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Legal Opinion 2009-013

TO: Roger Millar, OPG; Mike Barton, OPG; Laval Means, OPG; Tom Zavitz, OPG; Jen Gress, OPG; City/County Planning Board Members

CC: John Engen, Mayor; Bruce Bender, CAO; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Marty Rehbein, City Clerk; Nikki Rogers, Deputy City Clerk; Kelly Elam, City Clerk's Office; Dept. Atty.

FROM: Jim Nugent

DATE: April 22, 2009

RE: Three Court Cases from other States indicate that Significant Substantive Revisions to Permitted uses within a Zoning District could Require a Rezoning Process

FACTS:

Rathkopf's "The Law of Zoning and Planning" by Ziegler in volume 3, §§38.3 and 39.2 identify three court cases, one from New York, Georgia, and Minnesota, in which the court held that significant substantive revisions to the permitted uses within a zoning district pursuant to zoning amendments procedurally required a rezoning process. Two of the cases involve the elimination or deletion of a previously permitted use. The other case involved a general zoning regulation revision where after the public hearing, at the request of a property owner, a zoning revision was made to the property owner's property without going through a rezoning process.

It should also be noted that some permitted uses of lands within a city are governed by either federal or state law and that identifying within the city zoning code update those uses permitted by federal or state law is not an authorization of a permitted use, but merely an acknowledgment of what either federal or state law already permits. Further, where existing zoning district classifications currently allow commercial or retail land uses, it is not the authorization of new permitted uses to identify commercial or retail uses that would currently be permitted as a commercial or retail use.

ISSUE(S):

Is it possible that a zoning regulation text change that revises allowed or permitted uses within an existing zoning authorization is so significantly substantive that the specific amendment must be treated as rezoning procedurally.

CONCLUSION(S):

There are three court cases from other states that indicate that if a zoning amendment to allowed or permitted land uses within an existing zoning authorization is so significantly substantive that the specific amendment must be treated procedurally as a rezoning procedure. Two court cases, one from New York and one from Georgia, indicate that the elimination or deletion of a previously authorized or permitted use through a zoning amendment procedurally requires a rezoning process. The third case involved a public hearing on a general zoning amendment revision and thereafter a property owner requested that the specific zoning applicable to the property owner's property be revised and the city inappropriately accommodated the property owner pursuant to the general zoning amendment without procedurally going through the rezoning process.

LEGAL DISCUSSION:

The three (3) court cases from other states where a court found a text change actually constituted a rezoning involved two cases where a previously permitted use was eliminated or deleted and there was some evidence that the prior permitted use was relied on by a landowner and a third case where after a public hearing on a general zoning regulation amendment a property owner's request to have the zoning applicable to their property revised was accommodated through amendment to the general amendment without procedurally going through a rezoning.

Rathkopf's **"The Law of Zoning and Planning"** Volume 3, Sections 38.3 and 39.2 state in pertinent part:

I. REZONINGS: TERMINOLOGY, DISTINCTIONS, AND LEGAL CLAIMS

§ 38:2 Types of rezoning-Zoning map changes: Reclassifications

Perhaps the most common type of zoning amendment substantially affecting private rights is a zoning map change involving the zoning district reclassification of a particular tract of land. This type of district reclassification or rezoning of particular tracts of land is usually accomplished by alteration of the classification or designation of the land on the official zoning map, or in the descriptive "metes and bounds" portion of the ordinance. Allowed uses or other development restrictions change with the change in the land's zoning district classification. Such a change may involve either upzoning or downzoning of the land and depending on the nature of the change may give rise to either an owner's or a neighbor's lawsuit.

§ 38:3 Types of rezoning-Zoning text changes: Change in Restrictions

Another type of zoning amendment substantially affecting private rights is a change in the zoning text or code that specifies the allowed or permitted uses within a particular existing zoning district classification. Under this type of zoning amendment, the zoning district classification of particular tracts of land remain unchanged but the respective corresponding text of the zoning code is changed with respect to allow uses or other development restrictions therein. This type of zoning amendment may involve either an upzoning or downzoning of land and, depending on the nature of the change, may give use to either an owner's or a neighbor's lawsuit. It has been held that where a zoning ordinance amendment, without actually changing the classification of a tract of land, nevertheless changes the permitted uses on that land as fully as would reclassification, the procedural requirements pertaining to a reclassification must be followed.

....

§ 39:2 Reclassification and other zoning amendments

Generally, amendments of zoning ordinances can be viewed as falling into two categories. By far the most frequent instance of a zoning ordinance amendment is the "reclassification" or "rezoning" of particular tracts of land, usually accomplished by alteration of the classification or designation of land on a zoning map, or in the descriptive "metes and bounds" portion of the ordinance. ...

It is not to be overlooked, however, that some zoning ordinance amendments do not involve rezoning or reclassifications. For instance, changes in (1) procedural requirements, (2) enforcement mechanisms, of (3) terms of office holders under a zoning ordinance, might all be accomplished by zoning ordinance amendments. Whether zoning ordinance amendments of this latter, less frequent variety must conform to the same notice, hearing, and procedural requirements as are applicable to rezoning of particular tracts of land is largely to be determined by reference to the governing statutory language and, to some degree, by reference to the facts of the case.

In regard to the above distinction, it has been held that where a zoning ordinance amendment, without actually changing the classification of a tract of land, nevertheless changes the permitted uses on that land as fully as would reclassification, the procedural requirements pertaining to a reclassification must be followed. (Emphasis added.)

A review of the court cases from New York, Georgia and Minnesota that were cited in footnotes with respect to sections 38.3 and 39.2 of vilume3 of Rathkopf's "THE LAW OF ZONING AND PLANNING" by Zeigler indicates the following. Two of the court cases pertain to zoning amendments that deleted previously permitted uses without providing notice to the

adversely affected property owners of the purported public hearing at which the ordinance deleting the previously authorized use was deleted. The third case from Minnesota involved a revised comprehensive zoning proposal being revised at the request of a specific property owner with respect to that owner's property without following the rezoning process and giving the required notice with respect to the specific zoning revision to accommodate a property owner. These three court cases from New York, Georgia and Minnesota that are cited in footnotes to both sections cited, pertained to the following factual circumstances:

- (1) **IN THE MATTER OF SIBARCO STATIONS, INC. v. TOWN BOARD OF VESTAL, et. al.**; 288 N.Y.S. 2d 8, 1968 N. Y. App. Div. LEXIS 4457(1968) pertained to a zoning board of appeals issuing a special use permit for the operation of a gasoline station in a neighborhood shopping district. Thereafter, the town board published a notice of a public hearing to be held to consider an amendment to the town code, but the notice did not state that it was the zoning portion of the code which was to be amended. The successful applicant to obtain the special use permit for operation of gasoline station did not attend the hearing and an amendment was passed destroying the successful applicant's special use permit for operation of a gasoline station. Because the zoning amendment prohibited gasoline stations in a neighborhood shopping district. The lower court found that the zoning amendment prohibiting gasoline stations in a neighborhood shopping district was INVALID because the town had failed to comply with the notice provisions of the town zoning code. On appeal the lower court ruling of invalidity was affirmed because the town had failed to provide written notice of a proposed rezoning to the owners of the property subject to the rezoning that their property was being rezoned. The appellate court held that the notice provisions applied when a zoning change would make a use of the property, allowed under a special permit properly previously granted, illegal.
- (2) **WHIDDEN v. FAIGEN**, 338 S.E. 2d 264; 1986 Ga. LEXIS 485 (1986) The county adopted a new zoning ordinance which deleted mobile home parks as a permitted use under a RM-75 classification. The county did not post signs when the ordinances were amended deleting mobile home parks as a permitted use. Also there was no amendment to the official zoning map. After the zoning amendment had already been adopted, the landowner purchased property in 1978 and in 1984 and subsequently sought approval to develop a mobile home park. The trial court ruled in favor of the landowner. On appeal the appellate court affirmed. The court held that the county failed to comply with a 1963 ordinance requiring notice when the ordinance was amended. The court rejected a contention the 1973 ordinance did not change because the title remained the same; the court stated the uses permitted determined whether the ordinance changed. The court further rejected the argument that the landowner bought the land after the zoning change deleting the mobile home parks. Therefore the subsequent purchasing landowner was not subject to the zoning ordinance amendment deleting the mobile home parks as a permitted use.
- (3) **GLEN PAUL COURT NEIGHBORHOOD ASSOCIATION v. PASTER** 437 N.W. 2d 52; 1989 Minn. LEXIS 67(1989) involved factual circumstances where a city held a public hearing regarding adoption of a revised comprehensive zoning ordinance, and after the public hearing a property owner asked the city to change the revision's zoning of the owner's property. The city adopted the revised comprehensive zoning ordinance as well as adopted the zoning revision for the property owner who wanted their property rezoned. The city denied the neighbor's petition to rezone the property of the property owner who had requested that the zoning be changed for their property. The rezoning of the property

owner's property was challenged pursuant to lawsuit; because there had been no mail notice about the property owner's requested zoning change after the city public hearing. Upon review the court held that the mailed notice requirement had been triggered by the property owner's rezoning request because the request had been an amendment to the comprehensive zoning ordinance. The court also held that a bona fide attempt to comply with the statutory notice requirement had not been made because the defects in the notice were more than just slight defects.

There are numerous instances where federal or state law authorizes land uses within a municipality that might be inconsistent with municipal zoning wherever the land use occurs. Identification of these federal or state law allowed uses within the zoning code update is not an authorization, but instead a mere acknowledgment of what federal or state law allows. For examples see 47 US C253 providing a federal exemption from local regulations for any interstate or intrastate telecommunication service public utilities and/or some aspects of the Federal Telecommunications Act. Also, pursuant to Montana state law, see §§76-2-401 and 76-2-402 MCA pertaining to government agencies, §§76-2-411 and 76-2-412 MCA pertaining to community residential facilities, §75-20-401 pertaining to some public utilities as well as state school laws.

CONCLUSION(S):

There are three court cases from other states that indicate that if a zoning amendment to allowed or permitted land uses within an existing zoning authorization is so significantly substantive that the specific amendment must be treated procedurally as a rezoning procedure. Two court cases, one from New York and one from Georgia, indicate that the elimination or deletion of a previously authorized or permitted use through a zoning amendment procedurally requires a rezoning process. The third case involved a public hearing on a general zoning amendment revision and thereafter a property owner requested that the specific zoning applicable to the property owner's property be revised and the city inappropriately accommodated the property owner pursuant to the general zoning amendment without procedurally going through the rezoning process.

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