



# Module 6. Landmark NC Legal Cases

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This training module has eleven parts:

- Zoning power generally
- Police power: regulations and takings challenges
- Aesthetics
- Consistency with comprehensive plans
- Multi-stage plan approval
- Procedure; due process
- Variances; role of boards compared to governing bodies
- Moratoria
- Amortization and non-conforming uses
- Conditional use zoning; spot zoning
- Developer exactions



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## *Zoning Power Generally*

### ELIZABETH CITY v. AYDLETT, 201 N.C. 602 (1931)

- **Concepts Noted Here**

- (1) *Uses may be restricted in a zoning district.*
- (2) *Non-conformities existing prior to the application of the ordinance may be allowed to remain.*

- **Facts**

In 1929, the city council passed a comprehensive zoning ordinance. Defendant's lot was located in a business zoning district that prohibited the construction and operation of filling stations. After the adoption of the ordinance, defendant undertook to complete the filling station without a permit from the city, and the city brought suit to restrain defendant from proceeding with the project.

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• **HOLDING:**

**The Court upheld zoning as constitutional in North Carolina.** In a later case, the Court would reflect that this was the case in which the philosophy of zoning ordinances is expounded and applied. **The central holding was that a particular land use could be excluded from a zoning district. The Court also held that upon adoption of a zoning ordinance, existing uses which were no longer permitted could be allowed to remain in operation, while similar new uses would be entirely prohibited.** (In a related case involving the same parties, the Court held that a city could use injunctions to enforce zoning ordinances.)

The Court rejected the argument that the ordinance was invalid because it was confiscatory, as the projection that the building of a filling station would increase the rent of the lot was not decisive. Aydlett is the seminal case providing that **depreciation in value is not the test used in seeking to determine the validity of a zoning ordinance**, and the case also set forth the important principle that the sound discretion of local legislative bodies would be given considerable deference by the courts in matters involving difficult land use issues. "Financial loss is not the test; the question is whether the scheme is sound and the classification fair. If the question is fairly debatable the court will not substitute its judgment for that of the legislative body which creates the ordinance."

The case discusses Euclid v. Ambler Realty Company, 272 U. S. 365, 71 L. Ed. 303 (1926), a landmark United States Supreme Court decision upholding the validity of zoning and rejecting the argument that zoning was an unconstitutional interference with property, decided just five years prior to Aydlett. Considering the principles articulated in Euclid, the North Carolina Supreme Court stated:

*The word "zoning" signifies the division of a municipal corporation into separate areas and the application to each area of regulations which generally pertain to the use of buildings or to their structural or architectural design. Such municipal action finds its authority in the police power which may be exercised, not only in the interest of the public health, morals, and safety, but for the promotion of the general welfare. This power embraces the whole system of internal regulation and cannot be bargained away....*

*The police power is not static. It expands to meet conditions which necessarily change as business progresses and civilization advances. This is adverted to in Euclid v. Ambler Realty Company, 272 U. S. 365, 71 L. Ed. 303, in which a zoning ordinance was upheld against an attack on the question of its constitutionality: "Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained under the complex conditions of our day for reasons analogous to those which justify traffic regulations, which before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.*

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The case is also important because it established that in examining the reasonableness of an ordinance, due process dictates that a court will examine the entire ordinance and not only the provision as it applies to a particular inhabitant of the municipality. As the Court would later state in Blades v. City of Raleigh, 280 N.C. 531, 546 (1972):

*The whole concept of zoning implies a restriction upon the owner's right to use a specific tract for a use profitable to him but detrimental to the value of other properties in the area, thus promoting the most appropriate use of land throughout the municipality, considered as a whole.*

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## **Police Power: Regulations & Takings Challenges**

### **IN RE APPEAL OF PARKER, 214 N.C. 51, appeal dismissed, 305 U.S. 568 (1938)**

#### **• Concepts Noted Here:**

(1) Requirement to remove a use that fails to comply with zoning ordinance is not an unconstitutional "taking".

#### **• FACTS:**

The City of Greensboro adopted a zoning ordinance which provided in pertinent part as follows:

**Section 13. Set Back Building Lines.**

(a) Except as specified in sections 13 and 17, no part of any building or structure shall be within 25 feet of any street line in any residence district.

**Section 17. Projection and Encroachments in Yards and Courts.**

(f) The set back and yard requirements of this ordinance shall not apply to any necessary retaining wall, or to any fence or wall which is less than five feet high and less than 60 % solid. Nothing herein shall prevent the construction of a rear line fence or wall to a height not exceeding six feet, except that where the rear of any corner lot abuts any lot facing on a street which is a side street with reference to said corner lot, any fence built on the rear lot line shall not be in excess of five feet in height and shall be less than 60 % solid.

Parker owned a residence on a corner lot upon which he built a line fence or wall, the height of which exceeded the limitations set forth in the ordinance. After the wall had been completed except for stuccoing, the city building inspector cited Parker for a violation of section 17(f) of the zoning ordinance and directed him to correct the violation within seven days. Parker appealed to the board of adjustment, which affirmed the order of the building inspector.

The trial court held that the ordinance was valid. Given that Parker's wall was in direct violation of the ordinance, the trial court ordered Parker to tear down the wall or make it comply with the ordinance. Parker appealed.

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• **HOLDING:**

In a 5-2 decision marking the first appellate review of a claim alleging that a zoning restriction was an unconstitutional taking, the North Carolina Supreme Court upheld the ordinance as a valid exercise of the police power in the promotion of the public welfare. The Court noted that the underlying justification for the ordinance was increased congestion in cities, resulting in increased traffic and fire hazards.

As to Parker's argument that the ordinance was an arbitrary and unreasonable restriction upon his property rights, the Court stated,

*That he, due to the particular circumstances of his case, may suffer hardship and inconvenience by an enforcement of the ordinance is not sufficient ground for invalidating it. The fact that the ordinance is harsh and seriously depreciates the value of complainant's property is not enough to establish its invalidity.*

Inherently recognizing that the nature of zoning regulations is to deflate some property values while inflating others, the Court once again emphasized that **depreciation in value is not the test to be used in determining the validity of a zoning ordinance**, as such a test would necessarily render ineffective the efforts of a municipality to orderly regulate the use of property for the common health, safety, and welfare of its citizens. As the Court explained:

*Each person holds his property with the right to use the same in such manner as will not interfere with the rights of others or the public interest or requirement. It is held in subordination to the rights of society. He may not do with it as he pleases any more than he may act in accordance with his personal desires. The interests of society justify restraints upon individual conduct and also upon the use to which the property may be devoted. The provisions of the Constitution are not intended to so protect the individual in the use of his property as to enable him to use it to the detriment of the public. When the uses to which the individual puts his property conflict with the interest of society the right of the individual is subordinated to the general welfare and incidental damage to the property resulting from governmental activities or laws passed in the promotion of the public welfare is not considered a taking of the property for which compensation must be made.*

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**RESPONSIBLE CITIZENS v. CITY OF ASHEVILLE, 308 N.C. 255 (1983)**

• **Concepts Noted Here:**

- (1) *The "ends-means" test can be used to determine if an ordinance is reasonable. If the ends are within the realm of police power, and the means to achieve the goals of the law are reasonable, the law is valid.*
- (2) *The concept that a property owner must be denied all reasonable use of the property in order for the regulation to constitute a taking is upheld*

• **Facts:**

The City enacted an ordinance imposing certain land-use regulations on property located in a designated flood hazard district. The ordinance placed conditional affirmative duties on landowners within the district in that it: (1) required that new construction be

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built in such a manner as to prevent or minimize flood damage, and (2) contained requirements applicable when substantial improvements were to be made to existing properties. For example, a main part of the ordinance applied to all properties within the flood hazard district and provided as follows:

- (1) *All new construction and substantial improvements shall be anchored to prevent flotation, collapse or lateral movement of the structure.*
- (2) *All new construction and substantial improvements shall be constructed with materials and utility equipment reasonably resistant to flood damage as defined in N.C. Building Code.*
- (3) *All new construction and substantial improvements shall be constructed by methods and practices which reasonably minimize flood damage.*
- (4) *All new and replacement water supply systems, either private or public, shall be designed and installed to minimize, to the greatest extent practicable, infiltration of flood waters into the system.*
- (5) *All new and replacement sanitary sewerage systems, either private or public, shall be designed and installed to minimize, to the greatest extent practicable, infiltration of flood waters into the systems and discharge from the systems into the flood waters.*
- (6) *On-site waste disposal systems shall be located or constructed to avoid impairment of them or contamination from them during flooding.*
- (7) *Any alteration, repair, reconstruction or improvements to a structure, on which the start of construction was begun after the effective date of this Ordinance, shall meet the requirements of "new construction" as contained in this Ordinance.*

Plaintiffs owned commercial property located in the flood hazard district and claimed that the land-use regulations deprived them of the right to reasonable use of their property and resulted in a depreciation of a portion of its value. They further claimed that the ordinance imposed severe restrictions on the property of some citizens for the purpose of allowing other property owners in the City to receive the benefit of numerous federal financial assistance programs. Accordingly, they filed suit, challenging the enactment of the flood plain ordinance as an invalid exercise of the police power because it effected a taking of private property for public use without just compensation.

• **HOLDING:**

The ordinance was upheld by the North Carolina Supreme Court. The case contains numerous key concepts, as discussed below. The Court first examined the City's exercise of the police power, and then proceeded to examine if a taking had occurred.

**A. Police Power Analysis** The North Carolina Supreme Court initially engaged in a two-part analysis to resolve the issue of the legitimacy of the City's particular exercise of the police power. **The "ends-means" test, applied to determine the legitimacy of the utilization of the police power, was set forth as follows:**

- (1) whether the ends sought (i.e., the object of the legislation) is within the scope of the police power, and then;

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- (2) whether the means chosen to regulate are reasonable (wherein the court must determine if the regulation is reasonably necessary to “promote the accomplishment of a public good” and if “the interference with the owner’s right to use his property as he deems fit [is] reasonable in degree”).

**Application of the ends-means test:** The Court held that:

- (1) the ends sought to be achieved under the ordinance fell well within the scope of the police power (the prevention or reduction of loss of life and property damage due to floods); and
- (2) the provisions of the ordinance were reasonably necessary for the public health, safety and welfare, as adequate findings were made that flood damage was caused by properties within the flood hazard district which were inadequately elevated, floodproofed, or otherwise protected.

**B. Takings Analysis** As to whether the ordinance was invalid because the interference with plaintiffs' use of the property amounted to a taking, the Court found in the City’s favor as well. The Court specifically noted that:

*This Court has not previously determined at what point a land-use regulation becomes an invalid exercise of the police power, as applied, because the interference with the property owner's rights is unreasonable, and, in effect constitutes a “taking” of the owner's land.*

The Court recalled that in Helms v. City of Charlotte, 255 N.C. 647 (1961), the Court seemed to indicate that **a zoning ordinance would be deemed "unreasonable and confiscatory," as applied to a particular piece of property, if the owner of the affected property was deprived of all "practical use" of the property and the property was rendered of no "reasonable value."**

**Application:** Here, the Court found that the requirements could be characterized as “conditional affirmative duties” placed upon the landowner's use of his property.

*The requirements are conditional because they apply only to “new construction and substantial improvements”. The regulations do not affect in any way the current use of each plaintiff's property; each plaintiff thus continues to have a “practical use” for his property of “reasonable value”. Furthermore, plaintiffs are not prohibited from engaging in new construction or substantial improvements on their properties. They are only required to do so in a manner that prevents or minimizes flood damage, that is, in conformance with the land-use regulations.*

**Discussion Relating to Costs:** The Court rejected plaintiffs’ arguments regarding the cost of complying with these regulations. Plaintiffs argued that their properties had been "taken," because for all practical purposes, they could not add to or change the uses to which they currently put their properties given the cost of compliance with the ordinance. The Court stated:

*Even assuming that the cost of complying with the land-use regulations is prohibitive (and we do not decide that it is) and recognizing that the market value of plaintiffs' properties has diminished (a fact found by the trial court), these factors are of no consequence here. . . . "[T]he mere fact that an ordinance results in the depreciation of the value of an individual's property or restricts to a certain degree the right to develop it as he*

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*deems appropriate is not sufficient reason to render the ordinance invalid.”*  
(emphasis added).

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**FINCH v. CITY OF DURHAM, 325 N.C. 352, rehearing denied, 325 N.C. 714 (1989)**

• **Concepts Noted Here:**

(1) *Court determines that a critical factor in determining validity of re-zoning ordinance can be its relationship to previously-stated public goals.*

• **Facts:**

This case involved a dispute over the 1985 rezoning of a 2.6-acre, vacant, undeveloped tract near the southeastern quadrant of the intersection of Interstate 85 ("I-85") and Hillandale Road. The property had the following characteristics:

- South of I-85 and surrounding the property to the east, south, and west, there was R-10 (residential, minimum 10,000 square foot lot) zoning, in which single-family houses were built. The property was located on the edge of the Watts-Hillandale neighborhood. Uses permitted in an R-10 zone included single-family houses, athletic fields, cemeteries, mausoleums, child care centers, churches, clubs or private lodges, non-commercial community buildings, family care homes, parking lots, public buildings, libraries, museums, art galleries, parks, recreational facilities, public or private swimming pools, and schools, including nursery schools and kindergartens.
- A church was located across the street from the property, and a gas station, previously zoned C-1 (neighborhood commercial) but now abandoned and rezoned to R-10, was situated immediately adjacent to the west.
- Across I-85 to the north, there was office-institutional and commercial zoning, including hotels.

The history of the 2.6 acre tract was as follows:

- Pre-1979 -- All the land south of I-85 in this area was zoned R-10. (In 1972, there had been an attempt to rezone the property from R-10 to O-I, but it failed.)
- 1979 -- Plaintiffs (who had a contract for an option to lease, with the lease to contain an option to purchase the property) initiated a request to rezone the property to O-I (office-institutional) in order to build a 100-room motel on the site. The Durham City Council approved plaintiffs' rezoning request in 1979, and the property was rezoned to O-I. Immediately thereafter, plaintiffs entered into a seven-year lease with the property owner with an option to purchase the property in the final year. (The specified purchase price was \$165,000.)
- 1979-1985 -- The property in question was zoned O-I. Although plaintiffs paid for architectural plans and a cash flow study, high interest rates and a lack of partners prevented them from initiating construction of the motel: physical developments or improvements were not made on the land.

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- 1985-- When a collateral proposed deal arose with a national chain involving the lot, plaintiffs submitted a petition to close the adjacent street so that the deal could be pursued. Neighboring property owners then petitioned the Council for a rezoning back to the original R-10 zoning. The City had a policy, articulated through its comprehensive plan, of preserving residential neighborhoods. On April 2, the Planning and Zoning Commission recommended by a 5 to 2 vote that the property be rezoned to R-10. (A hearing before the City Council was scheduled for May 6.)

Because of their financial interest to date in the property, plaintiffs exercised their option to purchase the property on April 29, with knowledge of the ongoing proceedings and the possibility of rezoning. One week later, the City Council voted to rezone the property and an adjacent tract to R-10, a classification which prohibited motels. Two months later, plaintiffs contracted with the national chain to sell the property for \$500,000 if the property were again rezoned to O-I.

Plaintiffs were unsuccessful in their efforts to sell the property, and then sued the City seeking monetary damages based upon numerous claims. At trial, plaintiffs' experts contended that the rezoning decreased the value of their property from \$550,000 to between \$20,000 - \$25,000. The jury found that the rezoning ordinance was an invalid taking but that plaintiffs had suffered no damages. Post-trial motions were filed. The trial judge granted plaintiffs' motion for judgment notwithstanding the verdict as to damages and entered a judgment of \$150,937 plus legal fees for plaintiffs. The case was appealed directly to the North Carolina Supreme Court upon its granting of discretionary review.

• **HOLDING:**

**The North Carolina Supreme Court, in a 4-3 decision, reversed and remanded for entry of judgment in favor of the City, holding that the rezoning of the property did not amount to a taking of the property under the state or federal constitutions.**

The Court applied the "ends-means" test set forth in Responsible Citizens v. City of Asheville, 308 N.C. 255 (1983)(summarized above). Pursuant to the test, the Court first examined the goals of the rezoning ordinance to determine whether a nexus existed between those goals and the rezoning ordinance itself. The Court observed that one of the goals of the City of Durham's comprehensive plan was to maintain the integrity of existing single-family residential neighborhoods and that the general goal of the rezoning ordinance at issue was to protect an existing single-family residential neighborhood. The Court found a sufficient nexus between the goal of the rezoning ordinance-- the protection of an existing single-family residential neighborhood from commercial encroachment-- and the ordinance itself.

The second part of the test, whether the means chosen to regulate were reasonable, requires an analysis of whether the rezoning ordinance deprives plaintiffs of all practical use of the property and renders it of no reasonable value. The Court determined that while the rezoning may have resulted in a substantial depreciation of the market value of the property, the property nonetheless retained both practical use and reasonable value. (Plaintiff's evidence showed that the property could have been sold undeveloped at the time of trial for between \$20,000 to \$25,000.) The Court, rejecting plaintiffs' argument that the available residential zone uses were impractical and unreasonable because they would not guarantee a return on plaintiffs' investment, held that no taking occurred. **The Court stated "The property owner's actual investment in the property prior to a**



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rezoning is not determinative of “practical use” and “reasonable value” of the property after rezoning.

• **NOTE:**

**Finch** is a landmark 4-3 decision which merits particularly careful reading. “Even though the land owner lost in the case, the opinion makes it clear that our Supreme Court is willing to find a regulatory taking in the proper circumstances.” *Webster, Real Estate Law in North Carolina*, 4th Edition (Charlottesville, Va.: Michie, 1994), sec. 18-15, at p. 761, n. 188. Arguably, the reported appellate decision coming closest to finding a taking in a rezoning matter is *Helms v. City of Charlotte*, 255 N.C. 647 (1961), wherein two small vacant lots were rezoned from industrial to residential. The Supreme Court sent the case back to the trial court because there were insufficient findings as to whether the market value of a proposed three room shot-gun house (plaintiff’s only option under the zoning ordinance) requiring a foundation and roof variation for each room would be less than the cost of the construction of the residence. The Court observed:

*It is possible that, if a residence was erected on the lots, upon completion the market value of the house and lots would be less than the cost of constructing the residence. In such case the lots would be valueless for residential purposes.*

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## **Aesthetics**

### **STATE v. JONES, 305 N.C. 520 (1982)**

• **Concepts Noted Here**

- (1) *Aesthetics-based regulations are permissible in that they are a valid basis for the exercise of the police power. The reasonableness of such regulations depends on the facts and circumstances of each case.*

• **Facts:**

The County enacted an ordinance requiring the screening of junkyards. The ordinance provided in pertinent part as follows:

**SECTION FOUR. PROHIBITIONS**

*Except as hereinafter provided, it shall be unlawful after the effective date of this Ordinance for any person, firm or corporation, or other legal entity to operate or maintain in any unincorporated area of Buncombe County a junkyard or automobile graveyard within one hundred yards of the center line of any "public road" within one quarter mile of any "school" or within any residential area. For the purposes of this Ordinance, a junkyard or automobile graveyard shall be within a residential area if there are twenty-five (25) or more housing units within a geographical area comprised of a one fourth (1/4) mile wide strip contiguous and parallel to the external boundary lines of the tract of real property on which said automobile graveyard or junkyard is located.*

**SECTION FIVE. EXCEPTIONS**

*A. This Ordinance shall not apply to service stations, repair shops or garages.*

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*B. Junkyards or automobile graveyards may be operated and/or maintained without restrictions if and providing that said junkyard or automobile graveyard shall be entirely surrounded by a fence, or by a wire fence and substantial vegetation of sufficient height and density as to prevent as nearly as is practical any contents of said junkyard from being visible from any public road or residence, taking into consideration the surrounding terrain. The fence or wire fence shall have at least one and not more than two gates for purposes of ingress and egress. The gates shall be closed and securely locked at all times, except during business hours.*

*In the event that an operator or maintainer of an automobile graveyard or junkyard prohibited herein chooses to surround said automobile graveyard or junkyard with a fence or a wire fence and substantial vegetation as hereinabove provided for, the Environmental Health Services Division of the Buncombe County Health Department shall have the discretion to determine whether or not the said fencing and/or vegetation is substantial and of sufficient height and density as to prevent as nearly as is practical any contents of said automobile junkyards or graveyards from being visible from any public road or residence, taking into consideration the surrounding terrain. The said Environmental Health Services Division shall be available to assist an operator or maintainer of an automobile graveyard or junkyard, upon request by the said operator or maintainer, in the formation of plans for said fencing and/or vegetation. The fence or wire fence and vegetation shall be maintained in good order and shall not be allowed to deteriorate.*

Defendant was charged with failure to erect a fence as required by the ordinance and filed suit challenging the legality of the ordinance.

• **HOLDING:**

This is the landmark case in which **it was decided that “regulation based on aesthetic considerations may constitute a valid basis for the exercise of the police power depending on the facts and circumstances of each case.”** The case was decided two years after another significant case of first impression, A-S-P Associates v. City of Raleigh, 298 N.C. 207 (1979), which upheld the validity of historic district preservation zoning, in light of the legitimate police power objective of preserving the State’s legacy of historically significant structures. Approximately five years after the issuance of the Jones decision, the Fourth Circuit, in upholding the constitutionality of a billboard ordinance as a valid exercise of the police power, would hold that “aesthetics alone is a sufficient justification for an exercise of the police power.” Georgia Outdoor Advertising v. City of Waynesville, 833 F.2d 43 (4th Cir. 1987).

In Jones, the Court held that **aesthetics-based regulatory ordinances are permissible when they are reasonable.** Reasonableness depends on the facts and circumstances of each case, including a determination of "whether the aesthetic purpose to which the regulation is reasonably related outweighs the burdens imposed on the private property owner by the regulation." The Court adopted the test set forth in A-S-P: the property’s diminution in value is to be weighed against the public gains from the existence of the regulation.

The Court noted that aesthetic regulation may provide numerous benefits to a community, such as:

- protection of property values;
- promotion of tourism;
- preservation of a community’s character and integrity;

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- furtherance of the comfort, happiness, and emotional stability of area residents;
  - indirect protection of health and safety

**These corollary community benefits are factors to be considered in balancing the public interests in regulation against the individual property owner's interest in the use of property free from regulation.** The Court emphasized that:

*[s]ome of the factors which should be considered and weighed in applying such a balancing test include such private concerns such as whether the regulation results in confiscation of the most substantial part of the value of the property or deprives the property owner of the property's reasonable use, and such public concerns as the purpose of the regulation and the manner in achieving a permitted purpose.*

The Court went on to warn that:

*[w]e feel compelled to caution the local legislative bodies charged with the responsibility for and the exercise of the police power in the promulgation of regulations based solely upon aesthetic considerations that this is a matter which should not be delegated by them to subordinate groups or organizations which are not authorized to exercise the police power by the General Assembly.*

• **NOTE:**

While the Court in Jones indicated, for the first time, that an ordinance could be based primarily upon aesthetic considerations, the Court also emphasized that its use of the A-S-P balancing test was intended to preclude "carte blanche" approval of the exercise of the police power for any reason. Simply stated, an ordinance based primarily upon aesthetic considerations is a reasonable use of the police power if the aesthetic purpose to which the regulation is related outweighs the burdens imposed on the private property owner. **While aesthetic considerations may serve as a basis for zoning regulations, ordinance provisions must be carefully drafted to relate to the purposes they are designed to serve.** The Court of Appeals would later note in a subsequent decision that when other worthwhile objectives are also realized, such as improvement of traffic safety and the protection of property values, the challenged regulation will be deemed to be within the scope of permissible purposes properly achieved through use of the police power. Goodman Toyota v. City of Raleigh, 63 N.C. App. 660 (1983).

In A-S-P Associates v. City of Raleigh, 298 N.C. 207 (1979), the Supreme Court upheld the concept of historic district zoning and issued a decision which would ultimately set the path for the landmark decision in Jones. **A-S-P is an important case in that it stands for the proposition that due consideration will be paid by courts to the concept of contextuality (the focus being upon the entire area at issue, rather than upon just one building), and that deference will be given to the line drawing of district boundaries by local governments.** In sum, the Court rejected the contention that adequate standards had not been established by the Legislature. A reading of Jones and its successor cases demonstrates that the record should clearly indicate that due consideration was paid to all objectives to be served by enactment of the ordinance, as well as the likely burdens of such an ordinance, to maximize the chances that the ordinance will be upheld.

*It is a matter of practical impossibility for a legislative body to deal with the host of details inherent in the complex nature of historic district preservation. It is therefore sufficient that a general, yet meaningful, contextual standard has been set forth to limit the discretion of the Historic District Commission.*

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## Consistency with Comprehensive Plans

### **BATCH v. TOWN OF CHAPEL HILL, 326 N.C. 1, cert. denied, 496 U.S. 931 (1990)**

#### • Concepts Noted Here:

- (1) *Consistency with a Comprehensive Plan may be made a requirement of development ordinance.*

#### • FACTS:

In 1987, Batch submitted a preliminary subdivision plat to the Town of Chapel Hill for its approval. The plat showed the subdivision of a tract of 20.16 acres into eleven (11) single-family residential lots surrounding two short cul-de-sac streets. In 1984, the Town had adopted the 1983 Chapel Hill/Carrboro Thoroughfare Plan as part of the Chapel Hill Comprehensive Plan. The Thoroughfare Plan included plans to construct a limited access two-lane highway, the Laurel Hill Parkway, traversing the eastern and southern portions of Chapel Hill's extraterritorial planning area. If built as planned, the parkway, with a projected ninety-foot right-of-way, would have passed through the northeastern portion of Batch's tract. Its construction would have significantly interfered with the use of at least four of the proposed subdivision lots.

In denying approval to Batch's plat, the Town Council adopted a resolution that concluded that among its deficiencies the subdivision plan did not "have streets which coordinate with existing and planned streets and highways as required by [the Town development ordinance]." The trial court and the North Carolina Court of Appeals invalidated the Town's decision, viewing the matter as involving the illegal imposition of exactions upon a developer. (The decision of the Court of Appeals in Batch, 92 N.C. App. 601 (1989), is discussed under Part XI below ("Developer Exactions")).

#### • HOLDING:

In reversing decisions of both the trial court and the Court of Appeals, the North Carolina Supreme Court held that the Town Council properly denied approval of the plat. The Court explained the basis for its decision this way:

*Under N.C.G.S. 160A-372, a town is clearly authorized to require a developer to take future as well as present road development into account when designing a subdivision. See N.C.G.S. 153A-331 for parallel authority for counties. A requirement that a subdivision design accommodate future road plans is not necessarily tantamount to compulsory dedication. Rather, such a requirement might legitimately compel a developer to anticipate planned road development in some logical manner when designing a proposed subdivision.*

#### • NOTE:

Batch is one of the relatively few North Carolina appellate court cases that addresses the interplay between approval of a development application and its coordination or

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consistency with elements of a comprehensive plan adopted by a local government. **Batch establishes that coordination or consistency with an element of a comprehensive plan may be made an ordinance requirement.** Of course, a local government must be cautious to ensure that its zealotry to carry out plan objectives does not result in the imposition of an exaction requirement or burdensome restriction that unfairly or illegally impacts a single property owner.

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## ***Multi-Stage Plan Approval***

### **RIVER BIRCH ASSOC. v. CITY OF RALEIGH, 326 N.C. 100 (1990)**

#### **• Concepts Noted Here:**

- (1) *Requirement for conveyance of open space to a homeowners association constitutes a valid exercise of the powers of local government.*
- (2) *Requirement for set-asides of land within a larger development is not a taking, as development potential of the rest of the subdivision is still available to the developer.*

#### **• FACTS:**

The developer obtained approval of preliminary plans for a 19.6-acre townhouse project of 144 units. A particular three-acre area, along with certain other areas, were shown on the approved plans as common recreation area (open space), despite the fact that the ordinance required only 10% of the tract (1.96 acres) to be so designated. The developer developed and sold townhouses in seven different sections, obtaining final plat approval for each section as it proceeded.

Each of the recorded sections of the development met the common open space, density, and lot size requirements of the subdivision and zoning ordinances, both singly and in combination with previously recorded sections. None of the first seven sections included the three-acre area. However, when plans for the eighth and final phase of the development were submitted, the plans depicted the three-acre area as being developed for additional townhouses. The City refused to approve the site plan and plat for this last phase, insisting that the three acres be conveyed to the homeowners association as open space.

The developer alleged an uncompensated taking of its land, sought damages, and an order compelling the City to approve its plans for the last phase. It also challenged the City's authority to require it to convey open space to the homeowners association rather than to dedicate the land to a governmental unit.

#### **• HOLDING:**

The North Carolina Supreme Court first held that **the City was authorized to require the transfer of open space to a homeowners association in lieu of requiring it to be dedicated.** That ruling set the stage for its second holding-- that River Birch was compelled to convey the common areas depicted on the preliminary plat instead of developing the area. Finally, the Court ruled that no unconstitutional taking of land had occurred, despite the fact that none of the three-acre area could be used for development.

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As to the first matter, the Court ruled that the City's requirement that recreation areas be conveyed to a homeowners' association to serve subdivision residents was valid. It noted that the municipal subdivision control enabling statute (G.S. 160A-372) provides for the "dedication or reservation of recreation areas serving residents of the immediate neighborhood within the subdivision." It conceded that the ordinance did not provide for "dedication" in the strict technical sense since a conveyance creates a "dedication" only when it benefits the public at large, not merely a portion of the public, such as the property owners within a single development. But the Court also referred to the statute (G.S. 160A-4) that provides that powers granted to municipalities must be broadly construed to include supplemental powers "reasonably necessary or expedient to carry them into execution and effect." (Four years later, the Court would later cite the River Birch decision as instrumental in another case involving interpretation of municipal statutory authority pursuant to G.S. 160A-4, Homebuilders v. City of Charlotte, 336 N.C. 37, 44 (1994).) **Thus, the Court concluded that Raleigh's ordinance requirement that common recreation areas be conveyed to a homeowners' association was:**

*an "additional and supplementary" power "reasonably necessary or expedient" to carry into effect the legislative intent to secure to the residents of the subdivision the benefits of the recreation areas.*

Moving on to the second matter, the Court reviewed the nature of River Birch's preliminary plat submission and the City's approval of it. It concluded that the City imposed a valid approval condition requiring that the actual development of the subdivision be in accordance with the preliminary site plan that River Birch submitted and that had been approved. In addition, the Court noted as follows:

*. . . River Birch took advantage of benefits that accrued as a result of voluntarily depicting common area in its preliminary plat. Upon approval of its plan, River Birch received and exercised the right to cluster the development and effectively increase the housing density to greater than otherwise allowed under the zoning ordinance. . . . That River Birch depicted more than the minimum common area necessary is of no great import. River Birch cannot now attack a condition of its own making which the City has accepted.*

In summary, the Court concluded:

*. . . . [W]e hold that where a developer submits a project plan for approval and undertakes the development of the property according to the approved preliminary plan, a city may refuse to consider a subsequent stage of the overall project that fails to take into account the prior development as proposed and undertaken in the prior stages of development.*

The third issue that the Court addressed was the alleged taking by the City of the three acres of land. River Birch had argued that the City denied the developer the right to develop its three-acre parcel and thus had denied to it the reasonable value and all practical use of that land. The Court rejected this argument, pointing out that the three-acre area was merely a portion of the larger subdivision and that River Birch had received all of the use of the entire tract that it had sought and to which it was entitled.

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## ***Procedure, Due Process***

### **HUMBLE OIL REFINING CO. v. BOARD OF ALDERMEN, 284 N.C. 458 (1974)**

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• **Concepts Noted Here:**

- (1) *A decision-making board in a quasi-judicial setting must:*
- (a) *follow the procedures specified in the ordinance;*
  - (b) *conduct its hearings in accordance with fair-trial standards;*
  - (c) *base its findings of fact only upon competent, material, and substantial evidence;*
  - (d) *in allowing or denying the application, state the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision.*

• **FACTS:**

Landowner sought the use of his lots for construction of and operation of an automobile drive-in service station. The site was within a district zoned as "central business." The zoning ordinance allowed the construction and operation of an automobile service station in the central business district upon the approval of a special use permit by the Aldermen. Accordingly, the landowner sought a special use permit. The procedures set forth in the ordinance included a duly advertised public hearing on the application before a joint meeting of the Aldermen and the Planning Board and further required the subsequent referral of the application to the Planning Board for its consideration and recommendations.

The Community Appearance Commission reviewed the application, recommending that, if the Aldermen approved the requested special use permit, it make certain stipulations pertaining to a large tree, a proposed revolving sign, an island canopy, and lighting fixtures. The Aldermen and the Planning Board, after due advertisement, sat jointly at the public hearing on the application. The Aldermen immediately denied the permit at the conclusion of the hearing, without referring Humble's application to the Planning Board for its review and recommendation.

• **HOLDING:**

Humble Oil is the leading case protecting citizens against arbitrary action by decision-making bodies, and the **principles articulated in the case have come to serve as the benchmark against which the fairness of proceedings is ultimately measured.** The case does so not only by setting forth requirements for the conduct of the hearing itself, but by also setting forth requirements that guide review of the decision by the judiciary upon appeal by the applicant. Three key components of Humble Oil provide:

- (a) that bodies which conduct quasi-judicial hearings involving the rights of an individual (such as permit or variance decisions) must ensure that the core elements of a fair trial are present;**
- (b) that bodies must consistently follow their own procedural rules, and;**
- (c) that the decision rendered by the body must contain sufficient written findings so that a party will be informed of the grounds for the decision and so that a reviewing court may properly determine whether the agency has acted lawfully.**

**A. Elements of a Fair Trial Required--** What does it mean for a body to act in a quasi-judicial capacity? When a board of aldermen, a city council, or zoning board hears

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evidence to determine the existence of facts and conditions upon which an ordinance expressly authorizes it to issue a permit to a particular individual, it acts in a quasi-judicial capacity. (Compare an enactment regulating the conduct of all citizens, which is a legislative decision.) As the Court recognized in *Humble Oil*, “[s]ince boards of aldermen and city councils are generally composed of laymen who do not always have the benefit of legal advice, they cannot reasonably be held to the standards required of judicial bodies”. Accordingly, courts do not expect the myriad of rules applicable to court proceedings to be interpreted and applied in quasi-judicial-proceedings, but some aspects of court proceedings must be present in quasi-judicial hearings because they are so fundamental to the notions of fairness embodied within the constitutional principles of due process and equal protection. As the Court explained:

***When a body conducts a quasi-judicial hearing to determine facts prerequisite to issuance of a permit . . . it "can dispense with no essential element of a fair trial."***

*Accordingly, for the hearing to mirror trial proceedings: (1) the party whose rights are being determined must be given the opportunity to offer evidence, cross-examine adverse witnesses, inspect documents, and offer evidence in explanation and rebuttal; (2) a board may not base findings as to the existence or nonexistence of crucial facts upon unsworn statements (absent stipulations or a waiver); and (3) crucial findings of fact which are "unsupported by competent, material and substantial evidence in view of the entire record as submitted" cannot stand. (Emphasis added.)*

**B. Procedure Must Be Followed--** Concomitantly, the Supreme Court emphasized that when a board passes upon an application for a permit, it

*may not violate at will the regulations it has established for its own procedure; it must comply with the provision of the applicable ordinance. . . . The procedural rules of an administrative agency "are binding upon the agency which enacts them as well as upon the public. . . . To be valid the action of the agency must conform to its rules which are in effect at the time the action is taken, particularly those designed to provide procedural safeguards for fundamental rights."*

As to the specific case at issue, the Board had violated its own established rules of procedure by rendering a decision immediately after the hearing without referring the case to the Planning Board for its recommendations. Said the Court,

*The obvious purpose of this provision is to insure that every application for a special use permit receives the same careful, impartial consideration. Thus, whether the application is to be allowed or denied, the Aldermen must "proceed under standards, rules, and regulations uniformly applicable to all who apply for permit." This means that, in passing upon an application for a special permit, a board of aldermen may not violate at will the regulations it has established for its own procedure; it must comply with the provision of the applicable ordinance.*

**C. Findings of Fact Required for Issuance of Decision--** Finally, "in allowing or denying the application, [the body must] state the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision." The requirement of having findings of fact ultimately serves as a protection against arbitrary action by providing a sufficient record upon which a court can review the board's decision. This helps to insure due process and equal protection to applicants and refute possible charges that any denial constitutes an arbitrary discrimination against the applicant.



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## **Variances; Role of Boards Compared to Governing Bodies**

### **LEE v. BOARD OF ADJUSTMENT, 226 N.C. 107 (1946)**

#### **Concepts Noted Here:**

- (1) *Board of Adjustment is an administrative entity, operating in a quasi-judicial role. It is not a legislative body and has no power to re-write an ordinance.*

#### **• FACTS:**

The City had a zoning ordinance which created a district for residential purposes only. Within that residential district, the zoning ordinance prohibited the construction of any structure which was "intended or designed to be used, in whole or in part, for any industrial, manufacturing, trade or commercial purpose."

Duke owned a lot located at the corner of Daughtry Street and Highway 64 directly in front of a residence within the district. He gave an option to purchase to Edmondson, who applied to the building inspector for a permit to construct buildings suitable for, and to be used as, a grocery store-service station. The building inspector declined to issue the permit, reasoning that the proposed buildings were designed to be used for a nonconforming purpose. Edmondson appealed to the board of adjustment.

The board of adjustment "concluded that to reject this permit would work a great hardship on the applicant, and that no damage would be sustained by adjoining property owners if the permit were granted." It unanimously ordered that the permit be issued.

#### **• HOLDING:**

The Board of Adjustment's decision that the permit should be issued was invalidated on appeal. Lee is the leading case on variances in North Carolina and sets forth the dividing line between the powers of the council and planning boards. **The Court's decision emphasized that the Board of Adjustment is not a legislative body and accordingly has no power to rewrite an ordinance.**

As to the facts of this case, the lot was in a residential zone. The Court concluded that the Board of Adjustment had essentially rezoned the parcel to allow a business purpose and thus in effect had amended the zoning ordinance. The Board of Adjustment had no authority to do so. (Recall that the zoning ordinance prohibited the construction of any structure within the residential district which was "intended or designed to be used, in whole or in part, for any industrial, manufacturing, trade or commercial purpose.") In other words, the action taken by the Board of Adjustment was an amendment of the law, rather than a variance of its regulations.

The Court described the Board of Adjustment, authorized in the zoning statutes as an administrative agency, as acting in a quasi-judicial capacity. The Court explained that the Board of Adjustment's

*main function is to grant variance permits in exceptional cases, subject to court review. In the exercise of this discretion, however, it is not left free to make any determination whatever*

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*that appeals to its sense of justice. It must abide by and comply with the rules of conduct provided by its charter - the local ordinance enacted in accord with and by permission of the State zoning law.*

In sum, the Supreme Court held that the board of adjustment had no authority to issue the variance for this particular purpose, reasoning that such a substantial departure from the zoning ordinance did violence to the spirit of the ordinance. The Supreme court concluded that the landowners' intended result could be achieved only through rezoning, a matter reserved to the discretion of the governing body.

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## **Moratoria**

### **VULCAN MATERIALS COMPANY v. IREDELL COUNTY, 103 N.C. App. 779 (1991)**

#### **Concepts Noted Here:**

- (1) *Moratoria are permissible, but public notice and hearing requirements of the zoning ordinance must be followed.*

#### **• FACTS:**

Prior to February 1990, the County had taken initial steps to enact a complete countywide zoning ordinance covering the property upon which Vulcan Materials Company, Inc. ("Vulcan") planned to construct its quarry. A Land Development Plan had been adopted in October 1987, but no zoning ordinance covering the property at issue was in place during the pertinent period of time in this case.

In February 1990, Vulcan made inquiries regarding the permit process for a building permit for the placement of structures on unzoned property in the County where it planned to develop a quarry. Vulcan was told that in order to obtain a building permit, it would need to install a septic tank, apply for an erosion control permit, and obtain a driveway permit.

On March 6, 1990, the County Board of Commissioners passed an ordinance placing a 60-day moratorium on the issuance of building permits. (Prior to adoption of the moratorium ordinance, there was no public notice or advertised public hearing.) Because there had been requests for building permits in this unzoned area of the county "for structures that [were] out of compliance with the land use study and [would] be out of compliance with the proposed zoning of the area under the countywide zoning plan," the Board adopted this moratorium ordinance restricting "any building permits being issued in all areas not currently zoned if the building permit calls for uses of the land other than that stated in the land use plan." The ordinance provided that the restriction was to be in force "for sixty days unless extended by the board of commissioners. . . ."

Later that month on March 19, after Vulcan had taken the necessary measures outlined above, the County Inspections Department denied Vulcan's request for a building permit because of the moratorium. The denial was confirmed by a letter from the Director of Inspections stating that the Board's "action does not allow issuance of permits for uses not in compliance with the County's adopted Land Development Plan."

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Vulcan filed suit seeking an order declaring the moratorium to be void and seeking a mandatory injunction directing the issuance of the requested building permit. The trial court granted Vulcan's summary judgment motion and ordered the Department of Inspections to issue the requested building permit.

• **HOLDING:**

**The Court of Appeals held that it was permissible for a local government to implement a moratorium, but that the public notice and hearing requirements of the zoning statute had to be followed.** (Here, the requirements were not followed by the County.)

The Court initially noted that no specific authority exists for the imposition of a moratorium on the issuance of building permits pending zoning. The Court noted that while notice and public hearing are not mandated for the adoption of ordinances generally, they are mandated for matters regarding planning and regulation of development (found in Article 18 of Chapter 153A for counties, or Article 19 of Chapter 160A for municipalities). Specifically, within Article 18, G.S. 153A-323 states:

*Before adopting or amending any ordinance authorized by this Article . . . the board of commissioners shall hold a public hearing on the ordinance or amendment. The board shall cause notice of the hearing to be published once a week for two successive calendar weeks. The notice shall be published the first time not less than 10 days nor more than 25 days before the date fixed for the hearing.*

(G.S. 160A-364 provides the same for municipalities.) Here, the Court had to decide whether this type of moratorium ordinance was within the purview of Article 18. The Court noted that the record did not reveal under which provision the moratorium on building permits was enacted. The Court stated that:

*The trial court found that the defendants had conceded "that the moratorium ordinance had the effect of making the unzoned areas of the County subject to zoning restrictions prior to the adoption of a zoning ordinance applicable to those areas." Zoning is covered by Article 18, and the ordinance deals specifically with the issuance of building permits, which is also covered by Article 18.*

The Court of Appeals proceeded to quote a case from Florida:

*"If an ordinance substantially affects land use, it must be enacted under the procedures which govern zoning and rezoning. To entirely prohibit a person from building upon his property even temporarily is a substantial restriction upon land use. Consequently, it is not too much to ask that a municipality follow the same procedures with respect to notice and hearing before it puts such a moratorium into effect."*

Here, the County had provided no notice to the public or advertised public hearing prior to adoption of the ordinance as required by G.S. 153A-323. Accordingly, the Court of Appeals affirmed the trial court's conclusion that the ordinance passed by the Board imposing the moratorium on building permits pending zoning was invalid due to the procedural violations.

• **NOTE:**

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**Vulcan Materials stands as the first North Carolina case to recognize the legitimacy of moratoria in the land-use context.** While Vulcan Materials stands as the sole reported North Carolina appellate case to date on moratoria, **generally courts in other states have upheld moratoria after examining them based upon three criteria: (1) durational (i.e., imposed for reasonable periods of time); (2) certainty of purpose (i.e., implemented in good faith for a specific purpose), and; (3) procedural (i.e., the correct procedures have been followed prior to implementation).** In sum:

*“Several general rules must be followed for a moratorium on land development to be valid in North Carolina. First, it is best to meet the hearing and notice requirements. . . . An urgent threat to the public health or safety will justify the more expeditious process of adopting an ordinance under the general police power [G.S. 153A-121; G.S. 160A-174A], but this alternative should be employed judiciously. Any moratorium should have an explicitly limited duration that is reasonably related to the time it will take to address the concerns that have led to its adoption. The moratorium’s coverage should be as specific as possible, so as to regulate all of the land uses that generated its need, but no others.”*

Owens, *Legislative Zoning Decisions: Legal Aspects* (Chapel Hill, N.C.: Institute of Government, 1993), p. 63.

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## ***Amortization and Non-Conforming Uses***

### **STATE v. JOYNER, 286 N.C. 366, appeal dismissed, 422 U.S. 1002 (1975)**

#### **Concepts Noted Here:**

- (1) *Amortization is a legal means to remove non-conformities.*
- (2) *When using amortization, the period established for coming into compliance when using amortization must be reasonable.*

#### **• FACTS:**

The City enacted an ordinance, effective September 17, 1968, prohibiting the operation of a building material salvage yard in specified districts, including those zoned as B-3. The ordinance allowed a grace period of three years thereafter for the removal of such businesses.

Defendant operated a building material salvage yard within the B-3 zone contrary to the ordinance. (Building material salvage yards are permitted in districts zoned as I-3.) Defendant did not own the land, but had begun operation at this location in 1966 under an oral lease. After the adoption of the zoning ordinance in 1968, defendant (with notice of this ordinance) entered into a written lease extending until 1979. Upon the expiration of the three-year period following the passage of the ordinance, defendant was informed that his business violated the zoning ordinance. He refused to remove his salvage yard, and in 1973 the City cited him for a violation of the zoning ordinance.

#### **• HOLDING:**

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**Joyner** was a landmark case establishing that amortization was a legal practice provided that the period for coming into compliance with the ordinance was reasonable. The case was eventually appealed to the United States Supreme Court, which declined review of the decision of the North Carolina Supreme Court.

Noting that at the time it rendered its decision, North Carolina courts had neither accepted nor rejected amortization provisions requiring termination of nonconforming uses within a prescribed period of time, the North Carolina Supreme Court cited with approval the following excerpt from Anderson, American Law of Zoning, sec. 6.65, at pp. 446-47 (1968):

*Municipalities which seek to terminate nonconforming uses through amortization proceed on the assumption that the public welfare requires that such uses cease, but that summary termination is illegal, impractical, or unfair. They find a middle ground, between immediate cessation of use and the indefinite continuance thereof, by adopting regulations which permit the nonconforming users, or some of them, to continue for a specified period, but which require them to end the prohibited use upon the expiration of that period. The term "amortization" is derived from the notion that the nonconforming user can amortize his investment during the period of permitted nonconformity. It is reasoned that this opportunity to continue for a limited time cushions the economic shock of the restriction, dulls the edge of popular disapproval, and improves the prospects of judicial approval.*

Noting numerous cases from other states, **the Court adopted the majority rule that the provisions for amortization of nonconforming uses are valid if reasonable.** Favorably citing an excerpt from a case from another state, the Court set forth the factors that the test of reasonableness for an amortization ordinance would include:

- 1) the nature of the business of the property owner;
- 2) the improvements erected on the land;
- 3) the character of the neighborhood, and;
- 4) the detriment caused the property owner.

In upholding the ordinance, the North Carolina Supreme Court observed that the City

*sought, through a comprehensive ordinance, to assure that future growth is orderly and in the best interests of its citizens. To further that purpose, the ordinance establishes a three-year period during which defendant may remove his nonconforming use. The method used to terminate nonconforming uses was a legislative decision to be reached by balancing the burden on the individual with the public good sought to be achieved. [The ordinance] is not so arbitrary, unreasonable, or unrelated to the general welfare of the community as to be unconstitutional by its terms. To the contrary, it represents a conscious effort on the part of the legislative body of the city to regulate the use of land throughout the city and thus promote the health, safety, or general welfare of the community.*

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## **Conditional Use Zoning; Spot Zoning**

### **CHRISMON v. GUILFORD COUNTY, 322 N.C. 611 (1988)**

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## Concepts Noted Here:

- (1) *Conditional Use Zoning is legitimate, subject to its being reasonable, fair, and in the public interest.*
- (2) *Illegal spot zoning is analyzed according to four factors: Size of tract; conformity with plan; benefits and detriments to neighborhood, applicant and community; relationship with adjacent properties.*
- (3) *Illegal contract zoning exists where there are reciprocal promises between applicant and the local government.*

## • Facts:

Beginning in 1948, Clapp operated a business on a 3.18-acre tract next to his home, consisting of: (1) buying, drying, storing, and selling grain, and (2) selling and distributing agricultural chemicals. The sequence of events in this case was as follows:

- In 1964, the County adopted a zoning ordinance which zoned his tract and an extensive area surrounding it as "A-1 Agricultural," a general use district. The storage and sale of grain were permitted uses under the new classification. The sale and distribution of agricultural chemicals were not permitted uses, but were nonconforming uses. Accordingly, Clapp was permitted to continue the sale and distribution of agricultural chemicals on the land next to his residence since the activity preexisted the ordinance, but as a nonconforming use he could not expand this part of his business.
- In 1969, plaintiffs bought a lot from Clapp (next to an additional 5 acre tract that he owned and used for the growing of tobacco) across the road from Clapp's home and business. Plaintiffs built a house on the lot to serve as their residence.
- In 1980, Clapp expanded his business onto the 5 acre tract next to plaintiffs' residence. He constructed some new buildings on the tract, erected several grain bins, and generally enlarged his business. Given their concerns regarding the increased noise, dust, and traffic, plaintiffs filed a complaint with the County's Inspections Department. The Inspections Department subsequently notified Clapp that the expansion of the agricultural chemical operation to the tract adjacent to the plaintiffs' lot was an impermissible expansion of a nonconforming use. At the same time, Clapp was advised that he could seek a rezoning of the property. Clapp applied to have both his 3.18 acre and 5 acre tracts rezoned from A-1 to "Conditional Use Industrial District." (In other words, this case involved rezoning from a general district to a conditional use district.) Clapp also applied for a conditional use permit, specifying in the application that he would use the property as it was then being used and listing the improvements he intended to make during the next five years. Under the "Conditional Use Industrial District" (CU-M-2) classification, Clapp's agricultural chemical operation would become a permitted use upon the issuance of the conditional use permit.
- In 1982, the Planning Board recommended the approval of Clapp's rezoning request. The Board of Commissioners held a public hearing concerning the rezoning application. Members of the Board heard statements from Clapp, from plaintiffs, and from plaintiffs' attorney. Several additional persons had previously spoken in favor

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of Clapp's rezoning request at earlier Board meetings, stating that Clapp's business provided a service to the farmers in the immediate vicinity. The Board had also been presented with a petition signed by eighty-eight persons favoring the rezoning. After the public hearing, the Board of Commissioners voted to rezone the tracts from A-1 to a Conditional Use Industrial District (CU-M-2) and voted to approve Clapp's conditional use permit application.

Pursuant to the County's decision to rezone the property in question, plaintiffs filed suit seeking to have both the rezoning and the conditional use permit declared invalid. The trial court upheld the rezoning and the granting of the permit. The Court of Appeals reversed, holding that the rezoning constituted an illegal form of spot zoning and illegal contract zoning, and was therefore void. The North Carolina Supreme Court allowed the County's petition for discretionary review and reversed the holding of the Court of Appeals as set forth in the paragraphs that follow.

• **HOLDING:**

In a 5-2 decision, the North Carolina Supreme Court upheld the County's decisions to rezone the property and issue the conditional use permit. In this decision, the court discussed three substantive topics: (1) conditional use zoning; (2) spot zoning, and; (3) contract zoning.

**A. The Court Discusses Conditional Use Zoning:**

**This case established for the first time in North Carolina that the practice of conditional use zoning was legitimate, so long as the action of the local zoning authority was: (1) reasonable; (2) neither arbitrary nor unduly discriminatory; and (3) in the public interest (which are three requirements applicable to any form of zoning as well).** The Court noted and discussed the existence of a considerable divergence of opinion amongst other state courts and commentators alike as to the legal status of the practice, and ultimately joined a growing number of jurisdictions in recognizing the validity of properly employed conditional use zoning.

*[C]onditional use zoning anticipates that when the rezoning of certain property within the general zoning framework . . . would constitute an unacceptably drastic change, such a rezoning could still be accomplished through the addition of certain conditions or use limitations. Specifically, conditional use zoning occurs when a governmental body, without committing its own authority, secures a given property owner's agreement to limit the use of his property to a particular use or to subject his tract to certain restrictions as a precondition to any rezoning.*

The Court explained that public policy supported conditional use zoning as a mechanism allowing the degree of flexibility needed to enable local officials to respond appropriately to "constantly shifting conditions and public needs."

The Court cautioned that even though conditional use zoning was a tool to enhance flexibility,

*it goes without saying that it . . . cannot constitute illegal spot zoning or illegal contract zoning . . . the benefit of the flexibility of conditional use zoning can be fairly achieved only when these limiting standards are consistently and carefully applied.*

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Thus the main inquiry ultimately revolved around the compatibility of Clapp's agricultural chemical operation and the adjacent A-1 district.

### **B. The Court Discusses Spot Zoning**

The Court rejected plaintiffs' arguments that all forms of spot zonings were invalid, a view held in several other states. The Court distinguished between legal spot zoning and illegal spot zoning. The Court recognized that

*[i]t has been stated that the true vice of illegal spot zoning is in its inevitable effect of granting a discriminatory benefit to one landowner and a corresponding detriment to the neighbors or the community without adequate public advantage or justification.*

The Court emphasized that the balancing of the interests to be weighed in the evaluation of the existence or nonexistence of a sufficient reasonable basis in the context of spot zoning is the "product of a complex of factors," which are numerous and flexible. The specific analysis used depends on the facts and circumstances of a particular case. **The Court set forth four factors applicable in the judicial balancing of the reasonableness (i.e., the legality or illegality of) an action amounting to spot zoning:**

- 1) Tract Size-- the size of the tract in question;**
- 2) Plan Compatibility-- the compatibility of the disputed zoning action with an existing comprehensive zoning plan;**
- 3) Benefits and Detriments-- the benefits and detriments resulting from the zoning action for the owner of the newly zoned property, his neighbors, and the surrounding community; and**
- 4) Relationship Amongst Proposed and Adjacent Uses-- the relationship between the uses envisioned under the new zoning and the uses currently present in adjacent tracts.**

Here, the Court gave substantial consideration to the community's support of the rezoning, and noted that "spot zoning which provides a service needed in the community in addition to benefitting the landowner may be proper."

### **C. The Court Discusses Contract Zoning:**

On the issue of contract zoning, the Court held that the rezoning here was valid conditional use zoning and not illegal contract zoning. The Court noted the following differences amongst the two:

- ***Valid conditional use zoning* merely features a unilateral promise from the landowner to the local zoning authority as to the landowner's intended use of the land in question: the local zoning authority maintains its independent decision-making authority.**
- ***Illegal contract zoning* exists where a bilateral contract in which the landowners and the zoning authority make reciprocal promises: the Board abandons its independent decision-making authority by binding itself contractually with the landowner seeking a zoning amendment.** The Court would note in a later decision that, *[a] typical example of such reciprocal assurances occurs when the applicant assures the city council that the property will be used only for a specified purpose and no*



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*other, and the city council, in consideration of such assurance, agrees to rezone the property for a specified time thereafter. Hall v. City of Durham, 323 N.C. 293 (1988).*

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## **Developer Exactions**

**BATCH v. TOWN OF CHAPEL HILL, 92 N.C. App. 601 (1989), *rev'd on other grounds*, 326 N.C. 1, *cert. denied.*, 496 U.S. 931 (1990).**

### **Concepts Noted Here:**

*(1) Development exactions must have some "rational nexus" or "rough proportionality" to the impact of the development to which the exaction is being applied.*

### **• FACTS:**

In 1987, Batch submitted a subdivision plat to the Town for its approval. The plat showed the subdivision of a twenty-acre tract of land into eleven (11) single-family residential lots. The land proposed for subdivision abutted a minor arterial road (Old Lystra Road) for about 973 feet. The subdivision plan proposed a single new cul-de-sac street branching off Old Lystra Road serving all eleven lots.

After reviewing the plat, the Town Council denied approval, prompting Batch to sue. She alleged that the real reason for the rejection of her plat was that she had refused to indicate on her plat an intent to comply with several conditions proposed by the town that Batch believed were unconstitutional. Two of the requirements to which she objected were these: (1) the dedication of a 90-foot corridor through the north-central portion of her tract for the Laurel Hill Parkway, a four-lane road shown on the adopted Chapel Hill-Carrboro Thoroughfare Plan; and (2) the dedication of an additional ten feet of right-of-way along Old Lystra Road and the construction of an additional 12-foot wide traffic lane with curb and gutter along the entire frontage of the tract. She claimed that the imposition of these two requirements amounted to an unconstitutional taking of her property. The trial court agreed with Batch on these and several other issues, ordered the plat approved, and reserved for trial the question of the damages to which Batch would be entitled.

### **• HOLDING:**

The North Carolina Court of Appeals agreed with the trial court that the "parkway dedication" condition and one other condition were unconstitutional, but ordered that the question of the Old Lystra Road requirements be remanded to the trial court for further findings.

This decision was ultimately reversed by North Carolina Supreme Court, which based its own decision on the premise that no such conditions had ever been imposed. (See Batch, 326 N.C. 1 (1990) under "Consistency with Comprehensive Plans" above.) However, **the decision of the Court of Appeals is nevertheless significant because it marked the first occasion that a North Carolina appellate court addressed the nature of developer exactions, their statutory basis, and the appropriate constitutional test to be applied to them.** According to the Court of Appeals:

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*An exaction is a condition of development permission that requires a public facility or improvement to be provided at the developer's expense. Most exactions fall into one of four categories: (1) requirements that land be dedicated for street rights-of-way, parks, or utility easements and the like; (2) requirements that improvements be constructed or installed on land so dedicated; (3) requirements that fees be paid in lieu of compliance with dedication or improvement provisions; and (4) requirements that developers pay "impact" or "facility" fees reflecting their respective prorated shares of the cost of providing new roads, utility systems, parks, and similar facilities serving the entire area.*

In order to determine whether an exaction meets the standard of the U.S. Constitution that private property may not be taken for public use except upon the payment of just compensation, the Court of Appeals enunciated an exaction test. It declared that

*(a)n exaction test identifies when an individual property owner should pay for a community improvement and when that cost more fairly lies with the "public as a whole."*

According to the Court of Appeals,

*the "rational-nexus" test provides that a subdivider can be required "to bear that portion of the cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision." (Citations omitted.) Though North Carolina has not yet adopted a test which determines when an exaction would be the equivalent of a regulatory taking, statutory authority leads us to conclude that the North Carolina legislature has indicated that the 'rational-nexus test' is the proper test to be adopted in North Carolina.*

When the Court of Appeals applied this test to the facts of the case, it concluded that the test had not been met with respect to the parkway condition, which in its opinion was indeed unconstitutional. With respect to the parkway dedication condition, the Court declared,

*The need for the proposed parkway arises not as a result of the plaintiff's subdivision plan, but because of pre-existing traffic congestion on Highway 15-501 created by the general community, not plaintiff's proposed subdivision. In addition, plans for the parkway are indefinite both as to financing and timing.*

The Court found the impact of the subdivision traffic on the parkway and a nearby highway road to be minimal.

However, the Court did not reach the same conclusion with respect to the requirement that Old Lystra Road be widened. It reversed the trial court's judgment in favor of the property owner and remanded the matter back to the trial court to hear further evidence and to make further findings concerning the possible connection between the subdivision's impact and the Old Lystra Road requirements.

• **NOTE:**

The constitutional test for developer exactions set forth by the Court of Appeals in Batch seems generally consistent with the analysis of the United States Supreme Court in Dolan v. City of Tigard, 512 U.S. 374 (1994). **In this latter case, the U.S. Supreme Court ruled that the U.S. Constitution requires "rough proportionality" between the impact of the development and the nature and extent of the exaction.** Although precise mathematical calculation is not required, some sort of individualized determination must be made to

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justify an exaction requirement as it is applied in a particular case. Dolan also held that a local government bears the burden of proving that an exaction is constitutional.

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## Some Exercises

### Police Power: Regulations and takings challenges

The planning commission is asked to examine the lack of recreational areas within the town limits. The planning commission finds considerable open space within the town limits apparently suitable for parks. Further investigation reveals that all of the land is owned by private property owners, that none of the land is currently for sale, and that currently there are no plans for development of the land underway. The planning commission recommends that a land use regulation be passed which requires any vacant land be made temporarily available for use by the public as parks until the time that construction begins on the land for development. Evaluate the validity of this ordinance. What is one key difference between this case and the other cases described in the Police Power section of this Module?

### Consistency with Comprehensive Plans

A developer wishes to rezone land currently zoned Residential-Agricultural to a Community Shopping District that would permit the development of the land for a community shopping center. The local government consults the recently adopted land-use plan. What kinds of guidance might the land-use plan include that might bear on whether the rezoning is consistent with the plan?

### Multi-Stage Plan Approval

Consider a subdivision of about 60 lots. A preliminary plat for the entire development has been approved. Each final plat presented for approval must be generally consistent with the preliminary plan. However, when the developer presents a final plat, certain changes have been made in the plans. Which of the following kinds of changes are most likely to be generally consistent with the preliminary plat and which are not.?

- (A) An increase in the number of lots by one third
- (B) A reworking of the size and shape of one of the cul-de-sacs
- (C) The substitution of the two street stub-outs in the development with two cul-de-sacs.

### Variances; Role of Boards Compared to Governing Bodies

1. Smith owns a couple of lots in the Town. The lots and surrounding area are zoned R-1, which is primarily for single family residences and which prohibits duplexes. The Town's building inspector denied Smith's applications to build duplexes on the lots. Smith proceeds to request a variance. Using the principles articulated in Lee, construct an argument that the request for a variance should be denied.

2. What previous action by the Town Council could you look for that would strengthen your answer to the above question in arguing for the denial of the variance?

### Amortization and Non-Conforming Uses

In 1986, the Board of Commissioners enacts an ordinance regulating certain outdoor advertising signs. The ordinance states that its purpose:

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*... is to permit such signs that will not, by their reason, size, location, construction, state of repair, or manner of display, endanger the public safety of individuals, confuse, mislead or obstruct the vision necessary for traffic safety, or otherwise endanger public health, safety and welfare. Signs, if improperly constructed, located, or concentrated in large numbers can be hazardous to public health, safety and welfare and result in aesthetic harm. A sign left unregulated may be a fire hazard, dangerous in high winds, a cause of garbage accumulation, an obstruction of light and air, and a traffic hazard by distracting a driver's attention from the road.*

The ordinance regulates the size, height, configuration and location of a sign not advertising a business located on the same lot or parcel as the sign (i.e., an "off-premise" sign). The ordinance regulates only off-premise signs larger than 15 square feet. (Those signs located on the premises and those less than 15 square feet are not subject to regulation.)

The ordinance provides that all outdoor advertising signs (subject to the ordinance) shall have a permit prior to construction and that signs already in existence must be brought into compliance with the ordinance to receive a permit. The ordinance allows existing nonconforming signs to be brought into compliance with the ordinance requirements or be removed within five years of enactment (by 21 May 1991).

Beginning in June 1986, plaintiff submitted applications for signs and building permits. Plaintiff maintains that 32 of his signs were legally permitted when he bought or rebuilt them. These 32 signs are now "nonconforming" under the ordinance, because 27 are four inches to 10 feet too close to the road and five are three to 11 feet too tall. Five of the 32 signs have too many faces under the ordinance.

Plaintiff maintains the ordinance's provisions for amortization are invalid. Evaluate the ordinance under the principles articulated in Joyner.

## **Developer Exactions**

Which of the following kinds of exactions are most likely to meet the requirements of the rational nexus test?

- (A) A requirement that the developer of a subdivision with fifty half-acre lots dedicate 60,000 square feet for a playground and park.
- (B) A requirement that the developer provide a deceleration lane to be added to the existing four-lane artery that is located on the perimeter of the developer's 500,000 square-foot shopping center.
- (C) A requirement that the developer provide street intersection improvements and traffic signals at an intersection several blocks away from the center.

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***Other related subjects:***

Ask your professional staff provide you with more training on these issues:

- **Conditional Use Zoning**
- **Takings - Recent US Supreme Court Decisions**
- **Exactions, Impact Fees and Takings**
- **Constitutional Protections**
- **Amortization and Aesthetic Regulations**

***Resources***

***Supplemental Materials, with other citations for the various sections in this module are available from Richard Ducker at the Institute of Government,, Knapp Building, UNC-CH, Chapel Hill, N.C. 27599.***