

Supension of permits pending building moratorium

Number: INFORMAL

Date: June 27, 2002

The Honorable Arnold E. Kempe
Mayor of Cape Coral
Post Office Box 150027
Cape Coral, Florida 33915-0027

RE: MUNICIPALITIES–BUILDING PERMITS–ZONING–ORDINANCES–suspension of issuance of building permits while building moratorium ordinance being adopted. s. 166.041(3)(c), Fla. Stat.

Dear Mayor Kempe:

On behalf of the Cape Coral City Council, you ask whether the city may suspend the issuance of residential building permits on a given street while it is actively undertaking the procedures required under section 166.041(3)(c), Florida Statutes, for the enactment of an ordinance providing for a moratorium on the issuance of said permits on that street. Attorney General Butterworth has asked me to respond to your inquiry.

Based upon the following analysis, it appears that the city may not suspend the issuance of residential building permits on a given street while it is actively undertaking the notice and hearing procedures prescribed by section 166.041(3)(c), Florida Statutes, for the enactment of an ordinance providing for a moratorium on the issuance of said permits on that street.

In *City of Sanibel v. Buntrock*,^[1] the Second District Court of Appeal held that a municipality must enact an ordinance declaring a building moratorium with the same formality required for an ordinance that rezones property. In reaching such a conclusion, the court stated:

"If an ordinance substantially affects land use, it must be enacted under the procedures which govern zoning and rezoning. To entirely prohibit a person from building upon his property even temporarily is a substantial restriction upon land use. Consequently, it is not too much to ask that a municipality follow the same procedures with respect to notice and hearing before it puts such a moratorium into effect."^[2]

Subsequently, in *City of Gainesville v. GNV Investments, Inc.*,^[3] the First District Court of Appeal struck down a city commission's declaration of moratorium on any development of lands zoned "shopping center" until a rewrite of city zoning ordinances could be accomplished, as well as the city's subsequent zoning resolution adopting a more restrictive zoning ordinance for a property owner's land. The court held that the moratorium and subsequent zoning resolution were invalid and ineffective regarding a property owner's proposed development since the city failed to comply with statutory notice requirements regarding zoning ordinances.

Section 166.041, Florida Statutes, establishes a uniform procedure for the adoption of municipal

ordinances and resolutions. These procedures are generally applicable to all municipalities throughout the state and the requirements set forth in section 166.041 cannot be lessened or reduced by any municipality.[4] Section 166.041(3)(c), Florida Statutes, prescribes the procedures for adopting zoning ordinances, ordinances "that change the actual list of permitted, conditional, or prohibited uses within a zoning category, or ordinances initiated by the municipality that change the actual zoning map designation of a parcel or parcels of land[.]"

For ordinances that change the actual zoning map designation for a parcel or parcels of land involving less than 10 contiguous acres, notice is to be provided to each real property owner whose land will be redesignated and whose address is known by reference to the latest ad valorem tax records. The notice, which is to be given at least 30 days prior to the date of the public hearing, must contain the substance of the proposed ordinance as it affects that property owner and shall set a time and place for one or more public hearings on such ordinance. The governing body is required to hold a public hearing on the proposed ordinance and may, upon the conclusion of the hearing, immediately adopt the ordinance.[5]

If the ordinance seeks to change the actual list of permitted, conditional, or prohibited uses within a zoning category, or changes the actual zoning map designation of a parcel or parcels of land involving 10 contiguous acres or more, the governing body must hold two advertised public hearings on the proposed ordinance, with at least one hearing to be held after 5 p.m. on a weekday, unless the local governing body, by a majority plus one vote, elects to conduct that hearing at another time of day. The first public hearing shall be held at least 7 days after the day that the first advertisement is published. The second hearing shall be held at least 10 days after the first hearing and shall be advertised at least 5 days prior to the public hearing. The statute sets forth the specifications for advertising the hearing. In lieu of publishing the advertisement set out in section 166.041(3)(c)2.b., Florida Statutes, however, the municipality may mail a notice to each person owning real property within the area covered by the ordinance, clearly explaining the proposed ordinance and notifying the person of the time, place, and location of any public hearing on the proposed ordinance.[6]

The above notice provisions therefore must be complied with when a municipality seeks to impose a building moratorium. You recognize that the city must adopt the building moratorium in accordance with the provisions of section 166.041(3)(c), Florida Statutes. You ask, however, whether the city may suspend issuance of building permits until such an ordinance is adopted.

The courts of this state have grappled with the question of which ordinance applies when a building permit has been applied for while a local government is in the process of changing its zoning. It has been generally considered that a building permit may be revoked where the zoning law has been amended subsequent to the issuance of the permit in the absence of circumstances which would give rise to equitable estoppel,[7] and one Florida court has stated that when a change in zoning is in progress which would affect the permit, a municipality may properly delay issuance of a building permit.[8]

In the instant inquiry, however, suspension of the issuance of all building permits is in the nature of a moratorium. While the city is in the process of adopting a moratorium ordinance, it has not yet done so. By permitting the suspension of building permits before the city has adopted the building moratorium ordinance, the city, in effect, would be imposing a building moratorium

before it has complied with the requirements of section 166.041(3)(c), Florida Statutes. As indicated by the courts' decisions in *City of Sanibel v. Buntrock, supra*, and *City of Gainesville v. GNV Investments, Inc., supra*, a municipality may not impose a building moratorium until and unless the requirements of section 166.041(3)(c), Florida Statutes, have been met.[9]

Accordingly, it appears that the city may not suspend the issuance of residential building permits on a given street while it is actively undertaking the procedures required under section 166.041(3)(c), Florida Statutes, for the enactment of an ordinance providing for a moratorium on the issuance of said permits on that street.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tgk

[1] 409 So. 2d 1073 (Fla. 2d DCA 1981), *review denied*, 417 So. 2d 328 (Fla. 1982).

[2] *Id.* at 1075.

[3] 413 So. 2d 770 (Fla. 1st DCA 1982).

[4] See, e.g., Op. Att'y Gen. Fla. 80-104 (1980) and 74-371 (1974).

[5] Section 166.041(3)(c)1., Fla. Stat.

[6] Section 166.041(3)(c)2., Fla. Stat.

[7] *Cf. City of Boynton Beach v. Carroll*, 272 So. 2d 171 (Fla. 4th DCA 1973), *cert. denied*, 279 So. 2d 871 (Fla. 1973) (possession of a building permit does not create a vested right, and a permit may be revoked where the zoning law has been amended subsequent to the issuance of the permit in the absence of circumstances which would give rise to equitable estoppel); *Smith v. City of Clearwater*, 383 So. 2d 681, 687 (Fla. 2d DCA 1980), *rev. dismissed*, 403 So. 2d 407 (Fla. 1981) *quoting* 4 R. Anderson, *American Law of Zoning* 309 (2d ed. 1977),

"Municipal officials can, and sometimes do, delay issuance of a permit until the zoning ordinance is amended to prohibit the proposed use, or a court orders issuance of a permit. This administrative procrastination, calculated to deny a property owner the right to use his land in a currently lawful manner, is supportable neither by law nor by sound and ethical practice. But its use is common enough to have provided the materials for a number of judicial opinions.

Where a municipal corporation unlawfully withholds a permit, the applicant can by mandamus force the appropriate official to issue it. But the zoning power of the municipality is not suspended during the pendency of the permit application, or an action for a writ ordering

issuance of the permit. This power may be employed to amend the zoning ordinance to outlaw the use. If it is so used, a court will not order a municipal official to issue the permit unless the applicant has established a right to nonconforming use of the land."

[8] *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 509 So. 2d 1295 (Fla. 4th DCA 1987), which cites *Smith v. City of Clearwater*, *supra*, and *City of Boynton Beach v. Carroll*, *supra*, as authority.

[9] *Cf. City National Bank of Miami v. City of Coral Springs*, 475 So. 2d 984 (Fla. 4th DCA 1985), concluding that city's condition for approval of proposed plat for convenience store, that no building permit for construction would be issued until adjacent road had been improved to four-lane roadway, was in nature of building moratorium directed to specific parcel of land without meeting any of the formal requirements for such moratorium, and as such, was appropriately stricken by trial court.