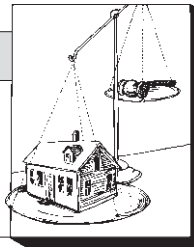


When the Town Says Stop

by Brian R. Smith



What do you do when the building inspector stops your job because he says you're violating the terms of the building permit? Or, worse yet, when the zoning enforcement officer says you need another site plan approval before continuing?

Code and zoning disputes range from the relatively simple and easily corrected, such as a dispute over the height of a rail, to the complex, such as a New York City case regarding setback requirements that resulted in the demolition of part of a 31-story skyscraper. But while the regulations in question may vary from place to place, the legal avenues for appealing a stop-work order are similar in most jurisdictions. Along with a good knowledge of code and zoning regulations, a grasp of how these appeals work can help you avoid lengthy and costly court trials — or know when one might be worthwhile.

First Things First

If presented with a stop-work order, the first thing to do is stop work. Then, try to understand exactly why you are being told to stop.

If the reason is a building code violation, ask the building inspector to explain the problem and to show you the part of the state or local building code that prohibits the work. Don't expect to win an argument with the inspector on the spot, but do note the sections of the code that he alleges you violated.

If you can't easily fix the problem or work it out with the inspector, ask the inspector where you (or the owner) can appeal the stop-work order. Typically, the local Zoning Board of Appeals (ZBA) will review the inspector's decision and reverse it if it's wrong. (In some states, some other local administrative body may handle these appeals.)

This appeals process holds for zoning violations as well. If you're stopped for a zoning violation, you should find out which section of the zoning regulations the zoning enforcement officer says you have violated, and to whom you should appeal. Typically, that will be the same local ZBA or similar administrative body.

In either case, if the ZBA or other municipal body doesn't side with you in your appeal, ask that body where next to appeal. Most likely it will be the courts.

Problems with Litigation

You face at least two potential problems when you appeal a zoning or code violation to the courts.

Getting bounced back to the town. First, if you have not exhausted all available local appeals

processes before going to court, the court may dismiss the case for "failure to exhaust administrative remedies." In other words, you didn't try everything else first. Overburdened courts do not want to review your complaint if they think you might have been able to resolve it first with the ZBA or other local appeals body.

Waiting. The second hazard of going to court over a stop-work order is that the case might not be heard for months or years, during which time the work will remain stopped.

For these reasons, wise builders and owners pick their court battles over zoning or code matters very carefully.

Cases of Constitutionality

There is one class of code or zoning disputes that some courts will hear even if the appellant hasn't first exhausted administrative remedies: cases in which the code or its enforcement is alleged to be unconstitutional.

In such cases, courts in some states have held that the appellant is not required to first exhaust its administrative remedies before attacking the validity of the disputed ordinance or enforcement. States that hold this position include California, Colorado, Connecticut, Illinois, Indiana, Minnesota, New York, Ohio, and Washington.

The taking argument. Unfortunately, even in these cases, the courts rarely side with the appellant. One common appeals strategy is to claim a code or zoning law in some way infringes on the property owner's or builder's constitutional rights to full possession and enjoyment of his or her property, or that the code or regulation in question amounts to an unfair "taking" of property (that is, the uncompensated taking of property by a government body, an act prohibited by the U.S. Constitution). However, the courts rarely find that codes or zoning ordinances are unconstitutional (see *The Legal Column*, 2/90).

Discriminatory enforcement. Alleging discrimination in the administration and enforcement of zoning ordinances is another often-raised defense. In one case, 303 West 42d Street Corporation v. Klein, a court held that an appellant is entitled to a hearing if there is an assertion of an unconstitutionally discriminatory enforcement of valid laws.

But such allegations of unconstitutionality are hard to prove, as shown by the case *Johnson v. Hinds County*. In this case involving a dispute over

subdivision zoning regulations, the owner charged that the county's denial of his subdivision application had violated his constitutional rights both by taking his property and because, he alleged, the county had singled him out for enforcement of the law in a discriminatory manner.

The Mississippi Supreme Court sided with the county. It first denied the "taking" argument, acknowledging that all land-use regulations "take" something, but that in doing so they "invoke the government's [legitimate] police power" to protect the public. It then found that Johnson and his estate had violated the subdivision regulations. Finally, it threw out the discrimination charge, stating that "a governing authority is not precluded from enforcing an ordinance merely because certain persons have been permitted to violate it without prosecution or punishment."

This and other cases from around the country show that an allegation of selective or discriminatory enforcement of zoning or subdivision regulations rarely succeeds, even if previous enforcement of the regulations in question has been spotty.

Be Glad This Wasn't You

To get an idea just how difficult it is to prevail against a building department, consider *Parkview Associates v. New York City*.

Parkview Associates had received a building permit authorizing it to construct a building that was 19 stories tall between its property line and 100 feet back from Park Ave., and a full 31 stories tall behind that 100 foot line. (Such aerial setbacks are meant to ensure adequate light on the streets below.)

With the project well underway, however, the Commissioner of Buildings revoked part of the building permit because it had been erroneously issued — the setback for the 19-story limitation should have been 150 feet instead of 100 feet. Parkview Associates appealed, claiming it had vested rights. The company argued that because it had relied on the issuance of a building permit to its harm, the city should not revoke it, especially considering the city's own map on which the permit was based was wrong. Finally, they argued that the stop-work order amounted to a "taking."

New York's highest court, however, ruled in favor of New York City, despite the administrative errors on the map and in the original building permit. The court let stand the city's order that the top 12 stories be removed from the building.

As a small builder, you probably won't run into anything this big. But as this case suggests, it is best to proceed carefully if you get a stop-work order, and get the matter resolved quickly. ■

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