). As with many other land uses, a zoning-compliance permit or other zoning approval may be required in order to commence a short-term-rental land use.”

The School of Government notes that the City of Asheville has adopted ordinances to define and regulate STRs. According to the SoG, the city classifies STRs as “commercial lodgings” and defines them as:

“a dwelling unit with up to six guest rooms that is used and/or advertised through online platform, or other media, for transient occupancy for a period of less than one month.”

STRs are a permitted use in one zoning district, a special use in others and altogether prohibited in some residential districts.

Other cities in North Carolina have adopted zoning restrictions on STRs or are considering them. But until either the General Assembly or the courts address the matter, there is some uncertainty on the power of municipal governments to regulate these uses. In some other states municipal regulation has been stricken on various grounds, largely because while transient occupants may come and go, the structure is still occupied as a “single family residence.” In some other states municipal regulation of STRs has been approved by the courts.

The School of Government advises that if towns and cities plan to regulate STRs they do so by defining exactly what the use is, basically to include that it is a “commercial use” and then apply the normal rules on where the use is permitted and where it is not.

If Pine Knoll Shores chooses to regulate STRs, I recommend that we research ordinances from some of the larger towns and cities in North Carolina and use as much of their language as we can rather than drafting our own ordinance from scratch.

* * *

Theme: Zoning ordinances are in derogation of the rights of private property and should be liberally construed in favor of the property owner. *Clark v. Richardson*, 24 NC Court of Appeals 566 (1975)



NOTICE OF SPECIAL MEETING

Notice is hereby given that the Planning Board will hold a meeting in the Board Room of Pine Knoll Shores Town Hall at 5:00 p.m. on Wednesday December 4, 2019; to discuss the legal limits of regulation with the Town Attorney. This meeting will be held in lieu of their regularly scheduled November and December meetings.

Sarah G. Williams, Town Clerk

November 22, 2019

Our vision is to provide a quality environment in which our citizens are safe and secure, where individual talents flourish, and everyone enjoys the natural resources of our area.

It is the mission of the Town of Pine Knoll Shores to provide concerted and friendly means of promoting health, safety and social well-being; develop and implement plans for the continuous improvement of the town; and encourage the participation of residents in service to the Town and community.

Pine Knoll Shores Board of Commissioners