



2010-075

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

TROY KING
ATTORNEY GENERAL

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500 DEXTER AVENUE
MONTGOMERY, AL 36130
(334) 242-7300
WWW.AGO.STATE.AL.US

Honorable Jay M. Ross
Daphne City Attorney
Ross, Jordan and Gray
1111 Dauphin Street
Mobile, Alabama 36604

Zoning Board of Adjustment -
Subdivisions - Zoning - Municipal
Ordinances - Municipalities -
Baldwin County

The Daphne Zoning Board of Adjustment has the authority to hear requests for variances to setbacks established by the city's zoning ordinance but not the setbacks established by the recorded plat of the TimberCreek Subdivision. Thus, owners seeking a setback of less than 30 feet must obtain a variance from the Daphne Zoning Board of Adjustment.

Dear Mr. Ross:

This opinion of the Attorney General is issued in response to your request on behalf of the City of Daphne.

QUESTION

Does the Daphne Board of Zoning Adjustment have the authority to hear requests for variances to setbacks that were established by the recorded plat of TimberCreek, or only the city's zoning ordinance, or both?

FACTS AND ANALYSIS

Your request states as follows:

The final plat for TimberCreek Subdivision Phase One, Part C ("TimberCreek") was approved by the City of Daphne Planning Commission ("Commission") in 1992 and subsequently recorded in the Baldwin County Probate Court in 1993.

The TimberCreek Subdivision plat provides for minimum setback requirements of 50' in the front and rear, as well as 10' on each side.

The City of Daphne Land Use and Development Ordinance was adopted prior to the Commission's approval of the plat and provides for minimum setback requirements of 30' in the front and rear and 10' on each side.

The plat contains the following statement: "Listed below are typical minimum setback standards for TimberCreek. *Setback limits can be changed by the Architectural Review Board on a case-by-case basis.*" The plat contains the following additional language for certain phases of TimberCreek: "Setback limits can be changed by the Architectural Review Board on a case-by-case basis, *provided it does not violate City of Daphne requirements.*"

The TimberCreek Architectural Review Board ("ARB") has been granting "variances" to the setbacks in the plat but not more than the setbacks in the ordinance.

(emphasis added).

You argue that the plat is an amendment to the ordinance relating to setbacks and that the amended setbacks are subject to modification by the Daphne Zoning Board of Adjustment, not the TimberCreek ARB. You rely on section 11-52-32(b) of the municipal planning commission

statutes. ALA. CODE § 11-52-32(b) (2008). Municipal planning commissions are established pursuant to section 11-52-1, *et seq.*, of the Code of Alabama. ALA. CODE § 11-52-1 to 11-52-85 (2008 & Supp. 2009). The planning commission has the authority to regulate subdivisions under section 11-52-31. ALA. CODE § 11-52-31 (2008). The procedure for approval or disapproval of a subdivision plat is set forth in section 11-52-32(b), which states that “[e]very plat approved by the commission shall, by virtue of such approval, be deemed to be an amendment of or an addition to or a detail of the *municipal plan* and a part thereof.” ALA. CODE § 11-52-32(b) (2008) (emphasis added).

The “municipal plan” referred to in section 11-52-32(b) is the master plan that the planning commission is required to adopt for the physical development of the municipality pursuant to section 11-52-8. ALA. CODE § 11-52-8 (2008). Although the master plan includes “a zoning plan for the control of the height, area, bulk, location and use of buildings and premises,” *id.*, this Office has emphasized that the master plan merely consists of recommendations to the city council. Opinions to Honorable Brenda Gale Blalock, City Clerk, City of Montgomery, dated March 24, 2004, A.G. No. 2004-104; and to Honorable Harold Newell, Mayor, Town of Killen, dated August 7, 2002, A.G. No. 2002-309.

Setbacks, on the other hand, are zoning ordinances. Municipalities are given the authority by the Legislature to enact comprehensive zoning ordinances and to create a zoning board of adjustment. *See* ALA. CODE § 11-52-70 to 11-52-85 (2008 & Supp. 2009). Section 11-52-73 provides that the municipality may regulate, among other things, the location and size of buildings and percentage of lot that may be occupied. ALA. CODE § 11-52-73 (2008). The board of adjustment may grant a variance from a zoning ordinance. ALA. CODE § 11-52-80(d)(3) (2008). Because the TimberCreek plat did not amend the Daphne setback ordinance, the TimberCreek setbacks are not city ordinances for which the Daphne Zoning Board of Adjustment may authorize a variance.

American Jurisprudence explains the relationship of restrictive covenants to zoning laws as follows:

Restrictive covenants do not supersede or in any way affect the requirements of an already-existing zoning ordinance, so that if the *restrictive covenant is less restrictive than the ordinance, the ordinance prevails, and if the restrictive covenant is more restrictive than the*

ordinance, the covenant prevails as to purchasers; but in either case, the ordinance is enforceable as enacted.

20 AM. JUR. 2d *Administrative Law* § 232 (2010) (emphasis added). The Alabama Supreme Court has reiterated the latter scenario, stating that “[p]rivate restrictions subsequent to valid zoning restrictions, may be more but not less restrictive.” *Brown v. Morris*, 279 Ala. 241, 243, 184 So. 2d 148, 151 (Ala. 1966).

This Office applied these principles to a similar situation in which a proposed use did not violate the municipal zoning ordinance, but did violate the restrictive covenants for the subdivision, which were more restrictive. Opinion to Honorable Charles W. Penhale, Mayor, Town of Helena, dated September 1, 1981, A.G. No. 81-00559. That opinion concluded that “the restrictive covenants of a subdivision should be enforced by the private landowners and not by the municipal government, *unless, of course, the proposed use is also in violation of a zoning ordinance.*” *Id.* at 2 (emphasis added).

Based on these authorities, the more restrictive 50-foot TimberCreek setback prevails over the 30-foot city setback, and the Daphne Zoning Board of Adjustment has the authority to hear requests for variances to setbacks established by the city’s zoning ordinance but not the setbacks established by the recorded plat of the TimberCreek Subdivision. Owners seeking a setback of less than 30 feet must obtain a variance from the Daphne Zoning Board of Adjustment.

This Office does not provide interpretations of restrictive covenants between private parties. Thus, whether private property owners in the Timbercreek Subdivision seeking a setback of less than 50 feet, including a setback of less than 30 feet, must also obtain a variance from the Timbercreek Architectural Review Board is a private question that this Office cannot address.

CONCLUSION

The Daphne Zoning Board of Adjustment has the authority to hear requests for variances to setbacks established by the city’s zoning ordinance but not the setbacks established by the recorded plat of the TimberCreek Subdivision. Thus, owners seeking a setback of less than 30 feet must obtain a variance from the Daphne Zoning Board of Adjustment.

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I hope this opinion answers your question. If this Office can be of further assistance, please contact Ward Beeson of my staff.

Sincerely,

TROY KING
Attorney General
By:

A handwritten signature in cursive script that reads "Brenda F. Smith".

BRENDA F. SMITH
Chief, Opinions Division

TK/GWB

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