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Opinion No. 00-148

Board of Zoning Appeals' Modification of Zoning Variance

QUESTIONS

1. Once a board of zoning appeals issues a special exception or variance to allow the construction of an outdoor gun range, does the board of zoning appeals have the right to later impose additional restrictions or conditions on the use of that real property so long as it is being used for a gun range?

2. Does a board of zoning appeals have the jurisdiction, once it has issued a variance or special exception for the use of the property as a gun range, to thereafter:

   a. require that additional improvements be made to the gun range for "safety reasons?"
   b. require that additional improvements be made to the property to minimize access by trespassers?
   c. impose restrictions on the frequency of its use as a gun range?
   d. impose restrictions on the types of weapons or ammunition that may be used on the gun range?
   e. impose restrictions on the types of targets that may be used on the range?

3. Does a property owner, having been granted a variance or special exception regarding the use of its property, have the right to expand the use so long as the type of use remains consistent (*e.g.*, an expansion in the size of a gun range)?

4. Does a property owner have a vested right to use its property in accordance with any special exceptions or variances granted to it by a board of zoning appeals?

5. Once a special exception or variance is issued by a board of zoning appeals, is the scope of the variance controlled by the face of the approved application or would statements and comments contained in the board's written minutes have any relevance?

OPINIONS

1. No, as a general rule, a board of zoning appeals that issues a special exception or variance cannot later modify the special exception or variance by imposing additional restrictions or conditions on the property owner's use of its property.

2. No, once a board of zoning appeals has issued a special exception or variance, the board no longer has the authority to impose additional restrictions or conditions on the property owner's use of its property. At the time it issues a special exception or variance, however, a board of zoning appeals may impose reasonable conditions that relate to the property owner's use of its property and that protect the public health, safety, and welfare.

3. Yes, absent a limiting condition in a special exception or variance, a property owner usually has the right to expand the permitted use of its property.

4. Yes, if a property owner incurs expenses or other liabilities in reliance upon a special exception or variance, the property owner may acquire a vested right in continuing the use granted by the special exception or variance.

5. Yes, a property owner's use of its property is governed by the terms of the special exception or variance granted. Accordingly, if a board of zoning appeals wishes to attach conditions to a special exception or variance, the board must clearly and specifically state the required conditions on the record when the board grants the special exception or variance. Conditions will not be implied from the minutes of board meetings leading up to the granting of the special exception or variance.

ANALYSIS

Your request relates to the authority of a board of zoning appeals to attach conditions to a special exception or variance that was previously granted for an outdoor gun range. The following analysis of the questions presented is based upon general zoning and land use principles recognized in Tennessee and other jurisdictions; however, the analysis of these questions could differ significantly depending on the content of the special exception or variance that was granted or any local zoning regulations that might apply.

A board of zoning appeals has the inherent authority to attach conditions to the granting of a special exception or variance. *See Stevenson v. Palmer*, 448 S.W.2d 67, 68-69 (Tenn. 1969); *Nance v. City of Memphis*, 672 S.W.2d 208, 212 (Tenn. Ct. App. 1983); Tenn. Code Ann. §§ 13-7-109, -207 (1999); *see also* Kenneth H. Young, 3 *Anderson's American Law of Zoning* § 20.63 (4th ed. 1996); 83 Am. Jur. 2d *Zoning & Planning* §§ 931, 1008 (1992); 101A C.J.S. *Zoning & Land Planning* § 238 (1979). The board's authority, however, is not unbridled. Any conditions imposed by the board must be reasonable, must relate to the proposed use of the land, and must be designed to protect the public health,

safety, and welfare. *See Caseria v. Zoning Bd. of Appeals*, No. 312301, 1995 WL 360794, at *2 (Conn. Super. Ct. 1995); 83 Am. Jur. 2d *Zoning & Planning* §§ 928, 1009 (1992); 101A C.J.S. *Zoning & Land Planning* § 238 (1979).

Any conditions imposed by the board also must be clearly and specifically stated on the record at the hearing when the special exception or variance is granted. *See In re Hoffmann*, 666 N.Y.S.2d 685, 687 (N.Y. App. Div. 1997), *appeal denied*, 699 N.E.2d 431 (N.Y. 1998); 83 Am. Jur. 2d *Zoning & Planning* §§ 933, 1008, 1010 (1992); 101A C.J.S. *Zoning & Land Planning* § 238 (1979). Conditions must be stated with sufficient clarity to inform the property owner of the limitations placed upon its use of the land. *See* 3 *Anderson's American Law of Zoning* § 20.65; 83 Am. Jur. 2d *Zoning & Planning* §§ 928, 933, 1008 (1992). Conditions will not be implied from the minutes of board meetings leading up to the granting of the special exception or variance. *See Hoffmann*, 666 N.Y.S.2d at 687.

When a property owner receives a special exception or variance, its use of the property is limited by the terms of the special exception or variance granted. *See In re Borer*, 623 N.Y.S.2d 378, 380 (N.Y. App. Div. 1995); 3 *Anderson's American Law of Zoning* § 20.66; 83 Am. Jur. 2d *Zoning & Planning* § 929 (1992). A condition of a special exception or variance may limit the size of the proposed use. *See* 83 Am. Jur. 2d *Zoning & Planning* § 935 (1992). If the special exception or variance does not contain such a limiting condition, however, a property owner usually may expand the size of its operation without applying for a further exception or variance. *See Hoffmann*, 666 N.Y.S.2d at 687; *Borer*, 623 N.Y.S.2d at 380; *In re Angel Plants, Inc.*, 546 N.Y.S.2d 112, 113 (N.Y. App. Div. 1989).

A property owner to whom a special exception or variance has been granted may seek the modification of a condition by showing that a material change in circumstances has made the condition unreasonable. *See Caseria*, 1995 WL 360794, at *2; 3 *Anderson's American Law of Zoning* § 20.67; 83 Am. Jur. 2d *Zoning & Planning* § 934 (1992). If the property owner makes such a showing, a board of zoning appeals may eliminate the challenged condition from the property owner's special exception or variance. *See Caseria*, 1995 WL 360794, at *2; 3 *Anderson's American Law of Zoning* § 20.67; 83 Am. Jur. 2d *Zoning & Planning* § 934 (1992). As a general rule, however, a board of zoning appeals lacks the authority to impose new conditions after a special exception or variance has been granted. *See Huntington v. Zoning Bd. of Appeals*, 428 N.E.2d 826, 829 n.4 (Mass. App. Ct. 1981); *Haba v. Cuff*, 201 N.E.2d 343, 345-46 (Ohio Ct. App. 1963), *appeal dismissed*, 199 N.E.2d 736 (Ohio 1964), *cert. denied*, 379 U.S. 964 (1965); *Vendettuoli v. Dimuro*, No. PC 91-4520, 1993 WL 853806, at *3 (R.I. Super. Ct. 1993); *see also* 101A C.J.S. *Zoning & Land Planning* §262, at 766 (1979) (indicating that, "[i]n a proper case, the conditions previously imposed on the grant of a variance may be eliminated, but it has been held that the imposition of conditions on a previously granted variance is ineffective").

Tennessee courts recognize the "vested rights" doctrine in zoning and land use cases. *See Rives v. City of Clarksville*, 618 S.W.2d 502, 508 (Tenn. Ct. App. 1981); *Moore v. Memphis Stone & Gravel Co.*, 339 S.W.2d 29, 33-34 (Tenn. Ct. App. 1959). Under this theory, when a property owner obtains a special exception or variance and, in reliance upon the special exception or variance, makes contracts

and incurs liabilities thereon, the property owner may acquire vested rights in continuing the use allowed by the special exception or variance. *See Rives*, 618 S.W.2d at 508; *Moore*, 339 S.W.2d at 33-34; 101A C.J.S. *Zoning & Land Planning* § 260 (1979). Once a property owner's rights vest, a board of zoning appeals may not revoke a special exception or variance in the absence of good cause or public necessity. *See Moore*, 339 S.W.2d at 33; *see also O'Hagan v. Board of Zoning Adjustment*, 113 Cal. Rptr. 501, 504 (Cal. Ct. App. 1974); 101A C.J.S. *Zoning & Land Planning* § 262 (1979). Good cause for revocation may exist where a property owner fails to comply with reasonable conditions expressed in the special exception or variance. *See O'Hagan*, 113 Cal. Rptr. at 504. A public necessity for revoking a special exception or variance may arise where the property owner is conducting its business so as to constitute a nuisance. *See id*.; *see also Kelley v. Board of Zoning Appeals*, 13 A.2d 675, 676-77 (Conn. 1940); *Cornell Uniforms, Inc. v. Township of Abington*, 301 A.2d 113, 115-16 (Pa. Commw. Ct. 1973). In a case of public necessity, a board of zoning appeals, as an alternative to revoking a special exception or variance, may impose additional reasonable conditions designed to ensure that the property owner does not operate its business so as to constitute a nuisance. *See Cornell Uniforms*, 301 A.2d at 115-16.

1. When a board of zoning appeals grants a special exception or variance, the board has the inherent authority to impose reasonable conditions that relate to the property owner's use of its land and that protect the public health, safety, and welfare. *See* 83 Am. Jur. 2d *Zoning & Planning* §§ 928, 931, 1008, 1009 (1992); 101A C.J.S. *Zoning & Land Planning* § 238 (1979). Once a board of zoning appeals has granted a special exception or variance, however, the board generally loses the authority to impose additional conditions on the property owner's use of its land. *See Huntington*, 428 N.E.2d at 829 n.4; *Haba*, 201 N.E.2d at 345-46; *Vendettuoli*, 1993 WL 853806, at *3; 101A C.J.S. *Zoning & Land Planning* §262 (1979).

2. As previously indicated, a board of zoning appeals generally does not have the authority to impose additional conditions on a property owner's use of its land after the board has granted a special exception or variance. When a board of zoning appeals initially grants a special exception or variance, however, the board may impose reasonable conditions that relate to the property owner's use of its land and that protect the public health, safety, and welfare. Reasonable conditions may include those limiting the hours of operation of a business, limiting the public's access to the property, requiring fencing on the property, prohibiting an increase in size of the permitted use, or, in a similar case involving a proposed hunting preserve, limiting the types of weapons to be used. *See* 3 *Anderson's American Law of Zoning* § 20.70; E.C. Yokley, 3 *Zoning Law and Practice* § 21-12 (4th ed. 1979); 83 Am. Jur. 2d *Zoning & Planning* §§ 935, 936, 1009 (1992); *see also Janiak v. Planning Bd.*, 552 N.Y.S.2d 436, 436-37 (N.Y. App. Div.), *appeal denied*, 561 N.E.2d 889 (N.Y. 1990).

3. A property owner's use of its land pursuant to a special exception or variance is limited by the terms of the exception or variance. *See Borer*, 623 N.Y.S.2d at 380; 3 *Anderson's American Law of Zoning* § 20.66; 83 Am. Jur. 2d *Zoning & Planning* § 929 (1992). If a special exception or variance contains a condition limiting the size of the permitted use of the property owner's land, the property owner

will be bound by such a condition. *See* 83 Am. Jur. 2d *Zoning & Planning* § 935 (1992). In the absence of such a limiting condition, however, a property owner generally has the right to expand the permitted use of its land without requesting a new special exception or variance. *See Hoffmann*, 666 N.Y.S.2d at 687; *Borer*, 623 N.Y.S.2d at 380; *Angel Plants*, 546 N.Y.S.2d at 113.

4. Tennessee courts recognize the "vested rights" doctrine in zoning and land use cases. *See Rives*, 618 S.W.2d at 508; *Moore*, 339 S.W.2d at 33-34. A property owner who incurs substantial expenses or other liabilities in reliance upon a special exception or variance may have a vested right in continuing the use granted by the special exception or variance. *See Rives*, 618 S.W.2d at 508; *Moore*, 339 S.W.2d at 33-34; 101A C.J.S. *Zoning & Land Planning* § 260 (1979). Thus, a property owner who constructs and operates an outdoor gun range pursuant to a previously granted special exception or variance may have a vested right to continue operating the gun range in accordance with the exception or variance. If the property owner operates its outdoor gun range so as to constitute a nuisance, however, upon proper application, the board of zoning appeals may revoke the special exception or variance or, alternatively, may impose additional reasonable conditions designed to ensure that operation of the gun range does not constitute a nuisance. *See O'Hagan*, 113 Cal. Rptr. at 504; *Kelley*, 13 A.2d at 676-77; *Cornell Uniforms*, 301 A.2d at 115-16.

5. If the board of zoning appeals attaches conditions to a special exception or variance, the board must clearly and specifically state the conditions on the record when it grants the special exception or variance. *See Hoffmann*, 666 N.Y.S.2d at 687; 83 Am. Jur. 2d *Zoning & Planning* §§ 933, 1008, 1010 (1992); 101A C.J.S. *Zoning & Land Planning* § 238 (1979). Conditions will not be implied from the minutes of board meetings leading up to the granting of the special exception or variance. *See Hoffmann*, 666 N.Y.S.2d at 687.

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