Community Appearance and Design Controls after *Lanvale*

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COMMUNITY APPEARANCE AND DESIGN CONTROLS AFTER *LANVALE*

Part I: The *Lanvale* Case

A growing number of North Carolina local governments have adopted and enforce zoning regulations that involve community appearance standards of one type or another, or design controls applicable to particular buildings. With relatively little direct statutory guidance or case law to go by, the validity of some of the more ambitious regulatory programs has become a topic of debate. The complexion of the debate about whether such standards are legal may have changed a bit since the North Carolina Supreme Court case of Lanvale Properties, LLC v. County of Cabarrus, 366 N.C. 142, 731 S.E.2d 800 (2012), was handed down several years ago. Just how that case may have affected the powers of local government as applied to appearance matters is analyzed below.

In the *Lanvale* case our state's highest court ruled that the "adequate public facilities (APF)" provisions of the Cabarrus County Unified Development Ordinance, as applied to public schools, were invalid. A critical element of the program was the payment by developers of "voluntary mitigation fees (VMF)" as a means of ameliorating the lack of capacity in schools that would serve the new development. The court compared VMF with school impact fees, which had been ruled invalid in an earlier case involving Durham County. Among other things, the *Lanvale* court concluded that the North Carolina zoning enabling statutes failed to authorize APF programs with VMF components and, apparently, those with the other mitigation measures as well.

One issue in the case was whether the APFO regulations were a form of zoning and whether the county zoning enabling statutes authorized them. The court in *Lanvale* referred to G.S. 153A-341, the county zoning statute setting forth the purposes of zoning:

> § 153A-341. Purposes in view.
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> . . .
>
> Zoning regulations shall be designed to promote the public health, safety, and general welfare. To that end, the regulations may address, among other things, the following public purposes: to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to lessen congestion in the streets; to secure safety from fire, panic, and dangers; and to facilitate the efficient and adequate provision of transportation, water, sewerage,

> schools, parks, and other public requirements. The regulations shall be made with reasonable consideration as to, among other things, the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the county. In addition, the regulations shall be made with reasonable consideration to expansion and development of any cities within the county, so as to provide for their orderly growth and development. (*Underlining added*.)

The court conceded that the facilitation of efficient and adequate provision of schools was a permissible zoning objective. However, G.S. 153A-340(a), the subsection of the county zoning statute that lists the types of zoning standards that may be used to achieve zoning purposes was a different matter. That language is set out below:

> § 153A-340. Grant of power.
>
> (a) For the purpose of promoting health, safety, morals, or the general welfare, a county may adopt zoning and development regulation ordinances. These ordinances may be adopted as part of a unified development ordinance or as a separate ordinance. A zoning ordinance may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes. The ordinance may provide density credits or severable development rights for dedicated rights-of-way pursuant to G.S. 136-66.10 or G.S. 136-66.11.
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> . . .

The *Lanvale* court ruled that this language above did not expressly mention or authorize the means chosen by Cabarrus County for carrying out its program.

A key question in *Lanvale*, then, was how to construe these county zoning statutes in light of G.S. 153A-4. That statute provides as follows:

> § 153A-4. Broad construction.
>
> It is the policy of the General Assembly that the counties of this State should have adequate authority to exercise the powers, rights, duties, functions, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power. (Underlining added.)

The court first emphasized that G.S. 153A-4 is a rule of statutory construction rather than a general directive to give the zoning statutes the broadest construction possible. As a result, the court declared that G.S. 153A-4 applies only (1) when the statutes to be construed are ambiguous, or (2) when its application is necessary to give effect to "any powers that are reasonably expedient to (a county's) exercise of the power."

The court ruled that the traditional county zoning statutes set forth above were not ambiguous; thus there was no mandate to give them a generally broad construction. The result was no different with respect to the interpretation of supplemental powers that might be reasonably expedient to carrying out those zoning powers that were expressly mentioned, such as using zoning to ensure that school facilities were adequate (G.S.153A-341). According to the court, the APF provisions were not a "reasonably expedient" method of ensuring that school facilities were adequate (G.S. 153A-341). (Apparently the court viewed the fees Cabarrus County charged as being unreasonably high, or, perhaps in addition, simply an unreasonable or unsuitable fee-based means for achieving an otherwise allowable zoning purpose.)

The court in *Lanvale* also pointed out that several North Carolina counties have obtained local legislation expressly authorizing them to adopt school impact fee ordinances. Cabarrus County had not secured comparable authority from the General Assembly, nor had the county or any other North Carolina county obtained express AFPO authority. This fact was cited by the court to bolster the conclusion that the county lacked authority to adopt and enforce its APFO program.

Part II: Implications for Community Appearance and Design Controls

How, then, does the *Lanvale* case relate to community appearance issues? Cities tend to be far more active in regulating community appearance than counties. So it is appropriate to consider the enabling legislation in General Statutes Chapter 160A, which applies to municipalities. G.S. 160A-4 is a statute similar but not identical to G.S. 153A-4. G.S. 160A-4 provides as follows:

> § 160A-4. Broad construction.
> It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect: Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State. (*Underlining added*.)

The municipal statute above expressly mentions the inclusion of "additional and supplementary powers that are reasonably necessary or expedient"; the county statute speaks of "any powers

that are reasonably expedient to the exercise of the power." Despite the variation in language, it is likely that these city and county statutes mean much the same thing. The essential question is what other supplemental powers are suitable or necessary to carrying out the express purposes of the statute or the express means for achieving them.

The zoning enabling statues for cities setting forth the fundamental purposes of zoning (G.S. 160A-383) and the authorized means for accomplishing zoning (G.S. 160A-381(a)) are virtually identical in relevant respects to the county statutory language interpreted in *Lanvale.*

§ 160A-383. Purposes in view.

. . .

Zoning regulations shall be designed to promote the public health, safety, and general welfare. To that end, the regulations may address, among other things, the following public purposes: to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to lessen congestion in the streets; to secure safety from fire, panic, and dangers; and to facilitate the efficient and adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. The regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city. (*Underlining added*.)

§ 160A-381. Grant of power.

(a) For the purpose of promoting health, safety, morals, or the general welfare of the community, any city may adopt zoning and development regulation ordinances. These ordinances may be adopted as part of a unified development ordinance or as a separate ordinance. A zoning ordinance may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land. The ordinance may provide density credits or severable development rights for dedicated rights-of-way pursuant to G.S. 136-66.10 or G.S. 136-66.11. (*Underlining added*.)

The words "appearance," "aesthetics," "architectural style," and "design" are not mentioned in these particular zoning statutes. Nor do these traditional zoning enabling statutes mention "design review boards, "form-based" zoning codes, facade treatment, or "congruity." Nor is there any mention of screening, sign control, or landscaping. In other words those zoning statutes that are designed to define the basic parameters of zoning provide essentially no express authorization for the direct municipal regulation of community appearance, or for various features of the built or natural environment that involve appearance considerations.

Yet considerations of appearance in one form or another are integral to zoning in many North Carolina local governments. In a 2012 survey of North Carolina cities and counties to which 296 of them responded, some 124 reported using some form of mandatory design

standards. Many of these responding based their response on regulations governing the height, size, bulk, and location of structures on a site; historic district or landmark standards; or regulations governing signs, junkyards, telecommunication towers, manufactured housing, and landscaping. Some apply appearance standards and controls concerning the design features of buildings in commercial areas such as central business districts and entry corridors. Fewer than 10% reported using appearance standards and design controls for single-family residences outside of historic districts. Some of these municipalities have adopted "neighborhood conservation districts," zoning districts that do not qualify as historic districts, but in which residential appearance standards apply to new development and alterations to existing development. Other cities have adopted more unconventional design standards that apply in districts where traditional lot-related standards and use standards have given way to form-based standards. These standards tend to emphasize the form of buildings more and the use of buildings less. These typically emphasize building height, building placement, the design of building fronts, and the relation of buildings to streets, sidewalks, and public open space. Some codes include more detailed architectural standards to regulate building styles, features, details, and materials so that a development project conforms to the purposes of the community's comprehensive plan. Does *Lanvale* imply that all of these community appearance standards and design controls that apply to buildings other than historic properties or manufactured housing units are legally impermissible?

The law in North Carolina has long held that reasonable regulation based on aesthetic considerations alone may constitute a valid basis for the exercise of government's regulatory power. In State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982), the North Carolina Supreme Court upheld an ordinance over a due process challenge which required owners of junkyards and auto graveyards in certain areas to screen their premises over objections that the means and purpose of the ordinance were not legally justifiable. Since then, a number of North Carolina courts have upheld or applied zoning measures based on community appearance considerations in particular situations involving signs, telecommunications towers, resource conservation districts, accessory buildings and structures, historic preservation, and manufactured housing. Our courts have held that these measures may be used to protect property values, promote tourism, and preserve the character of the community. The use of appearance and design standards as applied to non-historic buildings, however, is an emerging, untested application of these ideas.

A legal analysis of the local appearance or design controls in a local ordinance will involve determining the applicability of G.S. 160A-4 (or its county counterpart). The language of the two zoning statutes discussed above is unambiguous and does not expressly authorize such regulations. The primarily question is likely whether the particular ordinance is a reasonably necessary or expedient means of "conserving the value of buildings and encouraging the appropriate use of land throughout the city." (G.S. 160A-383). To answer this question means that the particular ordinance must be analyzed. What exactly does it say? What are the

regulations intended to accomplish? How does the ordinance affect the rights of private property owners? Are supplemental regulations a suitable way of accomplishing the purpose of zoning or do they involve regulatory overreach? The answers are in the details. Just how a court might rule if an ordinance were to be challenged might depend on some of the following considerations.

(1) What is the effect of local government regulations being subject to a presumption of validity that applies to zoning ordinance provisions generally?

In *Lanvale* the court held that this presumption had been overcome, but it unclear just what was needed in the way of proof to do so. At a minimum the presumption probably means that a court will not invalidate an ordinance simply because it disagrees with the wisdom of its adoption.

(2) Is there North Carolina legal precedent regarding the inclusion of appearance standards and design controls in zoning ordinances?

There are a handful of North Carolina cases that recognize appearance and aesthetics as a legitimate basis for regulation. But most of these cases involve constitutional claims rather than the sufficiency of statutory authority. In one key case, A-S-P Associates v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979), the North Carolina Supreme Court upheld the right to control the exterior appearance of private property in the context of the state's historic preservation legislation, but did not directly address design controls outside of that program.

(3) Is there specific enabling legislation in North Carolina that specifically authorizes the use of design guidelines and appearance standards in particular circumstances?

There is. The state's historic preservation legislation provides a comprehensive regulatory system for delineating historic districts and landmarks. It also provides for the granting of certificate of appropriateness if exterior changes to buildings and sites are not incongruous with design guidelines administered by a historic preservation commission. In addition, other statutes provide for the appointment of community appearance commissions that function in an advisory capacity. Finally, G.S. 160A-383.1(d), a supplemental zoning statute expressly authorizes cities to "adopt and enforce appearance and dimensional criteria for manufactured housing." Does the adoption of these other forms of authority by the General Assembly imply that appearance and design controls not subject to this kind of express authorization are unauthorized? The court in *Lanvale* uses this type of reasoning to bolster the conclusion that Cabarrus County lacked APFO authority. However, in another case, Homebuilders Assn. of Charlotte, Inc. v. City of Charlotte, 336 N.C. 37, 442 S.E. 2d 45 (1994), the North Carolina Supreme Court held that just because regulatory fees were expressly authorized by statute for certain governmental agencies did not prevent the court from concluding that the city of Charlotte was entitled to adopt such fees in the absence of express authority to do so. In that case the court held that the power to adopt

application and inspection fees was a power that was "reasonably necessary and expedient" to carrying out the substantive land development regulatory powers of local government.

(4) Are North Carolina cities subject to local legislation that authorizes the adoption of mandatory appearance standards and design controls for buildings other than with respect to historic properties?

There is little, if any, local legislation of this sort. This result may suggest either that those local governments using these standards may assume that they do not need local legislation. Or it can imply that once such legislation is obtained by one local government, other local governments interested in exercising such authority had better obtain it as well. Neither assumption is likely to be entirely accurate.

(5) How pervasive throughout the state are the particular appearance standards and design controls?

The adoption and enforcement of design controls and similar appearance standards is not widespread throughout North Carolina. If it were, a court might feel the need to consider the widespread, practical impact of invalidating a particular type of regulatory program used by a number of local governments. This "upsetting the little red wagons effect" is obviously not a principle of statutory construction, but it may have some practical significance.

(6) To what extent is the regulatory program in question innovative and different?

The court in *Lanvale* declared that local governments "enjoy flexibility" in developing and applying zoning regulations and have "considerable latitude" in exercising their zoning power. Some of the most important concepts in urban planning today, such as form-based development and traditional neighborhood development, include strong aesthetic and appearance themes. Courts are influenced by emerging ideas and trends that affect their disposition of cases, even as they interpret legislative intent. Many courts do not want to seem oblivious to the changing complexion of planning and zoning. But innovative, unusual ways of doing regulatory business also challenge the expectations of stakeholders. In some cases it may be easier for a court to challenge the General Assembly to change the law rather than to give it an expansive interpretation.

(7) Does the ordinance establish a design review board or similar agency to administer the regulations?

Boards of this type are generally established in order to exercise permitting authority and discretion in the process of approving development projects. But this can be a legal problem in circumstances where there is no express enabling authority for the board to make such decisions. Community appearance commissions have been authorized for decades, but they are not allowed to make final decisions regarding permits and approvals. Indeed, the court in the *Jones* case

warned that "(w)e feel compelled to caution local legislative bodies charged with the responsibility for and the exercise of the police power in the promulgation of regulations based solely upon aesthetic considerations that this is a matter which should not be delegated by them to subordinate groups or organizations which are not authorized to exercise the police power by the General Assembly." This delegation-of-power problem is potent in part because the role North Carolina historic preservation commissions play in issuing certificates of appropriateness is spelled out in the general statutes in considerable detail.

(8) Are the appearance standards and design controls concrete and specific?

Those that are stand a better chance of avoiding invalidation. Regulation of appearance and design is plagued by the perceived notion that those regulated are subject to the whims and arbitrariness of regulators with wide-ranging discretion and that decisions are based on highly subjective notions of good taste and beauty. Making standards specific and spelling them out in an ordinance curtails the risk of arbitrariness that comes with discretion. Such standards also provide some assurance that the standards will not be found to be arbitrary or impermissibly vague.

(9) Are the design controls and appearance standards in question based on the context in which affected structures are located?

Design controls and appearance standards for buildings work best and are most likely to be legally defensible if they are linked in some way to the context in which the affected structures are located. The best way may be to link the standards to the analysis and policies of any applicable community comprehensive plan.

(10)Does the regulatory program intrude on private property rights in a substantial or unexpected way?

Appearance standards and design controls, particularly those affecting buildings, should be carefully conceived and developed with an eye to how they affect the property owners subject to them. The *Jones* case in 1982 held that regulations and the use of local government police power could be justified solely on the basis of aesthetics. It also reminds us that any diminution in value of an individual's property must be balanced against the corresponding gain to the public from the regulation. For example, appearance standards that are applied to buildings have the potential for affecting property values and housing costs more than appearance standards that may apply to incidental commercial signs or landscaping. In any event, design control and appearance standards that engender reciprocal benefits for all of those property owners subject to them are more likely to fare better, and are more consistent with the purposes of zoning.

In summary, community appearance standards of one type or another are relatively widely used in North Carolina and have enjoyed moderate success in the courts. The legal validity of design controls applicable to non-historic buildings is more uncertain. The *Lanvale* case refocuses attention on the scope of the local government zoning power and the rules of statutory construction that apply, but does not appear to impact the legality of appearance and design controls in a major way. The legal reception that the courts are likely to give challenges to appearance and design controls will likely depend on the specific nature of the regulations involved and the extent to which they complement traditional zoning tools and objectives.