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Two Major Zoning Decisions: *Chrismon v. Guilford County* and *Hall v. City of Durham*

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Within the short span of two months the North Carolina Supreme Court has produced two of its most important zoning decisions, *Chrismon v. Guilford County*[1] and *Hall v. City of Durham*.[2] Not only has it given its wholehearted blessing to the special use district/conditional use district ("SUD/CUD") zoning technique, but it has extensively clarified the "spot zoning" and "contract zoning" doctrines. In *Chrismon* it overruled the court of appeals' decision[3] on every major point; in *Hall* it affirmed that court's decision[4] but modified its rationale.

The *Chrismon* Case

General Background

To understand the *Chrismon* holding, it is necessary first to have some understanding of the SUD/CUD zoning technique, which was pioneered by the city of Greensboro in 1972. SUD/CUD zoning grew out of a general desire by zoning officials, neighboring property owners, and others to have a means of enforcing commitments made by rezoning applicants concerning their specific plans for the affected property. It reflected legal roadblocks that our courts had imposed on "contract zoning,"[5] "conditional zoning,"[6] single-purpose zoning,[7] and "spot zoning."[8] All of these techniques, to some degree, were efforts to accommodate a rezoning applicant while restricting use of the rezoned property more narrowly than otherwise would be possible under the ordinance, so that the applicant would not later abuse those privileges. Once they were ruled out, a new system had to be devised.

SUD/CUD zoning is in essence a combination of two types of zoning procedures that North Carolina's appellate courts had upheld: (1) issuance of special use permits (or conditional use permits, as some units prefer to call them)[9] and (2) amendments pursuant to "floating zone" provisions of the zoning ordinance.[10]

The SUD/CUD system works like this: First, the text of the the zoning ordinance is amended to add one or more districts, designated special use districts or conditional use districts (the terminology is immaterial). Each of these new districts is a "floating zone" because no land is actually mapped with the new designation until its owners have applied for such rezoning. Within a special use district there are no "uses by right"—a special use permit must be secured for each use made by the

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owner. (In a general use district of the conventional kind, the owner may develop the property under ordinary permits issued by the enforcement officer, in addition to seeking special use permits from a board.) These special use permits can be issued only by a board designated in the ordinance (usually the governing board) and only in accordance with the rules for issuing those permits in other districts—that is, following a *quasi-judicial* hearing at which evidence is submitted, findings required by the ordinance are made, and reasonable and appropriate conditions are imposed by the issuing body.

Once the new set of districts is added to the ordinance, an applicant will normally submit an application for two actions by the board: (1) a *rezoning* of the property to the appropriate kind of SUD/CUD district and then (2) the *issuance of a special use permit* allowing the applicant to make a specified use of the property, subject to appropriate conditions.

If the applicant later finds that the property cannot be developed in accordance with the special use permit, the applicant may ask the issuing body (1) to amend the permit by altering one or more of the imposed conditions, (2) to grant a new and different special use permit, or (3) to rezone the property back to a general use district. The important thing is that the applicant cannot just change plans and do something else—he or she must come back to the issuing agency for appropriate action, which means that the applicant will be held to the original conditions unless that body chooses otherwise.

The key to the constitutionality of this very restrictive zoning is that no special use district is created except on the application of all the owners of the land within the proposed district. This means that they and their successors are barred from later complaining about the restrictions it imposes on their property. (They may, of course, seek modifications of the types outlined in the preceding paragraph, but those actions rest in the discretion of the issuing body.) It should be noted that the imposed conditions under this system "run with the land." They cannot be avoided simply by transferring the property to someone else. The new owner has only the options that were available to the person who secured the rezoning and special use permit.

Finally, the conditions imposed on the special use permit are enforceable by the courts just as if they had been written into the ordinance itself. As the North Carolina Supreme Court pointed out in *Convent v. Winston-Salem*,[11] a person who receives a special use permit is being accorded a privilege not generally available; if the person accepts that privilege, he or she does so subject to whatever conditions have been imposed upon it and may not thereafter question their legal validity.

The original units to use this technique (Greensboro, Guilford County, and Statesville) thought that it was fully authorized under the standard zoning enabling act provisions. However, Winston-Salem and Forsyth County,[12] Surry County and its municipalities,[13] and Charlotte and Mecklenburg County[14] secured special acts authorizing its use in 1973, and a number of other units later followed suit. Finally, after a surge of interest by Wake County and all of its municipalities, it was explicitly mentioned in the general city and county zoning enabling acts in 1985.[15]

Facts and Proceedings

Chrismon illustrates rather well the use of the SUD/CUD zoning technique. The individual defendant, Bruce Clapp, owned two tracts (of 3.18 and 5.06 acres) across the road from each other in a very large agricultural area of Guilford County. He was operating a grain drying and storing operation on the smaller tract, along with a business selling fertilizer, pesticides, and other agricultural chemicals. In 1964 the county adopted a comprehensive zoning ordinance and placed his property in an Agricultural District extending for several miles in all directions. His grain business was a permitted use, but his agricultural chemical business was a nonconforming use. In 1980 he started moving his operations to the larger tract. On the complaint of a neighbor (Chrismon), the county informed Clapp that he could not move the chemical business, because it was a nonconforming use. He then applied for rezoning of both properties to a Conditional Use Industrial District and for a conditional use permit authorizing him to continue the businesses he had been engaged in, but on the new tract. After appropriate hearings, favorable recommendations from the county's planning division and its planning board, and a petition supporting the request from eighty-eight individuals in the vicinity, the county

commissioners rezoned the property and issued the conditional use permit as requested. Chrismon then sued for a declaratory judgment that both actions were invalid.

The trial court found that the permitted uses were compatible with the agricultural needs of the surrounding area, that the rezoning was neither "spot zoning" nor "contract zoning," and that the county commissioners had not acted arbitrarily in making their decision; it therefore upheld the actions taken. On appeal, the North Carolina Court of Appeals ruled that the actions violated both the "spot zoning" and "contract zoning" prohibitions and consequently were invalid.[16] The case was then appealed to the North Carolina Supreme Court.

Holding Number 1: Validity of SUD/CUD Zoning

Justice Lewis Meyer wrote the opinion of the supreme court. After outlining the facts and procedures below, he considered the general validity of conditional use zoning:

> As an initial matter, because this Court has not previously been called upon to address the legal concept of conditional use zoning, and because the decision of the Court of Appeals virtually outlaws that practice, we pause now to address its place in the jurisprudence of this state. Specifically, we hold today that the practice of conditional use zoning is an approved practice in North Carolina, so long as the action of the local zoning authority in accomplishing the zoning is reasonable, neither arbitrary nor unduly discriminatory, and in the public interest.

He then went on to support this conclusion with extensive quotations from various legal sources indicating the desirability of more precise and specific controls over many uses and the need for more flexible application of such controls than is possible with traditional zoning. Concluding this discussion, he stated:

> Like the jurisdictions we expressly join today, we are persuaded that the practice, when properly implemented, will add a valuable and desirable flexibility to the planning efforts of local authorities throughout our state. In our view, the "all or nothing" approach of traditional zoning techniques is insufficient in today's world of rapid industrial expansion and pressing urban and rural social and economic problems. . . . Having so stated, we hasten to add that, just as this type of zoning can provide much-needed and valuable flexibility to the planning efforts of local zoning authorities, it could also be as easily abused. . . . We have said . . . that, in order to be legal and proper, conditional use zoning, like any type of zoning, must be reasonable, neither arbitrary nor unduly discriminatory, and in the public interest. . . . It goes without saying that it also cannot constitute illegal spot zoning or illegal contract zoning. . . . The benefits of the flexibility of conditional use zoning can be fairly achieved only when these limiting standards are consistently and fairly applied.

Justice Meyer added a comment on one limitation suggested by the court of appeals. That court had held, "[I]n order to properly rezone the area to a conditional use district, the zoning authority initially must determine that the property, under the new zoning classification, is suitable for all the uses permitted in its corresponding district." Noting that this rule was appropriate in considering a rezoning from one *general use district* to another such district but would essentially negate the entire concept of *conditional use districts*, Meyer said:

> [W]e hold today that, contrary to the conclusion reached by the Court of Appeals below, it is not necessary that property rezoned to a conditional use district be available for all of the uses allowed under the corresponding general use district. In so holding, we join several other jurisdictions which have reached the same conclusion.

Holding Number 2: "Spot Zoning"

The court next turned to the holding by the court of appeals that the rezoning here constituted an illegal form of "spot zoning."

By way of background, there is nothing in the zoning enabling act or any other statute that refers to "spot zoning." The doctrine apparently arose spontaneously in other states, and it came into North Carolina jurisprudence in 1960, when the court considered its application to the facts in *Walker v.*

Elkin.[17] It was subsequently considered in *Zopfi v. City of Wilmington*,[18] but it was not until *Blades v. Raleigh*[19] that our appellate courts actually found "spot zoning" to have occurred. It was that case that gave us the North Carolina definition of this practice:

> A zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected, is called "spot zoning." It is beyond the authority of the municipality, in the absence of a clear showing of a reasonable basis for such distinction.[20]

The legal basis for this rule has nowhere been stated, but it appears to be rooted in the North Carolina Constitution's provisions that prohibit the granting of "exclusive privileges" [Article I, Section 32], the creation of monopolies [Article I, Section 34], or the denial of equal protection under the law [Article I, Section 19; also United States Constitution, Fourteenth Amendment].

Since the *Blades* decision (which involved rezoning approximately 5 acres), the rule has been applied in a succession of court of appeals decisions—each with regard to quite large "spots": *Stutts v. Swaim* (4 acres),[21] *Lathan v. Board of Commissioners* (11.412 acres), [22] *Godfrey v. Union County Board of Commissioners* (17.45 acres),[23] *Alderman v. Chatham County* (14.2 acres),[24] and the *Chrismon* case. But this was the first occasion since *Blades* in which the supreme court had had an opportunity to amplify the rationale to be applied in determining "spot zoning."

In this opinion the court stressed that not all zoning amendments meeting the "spot zoning" criteria were illegal. Focusing on the second sentence of the definition quoted above, it said that some apparent "spot zoning" was legal (if it had a reasonable basis), whereas other "spot zoning" was not (if it had no such basis). The court of appeals had found that Guilford County had failed to show a reasonable basis, citing three principal reasons: the rezoning was not called for (1) by any change of conditions on the land, (2) by the character of the district and the particular characteristics of the area being rezoned, or (3) by the classification and use of nearby land. The North Carolina Supreme Court disagreed.

Justice Meyer described the determination of whether there was a sufficient reasonable basis to support "spot zoning" as a "balancing of interests" involving such factors as the size of the tract being rezoned, the compatibility of the action with an existing comprehensive plan, the benefits and harm resulting from the zoning action (both for the owner of the rezoned property and for the neighbors and surrounding community), and the relationship between the uses envisioned under the new zoning and the uses currently present in adjacent tracts. In other words, he called for a factual analysis rather than a mere verbal interpretation as a basis for determining whether illegal "spot zoning" has occurred.

Proceeding with this kind of analysis, the court found that there was general support for the rezoning from all neighbors but the plaintiff, that it was clear that the proposed operations would be a valuable and necessary service for the agricultural community surrounding the tract, and that there was a strong similarity between the uses permitted under the proposed rezoning and the uses already present in surrounding areas. In these circumstances the court had little difficulty in finding a "reasonable basis" for the "spot zoning" amendment.

Holding Number 3: Contract Zoning

The court moved next to the question of whether the rezoning constituted illegal "contract zoning," as the court of appeals had held.

Before describing the court's treatment of this issue, some history is once again appropriate. In other states "contract zoning" traditionally has involved a situation in which an applicant for rezoning has attempted to defuse opposition by agreeing to enter into a written contract with the local government, specifying that if it would rezone his or her property to a certain classification, the applicant would use that property only in a specified manner (rather than preserving the right to use it for any or all purposes listed in the ordinance). Sometimes the owner agreed to strengthen this commitment by recording a deed restriction on the property. In

general, using standard contract-law analysis, courts have voided such contracts on the basis that (a) a government "cannot contract away its police power," which means that (b) there is no "legal consideration" to balance the commitment of the owner and that (c) there is, consequently, no contract between the two.

The North Carolina Supreme Court created a rather different concept of "contract zoning" in the case of *Allred v. City of Raleigh*.[25] An applicant for rezoning to permit development of an apartment complex on his single-family property, having been turned down once, showed site plans and architectural renderings when making a second effort. The city governing board apparently relied upon this representation and rezoned the property, although the record shows no formal commitment that the owner would actually build the complex as shown. Neighbors brought an action for a declaratory judgment invalidating the rezoning. They lost in superior court and before the court of appeals. But the supreme court quoted three earlier cases that had said, "[I]n enacting a zoning ordinance, a municipality is engaged in legislating and not in contracting," and went on to say:

> In our view, and we so hold, the zoning of property may be changed . . . only if and when its location and the surrounding circumstances are such that the property should be made available for all uses permitted in the [receiving] district. Rezoning on consideration of assurances that a particular tract or parcel will be developed in accordance with restricted approved plans is not a permissible ground for placing the property in a zone where restrictions of the nature prescribed are not otherwise required or contemplated. Rezoning must be effected by the exercise of legislative power rather than by special arrangements with the owner of a particular tract or parcel of land.

Justice Lake used this quotation in his opinion in the *Blades* case, calling the city's actions in that case "contract zoning" in addition to "spot zoning." Among the subsequent decisions using the same label have been *Graham v. City of Raleigh*,[26] *Godfrey v. Union County Board of Commissioners*,[27] *Willis v. Union County*,[28] *Nelson v. City of Burlington*,[29] *Alderman v. Chatham County*,[30] and *Hall v. City of Durham* (see below).[31]

In view of these precedents, it was not surprising that the court of appeals found that the *Chrismon* case involved "contract zoning," because the board had not considered the suitability of the property for all uses allowed in the new district. But the supreme court refused to go along any further with such Alice-in-Wonderland reasoning. Instead, it returned to the traditional view of other states that "contract zoning" referred to an actual contract between the city and the applicant:

> In our view, the principal differences between valid conditional use zoning and illegal contract zoning are related and are essentially two in number. First, valid conditional use zoning features merely a unilateral promise from the landowner to the local zoning authority as to the landowner's intended use of the land in question, while illegal contract zoning anticipates a bilateral contract in which the landowner and the zoning authority make reciprocal promises. Second, in the context of conditional use zoning, the local zoning authority maintains its independent decision-making authority, while in the contract zoning scenario, it abandons that authority by binding itself contractually with the landowner seeking a zoning amendment.

Thus the court put itself back into the mainstream with regard to the definition of "contract zoning" and encountered no difficulty in finding that no such zoning had taken place in this case. (But it left to later litigation in the *Hall* case, described below, the question of whether this precedent would be followed in non-SUD/CUD cases.)

Justices Webb and Mitchell dissented from the court's opinion on the basis of the earlier contract-zoning rule in *Allred* and *Blades* and their belief that Guilford County had no authority to adopt SUD/CUD zoning until the 1985 amendment to the zoning enabling act, which made clear that all units had such authority.

The *Hall* Case

It was left to the *Hall* decision to round out the concept of "contract zoning" as the doctrine applies

to ordinary, garden-variety (as opposed to SUD/CUD) zoning.

Facts and Proceedings

In this case the Durham City Council rezoned a 12.9-acre tract from R-20 Residential and C-1 Commercial to C-4(D) Heavy Commercial with an attached development plan. The application for rezoning set forth that Lowe' s Investment Corporation would use the land for operation of a "home center" consisting of four buildings, an outdoor lumber storage area, and a parking lot. The development plan submitted with the application showed the proposed physical site layout and included a notation that certain adjoining acreage would be deeded at the time of development to the Eno River Association (a conservation group). Also in the file was a proposed reverter clause to be placed in the deed from the current owner to Lowe's, stating that if Lowe's ceased to use the property for a lumber yard and home center, title would vest in the Eno River Association or, if the association no longer existed, in the city of Durham.

Despite the planning staff's recommendation to deny the application, the planning and zoning commission recommended 4-2 to approve the rezoning. Its minutes noted that as a result of neighborhood meetings, Lowe's had added a thirty-foot landscaped buffer along a nearby major road that would render the proposed buildings barely visible from the road. In addition, the company agreed to restrict left turns from the property onto the road.

At the council's hearing on the request, Lowe's representatives told of these attempts to accommodate community interests, as well as promises to the neighbors that it would not stack lumber more than ten feet high and that the neighborhood residents could select the color of the buildings. The council voted 7-6 to rezone.

Some neighbors sought and received a declaratory judgment by superior court that the transaction constituted invalid "contract zoning." On appeal, the North Carolina Court of Appeals affirmed, saying:

> In our view, *Allred* and *Blades* stand not only for the limited principle that rezoning may not be based on assurances that the applicant will make a specific use of the property, but also for the broader principles that property may not be rezoned in reliance upon *any* representations of the applicant and that rezoning must take into account all permitted uses under the new classification. Because, in the instant case, the City Council considered a proposed development plan as well as collateral representations concerning adjacent property and deed restrictions controlling future use of the rezoned site, but did not determine the suitability of the land for other C-4 uses, we hold that the challenged rezoning constitutes unlawful contract zoning.

Both the city and the applicant for rezoning appealed.

The Supreme Court's Holding

Unlike the *Chrismon* decision, the supreme court's *Hall* decision affirmed that of the court of appeals. But the supreme court followed different reasoning: "Although we disagree that the rezoning amounted to contract zoning in this instance, we nevertheless affirm the opinion of the Court of Appeals because of the failure of the City Council to consider whether the land was suitable for all uses permitted in the C-4(D) district."

The court restated its views expressed in *Chrismon*:

> [C]ontract zoning depends upon a finding of a transaction in which both the landowner seeking a rezoning and the zoning authority undertake reciprocal obligations. . . . 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 other, and the city council, in consideration of such assurance, agrees to rezone the property in question and not to alter the zoning for a specified period of time thereafter.

While the court found that the owner in this case had made all sorts of representations, it noted that the council had not: "[T]he record is barren of even a hint that the Council made any assurances in return. No meeting of the minds took place here, and no reciprocal assurances were made by the Council. . . . This is not therefore a case of illegal contract zoning."

But this was not the end of the matter. The court reminded the parties of the Allred precedent: "Since this case [unlike *Chrismon*] involves a rezoning from two general use zones with fixed permitted uses to another general use zone with fixed permitted uses, the Court of Appeals correctly relied upon Allred v. City of Raleigh . . . in concluding that the Durham City Council's decision to rezone [the] property was improper. . . . [As the court said in *Allred,*] 'In our view, and we so hold, the zoning of the property may be changed from R-4 to R-10 only if and when its location and the surrounding circumstances are such that the property should be made available for *all* uses in an R-10 district.' "

After examining the record in detail, seeking evidence that the Durham council had in fact considered the full range of uses permitted in the C-4 zone, the court concluded that it had not. This left the court only one possible basis for upholding the city's action. A special act had authorized Durham to require development plans showing details of proposed development and to require that site plans subsequently submitted be in accordance with the approved development plan. The court decided that this made no difference:

> We hold that when rezoning property from one general use district with fixed permitted uses to another general use district with fixed permitted uses, a city council must determine that the property is suitable for all uses permitted in the new general use district, even where it has additional authority to consider a development plan in passing upon a rezoning request and to require any submitted site plan to conform therewith.

In this case, justices Webb and Mitchell concurred in the result but disagreed with the reasoning; they continued to urge that the actions be regarded as illegal "contract zoning."

Notes

1. 322 N.C. 611, 370 S.E. 2d 579 (1988).
2. ___ N.C. ___, ___ S.E. 2d ___ (1988).
3. 85 N.C. App. 211, 354 S.E. 2d 309 (1987).
4. 88 N.C. App. 53, 362 S.E. 2d 791 (1987).
5. Allred v. City of Raleigh, 277 N.C. 530, 178 S.E. 2d 432 (1971).
6. Decker v. Coleman, 6 N.C. App. 102, 169 S.E. 2d 487 (1969).
7. *Cf.*, Helms v. Charlotte, 255 N.C. 647, 122 S.E. 2d 817 (1961), for a case holding that zoning may not be too narrowly restrictive.
8. Blades v. City of Raleigh, 280 N.C. 531, 187 S.E. 2d 35 (1972).
9. Convent v. Winston-Salem, 243 N.C. 316, 90 S.E. 2d 879 (1956).
10. Armstrong v. McInnis, 264 N.C. 616, 142 S.E. 2d 670 (1965); Allgood v. Town of Tarboro, 281 N.C. 430, 189 S.E. 2d 255 (1972).
11. 243 N.C. 316, 90 S.E. 2d 879 (1956).
12. 1973 N.C. Sess. Laws 381.
13. 1973 N.C. Sess. Laws 485.
14. 1973 N.C. Sess. Laws 1283.
15. N.C. Gen. Stat. 160A-382 (city) and 153A-342 (county), as amended by 1985 N.C. Sess. Laws 607.
16. 85 N.C. App. 211, 354 S.E. 2d 309 (1987).
17. 254 N.C. 85, 118 S.E. 2d 1 (1960).
18. 273 N.C. 430, 160 S.E. 2d 325 (1968).
19. 280 N.C. 531, 187 S.E. 2d 35 (1972).
20. *Id.* at 549.
21. 30 N.C. App. 611, 228 S.E. 2d 750 (1976).
22. 47 N.C. App. 357, 267 S.E. 2d 30 (1980).
23. 61 N.C. App. 100, 300 S.E. 2d 273 (1983).
24. 89 N.C. App. 610, 366 S.E. 2d 885 (1988).
25. 277 N.C. 530, 178 S.E. 2d 432 (1971).
26. 55 N.C. App. 107, 284 S.E. 2d 742 (1981).
27. 61 N.C. App. 100, 300 S.E. 2d 273 (1983).
28. 77 N.C. App. 407, 335 S.E. 2d 76 (1985).
29. 80 N.C. App. 285, 341 S.E. 2d 739 (1986).
30. 89 N.C. App. 610, 336 S.E. 2d 885 (1988).
31. 88 N.C. App. 53, 362 S.E. 2d 791 (1987).

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