

The Impact of Poor Zoning Decisions

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Municipalities make thousands of decisions every year involving land use issues. These decisions may be the result of a comprehensive change in a zoning ordinance, or they may be the result of one property owner bringing an issue before the Planning Commission, the ZBA or the Council.

The overwhelming majority of these decisions are made without fanfare or publicity and pass out of the public eye. The reason for that is because the decision was made after providing appropriate notice, giving the interested parties an opportunity to be heard on the issue, and applying the correct standards in making the decision. However, when a decision is made without providing the proper procedural safeguards, or when the proper standards are not used in making the decision, trouble in the form of a lawsuit often follows. This article will discuss the risks that municipalities face when the proper standards are not applied in making a zoning decision.

The following examples are based on real cases. The actual names of the municipalities will not be used, and the facts have been changed slightly so as not to allow easy identification of those involved.

The ABC Development Company was involved in litigation with Omega Township in 2001 over a rezoning issue. ABC sought to have a 100-acre of parcel rezoned from agricultural to multi-family. Omega Township rejected the request, and ABC filed suit. Ultimately, the township entered into a consent judgment and agreed to rezone the property to multi-family. In early 2005, ABC Development applied for and received a tax credit from the federal government in the amount of \$5 million. The tax credit was conditioned upon ABC beginning construction of an affordable housing development project on the 100-acre parcel by Oct. 1, 2005. The project was a permitted use in the multi-family district. ABC presented its site plan to the Planning Commission in early July 2005. The Planning Commission applied the site plan review standards, determined that the site plan fully complied with the standards and unanimously approved the site plan.

The Omega Township Board stepped in and suspended the approval of the site plan based on a section of the Zoning Ordinance that gave it authority to “review all decisions made under the ordinance.” The board ordered ABC to appear before the board in early August for review of the Planning Commission’s decision. When ABC appeared, the board tabled the issue and ordered the Planning Department to obtain reports from the police chief, the fire chief, the head of the DPW, the superintendent of schools, the road commission and the drain commissioner with respect to the impact the housing development would have on “public health, safety and welfare.” The planning director informed the board that the site plan review process did not allow for the review of such information. ABC objected, arguing that the information the board requested was information that was relevant only to a rezoning, and since the property was already properly zoned, it was irrelevant. The board overruled the objections and directed that the information be presented to the board in September.

At the September meeting the information was submitted to the board. Even though none of the reports concluded that the development would adversely impact public health, safety and welfare, the board nevertheless denied site plan approval on the basis that the development would have an adverse impact on the schools, on traffic and on public safety. ABC filed suit, but lost the \$5 million tax credit because they could not start construction by Oct. 1, 2005.

In 1998 the Village of Rome annexed over 300 acres of Alaska Township. At the same time, the village created a new zoning district called the Governmental Use District. The 300-acre parcel annexed from Alaska Township was zoned governmental use, and was referred to as the "County Campus." Among the permitted uses in the district were library, courthouse, animal control, government offices, health department and virtually every other governmental use. The purpose of the new district was to encourage the county to build its facilities in a centralized location. Over the next five years, the county constructed a number of new buildings on the site, including a new courthouse, a new sheriff's headquarters with jail, a new health department and a new animal control headquarters. All of these new buildings were submitted to the village council (which also sat as the planning commission) for site plan approval.

In 2004 when the county approached the village with a site plan for building a new library on the site, the village refused to approve the project. The village did not want the library to move out of the central business district. The council stated on the record in denying site plan approval that the library was necessary to maintain the viability of the central business district, and that moving the library to the County Campus was not in the best interests of the village. The county objected, pointing out that a library was a permitted use in the district, and that the village could only review and apply the site plan criteria in deciding whether to approve or deny the site plan. After the village refused to reconsider its decision the county filed suit.

The result of both cases, not surprisingly, was a judgment against the municipality. Both courts – one case was filed in federal district court, the other in state circuit court – ruled that the municipality had no authority to consider rezoning issues in the site plan review context. Both municipalities had zoning ordinances that allowed site plan review to consider the location of buildings on the site, distances between buildings, set back requirements and similar non-use issues. The issue of whether a particular use would be allowed was decided when the property was zoned. That issue was no longer open for review at the site plan approval stage.

The Village of Rome did not incur substantial financial liability for its position. The court did require the village to pay the county's attorney fees for taking what the court determined was a frivolous position in the litigation. The real damage to the village came in the political arena. The county became very adversarial toward the village after the decision on the library.

Omega Township did not fare as well financially. Although the developer was able to obtain a \$4.5 million tax credit in 2006, the township was required to pay \$500,000 to the developer to make up the difference for the 2005 tax credit. The court also enjoined the township from refusing to issue the necessary approvals to allow the project to proceed, and required the township to pay the developers' attorney fees.

Both of these situations came about because the municipalities refused to take the advice of their attorneys and planning professionals in terms of what they could and could not consider under the circumstances. However distasteful the municipalities found the particular projects, they could not use the site plan review process as a replacement for a rezoning process. The uses in both cases were permitted as a matter of right. Both municipalities put themselves at risk by refusing to apply the appropriate standards, and by addressing issues that were not properly before them.

The risk in both of these situations was easily avoidable. Municipalities rightfully expect that property owners will comply with the requirements of the zoning ordinance. Property owners should be able to expect no less from municipalities.



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