

REZONING CAN BE APPEALING

By Judith I. Johannsen

Here's what we do – when we don't get the answer we want, we ask someone else hoping that person will give us the answer we are looking for. Kids know this early on – if mom says “no”, they ask dad. So it's no surprise, then, that a landowner, who did not receive an answer he liked from his town's Planning and Zoning Commission (“P&Z”), asked someone else – the court.

Here's how this landowner's quest unfolded. Since 1962, M had owned approximately 29 acres of vacant land with about 200 feet frontage on a street. M's land was zoned for residential use, as were the three town-owned parcels of land that were contiguous to his land.

Periodically, the town's P&Z reviewed its zoning regulations and did so in 2004, but made no changes to these four parcels' residential classification. In August of 2004, M listed his parcel for sale prompting an interested buyer to speak to the town's planner in September 2004 about the possibility of building an active adult community on M's parcel. The prospective purchaser understood from that meeting that such a use would be permitted in a residential zone with a special permit.

In December 2004, M and the buyer signed a purchase and sale agreement after which the buyer had another meeting with the town planner, who revealed that the P&Z was initiating a rezoning of M's parcel and the three abutting town-owned parcels from residential to planned development industrial park.

At a public hearing that began in December 2004 but was continued in January 2005, the town planner acknowledged that he had advocated the zone change only after the buyer had expressed an interest in developing M's property as an active adult community. M, whose property was now under contract, opposed the rezoning as it applied to his property and filed a protest petition.

When the P&Z approved the rezoning, M appealed the commission's decision to the trial court, but the court dismissed his appeal for three reasons: 1) that the record supported the P&Z's reasons for rezoning, 2) the P&Z did not vote for a zone change to intentionally prevent M's property from being used for active adult housing, and 3) M had failed to establish financial loss to support his claim of inverse condemnation.

The trial court's dismissal of his appeal was not the answer M wanted, so he filed a motion with that same court to reconsider and re-argue, specifically that the town's zoning change left his 29 acre parcel of land zoned for industrial use at the rear of the property and residential use at the portion of the property fronting on the public street, eliminating access to the industrially zoned portion in violation of the town's own regulations.

The court conceded that M made a good point - that zoning law typically provides that residentially zoned land cannot be an accessory use of providing access to industrially zoned land - but affirmed its earlier ruling dismissing M's appeal, adding that M could apply to the P&Z for a variance for access across his residentially zoned land to the industrially zoned land. Once again, this was not what M wanted to hear, so he looked elsewhere for his answer, this time to the appellate court.

The appellate court held that the P&Z acted in its legislative capacity when it amended the zoning on these four parcels, that planning and zoning commissions were free to amend their regulations whenever they deemed changes were needed, and because a planning and zoning commission's legislative discretion is broad, any such amendments should not be disturbed by courts unless it could be shown that the P&Z acted arbitrarily or illegally.

M reiterated in his appeal that his town's zoning regulations expressly listed a zone's permissible uses and, as stated in case law, if a use was not explicitly included, it was prohibited. M then argued that both the P&Z and the trial court's decisions upholding the zone change on his property were wrong since the town's zoning regulations prohibited access to industrially zoned land through residentially zoned land and that's exactly what resulted from the P&Z's rezoning.

It's amazing to see how some apparently consciously sedated commissions and courts can read the same plain language regulations and arrive at conclusions contrary to what was intended, so high fives to M for his perseverance in seeking the answer he believed was right, and kudos to the appellate court for finding in M's favor and for sending the case back to the trial court with direction to render judgment sustaining M's appeal and vacating the zone change.

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