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Practice Areas

Zoning, Planning and Land Use

Good Company

When Business Owners Find Themselves in Conflict with Municipal Planning and Zoning Regulators: How Business Owners Can Protect Themselves Against Unfair Intervention

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Businesses from time-to-time find themselves at odds with municipal authorities or "Not In My Back Yard" (NIMBY) neighbors over zoning and planning issues. Businesses are seldom static and owners often must change their operations to remain competitive. Owners should be aware that land use laws are designed to protect the reasonable actions of businesses and not simply the wishes of land use regulators or town constituents who make the most noise.

Take the following example: You own a small manufacturing company. Your facility is not a permitted use where located. However, it pre-dates the enactment of zoning ordinances in your town and so it is allowed to operate as a "grandfathered" business. Your facility has become outdated. You need to update machinery and make exterior changes to the facility, and you may need to obtain from the state additional environmental permits. Your neighbors are concerned about the potential for increased traffic, pollution, and whether the updated facility will fit in with the neighborhood. While you understand their concerns, you also know that if you don't make these upgrades to the facility you will likely be forced to shut down.

The building inspector for the town has assured you that you would need only a building permit for the construction, but the town selectmen have informed you that you will need a new use variance from the Zoning Board of Adjustment.

What should you do? Cooperate? Fight? Rollover? Are your years of operation and cooperation with the town worth anything?

Following are several basic doctrines of law that business owners should be aware of when dealing with land use issues and when working with local land use regulators. Addressing land use issues properly the first time around and understanding the limits of the authority of local land use regulators will save valuable time and money when a land use issue does arise.

1. "Non-conforming" businesses may grow within limits.

Many businesses operate in municipal districts that are not zoned for the type of operation engaged in by the business.

As a business owner operating as "a non-conforming" use it is important to

understand the limits of a municipality's authority to regulate non-conforming use businesses. The law recognizes that businesses grow and change over time, and it limits the right of municipal zoning regulators to unreasonably restrict the natural growth and change of a business. Therefore, a non-conforming business may change or expand its operations so long as (1) the modifications are consistent with the original nature and purpose of the business and (2) the change or expansion does not significantly alter the character of the facility or the impact of the operations on the surrounding neighborhood.

2. The zoning ordinance needs to clearly prohibit the proposed expansion.

Most zoning ordinances address the rights of "grandfathered" and other non-conforming businesses by reciting a list of prohibited (or permitted) activities. For example, the zoning ordinance might state that a grandfathered business may not change from one type of business to another without first obtaining a variance to do so. However, a careful review of the non-conforming use provisions of the ordinance may reveal that the ordinance does not limit certain aspects of the growth of a business. For example, the ordinance might not limit the rights of grandfathered businesses to expand their operations. In such circumstances, the municipality lacks the authority to restrict the operations of the business in a manner not directly addressed in the municipality's zoning ordinance.

3. Dot your I's.

Communications and dealings with municipal zoning and planning regulators often lean toward the informal, especially where a business owner has built a relationship with local land use regulators over many years of operation. While local regulators may encourage informality, it can ultimately prove detrimental to a business owner in the event that a conflict arises with municipal regulators. "Authority" to act is dispersed at the municipal level (amongst the Selectmen, Planning Board, ZBA, building inspector and code enforcement office, to name a few). Businesses can incorrectly believe they are dealing with the appropriate municipal authority, when in fact that municipal representative does not have the authority to sign-off on the business's proposed project. It is important, therefore, to ensure that you are working with the proper local official. Confirming communications in writing is very helpful. Where you *have* obtained authorization from the proper local official, and you have relied to your detriment on that authorization (meaning that you have spent more than an insignificant sum in reliance on the Town's assurances), then the doctrine of "municipal estoppel" prohibits the town from revoking their authorization.

4. Who has the final word between the town and the state?

Suppose that you are able to obtain the necessary State environmental permits to modernize, but the selectmen inform you that you need a variance or site plan because the town shares the same concerns as the State about the safety of your plans to modernize. Are you required to comply with the town's wishes even though the state has approved the project?

The answer depends on the nature of the State's approval and the body of State laws under which the approval is granted. Under the Doctrine of Preemption, a municipality may not regulate conduct if the state or federal government has enacted comprehensive regulations on the same subject matter, and those regulations are intended to exclusively regulate the field in question. Towns frequently over-step their authority where the activity has local NIMBY opposition. The Doctrine of Preemption can stop that from happening.

5. When is it too late for the town to complain?

The Doctrine of Laches establishes that where the town has "sat on its rights" by failing to investigate a supposed violation of the zoning ordinance, the town may be barred from pursuing a claim against the alleged violator if a long period of time has passed since the town first learned of the alleged violation. The purpose of the Doctrine of Laches is not to condone violations of the zoning ordinances. A business owner that knows he is violating the

zoning ordinances cannot protect himself or herself with the Doctrine of Laches. Rather, the Doctrine is intended to protect property owners who honestly (though incorrectly) believe that they are acting properly, but where the municipality does not act responsibly to stop the business owner from violating the zoning ordinances.

6. Where the town's conduct is abusive is there relief?

In rare cases the town may exercise very poor judgment in dealing with a business. For example, in one instance, a town passed an ordinance declaring that a property owner could not develop their land because the town wanted it left as open space. In such instances the property owner suffers serious harm through the loss of the use of their property. When this occurs, the property owner may invoke the infrequently used doctrine called "inverse condemnation" or "wrongful unconstitutional taking." This doctrine may be invoked where the town has knowingly sought to take unfair advantage of a property owner. It provides the property owner with fair compensation for the "taking" of their property by the government.

Just as rare is the award of legal fees. As mad as you may be over high-handed behavior, the town's conduct needs to be flagrant in order for a court to force the town to pay your legal fees.

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